MAXVILLE FARMING (PVT) LIMITED
versus
ZIMBABWE AFRICAN NATIONAL UNION PATRIOTIC FRONT (ZANU-PF)
and
MIDLANDS DEVELOPMENT ASSOCIATION

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 20 September 2024, 12 November 2024, 25 February 2025 and 5 March 2025

Special Plea and Exception

Prof *L Madhuku*, for the plaintiff.
Ms *R Maposa*, for the 1st defendant.
Adv *L Uriri*, for the 2nd defendant.

DEME J: The Plaintiff instituted a claim for eviction against the Defendants. The Plaintiff also claimed against the Defendants holding over damages together with interest running at the prescribed rate from 1 March 2019 up to the date of final payment. More particularly, the Plaintiff's claim is for:

1. "An order evicting 1st and 2nd Defendants and all persons claiming through the 1st and 2nd Defendant from the following adjacent immovable properties wholly and exclusively owned by the Plaintiff through the Deed of Transfer 1847/2001, that is;
(i) Shenandoah, measuring 80.9359 hectares.
(ii) Subdivision E of Lot 60 of Umsungwe Block, measuring 42.2728 hectares.
(iii) Lot 1 of Greenvale of Brickford of Umsungwe Block, measuring 2.5191 hectares.
(iv) Lot 26 of Greenvale of Brickford of Umsungwe Block, measuring 2.4108 hectares.
2. Holding over damages in the sum of twenty thousand (US$20 000) United States Dollars per month being fair and reasonable damages from 1 March 2019 to the date of eviction together with interest thereon at the prescribed rate of interest from due date to date of payment in full, such damages and interest to be paid by the 1st and 2nd Defendants jointly and severally, the one paying and the other to be absolved;
3. Costs of suit on a legal practitioner and client scale to be paid by 1st and 2nd Defendants, jointly and severally, the one paying and the other to be absolved."

The Plaintiff alleged that it is the owner of the following properties:

(i) Shenandoah, measuring 80.9359 hectares.

(ii) Subdivision E of Lot 60 of Umsungwe Block, measuring 42.2728 hectares.

(iii) Lot 1 of Greenvale of Brickford of Umsungwe Block, measuring 2.5191 hectares.

(iv) Lot 26 of Greenvale of Brickford of Umsungwe Block, measuring 2.4108 hectares.

The properties shall hereinafter be called (the properties). It is the Plaintiff's allegation, that the Defendants occupied its properties without its consent with effect from 5 March 2012. It is further alleged by the Plaintiff that the Defendants, without the consent of the Plaintiff, stopped the Plaintiff's winery business operated at its properties.

The Plaintiff, further averred that the Defendants constructed a conference centre at the disputed properties. The Plaintiff also affirmed that the Defendants have no right to effect improvements at its properties. It is the Plaintiff's case that the Defendants refused to vacate its premises despite the Plaintiff's demand.

The 1st Defendant entered appearance to defend and proceeded to request for further particulars. Upon being furnished with further particulars, the 1st Defendant filed its plea. The 2nd Defendant, after entering appearance to defend, filed the exception and special plea.

The 2nd Defendant raised three exceptions to the summons and declaration. In its first exception, the 2nd Defendant averred that the summons does not comply with Rule 12(5)(d) of the High Court Rules, 2021 published in Statutory Instrument 202 of 2021 (hereinafter called "the High Court Rules"). In its second exception, the 2nd Defendant alleged that the Plaintiff's declaration is vague and embarrassing. According to the 2nd Defendant, paragraphs 5-8 of the declaration do not comply with Rule 36(1)(d) of the High Court Rules. In its third exception, the 2nd Defendant averred that the Plaintiff's claim is incompetent and bad at law in that the Plaintiff seeks the eviction of the 2nd Defendant from a piece of land they were allocated under land resettlement programme by the lawful authority. In its special plea, the 2nd Defendant argued that the land claimed by the Plaintiff was itemised in Schedule 7 to the former Constitution and hence, according to the 2nd Defendant, the Plaintiff is no longer entitled to that land.

In its heads of argument, the 2nd Defendant introduced a further special plea of prescription. According to the 2nd Defendant, the Plaintiff's claim had prescribed. The 2nd Defendant further alleged that a period in excess of three years, from the date of the 2nd Defendant's occupation of the disputed properties, had expired before the Plaintiff's claim for

eviction was instituted. By allowing prescriptive period to run before seeking eviction, the 2nd Defendant maintained that the Plaintiff lost its right to evict the 2nd Defendant.

Responding to the exception and special plea, the Plaintiff raised a point *in limine* against the exception and special plea. The Plaintiff argued that the exception and special plea were filed out of time. According to the Plaintiff, the exception is improperly before the court.

On the merits, responding to the first and second exception, the Plaintiff averred that summons and declaration comply with Rules 12(5)(d) and 36(1)(d) respectively. Consequently, the Plaintiff put the 2nd Defendant to the strict proof thereof. Responding to the third exception, the Plaintiff affirmed that that its claim is competent at law. Further, the Plaintiff maintained that the third exception does not fall within the four corners of the pleadings and hence it is a bad exception, according to the Plaintiff's view.

Responding to the special plea, the Plaintiff stated that the land described in the General Notice is not the correct description of its properties. Additionally, the Plaintiff maintained that the General Notice relied upon is for the preliminary notice made in terms of Section 5 of the Land Acquisition Act [*Chapter 20:10*]. There is no evidence that actual acquisition in terms of Section 8 of the Land Acquisition Act was finally done, according to the Plaintiff. It is the Plaintiff's argument that its properties are not itemised in Schedule 7 of the former Constitution and hence the Plaintiff is entitled to the properties. The Plaintiff also claimed that the special plea is bad at law as it is challenging the merits of the Plaintiff's claim. The special plea, according to the Plaintiff, is challenging the ownership of the disputed properties which forms the merits of the matter for eviction which is before the court. For these reasons, the Plaintiff contended that the special plea is not merited. In its heads of argument, the Plaintiff did not respond to the special plea of prescription raised by the 2nd Defendant in its heads of argument.

On the first hearing, I directed the parties to adduce evidence by way of affidavits for the assistance of the court. My view was fortified and motivated by the case of Jennifer Nan Brooker v Richard Mudhanda and Anor[1]. I also directed the parties to file supplementary heads of argument in light of new issues which could emerge from evidence adduced through affidavits. Parties complied with both directives.

[1] SC5/18

On the date of the final hearing, the parties chose to abide by written submissions. In its heads of argument filed on its behalf, the 2nd Defendant did not respond to the issue of the point *in limine* raised by the Plaintiff. Consequently, I asked the 2nd Defendant's counsel's attitude towards the Plaintiff's point *in limine*. Adv Uriri undertook to file heads of argument responding to this issue by no later than 24 February 2025. Having discovered that the evidence placed before my attention through affidavits did not address the question of prescription, I further inquired from Adv Uriri whether his client was still persisting with its special plea of prescription and he affirmatively responded. He undertook to file heads of argument in this respect by the same date. Prof. Madhuku undertook to respond to the heads of argument within two days of being in receipt of the same.

By 28 February 2025, no heads of argument had been filed on behalf of the 2nd Defendant. I was forced to proceed in the absence of the heads of argument promised by the 2nd Defendant's counsel.

I will start by dealing with the point *in limine* raised by the Plaintiff against the 2nd Defendant's exception and special plea. It is common cause that the Plaintiff's summons and declaration were filed on 29 April 2022. The 2nd Defendant was served with copies of the Plaintiff's summons and declaration on 4 May 2022. The 2nd Defendant entered appearance to defend on 12 May 2022. The 2nd Defendant gave notice of its intention to except to the summons on 14 September 2022. The 2nd Defendant finally filed its exception and special plea on 24 October 2022. This was after a period in excess of five months had expired from the date of being served with the summons and declaration.

The question which emerges from this point *in* limine is whether the 2nd Defendant filed its exception and special plea within the prescribed time lines.

In terms of rule 42(1)(a)-(b) of the High Court Rules, the special plea and exception are to be filed within the period allowed for filing any subsequent pleading. Rule 42(1) (a)-(b) is as follows:

"As an alternative to pleading to the merits, a party may within the period allowed for filing any subsequent pleading: —

(a) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;

(b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be where the pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be;"

It is apparent that the subsequent pleading contemplated by the provision of Rule 42(1) after entering appearance to defend is the Defendant's plea. The appearance to defend must be filed within ten days from the date of being served with copies of summons and declaration. Reference is made to the provisions of Rule 12(3) as read with Rule 20(2) of the High Court Rules. Where the Defendant was served with both summons and declaration, he or she must within a further period of ten days file his or her plea. Reference is made to Rule 12(4) of the High Court Rules which provides as follows:

"thereafter, if the summons is a combined summons and declaration, the defendant shall, within a further 10 days after giving such notice to defend, deliver a plea (with or without a claim in re-convention), an exception or an application to strike out."

In casu, the 2nd Defendant was served with copies of summons and declaration at the same time. Hence, it ought to have responded within a further period of ten days contemplated by Rule 12(4) of the High Court Rules. Rule 37(3) of the High Court Rules also provides for the same timelines. It provides as follows:

"Where the defendant has delivered notice of appearance to defend, he or she may, subject to rule 39, within ten days after filing such appearance, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out or special plea."

The provisions of Rule 37(3) are subjected to Rule 39. Rule 39(1), which is relevant, provides that:

"A party shall be entitled to give five days' notice of intention to bar to any other party to the action who has failed to file his or her plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 8 at the address for service of the party in default."

It is apparent that the period within which the plea may be filed is ten days after the initial period of ten days of entering appearance to defend. By filing the exception and special plea on 24 October 2022, more than five months after being served with the summons and declaration is way out of time. This is not in compliance with the Rules. In the case of Muvirimi and Ors v

Ramsway Investments (Pvt) Ltd and Ors[2], in interpreting rule 119 of the repealed High Court Rules, 1971 which were in force at the material time, the court held that:

> "Simple mathematical calculation shows that, in terms of Rule 119, the defendant should have filed its special plea, exception and application to strike out twenty days from the date that further and better particulars were refused. These were refused on 13 May, 2016. It should, therefore, have filed its special plea, exception and application to strike out on 13 June, 2016. The reality of the matter is that it did not do so."

Like Rule 37(3) of the current High Court Rules, Rule 119 of the repealed High Court Rules provides for similar timelines for the filing of exception and special plea. The court consequently struck from the roll the special plea, exception and application to strike out which were filed out of time in the case of Muvirimi (*supra).* I am persuaded to adopt the same position. Reference is also made to the case of *Madake* v *Makonza* & Anor[3], where, in commenting on the time frame for the filing of exception, I made the following remarks:

> " I do agree with the submissions for the counsel of the excipients. The Rules should not be read in isolation but they should be read together. It is apparent that R 37(3) of the High Court Rules is subject to R 12(3)-(4) of the High Court Rules. According to the return of service filed, the defendants were served with copies of summons and declaration on 19 July 2022. The defendants filed their notice of appearance to defend on 21 July 2022. The time or the first ten-day period contemplated in R 12(3) expired on 2 August 2022 while the second period of ten days contemplated in R 12(4) expired on 18 August 2022. The exception was filed on 11 August 2022 and served upon the plaintiff on 12 August 2022. The filing and service of the exception were done well before the expiration of the dies induciae. This point *in limine* is therefore meritless. It consequently stands dismissed."

Every provision of the legislation is designed to cure one or more mischiefs. Similarly, every legislative provision is intended to achieve one or more purposes. Rule 42(1) as read with rule 37(3) which require the exception and special plea to be filed within the specific timelines are meant to promote expeditious resolution of disputes between the litigants who are before the court. These provisions are a manifest expression of the legislature's intention to cure the mischief of litigants who wish to delay the proceedings by the belated filing of exception and special plea. In my view allowing the 2nd Defendant to file exception and special plea after a period in excess of five months is not in the interest of justice. The legislature was inspired by

[2] HH343/18.

[3] HH890/22.

the desire to bring finality to litigation when it enacted Rule 42(1). This court must jealously and conscientiously implement this provision in its true sense and spirit by discouraging litigants to file exception and special plea outside the stipulated time frames.

With respect to costs, it is apparent that the 2nd Defendant was warned through the Plaintiff's replication and Plaintiff's heads of argument but ignored this warning. For this reason, the 2nd Defendant must bear costs of suit on an ordinary scale. In my view, an order for punitive costs can only be made in exceptional circumstances. Such circumstances do not exist in the present case.

In the result, it is ordered as follows:

The 2nd Defendant's exception and special plea be and is hereby struck from the roll with costs.

Lovemore Madhuku Lawyers, plaintiff's legal practitioners.
Maposa and Ndomene, legal practitioners, 1st defendant's legal practitioners.
Mushangwe and Company, 2nd defendant's legal practitioners.