TAPERA D. MABUWA
and
LUCY MAURAENI NYAHUNI SAZIA
versus
LUGEN SIBANDA
and
REGISTRAR OF DEEDS
and
WINTERTONS LEGAL PRACTITIONERS

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 4 & 13 January 2016

Chamber Application for Default Judgment

In Chambers

CHAREWA J: First the plaintiff obtained an order for the joinder to his suit of the second plaintiff and third defendant before my brother Judge Mawadze on 28 September 2015. The order required the third defendant (Wintertons Legal Practitioners), to file its plea within 10 days.

Without giving notice of intention to amend, the plaintiffs filed two "amended declarations" on 8 October 2015. On the same day plaintiffs proceeded to "serve" the amended declarations and order of joinder. They filed the affidavit of service of the first plaintiff as "proof of service" on 4 November 2015.

On 11 December 2015, the plaintiffs filed this chamber application for default judgment. When the application was placed before me I noted various procedural challenges which rendered it to be improperly before me. I therefore caused a letter to be written on 18 December 2015 advising the plaintiffs as follows:

1. That the joinder of the third defendant did not expunge the first defendant's plea already on record.
2. The amendment to the declaration had not yet been sanctioned by a judge or consented to by the first defendant in particular.

3. Service of the order of joinder, which was equivalent to commencement of process against the third defendant ought to have been done in terms of the Rules.

Instead of rectifying the procedural shortcomings noted, the first plaintiff responded by letter dated 23 December 2015 that the chamber application for default judgment was procedural, alleging *inter alia*, that the first defendant's plea had been nullified by the joinder, and in any event had been improperly served. Further, the first plaintiff asserted that Order 17 r 115 entitled him to amend his declaration without the need to have the other party's consent or the court's sanction, and rr37 (2) and 39 (b) of Order 5 permitted him to effect service as he did.

Since I was not persuaded by his arguments, I directed, on 31 December 2015, that the plaintiffs' should comply with the letter dated 18 December 2015.

The first plaintiff responded on 31 December 2015 asserting that he had adhered to the rules of court and was at sea, presumably on what the letter of 18 December 2015 required him to do. For the avoidance of any further confusion, I therefore hand down this judgment.

It is trite that where a plea has been filed of record, and no exception or application to strike it out has been made, any application for default judgment must fail. *In casu*, as against the first defendant in particular, since his plea has been filed of record and is still extant, no default judgment may be granted.

Nor can an application for default judgment be made in default of plea without first giving notice to plead and intention to bar in accordance with Order 12 r 80, and filing a notice to bar with the Registrar in terms of r 81. The plaintiffs seem to have acted in the mistaken belief that since the order of joinder gave third defendant ten days to file its plea, failure to do so meant that it was automatically barred. In so far as the third defendant is concerned, therefore, the application for default judgment is also not in accordance with the rules, as on the papers before me, the plaintiffs have not adhered to Order 12.

With regard to the purported amendments to the declaration, the plaintiffs' have also run afoul of the rules. Order 20 prescribes how pleadings may be amended. Rule 115, which the plaintiffs' rely on to justify amending their declaration is improperly cited. That rule merely allows a party, who has filed his summons separately from the declaration, to alter, modify or extend his claim as stated in the summons upon subsequently filing his declaration. In the present case, the first plaintiff filed his summons together with his declaration on 27

December 2013. What the plaintiffs seek to do with the documents at p 10-14 and 27 of their application for default judgment is to amend that declaration originally filed in 2013, which can only be properly done in terms of r 132.

In so far as service of the order for joinder is concerned, Order 5 r 37(1) is unequivocal, providing as it does that:

> "Service of a summons, writ, warrant or order of court shall be effected by the sheriff or his deputy".

The rules do not provide any discretion to depart from this peremptory provision. Therefore the plaintiffs were obliged to deliver the order of joinder to the sheriff or his deputy for service on defendants in terms of r 37(3). Service by the plaintiff of the order of joinder was clearly improper.

Finally, since an application must stand and fall on the documents before the Court, I will confine myself to the documents filed of record in the application for default judgment and will not address peripheral issues which the plaintiffs have raised since 18 December 2015.

In the result, the application for default judgment is dismissed.