

CHICHI CLOTHING MANUFACTURERS (PVT) LTD
and
E. K. SAGUTA (PVT) LTD
and
DOC WATSON (PVT) LTD
and
ELLIOT SAGUTA CHICHI MAKUYANA
versus
COMMERCIAL BANK OF ZIMBABWE LTD
and
AGRICULTURAL BANK OF ZIMBABWE LTD
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 28 July 2006

Chamber Application

PATEL J: The plaintiffs in this matter issued summons in November 2004 claiming, *inter alia*, the cancellation of the sale and transfer of an immovable property situate in Chipinge, together with rentals and other ancillary relief. The 1st defendant duly and timeously entered appearance to defend.

After the passage of various intervening proceedings, the plaintiffs filed a notice to plead on the 13th of March 2006. This notice was served on the 1st defendant's legal practitioners on the same day. The 1st defendant filed its plea on the 22nd of March 2006, two days after the time to plead had expired. Subsequently, on the 23rd of March 2006 (as appears from the Registry date-stamp) the plaintiffs' legal practitioners purported to bar the 1st defendant pursuant to their notice to plead.

On the same day, the plaintiffs' legal practitioners filed the present chamber application for default judgement against the 1st defendant averring that the latter had been duly barred. The matter appears to have been queried at some stage and the plaintiffs' legal practitioners responded by persisting in their claim for default judgement. In response to a further query raised through the Deputy Registrar on the 20th of July 2006, the legal practitioner in question, *Mr.F. Mutamangira*, wrote to advise that:

“..... it is trite that where a party is served with a Notice to Plead and they default, as is (*sic*) in the present matter, the bar is automatic and it is not peremptory that for a bar to be effective, the Notice to bar be filed. In this regard, a party is barred whether or not a Notice to bar is filed to the extent that it can be proved that **dies inducia** (*sic*) has (*sic*) expired.

..... We also refer the Court to the provisions of Order 12 Rule 81 It is apparent that the use of the word may clearly shows that it is not peremptory that a bar must be filed for the other part (*sic*) to be barred.”

The learned legal practitioner is emboldened in his position by the decision in *HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H) where it was held that a party who fails to enter an appearance to defend is automatically barred. He further alludes to the point that where the defendant is in default the plaintiff is not obliged to give notice of his intention to apply for default judgement.

Rule 17 of the High Court Rules provides that “The time within which a defendant shall be required to enter appearance to defend shall be ten days, exclusive of the day of service”. Rule 50 then stipulates that “A defendant who has failed to enter appearance shall be deemed to be barred”. The effect of these

Rules, taken together, is abundantly clear. A defendant who fails to enter appearance to defend within the *dies induciae* is *ipso facto* barred. Rule 50 specifically says so. The bar against the defendant is automatic and the plaintiff is not required to do anything else before sallying forth to obtain his default judgement. And this is precisely what the decision in the *HPP Studios* case declares.

In the present matter, however, we are not concerned with the 1st defendant's failure to enter appearance to defend but its alleged failure to file its plea in response to the plaintiffs' notice to plead. In this context, the procedure for barring is spelt out in Order 12 as follows.

Rule 80: "A party shall be entitled to give five day's notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default."

Rule 81: "On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who has given the notice or his attorney."

Form No. 9 consists of three distinct parts. The first part constitutes the notice to the defendant in the following terms:

"Take notice that the defendant is hereby required to file his plea within five days and in default it is the plaintiff's intention to file a copy of this notice with the Registrar as a bar".

The second part of Form No. 9 is the certificate of service providing proof of service of the notice upon the defendant. The

third part of the form evinces the actual barring of the defendant after the time limit for pleading has expired.

The requirements of Rules 80 and 81, taken together with Form No. 9, are clear and relatively straightforward. The plaintiff must give the defendant five day's notice of his intention to bar unless the latter files his plea within that period. In the event that the defendant fails to file his plea within five days after being served with the notice, the plaintiff is entitled to realise his intention to bar by duly completing and signing a copy of the notice and filing it with the Registrar. The bar does not come into operation unless and until two things have occurred: the time limit stipulated must have expired **and** a copy of the notice must be filed thereafter in the prescribed format. In the specific context of Rules 80 and 81, **the bar is not automatic**. In other words, the defendant's failure to file his plea within five does not automatically operate to bar him. The plaintiff's intention to bar the defendant can only be effectuated by filing a duly endorsed copy of the notice with the Registrar. Until this is done the bar does not come into effect.

I have deliberately belaboured the foregoing self-evident propositions because of the obvious misconception besetting the learned legal practitioner *in casu* . The Court trusts that he will in future venture to pronounce what he imagines to be trite only after careful research and diligent reflection.

In the present case, the plaintiffs' legal practitioners have contrived to botch the procedure for barring in two critical respects. Firstly, the endorsement of the requisite bar (the third part of Form No. 9) is dated the 10th of March 2006, three days

before the Notice to plead was actually served on the 1st defendant and ten days before the bar might have been activated at the earliest. Secondly, and more significantly, the notice purportedly barring the 1st defendant was only filed with the Registrar on the 23rd of March 2006, a day after the 1st defendant had already filed its plea. The 1st defendant cannot therefore be held to have been barred and its plea quite properly forms part of the pleadings in this case.

It follows that the plaintiffs' application for default judgement on the papers filed of record is ill-founded and cannot succeed. It is accordingly hereby dismissed.

Mutamangira & Associates, plaintiff's legal practitioners
Gollop & Blank, 1st defendant's legal practitioners