TOBIAS TACHIVEYI MUSARIRI
versus
IGNATIUS RUVINGA
and
M & M ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 October, 2017 & 5 February, 2018

Opposed matter

J.R Tsivama, for the applicant
Respondents in person

MANGOTA J: I heard the matter which relates to the current parties on two separate occasions. The first hearing which fell under case number HC 963/16 took place on 6 April, 2017. The second hearing fell under case number HC 4934/17. This took place on 24 October, 2017. The second hearing emanated from the first hearing.

The first hearing showed that the papers, as filed of record, contained irreconcilable disputes of facts. The disputes offered a discretion to me to dismiss the application or to refer the same to trial. I chose the latter option. I, therefore, directed that:-

i. The applicants' affidavits and all documents which supported their case serve as the summons.
ii. The applicants would file their declaration within ten (10) days of their receipt of this directive and serve the same on the respondent within the mentioned period of time.
iii. The respondent's affidavit and all attachments which supported his case would serve as his appearance to defend.
iv. The respondent would file his plea within ten (10) days of his receipt of the applicants' declaration.
v. Thereafter, the matter would proceed in terms of the High Court Rules, 1991.

The applicant under HC 4934/17 was the respondent under HC 963/16. The parties appear under HC 4934/17 in the reverse order. The decision which I made under HC 4934/17 prompted the current applicant to address a letter to the registrar of this court. The letter is dated 8 December, 2017. It reads, in part, as follows;

> "1. We refer to the above stated matter in which we have assumed agency on behalf of the applicant…….
> 2. In order to properly advise our client on the appropriate course of action to take, we kindly request for reasons for the order issued under case number HC 4934/17.
> 3. It is our view that the reasons will greatly assist us in advising the client."

I state hereunder the reasons for the decision which l made on 24 October, 2017. The application under HC 4934/17 was one for the upliftment of the bar. The propriety or otherwise of the bar remained a matter for debate. It was, in my view, not valid.

The circumstances under which the bar came to be *imposed* run in this order. In compliance with my directive of 6 April, 2017, the first respondent, acting for the second respondent and him, served the declaration on the applicant on 4 May, 2017. Following the contents of the declaration which was long and winding the applicant requested for further particulars. He served the request on the respondents on 15 May, 2015. The respondents did not furnish the requested further particulars. They, instead, filed a paper which was to the effect that the applicant had failed to file his plea within the stipulated ten-day period. They proceeded to issue what they termed a "NOTICE OF BAR TO DEFENDANT RULE 59". The notice reads in, part, as follows:

> "Take note that defendant having been served with the plaintiff's declaration on 4th May 2017 in terms of an order direction granted by the Honourable Mr Justice Mangota. Defendant defaulted in filing his plea within ten (10) days in contempt of the judge's directive no. 5. Now in terms of rule 59 of this Honourable Court High Court rules 1971. Defendant having entered appearance to defend has been duly barred in default of plea."

The above mentioned conduct of the respondents prompted the applicant to address a letter to them. The letter is dated 24 May, 2017. The letter constituted the applicant's concerns as regards the propriety of the bar. It reads, in part, as follows:

> "We refer to your reply to the request for further particulars as well as your purported notice of bar and advise as follows:
> 1. You were served with our client's request for further particulars on the 7th day of service of your declaration, which is within the ten days as directed by the court.
> 2. The request for the particulars was prompted by the contents of your declaration which made it impossible to file a plea or other answer to it without the said clarifications.
> 3. Even assuming that we were obliged to plead to the said declaration notwithstanding its shortcomings, which is not the case, there is no automatic bar that can be issued before

> you have issued and served us with a notice to plead – See r 80.
> In the circumstances if we do not receive written confirmation of withdrawal of the bar within 48 hours of this letter we will proceed to file an application compelling you to do so….."(emphasis added).

The tenor of the respondents' reaction to the letter was that the applicant was in contempt of court and that the court would not entertain his cause. They stated that the request for further particulars was not a plea. They said the order/directive did not order filing of further particulars but a plea within ten (10) days. They submitted that the process of barring where a court order was involved was automatic. They averred that the time allowed to file a plea had lapsed and the consequences visited the applicant. They insisted that the applicant was in contempt of this court's order.

The respondents were self-actors when they appeared before me on the two occasions that I heard the matter. They are, therefore, forgiven for their misconstruction of the rules of court.

Rule 142 of the High Court Rules 1971 allows a party who receives the plaintiff's declaration to request further particulars from him. It is the furnishing of further particulars which clarifies unclear, vague or embarrassing issues which are contained in a declaration. The clarification enables the defendant to appreciate the plaintiff's case as well as to plead to the same. Where, after further particulars have been furnished, some matters which are part of the declaration require further clarification, the rules permit the defendant to request for further and better particulars which must, as well, be furnished to him.

The phrase which appears in para 5 of my directive should not, therefore, be construed in the narrow sense. It was within the applicant's right to tender his plea, or where the declaration required clarification, as was the case *in casu*, to request for further particulars which he did. The request which he made had the effect of enabling him to plead to the respondents' declaration which was, by any standard, very long and winding. It would have been a serious travesty of justice to compel the applicant to plead to what was not clear to him.

Litigation is serious business. It is not a game of chance or ambush. It reposes itself in the rules of fair play. A party who thinks that a word in a directive of the court thinks that it means what it thinks it means cannot be allowed to disregard the wider meaning of the word as interpreted from the context which surrounds the circumstances of that word. Any matter which goes into clarifying the issues which relate to a party's ability or otherwise, to plead should, in my view, be regarded as falling into the realms of a plea.

The current application was not necessary at all. The purported bar was not a bar at all. The contents of the notice which related to the purported bar were not in compliance with rule 80 of the High Court Rules, 1971. The notice was purportedly issued in terms of Rule 59 which is markedly removed from the procedure of barring as is stipulated in Rule 81 of the rules of court. The bar was, in fact, a nullity. There is, therefore, nothing for the court to set aside under the circumstances of this case. The remarks which the court made in *MacFoy* v *United Africa Co Ltd* (1961) 5 ALL ER 1169 (PC) 1172 confirm the view which l hold of the matter. It was stated in the case that:

> "If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so."

The defective bar cannot be lifted. Nothing can be removed from nothing. It is within the applicant's rights that he be furnished with further particulars which he requested. In the premise, it is ordered that:

1. no bar operates against the applicant under HC 963/16
2. the respondents pay the costs of this application on a higher scale.

Sawyer & Mkushi, applicant's legal practitioners