HOUSE OF VENGESAYI (PVT) LIMITED
t/a VENGESAYI ARCHITECTS
and
MINISTER OF TOURISM AND HOSPITALITY N.O

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 10 August 2022 & 25 January 2023

Civil Trial

Adv T Zhuwarara, for the plaintiff
with Mr *B Mataruka*
Ms O Zvedi, for the defendant

MANYANGADZE J: On 13 May 2016, the plaintiff issued summons against the defendant, claiming the following:

> "a) Payment in the total sum of ($30 286 747.86) Thirty Million Two Hundred and Eighty Six Thousand Seven Hundred and Forty Seven United States Dollars and Eighty Six Cents.
> b) Interest on the above amount from 15 February 2016 being date of demand to date of full payment.
> c) Costs of suit.
>
> Being payment for architectural services rendered by Plaintiff to defendant at Defendant's specific request and instance during the period extending from (sic) to 2013 in Victoria Falls, which amount despite demand remains due and payable."

The factual background to the matter dates back to 2011, when the Government of Zimbabwe was expecting to host the United Nations World Tourism Organization (UNWTO) conference on tourism. The conference was scheduled for 2013, at the resort town of Victoria Falls.

In anticipation of hosting this high profile and prestigious tourism conference, the Government of Zimbabwe planned to construct massive multi-purpose tourist facilities, which would include shopping malls, restaurants and hotels.

To this end, the plaintiff was engaged to provide architectural designs for the project, referred to in the pleadings as WTO Convention Centre Victoria Falls ("Project").

The defendant, being the Government Ministry responsible for tourism, was the focal ministry on the project, and represented Government as the plaintiff's client. According to the

plaintiff's declaration, the plaintiff designed and provided working drawings for the following facilities, and charged the fees indicated. The amounts indicated are in United States dollars. The Project was negotiated during the period the country had introduced the multi-currency system, of which the United States dollar was the dominant and preferred currency.

Multi-Purpose Warehouse	=	$ 1 572 889.98
Presidential Villas	=	$ 9 459 267.44
Bed & Breakfast Apartments	=	$ 3 118 860. 39
Carnivore Restaurant	=	$ 836 887.26
120 000 m^2 Shopping Mall	=	$ 9 159 624. 11
350-bed 3 Star Hotel	=	$ 4 655 429.90
20 000 m^2 Shopping Mall	=	$ 929 028.14
150-bed 3 Star Hotel	=	$ 551 633.98
TOTAL COST	=	**$ 30 286 747. 86**

At the hearing of the matter and before any opening statements were made, the plaintiff raised a point *in limine*. The point was to the effect that the defendant's plea is fatally defective. It is defective in that it is nothing more than a bare denial. It does not disclose the basis of the defendant's denial of the plaintiff's claim. Such a plea, averred the plaintiff, is in violation of the rules of the court and the law as set out in the authorities.

In this regard, the plaintiff referred to r 57(1) of the High Court Rules, 2021. This was an incorrect reference, as r 57 deals with applications. The correct citation is r 37(1), which provides:

> "The defendant's answer to the plaintiff's declaration shall be called his or her plea, and it shall set forth concisely the nature of his or her defence, and deal with the allegations in the declaration as provided for in rule 36(11) – (18)."

The plaintiff contended that a bare denial is an irregular pleading. A proper plea must set out with sufficient clarity and particularity the defendant's answer to the plaintiff's claim. Reference was made to *Mabaso* v *Felix* 1981(3) SA 865 at 875 A – H, *Durbach* v *Farming Hotel Ltd* 1949(3) SA 1081 (SR), where this point was highlighted. Advocate *Zhuwarara*, on behalf of the plaintiff, submitted that the defendant's plea must be struck out of the record. As a

consequence, there will be no plea and the defendant must be found to be in default. Advocate *Zhuwarara* pointed out that the defendant's attention had since been drawn to this defect. The issue was discussed at the pre-trial conference. In fact, it was drawn up as an issue of law, to be disposed of before the leading of evidence.

The plaintiff urged the court to find the defendant in default. In this regard, Advocate *Zhuwarara* stated during oral submissions:

> "In default of a valid plea what should be the determination? The court ought to find the defendant in technical default, or in short, the defendant is in default …….We urge the court to find the defendant in default. They will then put their house in order by making an appropriate applications."

The other basis on which the plaintiff implored the court to find the defendant in default was that he was not in attendance at the hearing of the matter. No representative of the defendant was in attendance. It was only the legal practitioner, Ms *Zvedi*, who came to argue the matter on behalf of the defendant. The plaintiff contended that the defendant was in double default – in default of a valid plea and in physical default by not appearing at the hearing.

This aspect of the matter (physical default) need not detain the court. When the parties initially appeared for trial, the matter was postponed for argument on the legal point of whether or not there was a valid plea. So the hearing was deferred specifically for that purpose. No evidence was going to be led. It was going to be exclusively a lawyers' show. It was understood that no evidence was going to be led in such a hearing. The court was being called upon to make a determination on an issue of law.

It is clear the matter had not been called for trial in terms of r 56(1). In terms of this rule, when a trial is called and the defendant does not appear, judgment may be given in favour of the plaintiff if he/she satisfactorily proves his/her claim.

Such proof necessarily involves the adduction of evidence. This was not so at the hearing of the legal argument on the validity of the defendant's plea. Unless the court directed that the parties, in addition to their legal practitioners, be present when the matter is being argued, there would be no basis to seek a default judgment. There was no basis at all for requiring their presence at such a hearing.

I must now deal with the defendant's response to the matter in issue, which is the validity of his plea to the plaintiff's claim.

An examination of the response, both written and oral, shows that the defendant avoided arguing the merits of the point raised. Instead, it raised the procedural issue of the correctness of the rule cited. Its submissions exclusively, or almost exclusively, focused on that. The procedural point raised by the defendant was that there was no application before the court, as r 57(1) does not deal with the filing of the defendant's plea. It deals with a different subject matter altogether, which is applications.

The rule that deals with pleas is r 37(1), which has already been cited in this judgment. Ms *Zvedi*, for the defendant, submitted that she was constrained in addressing the merits because the basis of the application was wrong. She contended that the basis of an application are the provisions of the rules in terms of which it is made. If the provisions are wrong, then the applicant is not properly before the court. In fact, she declined to address the merits by reason of this error on the part of the plaintiff. In this regard, Ms *Zvedi* remarked during oral submissions:

> "The basis of an application is that it stands based on the relevant provisions of the rules cited by the applicant.
> Basis of an application is what puts the applicant before you. Unfortunately, rule 57(1) relates to application procedure. It does not support this application at all.
> We insist there is no application for determination before you, hence we did not address the merits. We therefore urge this Honourable Court to find that there is no merit in the application *in casu*, and to accordingly dismiss it."

It is noted that Ms *Zvedi* kept on referring to the plaintiff as the applicant and the submissions made by the plaintiff as an application. It appears she was treating this aspect of the proceedings as an application to strike out defendant's plea.

The plaintiff, on the other hand, insisted this was part of the trial. It is only that it has commenced by submissions on a legal issue. This issue is listed in the pre-trial conference minutes as an issue of law, among the issues referred for trial. So, according to the plaintiff, the trial process has started, albeit by way of submissions on a legal issue concerning the validity of the defendant's plea.

Be that as it may, what is before the court at this stage is essentially a legal issue. It is the question of whether or not the defendant's plea is valid at law. The defendant's plea is a bare denial of the plaintiff's claim. The plea, which appears on p 43 of the record, is stated as follows:-

> "1. **<u>As Paragraph 1 – 3</u>**

No issues arise.

2. **<u>As Paragraph 4 – 5</u>**

   This is denied

3. **<u>Ad Paragraph 6 – 8</u>**

   This is denied and the Defendant will put the Plaintiff to the proof thereof."

The defendant has not addressed the question of the propriety or otherwise of its plea. As indicated, it has taken the position that the issue is not properly before the court. This is so because a wrong provision altogether in the rules has been cited.

In response to this, the plaintiff averred that citation of r 57(1) was a typographical error. What was meant was r 37(1). This should not be held against the plaintiff.

Indeed, it looks like the digit "5" was typed instead of the digit "3", making the citation read r 57(1) instead of r 37(1). The subject matter is clearly that of a plea, provided for in r 37(1). So, the substance of the submissions made is under r 37(1), and not under r 57(1).

The mis-citation does not, in my view, amount to a fatal irregularity. It was wrong for the defendant to treat it as such. What should be looked at is the substance of the submission, not the erroneous citation. See *Yunus Ahmed* v *Docking Station Safaris SC* 70/18.

The defendant knew what issue has been raised. As indicated, t was listed as the first issue in the joint pre-trial conference minutes. Thus, the defendant cannot hide behind the erroneous citation, and seek to impugn the plaintiff's submissions solely on that basis. What this entails is that on the substance or merits of the point raised, the defendant has no submissions in rebuttal.

A look at the plea, cited above, clearly shows that it is a bare denial of the plaintiff's claim. This bare denial was made in the face of a claim whose particulars are clearly set out in the declaration, with details of the amounts involved. It seems to me in the face of such a detailed claim, a certain degree of specificity or particularity was expected from the defendant. A bare denial would be wholly inadequate and irregular.

I am in full agreement with the submissions made in para(s) 7 – 9 of the "PLAINTIFF'S SUBMISSIONS [AD ISSUE OF LAW], wherein is stated:

"7. The Defendants refusal to reveal its Defence in its Plea not only violates the Rules of this Court but places the Plaintiff in the most prejudicial of positions. The Plaintiff is now required to present its case without having been put on notice as to the nature of the Defendants cause.

8. It is most improper for the Defendant to rely on bare denials and keep its Defence hidden for the Plaintiff and the Court. The Defendant is not allowed to present a case before this Court that it did not plead and reveal in its Plea see GARWE J's dicta in Makgatho v Old Mutual Life Assuarance (Zimbabwe) Ltd 2015 (2) ZLR 711 711 (S) [at page 718 -19].

9. The authors Cilliers AC, Loots C and Nel HC in their text Herbsten and Van Winsen, The Civil Practice of the High Courts of South Africa 5th Ed, Juta and Co. Ltd Cape Town [2009] (at page 558) quote the following passage from Halsbury's Laws of England, 4th edn (Reissue), Vol 36 para 1 in which the function of pleadings is said to be, *"……to give a fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. No trial can be conducted where a Defendant has lodged bare denials. Such is manifestly prejudicial to the Plaintiff."*

The plaintiff's submissions are in sync with the applicable law. The defendant has not made submissions to the contrary. In light of this, the plaintiff's prayer that the defendant's defective plea be struck out, must be granted.

The granting of that prayer i.e that the defendant's plea be struck out, leaves the defendant technically in default. He is in default by reason of failure to file a valid plea.

It seems the plaintiff is very much aware of the technical nature of the default. Beyond seeking to have the defendant's plea struck out, it has not prayed for judgment in its favour. The plaintiff must have found itself in a quandary in this respect, as the hearing was not on the merits of its claim. The hearing was confined to the legal issue of the validity of the plea. That is the issue that has been disposed of.

Notwithstanding the defendant's default, there is need for the plaintiff to prove its claim. This is especially so in this case, where the claims are rather complex and involve very large sums of money. The need for such proof is in line with r 56 (1), which provides for what happens when the defendant is in default during trial proceedings. It reads;

> "If, when a trial is called , the plaintiff appears and the defendant does not appear, the plaintiff may prove his or her claim so far as the burden of proof lies upon him or her until judgment may be given accordingly, in so far as the plaintiff has discharged such burden:
> Provided that where the claim is for a debt or liquidated demand, no evidence shall be necessary unless the court otherwise orders."

As already indicated, the claims *in casu* relate to the drawing up of complex architectural designs, and their costing. The costing runs into millions of United States dollars. There is certainly need for evidence to substantiate the claims. This is not the usual, simple and straightforward claim for the recovery of a debt. The defendant's default does not relieve the plaintiff of the need;

> "….. to prove his or her claim so far as the burden of proof lies upon him or her…"

Judgment can only be properly given in so far as the plaintiff has discharged such burden.

Thus, guided by r 56(1), the proper course of action is to allow the plaintiff to adduce evidence to substantiate its claims. In this regard, the defendant is legally hamstrung in that it is unable to adduce contrary evidence by reason of its default. Its position is akin to that of a party who has been barred for failure to comply with the rules of the court.

Meanwhile, it is open to the defendant to take the necessary steps to extricate itself from the legal predicament it has placed itself in. Even the plaintiff suggested as much. This is reflected in remarks made by Advocate *Zhuwarara* during oral submissions;

> "We urge the court to find the defendant in default. They (defendant) will then put their house in order by making an appropriate application."

The plaintiff could not go further and spell out what remedial action the defendant should take, as that would amount to rendering legal advice to an opposing party. Neither can the court render such advice.

It seems the plaintiff found itself in a somewhat invidious position. Having called for the striking out of the defendant's plea, leaving the defendant technically in default, the plaintiff realized it could not grab a judgment on the basis of such a default, having regard to the complex nature of its claim and the large amounts involved.

In the circumstances, it is the court's considered view that the proper course of action is to order that the defendant's plea be struck out and the plaintiff be directed to set the matter down for the hearing of evidence on its claims. This course of action may only be avoided if the defendant takes the necessary remedial action to extricate itself from the default position it has placed itself in.

In the result, it is ordered that;

1. The defendant's plea be and is hereby struck out.
2. The plaintiff shall take the necessary steps to set the matter down for hearing of evidence to substantiate its claims against the defendant.
3. The defendant shall bear the plaintiff's costs.

Gill, Godlonton and Gerrans, plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendant's legal practitioners