JO-ANN IRELAND
versus
OLD MUTUAL LIFE ASSURANCE COMPANY OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 9 February and 13 July 2022

Special Plea

J Mambara, for the plaintiff
R Moyo, for the defendant

CHILIMBE J:

BACKGROUND

[1] Plaintiff issued summons against defendant on 12 November 2021 claiming an amount of USD$84,322 plus interest and costs of suit. The amount in question represented, according to the claim, annuity payments due and owing. These obligations allegedly arose from retirement annuity contracts. The contracts concerned had been entered into between defendant and plaintiff`s late spouse in 1988 and 1994 respectively.

[2] The claim was contested by defendant. By letter dated 8 December 2021, defendant advised plaintiff that her claim had prescribed. In that regard, defendant warned plaintiff that unless the action was withdrawn (within two (2) days from the date of that letter) together with a tender of costs, a special plea would be raised.

[3] The claim was not withdrawn. Defendant made good its threat and filed a special plea of prescription, together with heads or argument, on 15 December 2021. In breach of rule 42 (9) of the High Court Rules SI 202/21, defendant omitted to file a replication to the special plea. Her legal practitioners proceeded to file heads of argument purporting to contest the special plea. No condonation was sought then and neither has been filed to date, for leave to file the replication.

THE SPECIAL PLEA

[4] The matter was set down for argument on 9 February 2022.A few days before that date, on 4 February 2022, plaintiff addressed a letter to the Registrar copying the defendant's lawyers. To this letter, defendant his letter sought the placement on record, and attached copies of two decisions which defendant intended to rely upon in argument.

[5] These authorities were (a) *Blooming Lily Investment (Pvt) Ltd & Another* v *Ontage Resources (Pvt) Ltd and Tapiwa Zebron Gurupira and 2 Others HH 1-21* and (b) the dual decisions of SANDURA JA in (1) *Nexbak Investments (Pvt) Ltd and Another* v *Global Electrical Manufacturers and Another and, (2) Nexbak Investments & Another (Pvt) Ltd and Another* v *Global Electrical Manufacturers (Pvt) Ltd and Another SC 43-09.*

[6] Essentially, these decisions reinforced the settled position at law that heads of argument cannot supplant a replication. The oft-cited decisions of (1) *Jennifer Nan Brooker* v *Richard Mudhanda & 2 Others and (2) Adrienne Staley Pierce* v *Richard Mudhanda & Another, SC 5-18* observed thus on that point per GUVAVA JA (as she then was), [at page 13]:

> "After being served with the special plea of prescription the respondent should have replicated. The purpose of a replication is to inform the court and the defendant of the plaintiff's rebuttal to the special plea. The failure by the respondent to file a replication to the special plea means that there are no disputes for determination on the special plea. In the absence of such replication there would be no issue for determination by the court *a quo."*

APPLICATION FOR LEAVE TO WITHDRAW CLAIM

[7] Plaintiff`s legal practitioners were apparently awakened to the calamity facing their client`s case. They issued a notice of withdrawal of plaintiff`s claim. That withdrawal was accompanied by a tender of costs. That concession found no favour with defendant. Mr *Moyo* for the defendant argued that the opportunity to withdraw the matter had passed. As such, the special plea had to sail through and be granted. The result being a dismissal of plaintiff`s claim.

[9] Mr *Mambara* entreated the court to permit plaintiff to withdraw the matter. He submitted that it was within the court`s power to exercise its discretion and ensure that the justice of the case was met. In support of that point he referred me to the Constitutional Court decision of *Everjoy Meda* v *Maxwell Matsvimbo Sibanda & 3 Others 2016 (ZLR) 474 (CC)* (supra) where the court stated at page 4 that:

> "The court has a discretion whether or not to grant such leave upon application. The question of injustice to the other parties is germane to the exercise of the court`s discretion."

[10] On that basis, I was urged to recognise the following as matters that militated in favour of permitting plaintiff to withdraw her claim rather than allow the special plea. Firstly, plaintiff intended to reorganise herself and launch her claim afresh. The plaintiff had been severely prejudiced and it would be fitting that her claim be articulated in court. Secondly, the plaintiff`s claim related to a matter whose outcome was of interest to a number of pensioners. In that regard, it would be in the interest of justice that this particular claim be determined conclusively.

[11] Mr *Moyo* referred the court`s to MALABA DCJ (as he then was) remarks in *Everjoy Meda* v *Maxwell Matsvimbo Sibanda & 3 Others (supra)* [or at page 4 of the CC 10-16]:

> "While parties may at any time before a matter is set down, withdraw a matter, with a tender of costs the same does not hold true for a matter that has already been set down for hearing. Once a matter is set down, withdrawal is not there for the taking.
>
> The applicable principles are set out in Erasmus "Superior Court Practice" B1-304.A person who has instituted proceedings is entitled to withdraw such proceedings without the other party`s concurrence and without leave of the court at any time before the matter is set down.
>
> Once a matter has been set down for hearing it is not competent for a party who has instituted such proceedings to withdraw them without either the consent of all the parties or the leave of the court. In the absence of such consent or leave, a purported notice of withdrawal will be invalid."

[12] Mr *Moyo*`s opposed the application for leave to withdraw. His argument was premised on the following heads. Firstly, defendant had raised a special plea to plaintiff`s claim. That special plea had not been resisted and it being good at law, had to be granted. This point on its own meant that the controversy had collapsed and matter had to be put to rest.

[13] Secondly, plaintiff's last-ditch attempt to avoid the consequences of the special plea through a withdrawal could not be permitted to avail. This was an ingenious way to avoid the obvious consequences of the special plea. It was not a legitimate intent to bury the dispute but a strategy to re-launch the claim afresh against plaintiff. This meant that defendant would be

laboured with further expense and trouble associated with the defence of plaintiff`s claim. That aspect would be associated with the need for finality in litigation.

[14] Thirdly, Mr *Moyo* argued that plaintiff had placed herself in a uniquely awkward position. She had not furnished the court with a basis upon which any grace or reprieve could be extended to her. There was nothing on record to explain why the special plea was not properly answered through a replication. The court was therefore strictured in that there was nothing upon which its discretion to grant the reprieve could be founded.

[15] As a fourth point, it was the further submission by counsel for defendant that permitting the plaintiff to withdraw her claim would effectively undermine the decisions cited in [4 and 5] above. This the court was precluded from doing so by stare decisis.

EXAMINATION OF THE TWO POSITIONS

[16] On the one hand I am being urged to recognise the mentioned demands of judicial precedent. The authorities had spoken and their verdict quite clear on a plaintiff who neglects to file a replication to a special plea. On the opposite end sits a request by plaintiff that she be granted leave to withdraw her claim this late in the day. To grant the defendant`s request means automatically refusing the leave sought by plaintiff to withdraw her claim. In addition, such refusal carries the possible implication that a court has forced a party to proceed with litigation where such party is no longer keen to do so.

[17] The principles applicable in determining whether to grant such leave have been articulated in the in the Constitutional Court`s remarks in Everjoy Meda. That court cited the following authorities: -*Abramacos* v *Abramacos 1953(4) SA 474(SR); Pearson & Hutton NNO* v *Hitseroth 1967(3) 591(E) at 593D, 594H Protea Assurance Co Ltd* v *Gamlase 1971(1) SA 460(E) at 465G Huggins* v *Ryan NO 1978(1) SA 216(R) at 218D Franco Vignazia Enterprises (Pty) Ltd* v *Berry 1983(2) SA 290(C) at 295H Levy* v *Levy 1991(3) SA 614(A) at 620B* and HERBSTEIN & Van Winsen "The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa" (5ed) p 75 The following are key considerations issuing from the above authorities:

i. Under normal circumstances, withdrawal of a matter becomes a matter of course, especially where there is a tender of costs.

ii. Where a matter has been set down, withdrawal will, unless consented to by the other parties, require prior leave of the court.
iii. The court will grant or withhold such leave based on its discretion.
iv. That discretion is defined by the need to do justice between the parties, especially avoidance of undue prejudice to the defendant.
v. The court must take care to ensure that the intended withdrawal is not based on ulterior motives or that it does not amount to an abuse of process.

[18] Guided by the above I note the conclusions taken in a few of the above decisions. In *Levy* v *Levy*, (supra), the court permitted a withdrawal although it noted that such was a tactical step by the plaintiff borne out of "commitment to her faith". In *Everjoy Meda*, an attempt to withdraw at the last moment was refused. It would appear that the court was principally swayed into declining the prayer for leave to withdraw by a subsequent argument proffered on behalf of applicant which did not find the court`s favour.

[19] In *Kika* v *Malaba and 2 Others HH 297-21*, this court was faced with a less contentious set of circumstances and proceeded to permit a withdrawal on the following reasons at page 2:

> "Having carefully considered submissions made by counsels for all the respondents, it is the decision of this court to allow the withdrawal with a tender of wasted costs. We have decided not to dismiss the application on the merits because the notice of withdrawal was filed before the respondents had filed their notices of opposition. This is a matter which was not yet ready for hearing. So, it may not be dismissed on the merits."

[20] It appears therefore that courts have principally been guided by the facts of the respective matters before them in electing whether to grant leave to withdraw. In disposing of the matter before me, I will take into account the following; -this application derives from plaintiff`s failure to defend the special plea raised against her claim. I am not privy to the reasons as to why that breach of the rules was committed. Defendant was therefore well within its rights to insist on an order recognising the success of its plea. Importantly, I am guided by the words of MALABA DCJ (as he then was) in *Everjoy Meda* [at page 4] to the effect that "*The question of injustice to the other parties is germane to the exercise of the court's discretion."*

[21] Any such assessment will naturally involve a balancing of the respective interests and positions. On that basis, I was not persuaded by Mr *Moyo*`s arguments to the effect that as a court, the only decision I could reach was to uphold the special plea. This submission was reiterated with considerable emphasis. I merely understood counsel to be fortifying his argument urging the court to refuse plaintiff`s prayer for leave to withdraw her claim. The court`s discretion is as wide as it is circumscribed by applicable principles guiding the use of such discretion. Those principles have been set out in the decisions cited herein. They remain sound considerations deriving from non-other than the need to invest in the court sufficient flexibility to deliver justice demanded by peculiar circumstances of each case.

[22] The principle enunciated in *Rejoice Meda* regarding the restrictions around withdrawal after set down, is yet another elaboration of the rules of court. Our courts have stated over the years that the purpose of the rules of court is basically to enhance the opportunity to do justice between parties through an orderly and rational organisation of proceedings. Hence the adage "rules for the court, not court for the rules*". See Stuttarfords* v *Madzudzu HH 33-03; Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) and 3 Ors HH 446 15; Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company of Zimbabwe (Pvt) Ltd and Another HH 667-15;Cuthbert Elkana Dube* v *PSMAS SC 73/19; Antech Laboratories* v *Permanent Secretary of Mines and Mining Development & 2 Ors HB 19/20; Keshelmar Farms (Pvt) Ltd & Ors* v *Mswelangubo Farms (Pvt) Ltd & Anor HB 39/22; Disruptive Innovations (Pvt) Ltd)* v *City of Harare And 4 Others HH 343-22* and of course, rule 7 of the High Court Rules SI 202/21.

[23] GARWE JA (as he was then) summarised the position as follows in *Cuthbert Elkana Dube* v *PSMAS And Another* (supra) at pages 9-10:

> "That rules and practice directives are made for the court and not the court for the rules is a principle accepted in this jurisdiction. Various decisions of the courts in this country and in South Africa have stressed this position. Therefore, where strict adherence to a rule and, I would add, a practice directive issued by a court results in substantial injustice, a court will grant relief in order to prevent such an injustice – *Eke* v *Parsons* 2016 (3) SA 37; HPP *Studios (Pvt) Ltd* v *Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H); *Mogale City* v *Fidelity Security Services (Pvt) Ltd & Ors* 2015 (5) SA 590. The Rules of Court are not laws of the Medes and Persians[1] and in suitable cases the Court will not suffer sensible

[1] The law of the Medes and Persians refers to that which is inviolable or immutable. The saying emanates from the Book of Daniel 6.8 in the Bible in which high officials and satraps said to King Darius "Now, O King establish the decree and sign the writing, so that it cannot be changed, according to the law of the Medes and Persians, which altereth not."

> arrangements between the parties to be sacrificed on the altar of slavish obedience to the letter of the Rules - *Scottish Rhodesian Finance Ltd* v *Honiball* 1973 (3) SA 747, 748 G-H."

[24] The defendant`s special plea was intercepted by, or at least reached the ears of the court simultaneously with plaintiff`s prayer for leave to withdraw the matter. I am obliged to listen to each request with both ears, and consider same with a full mind. Mr *Mambara* was candid with the court as regards the purpose of plaintiff`s withdrawal. It was a tactical manoeuvre meant to earn plaintiff`s case a lifeline. It was disclosed that plaintiff indeed intended to "regroup" and launch a more determined charge.

[25] Such an approach is neither encouraged nor desirable. Yet I remain focussed on whether granting a widow, whose claim was not well-handled by her lawyer, another opportunity to reframe her case would amount to an injustice against defendant? In processing this consideration, I recognise that plaintiff carries the belief that her entitlement from defendant totals USD$84,322 against pay-outs of USD$5,31 and USD$2,61. It does not point in the direction of justice to bar one who feels so aggrieved, a final opportunity to properly ventilate her claim in court. After all, such process will in the end, vindicate the innocent party.

[26] Lest it be construed that I have cast my net beyond the pond, I need to draw attention to the matter before me. This case before me involves, not the residual issues arising from an asinine and drunken brawl in a rough house, but a widow`s pension. I may in passing, take judicial notice of the significance of this type of claim. It forms part of the wider national dialogue on the residual effects of the nation`s long-drawn hyperinflationary period. In fact, the nation commissioned an inquiry in 2015, chaired by Retired JUSTICE LG SMITH, whose terms of reference among others were:

i. To establish the total value, nature and type of assets owned by insurance companies and pension funds;
ii. To determine the causes of loss of value of insurance and pension benefits;
iii. To assess the conversion methods and processes of insurance and pension assets and liabilities to Unites States dollars;
iv. To establish the extend of prejudice if any to policy holders and pensioners; and
v. To recommend compensation where prejudice has been established.

[27] This approach to recognise the importance of the issue in question was taken in *Chimpondah & Anor* v *Muvami 2007 (2) ZLR 326 (H) 328*.In that decision, MAKARAU JP as she was then, factored in the significance of a case`s subject matter, in deciding to grant an application for condonation. The learned Judge stated thus at 327 H to 328 A:

> "Further, in my view, the point raised by the respondent in his defence is an interesting and important legal point concerning the definition of instalment sales of land under the Contractual Penalties Act."

[28] Mr *Moyo* raised the need for finality to litigation. I agree with him. He also drew attention to the fact that defendant would have to incur expenses as well as expend effort in defending this matter. For those reasons, I will express my disapproval over the manner in which the plaintiff`s claim was prosecuted. To his immense credit, Mr *Moyo* took the trouble to engage plaintiff`s legal practitioners and warn them of the steps his client intended to take. His advice went unheeded. Indeed, the administration of justice will be well-served when legal practitioners and litigants prosecute their claims and defences with diligence. This notwithstanding, I do not believe that granting the plaintiff leave to withdraw her claim will amount to an injustice to defendant. An inconvenience to defendant most certainly; - but not an injustice. An offer of costs was made and indeed an order of costs will be confirmed in a bid to assuage the inconvenience occasioned to defendant.

DISPOSITION

I will thus grant the prayer for leave to withdraw and therefore order as follows:

1. Plaintiff`s application for leave to withdraw her suit in case number HC 6415/21 be and is hereby granted.
2. Plaintiff is ordered to pay the costs of suit.

J Mambara and Partners, plaintiff's legal practitioners
Gill, Godlonton and Gerrans, defendant`s legal practitioners