

ADAM TAKAWIRA  
versus  
TONY'S PANEL BEATER & SPRAY PAINTERS (PVT) LTD

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 23 November 2016 & 23 May 2018

### **Opposed Matter**

*O Mushumha*, for the applicant  
*W. Chinhamura*, for the respondent

FOROMA J: This matter came before me as an opposed application on 23 November 2016. I dismissed the application for rescission of judgment at the conclusion of the hearing (argument) and promised that reasons for the decision would be handed down in due course. In September 2017 the respondent reminded the court that the reasons had not yet been delivered and enquired as to when they would be. Further delays were occasioned in the preparation of the reasons by the fact that the bound record containing the application notice of opposition and answering affidavit was not on file and an effort to locate it was not successful resulting in a copy being requested from the parties.

The reasons as promised are given below. In this application for rescission of a default judgment which has been made in terms of r 449 (1) (a) of the High Court Rules 1971 the following factual background is common cause- on 2 October 2015 respondent filed an action in terms of which it sought as against the applicant a declaratur nullifying an agreement of sale entered into between the applicant and respondent in or about January 2005 at Harare in respect of Stand 14776 Harare Township of Salisbury Township Lands measuring 5834 square metres on the grounds of statutory illegality together with ancillary relief. This action was commenced through issue of summons and declaration which was served on the applicant on 19 October 2015 who in turn entered an appearance to defend on 22 October 2015.

The applicant did not file and deliver his plea or any other answer to respondent's claim in terms of the rules of this court despite the appearance to defend as a consequence of

which the respondent filed and served on applicant a notice of intention to bar on 16 December 2015. The notice of intention to bar read as follows:

“Take Notice that the defendant is hereby required to file his plea within 5 days excluding Saturdays, Sundays and public holidays and in default it is plaintiff’s intention to file a copy of this notice with the Registrar as a bar.”

The notice of intention to bar was served on the applicant on 17 December 2015. By expiry of the 5 days notice and on 28 December no plea had been filed by the applicant and on 4 January 2016 the respondent effected a bar against the applicant in terms of r 81 of the High Court Rules 1971. For reasons that have not been explained on receipt of the notice of intention to bar and before expiry of the 5 days notice the application purported to file an exception on 23 December 2015 but did not serve or deliver same on the respondent until the 14<sup>th</sup> of January 2016. The respondent however learnt about the exception on 8 January 2016 when the applicant attended at the registry in HC 9475/15 on which date the respondent then wrote to the applicant’s legal practitioners pointing out that a bar had been effected and also that the purported exception was irregular process which would be ignored. The applicant’s legal practitioners responded to the respondent’s legal practitioners disputing the suggestion that the exception was invalid and insisting that it had been filed properly. The respondent’s legal practitioner by letter dated 14 November 2016 to the applicants’ legal practitioners insisted that the exception was not only irregular process as it was not what the respondent had required the applicant to file in its notice of intention to bar and also highlighting that the said exception in any event had not been delivered within the 5 days stipulated in the notice. Through the same letter the respondent informed the applicant that the respondent would be proceeding to apply for default judgment which it did and obtained a default judgment on 27 January 2016.

It is pertinent to note that the applicant neither contested the application for default judgment nor did he apply for the upliftment of the bar despite the fact that the applicant did not accept that the bar was valid or effective.

Pursuant to the grant of default judgment the respondent issued out a writ of execution and on its execution the applicant was served with a notice of eviction accompanied by a copy of the default judgment.

The applicant then filed its application for rescission of judgment.

The applicant’s application for rescission of judgment has been premised on the contention that the application for rescission was erroneously made and granted.

The issue for determination in this matter is whether a notice to plead as couched above can properly and validly be responded to by the filing of an exception? The resolution of this issue entails determining whether the interpretation of r 80 of the High Court rules is the same as the interpretation given to rule 26 of the South African Uniform Rules 1965. The applicant's argument as to the validity of the exception filed in response to the notice of intention to bar is strongly supported on the basis of South African Authorities.

Rule 26 of the South African Uniform Rules 1965 reads as follows:

“26 failure to deliver pleadings – barring any party who fails to deliver a replication or subsequent pleading within the time stated in r 25 shall be *ipso facto* barred. If any other pleadings within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within 5 days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties shall be in default of filing such pleading and *ipso facto* barred.

Rule 80 has gone through several amendments as a result of which the current wording calls for an interpretation significantly different from r 26 of the Uniform Rules aforesaid GRIFFITH AJ interpreted r 26 in the case of *Landmark Mthattha v King Sabata Dalindyebo Municipality* 2010 (3) SA 81 (ECM) as follows:

“Secondly, the rule state ‘if any party fails to deliver any other pleadings ---’ It does not refer to a declaration or a plea. The reason for this is obvious Form 10 to the First Schedule to the rules (the standard combined summons) calls upon the defendant to deliver a plea, exception, notice to strike out, with or without a counter claim. Although it has become practice to call upon the defendant or third party to file a plea without reference to an exception and notice to strike out as in the combined summons it is clear from the wording of this rule that it requires the defendant to take the next procedural step in the proceedings, be it an exception, plea or notice to strike out. It follows logically in my view that where a defendant in response to a notice of bar delivers an exception he had taken the next procedural step in the matter and has thus complied with the demand made in the notice on pain of bar. In this regard it has been held that an exception is in fact a pleading and thus falls squarely within the wording of r 26.”

There is no doubt that r 80 of the High Court Rules and r 26 of the Uniform Rules are materially different. The following aspects illustrate the differences–

- (i) Rule 26 does not refer to a declaration or a plea while r 80 specifically refers to declaration and a plea
- (ii) Rule 26 requires the filing of any pleading in response to a notice of bar while r 80 requires the filing of a declaration or a plea or a request for further particulars depending on which of the parties has filed the notice of intention to bar.

- (iii) Rule 26 and in particular Form 10 to the First Schedule to the Uniform Rules calls upon the defendant to deliver a plea with or without a counter claim exception and or notice to strike out which r 80 only calls upon the defendant to file a plea or request for further particulars and it specifically excludes an exception and a notice to strike out.

By reason of these differences the cases of *Barclays National Bank v Thompson* 1989 (1)

SA 546 *Tyulu v Southern Insurance Association Ltd* 1974 (30 SA 726 In *Landmark Mthatha King Sabata Dalindiyoso Municipality supra* and *Mcnally N.O & Others v Codron & Others* [201] ZAWCHC 17 are clearly distinguishable in the interpretation of r 80. These cases while laying the principle that an exception is a pleading and cannot be ignored unless it was filed after a bar was effected are not relevant in the interpretation of r 80 and vice versa.

The interpretation given by the applicant to r 80 as it is supported by South African authorities ignores the fact that r 80 was amended by S.I. 431/1982. Indeed before the amendment of r 80 by S.I. 43/1992. Rule 80 was almost on all fours with r 26 as it presently exists as it required the filing of any pleading which permitted the filing of an exception in response to a notice of intention to bar. In *Harare City v D & P Investments (pvt) Ltd and Another* 1992 22 LR 254 S GUBBAY CJ as he then was at p 256 A remarked as follows:

“It is obvious that at the threshold of the argument is the contention that the term “any pleading” in r 80 (prior to its recent amendment) by S.I. 43/92 with which I am not concerned is to be read as excluding an exception. On the other hand if an exception is a pleading then a notice of intention to bar is required to be given and may be so given at any time after the expiration of the period specified in r 119.”

The position of the law changed with the amendment effected by S.I. 43 of 1992. S.I. 43/1992 published in the Supplement to the Zimbabwe Government Gazette Extra – Ordinary dated 6 February 1992 Section 13 reads as follows

“13 Order 12 of the principal rules is amended–

(a) In r 80 by the deletion of any pleading and substitution of “his declaration plea.”

Rule 80 has undergone substantial changes with the last being the 200 NO 35 introduced by S.I. 80/2000 which deleted four and substituting it with 5 days after receiving of notice of intention to bar excluding Saturdays, Sundays and public holidays. A notice of intention to bar now requires the delivery of a declaration, plea or request for further particulars within 5 days after receipt of the notice of intention to bar.

The respondent is therefore correct in arguing that prior to the S143/1992 amendment it was competent to file and deliver an exception in response to a notice of intention to bar but not after the amendment introduced by S I 43/1992 which substituted any pleading with his declaration, plea as the said amendment invariably means everytime a notice of intention to bar is issued at the plaintiff's instance it will be calling defendant to file a plea – see *Russel Noah P/L v Midsec North* 1999 (2) ZLR 8 wherein MALABA J as he then was.

I have the following to say – “A party who fails to ..... a pleading (declaration or plea) or request for further particulars within the time stated in the rules in made subject to penalties. When the defendant failed to file and deliver its plea to the plaintiff's claim as a request for further and better particulars by the 29<sup>th</sup> of October 1998 it automatically lost the right to dictate the next procedural step in the action and became liable to be barred.

Rule 80 makes it clear that the failure by the defendant to file a plea or a request for further and better particulars within the period prescribed in the rules automatically vested in the plaintiff the power to determine what the next procedural step in the action should be.

It however had a discretion to exercise in deciding upon the nature and terms of the obligation it intended to impose on the defendant by the notice of intention to bar. Be that as it may r 80 is couched in clear and unambiguous language which imposes on the party giving the notice of intention to bar the duty to choose the procedural step he intends to require defendant to take within four days (now 5 days) of delivery of the notice of intention to bar. What the plaintiff for instance requires the defendant to do within four (now 5) days of delivery of the notice, the latter must do in order to avoid being barred.

A defendant who is specifically required in the notice of intention to bar to do one thing but does another and the four (5) day period expires has not complied with the terms of the notice and becomes liable to the penalty of being barred. The notice of intention to bar given to the defendant in this case on the 5<sup>th</sup> November specifically required it to file its plea to plaintiff's claim within four days. The defendant had to do as required. It had no right to file a request for further and better particulars. That was not what the plaintiff had required it to file.”

*In casu* when respondent filed and delivered a notice of intention to bar requiring applicant to file its plea applicant had no right to file an exception which in any event could not competently be filed. That was not what the respondent had required it to file. Applicant thus at the expiry of the five days in the notice became liable to the penalty of being barred.

Applicant having realised that respondent was not to concede its position and had indicated that it was proceeding to apply for default judgment had to take measures to prevent a default judgment being entered against it in view of the respondent having barred it. Applicant by not applying for an upliftment of the bar in the circumstances makes the conclusion that it was in willful default unescapable.

It was for the foregoing reasons that at the conclusion of argument I dismissed the applicant's application for remission of judgment. It is clear that neither the application for default judgment nor its grant by the judge was erroneous.

*Muringi Kamdefwere*, applicant's legal practitioners  
*Mushuma Law Chambers*, respondent's legal practitioners