

GEORGE DZOMBA
versus
TWENTY THIRD CENTURY SYSTEMS LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 29 November, 2017

Chamber application for default judgment

CHITAPI J: The plaintiff seeks a default judgment against the defendant under circumstances I shall outline below for payment of US\$37 914. 16, interest, costs and collection commission.

Summons incorporating the declaration was served on the defendant on 2 May, 2017. Appearance to defend was timeously filed by the defendant on 15 May, 2015. There was no movement in the filing of further pleadings until 31 May, 2017 when the plaintiff filed a notice to plead and intention to bar. The notice was served on the defendant's legal practitioners on 5 June, 2017. On 9 June, 2017, the defendant's legal practitioners wrote a letter to the plaintiff's legal practitioners acknowledging the notice to plead and intention to bar. I have always wondered why legal practitioners style the notice as "notice to plead and intention to Bar."

Order 12 r 80 of the High Court Rules 1971 provides that a "notice of intention to bar" is issuable against a party in the following instances;

- (a) in default of the filing of a declaration.
- (b) in default of the filing of a plea or request for further particulars

within the times prescribed in the rules of court. A defendant is therefore entitled to call upon the plaintiff to file a declaration where such declaration is required to be filed in terms of the rules of court, in as much as the plaintiff is equally entitled to call upon the defendant to file a plea or request for further particulars where the rules of court provide for such. The plaintiff or defendant as the case may, is entitled to give the defaulting party 5 days' notice to comply failing which the plaintiff or defendant as the case may be can then if advised so issue a notice of intention to bar the party in default.

Order 12 r 81 provides that the notice of intention to bar is in Form 9. Form 9 is headed in the rules "Notice of intention to bar". I am not therefore clear as to why the practice has

arisen to head the form “Notice to plead and intention to bar”. I do not think the adulteration of the form as provided in the rules of court makes the notice irregular though I suggest that for purposes of uniformity and rule compliance, the notice should just be headed and drafted as provided for in the rules of court.

Leaving the digression on the form and content of the notice of intention to bar aside, the defendant’s legal practitioners in their letter of 9 June, 2017 aforesaid, indicated that they would file “the necessary papers” by 12 June, 2017. The notice filed by the plaintiff although not following the wording in Form No 9, gave the defendant 5 days to file and deliver a plea to the plaintiff’s claim. The 12th June, 2017 was by calculation, the 5th or last day by which the plaintiff required the defendant to have filed file and delivered the plea.

On 12 June, 2017, the defendant’s legal practitioners filed and served a pleading headed “Defendants’ exception and special plea”. On 16 June, 2017, the defendant filed heads of argument in support of the exception and special plea. The defendant’s legal practitioners also filed a blank notice of set down of hearing of the exception and special plea.

The plaintiff did not immediately respond to the exception and special plea until 3 July, 2017 when his legal practitioners filed a replication to the defendant’s exception and special plea addressing its merits. He also pleaded that the exception and special plea was improperly before the court as it had been filed “after a notice to plead and intention to bar. On the same date, the plaintiff’s legal practitioners filed heads of argument in answer to the defendants heads of argument and in support of the positions taken in the replication.

On 4 July, 2017 after filing the plaintiff’s heads of argument the previous day, the plaintiff’s legal practitioners filed the “notice to plead and intention to bar” barring the defendant. They followed up on the filing of the bar by filing this chamber application for default judgment on 7 July, 2017. The basis of the chamber application in the main was that the defendant did not file a plea within the prescribed period and was barred. It was further alleged that the defendant had instead filed an exception and special plea and that this was unprocedural since the defendant was required to “file a plea to the claim only” and that the defendant had not pleaded “over the merits”.

On 17 July, 2017, the plaintiff’s legal practitioners paginated the record and included the chamber application for default judgment. On 17 August, 2017, the plaintiff’s legal practitioners wrote a letter to the Registrar requesting that the chamber application be referred to the judge for a consideration of the default judgment application. The letter indicated that

the exception and special plea could only be set down for hearing in the event that the chamber application for default judgment was dismissed.

Before I answer the legal issue or issues which arise from the papers filed and on the parties positions, it is necessary to briefly outline the basis of the exception and the special plea. The exception taken related to an alleged defect in the summons as not complying with order 3 r 11 (c) which required that a plaintiff should give a “true and concise statement of the nature, extent and grounds of the cause of action”. Further it was alleged that the summons did not plead any basis in law or fact upon which liability for payment of the money claimed should be reposed upon the defendant. As regards the special plea, the defendant averred that the plaintiff’s claim being in essence a labour matter, this court did not have jurisdiction to entertain it or alternatively this court should decline its jurisdiction on the basis that the matter or dispute was suited for special dispute resolution using the mechanisms provided for in terms of the Labour Act, [*Chapter 28:01*].

On its part and in the replication, the plaintiff denied that his claim was excipiable on the grounds alleged by the defendant. As regards the jurisdiction argument, the plaintiff averred that his cause of action was grounded upon an acknowledgment of debt, thus this court had jurisdiction to determine it. So much about the content of the exception, special plea and the replication to the same.

The issue which arises for my determination is whether the filing of a notice of intention to bar bars the defendant from raising a dilatory defence and/or exception to the plaintiff’s summons. In other words, is it the correct formulation or interpretation of the rules and practice of this court that once the plaintiff serves a defendant with a notice of intention to bar, the defendant must invariably file a plea on the merits. I perused the parties heads of argument for purposes not of deciding on whether the exception and special plea have been well taken but to see if I could find any authorities of interest relevant to the determination of whether or not a defendant who has been served with a notice of intention to bar has no alternative answer to the plaintiff’s claim save to pleadover to the merits.

The defendant’s counsel did not address the question of the effect of the notice of intention to bar to the nature of the pleadings which can competently be filed. The omission to deal with this aspect was understandable because the defendant filed the exception and special plea together with the heads of argument. The plaintiff only raised the issue in the replication to the exception and special plea and supported the contention in the plaintiff’s heads of argument.

The plaintiff cited the cases of *NSSA v P &P Motors and Ors* HH 5/2013 and *Azarengwa v Azarengwa (nee Chikomo)* HB 53/17 as authority for the proposition that a defendant who has been served with a “notice to plead and intention to bar” ought to deliver a plea in terms of and within the days limited for the defendant to do so in the notice. In both cited cases, the defendant sought further particulars after service of the notice of intention to bar. In fact in the *NSSA* case the request or letter was conveyed by letter. It appears to me that in *Russell Noach (Pvt) Ltd v Midsec North (Pvt) Ltd* 1999 (2) ZLR 8 (H) MALABA J (as he then was) meticulously ventilated the issue concerning the consequences of filing a request for further particulars and/ or request for further and better particulars in answer to a notice of intention to bar in circumstances where the defendant has not filed a pleas in terms of order 18 r 119. According to the ratio *decidendi* in the *Russell Noach* case which was followed in the *NSSA* and *Azarengwa* cases, the defendant who has not complied with the time limits for filing a plea or other answer to the plaintiffs summons and declaration loses the right to dictate the pace and must when called upon to plead, purge the non-compliance by filing a plea on the merits. I agree with the rulings in the above cases.

The situation presenting itself in the case before me is different. The defendant filed an exception to the plaintiff’s claim coupled with a special plea. Both the exception and special plea taken in terms of r 137 (1) (a) have the effect if allowed of disposing of the case. In terms of r 139 (1) a special plea, exception and application to strike out where applicable should be stated in one document or pleading which is what the defendant did. The proviso to r 139 provides that where defendant has taken an exception, special plea or application to strike out, it shall not be necessary for such defendant to plead to the merits of the case. The defendant *in casu* did not plead to the merits of the case. The proviso aforesaid allowed him to elect not to plead over to the merits of the case. Rule 139 (2) provides an incentive to the defendant to elect to plead on the merits in the alternative to taking a plea in bar, exception or making application to strike out. The incentive is in the form of costs recovery even in instances where the court disposes of the matter before going to the merits. The costs will as in the ordinary course be in the discretion of the court. The subrule is important and useful in that it cuts on further delays in the disposal of a matter in that should the exception special plea or application to strike out fail, the merits will have been pleaded to meaning that the case immediately proceeds to the next procedural step in the litigation process.

The plaintiff’s contention that the defendant had no alternative to answering the plaintiff’s claim other than by filing a plea on the merits does not appear to me in the

circumstances of this case to be a correct extrapolation of the law. The defendant filed and delivered not just an exception but a special plea. Rule 119 (1) sets out the requisites of a plea. It provides that the plea should deal with matters raised in the declaration as provided for in r 104. Rule 104 provides for matters which must specifically be pleaded. Some of the matters which can be raised in a plea include, pleading such allegations as would show that the claim is void or voidable in point of law including such allegations not arising from the pleadings but would dispose of the matter, be they matters of, or arising from statute or common law.

Rule 137 provides for alternatives to pleading to the merits. There is no contradiction between r 137 and r 80. Rule 80 does nothing more than give the defendant an opportunity of 5 days to file an answer to the plaintiff's claim where the defendant has not timeously filed a plea or request for further particulars. The opportunity is conveyed in the nature of a notice drafted in form 9. Order 1 r 4 (2) provides that prescribed forms may be used with such alterations as the circumstances require. Rule 80 does not override r 137. In other words, r 80 does not debar the defendant from adopting any of the alternatives to pleading to the merits as provided for in r 137. The defendant can therefore in answer to a notice of intention to bar plead the alternatives and in the further alternative plead to the merits where he elects to do so.

The case of *Russel Noach (supra)* should be read in the context of its facts. In that case, further particulars requested for, being an alternative to a plea as provided for in terms of r 137 (1) (d) had been provided by the plaintiff. When the defendant was called upon to now plead through a notice of intention to bar, it filed a request for further and better particulars. This further request is not provided for as an alternative to pleading to the merits in r 137 (1). It did not raise any issues which should be raised in a plea in terms of r 119 (1) as read with r 104. In other words the request did not have the effect of taking the litigation to the next step and more over it was taken out of time.

In *casu*, a plea to jurisdiction is a matter of law which if argued successfully will bring the litigation to finality at least within this court. It is a plea which falls within the realms of r 119 as read with r 104. Once taken, the defendant has an option to plead to the merits in the alternative. Rule 80 read with form 9 does not specify the nature of the plea which must be pleaded by the defendant.

It follows upon my reasoning that the defendant properly complied with the rules in filing the exception and the special plea within the time limited in the notice issued in terms of r 80. The filing of the bar against the defendant was therefore irregular and must be set aside.

When the plaintiff purportedly filed the bar against the defendant, his legal practitioners requested that the processing and set down of the exception and special plea be held over until the chamber application for default judgment which has led to this judgment is disposed of.

In the circumstances, I make the following order:

1. The application for default judgment is refused.
2. The bar effected against the defendant on 4 July, 2017 is set aside.
3. In view of the uncertainty created by the wrongful barring of the defendant and subsequent filing of the chamber application for default judgment which I have refused, the parties are directed to proceed in terms of rule 138 of the High Court Rules and the time limits for complying with the provisions of the rule shall be deemed to run from the date of this judgment.

Mbidzo, Muchadehama & Makoni, plaintiff's legal practitioners
Dube Manikai & Hwacha, defendant's legal practitioners