FUNGAI MUNYOROVI
versus
WESTON SAKONDA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 16, 29 March 2021 and 9 September 2021

Special plea

TJ Mafongoya, for the defendant
D. Mudariki, for plaintiff

DUBE JP:

Background

1. The main issue in this application is whether a special plea filed outside r 119 of the High Court Rules 1971, is a nullity. Secondly, whether condonation for late filing of the special plea is permissible, if so, the stage at which an application for condonation of the late filing of the special plea ought to be made.
2. The chronology of events leading to the filing of this special plea is as follows. The plaintiff filed summons against the defendant on 20 August 2020 after which he filed appearance to defend on 28 August 2020 having been served with the summons on 25 August 2020.On 21 September 2020, the plaintiff caused a notice to plead and intention to bar, (the notice) to be issued which was served on the plaintiff on the same date. On 25 September 2020 the defendant filed a special plea raising the defense of *lis pendens*.

Plaintiff's submissions

3. At the commencement of the hearing of the special plea, the defendant made his intention of making an application for condonation of late filing of the special plea known to the court. The plaintiff objected to the making of the application and submitted that the special plea was filed out of time and is improperly before the court as it violates the settled position that after a notice to plead and intention to bar has been filed, a party ought to plead on the merits of the matter and cannot seek to raise any of the alternatives to pleading provided for in r137 of the High Court Rules, 1971, (the rules). She submitted that the special plea is fatally defective and a nullity. Further, that the special plea being a foundational pleading,

any application for condonation in respect of the fatally defective pleading ought to have preceded the filing of any fresh pleading and that the attempt to make an application for condonation is misplaced. She submitted that the notice to plead was properly before the court having been filed in line with Form 9.

4. The plaintiff submitted in the alternative that even if the special plea is valid, it was prematurely set down as it was set down before the period specified in r138 had elapsed and is improperly before the court. She refuted that her consent was sought before the special plea was set down. She urged the court to strike the special plea off the roll.

Defendant's submissions

5. Once given the opportunity to file supplementary heads of argument, the defendant took up a point on the propriety of the notice to plead and submitted that it is fatally defective in both form and substance for the reason that it is not in Form No 9 as specified in the rules. He impugned it on the basis that it has only the first part that gives notice of intention to bar and has no second part giving the time limit by which the plea should be filed. He took issue with the fact that the plaintiff has not applied for condonation for the failure to comply with the rules. He urged the court to grant him condonation of late filling of the special plea and urged the court consider that he has prospects of success in the main matter and that the other party will not suffer any prejudice should the court condone the departure from the rules. He refuted that the special plea was prematurely set down and maintained that the consent of the plaintiff was sought and granted orally within the 10 days prescribed in terms of the rules and that the rules do not provide that the consent envisaged be in writing.

Validity of the notice to plead and intention to bar

6. The High Court Rules 2021, Statutory Instrument 202 of 2021 [hereinafter referred to as the new rules], have replaced the High Court Rules, 1971. The special plea which is the subject of these proceedings was filed in terms of the old rules and hence the preliminary points raised herein will be determined in terms of the old rules.
7. The court's mind was exercised concerning the label placed on the notice filed in terms of r80. Rules 80 and 81 of the High Court Rules, 1971 provided for the procedure for barring as follows:

> "80. Notice of intention to bar
> 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 declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default.

> 81. Procedure for barring
> On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who has given the notice or his legal practitioner."

8. Rule 80 made provision for a notice of intention to bar. The accompanying form to r80, being Form 9, referred to a notice of intention to bar and not a notice to plead and intention to bar. Legal practitioners were borrowing the concept of a notice to plead from the old rule 272. Rule 272 applied in matrimonial causes where a defendant failed to enter appearance to defend, entitling a plaintiff to issue a notice to plead in accordance with Form 30. The High Court Rules, 1971 did not make provision for a notice titled "notice to plead and intention to bar" in r80.
9. The new rules provide for a notice of intention to bar as a standalone notice and a notice to plead in matrimonial causes in rr 39 and 68(3) respectively. These rules are worded in similar terms as rr80 and 272 of the old rules. Where a defendant has failed to file his plea or request for further particulars within the time prescribed in terms of r39, a plaintiff has an entitlement to file a notice of intention to bar as opposed to a notice to plead and intention to bar.
10. It is a misnomer that the notice required to be filed in terms of rr39 or 80 is a notice to plead and intention to bar. It has been noted that the "notice to plead and intention to bar" is one quite popular with legal practitioners. This is as a result of legal practitioners resorting to copying precedents without investigating the authority for such pleadings or notices . It is the duty of legal practitioners to ensure that they file correct pleadings based on the provisions of the rules rather than copy and paste precedents. As a result wrong jurisprudence has been created wherein legal practitioners have a tendency of labelling notices issued in terms of r80 as notices to plead and intention to bar.
11. A defect in the citation of the heading of a notice or pleading is not fatal where the substance in the notice remains the same. In *Yunus Ahmed v Docking Station Safaris Private t/a* CC Sales SC 70/18 where the court held as follows:

> "In cases where the headings on the cover of an application tell one thing and the contents of the founding affidavits tell another, the nature of the application that is before the court is determined by the contents of the founding affidavit and not the headings on the cover of the application."

12. A notice to plead and intention to bar filed in terms of r80 is an irregular step liable to being struck out and for which condonation may be sought. Courts use their discretion to condone irregularities that do not cause any prejudice to the other party. Because the issue of the notice

to plead did not arise during the hearing and is something that was picked by the court, the parties did not have an opportunity to address the court on the anomaly. Consequently, the court has not been asked to condone the irregular step. The irregularity, appearing on the purported notice to plead and intention to bar, would not ordinarily prejudice a defendant for as long as the substance of what is purported to be a notice of intention to bar complies with the rules. The defendant cannot purport to have suffered any prejudice arising from a mislabeling of a notice of intention to bar.

13. The defendant's challenge on the second part of the notice to plead and intention to bar is worrying. The applicant submitted that the notice to plead is not in the proper form provided in the rules. He raises a new issue not pleaded before which is a question of fact. He inappropriately raises a factual enquiry in heads of argument. However, the record resolves the issue. The record reveals that the second part of the notice to plead is there and found on p18 of the record of proceedings. The portion of the notice on p18 is not signed because the defendant has not yet been barred. The index to the pleadings clearly indicates that the notice to plead is found on pages 17 and 18. The notice, albeit wrongly labelled, complies with the format laid out in the rules.
14. What I find interesting about the defendant's challenge is that he simply highlights that the notice to plead is fatally defective and that the plaintiff did not seek condonation but does not seek any recourse save to mention that the plaintiff will fail to comply with r81 when attempting to effect the bar against him. The defendant does not say that he intends to take any particular action to impugn the notice.
15. Despite the reservations the defendant had, he went on to file a special plea based on the impugned notice to plead. If it was the defendant's view that the notice to plead was not filed in terms of the rules, he ought to have taken corrective action at the appropriate stage. He did not make an application to strike out the pleading presumably because no substantial prejudice was likely to be caused to him by the notice to plead in the form complained of. An application to strike out a pleading ought to be made promptly. The objection was not taken up at the appropriate stage and no corrective steps have so far been taken. The appearance was that the defendant had waived the right to challenge the noncompliance with the rules. Courts will not come to the aid of a defendant who shows no signs that he is displeased with a pleading, relies on it, only to take issue with it at a very late stage.

Status of the special plea.

16. The notice to plead and intention to bar, albeit wrongly labelled, not having been followed up with placement of a bar currently has no legal consequences. There was no provision for an automatic bar for failure to a file declaration, plea or request for further particulars within the time prescribed in the old rules. Rule 81 provided a procedure for barring and a failure to file a special plea within the timelines prescribed under r119 did not give rise to an automatic bar. A plaintiff desirous of barring a defendant was required to do so in terms of r81 or r 39(2) of the new rules. Consequently, the defendant was not barred.
17. The bar not having been effected , there was nothing in principle to stop the defendant from filing any further pleadings as long as they were filed in accordance with the rules. The Registrar of the court has no power to decline to accept documents for filing unless a party is barred.
18. The next enquiry is whether the special plea was filed in accordance with the rules. Rule 137 of the old rules made provision for alternatives to pleading to the merits. It stipulated as follows:

> "137. **Alternatives to pleading to merits:**
>
> (1) A party may—
>
> (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;
>
> (c) apply to strike out any paragraphs of the pleading which should properly be struck out;
>
> (d) apply for a further and better statement of the nature of the claim or defence or for further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.''

19. Thus, the special plea was filed in terms of r137. Rule 119 governed the filing of special pleas and stipulated as follows:

> "119. Time for filing plea, exception or special plea
>
> The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration provided that where the plaintiff has served his declaration with the summons as provided for in r 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of r 17."

20. A litigant who fails to file pleadings as stipulated in r119 was considered to be out of time. After the expiry of the time within which a defendant was required to plead expired in terms of r119 and notice of intention to bar was given to a defendant, a defendant had no entitlement to file a special plea. The defendant was required to plead over to the merits of the matter. See *Russell Noach (Pvt) Ltd v Midsec North (Pvt) Ltd* 1992 (2) ZLR 8 (HC).
21. The defendant filed the special plea three days outside the time prescribed in the rules. The parties are in agreement over the import of rr137 and 119. The defendant accepts that the special plea was filed out of time. The question that the court must address is whether the failure to file the special plea in compliance with the rules is condonable or is a nullity that cannot be cured in terms of the rules.
22. A fatally defective pleading is one that does not conform to the required substance or form prescribed in terms of the rules, see *Dabengwa & Anor v ZEC & Others SC 32-16.* A fatally defective pleading has a bearing on the cause of action. It is considered to be an inadequate pleading and cannot be a basis for any suit or action. A fatally defective pleading is a nullity. A nullity entails something that is null, or void. It is 'something that can be treated as nothing, as if it did not exist or never happened and is not considered as court process,' see *The Black's Law Dictionary, 4th Edition.* A pleading that is a nullity is not considered as a pleading and cannot be relied on, see *Jensen v Acavalos* 1963 (1) ZLR 216 at 220, where the court said the following of a nullity:

> "A notice of appeal which does not comply with the Rules is fatally defective and invalid. That is to say it is a nullity. It is not only bad but incurably bad, and unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, it must be struck off the roll with costs ….
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> In *Hattingh v Piennar* 1977 (2) SA 182(O) at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. "What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad …" every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

23. There is a plethora of authority from the Supreme Court albeit on appeals, that define what a fatally defective pleading is and the consequences of filing such a pleading. The case of *Jensen v Acavalos* was cited with approval in the *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) where the court held that failure to comply with mandatory provisions of the rules will render an appeal a nullity.
24. In *Tamanikwa v Zimbabwe Manpower Development Fund and Anor*, SC 73/17, the court dealt with an appeal that was fatally defective and a nullity at law and made it clear that a

pleading that is fatally defective or a nullity is incurably bad, beyond repair and cannot be condoned, revived or amended. The court remarked as follows:

> "In *Freezewell Refrigeration Services (Private) Limited v Bard Real Estate (Private) Limited* SC 61/03, this Court held that a fatally defective appeal cannot be condoned or amended. It can only be struck off. The notice of appeal in this case is therefore fatally defective and a nullity at law. For that reason it is incurably bad and beyond repair.…….when a proceeding is a nullity every proceeding based on it is also a nullity as observed by KORSAH JA in *Ngani v Mbanje & Another*; *Mbanje & Another v Ngani,* 1987 (2) ZLR 111 at p115 where the learned judge relying on the dicta in *Mc Foy v United Africa Company Ltd* ALL E R 1169 remarked that:
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> "If an act is in law a nullity, it is not only bad, but incurably bad. There is no need for the order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes more convenient to do so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse It is simply invalid for failure to comply with the rules''. See also *Sarah Ndlovu & Anor v Moffart Ndlovu & Anor* SC-133-02, *BEC v BIG* SC-78-02, *Florence Sigudu v Minister of Lands and Rural Resettling* N.O & 2 Others HH-11-13."

25. Whether a pleading is fatally defective and a nullity depends on the nature of the noncompliance with the rules. Clearly, one cannot seek condonation of a nullity and hence the pleading is liable to be struck off the roll.

26. A pleading filed in terms of a correct rule but does not comply with one or more requirements of a rule is deemed to be irregular and invalid. An irregular step constitutes a defect. An irregular step was condonable in terms of r4 C of the old rules. Rule 4C provided as follows:

> "4C. Departures from rules and directions as to procedure
>
> The court or a judge may, in relation to any particular case before it or him, as the case may be—
>
> *(a)* direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;"

27. Rule 4C is restated in the same terms in r7 (a) of the new rules. The rule makes provision for noncompliance with the rules and permits departures from any provision of the rules, the extension of time of any periods specified in the rules and removal of bars. It confers general and extensive powers of condonation to the court and gives the court discretion to condone departures from the rules on good cause shown. It must be shown that the departure is required in the interests of justice.

28. The rules are made for the court and not the court for the rules, see *Chikura and Anor v Al Shams Global BVI* Ltd SC 17 /17. The rules are not strictly peremptory. As put in *Watson v Gilson Enterprises (Pvt) Ltd* 1998 (1) ZLR 381 (SC):

> "The provisions of the Rules are not strictly peremptory. But as they are there to regulate the practice and procedure of the High Court, in general, strong grounds have to be advanced to persuade the court or judge to act outside them. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) at 243B, *Makaruse v Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) at 65D-E; *Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S) at 419C-D."

29. It is for this reason that rule 4C was included as part of the rules. In *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588(A), the court said the following of the power of a court to condone non-compliance with the rules:

> "Once it is seen that the Court has discretion, it seems to follow inescapably that it was not intended that a breach of the Rules relating to actions should necessarily be visited with nullity."

30. I agree. Because Rule 4C and its equivalent in the new rules gives the court extensive discretionary powers in the case of non-compliance with the rules, the provision was meant to be used to condone irregular steps stemming from noncompliance with the rules. Rule 4C cannot be used to condone fatally defective pleadings in either form or substance which are considered a nullity. It was never the intention of the legislature that r4C be resorted to for purposes of condoning fatal defects or nullities and revive pleadings.

31. In *Matanhire* the court said the following of a pleading filed out of time:

> "As no valid notice of appeal was delivered and filed within fifteen days of the date when the decision of the Labour Court was given, there was no appeal before the Court and to merely insert the relevant date in the defective notice of appeal, as suggested by Mr Muskwe, without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with the Rules of Court, would be grossly irregular."

32. In *Sammy's Group(Pvt) Ltd v Meyburgh N.O* SC 45/15, the court dealt with a special plea filed out of time and remarked as follows;

> "It is true, as the learned Judge remarked that there is no sanction for the late filing of an exception or special plea. However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First plaintiff's exception was filed 15 days out of time. Second plaintiff's special plea and exception were filed 6 and a half months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court a quo''

33. The *Sammy's* case settles the point that a special plea filed out of time is invalid and cannot have any validity in the absence of condonation for the noncompliance with the rules. A

failure to file a pleading on time raises questions of validity of the pleading. Clearly, the court accepted that condonation of late filing of a special plea could be made. I did not understand the court to have stated that a pleading that has been filed out of time is a nullity. Invalidity should not to be equated with nullity. For this reason, a failure to file the special plea on time is condonable under r4C (a) from where it derives validity. A pleading that is fatally defective and a nullity is not on the same footing as one filed in compliance with the rules but is invalid and therefore susceptible to condonation for noncompliance with the rules in terms of r4C to have it corrected. An application for condonation gives the invalid and irregular pleading validity.

34. Consequently, a special plea or other pleading filed outside the provisions of the rules is invalid and constitutes an irregular step or proceeding taken contrary to the rules, see the *Russel Noach case*. Because the rules provide a remedy for noncompliance with the rules in the case of a defect, noncompliance with the rules gives rise to the question of validity of the pleading. Where the noncompliance with the rules does not result is a nullity, it can be condoned. It does simply not follow that because a pleading has been filed out of time it is a nullity. The enquiry goes further than that. A breach of rule 119 in a case where a special plea is filed out of time is not visited with nullity.
35. The special plea filed by the defendant is impugned simply on the basis that it was not filed in terms of the rules and not on the basis of its form or substance, inadequacy or other flaw. Clearly therefore, the special plea is not in itself fatally defective and nor is it a nullity. The special plea filed by the defendant being an irregular step is invalid and condonable.
36. A foundational pleading is a pleading that forms the foundation of a case in a court of law see *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* SC 24/18. The fact that a special plea is a foundational pleading does not detract from the fact that the pleading sought to be condoned is merely irregular and invalid and therefore condonable.

When was condonation required to be sought?

37. Condonation for noncompliance with the rules must be sought in terms of the rules. Rule 4 C does not prescribe when condonation for noncompliance with the rules should be sought. A litigant who realizes that he has not complied with the requirements of a rule must, as soon as he becomes aware of the noncompliance, apply for condonation of the noncompliance with the rules, see *Commissioner for Inland Revenue v Burger* 1956 (4)SA 466(A). He is expected to do so within a reasonable time. The applicant must show good

cause for condonation. The court need not go into detail on the requirements for condonation.

38. In *Fuyana v Moyo* SC 54/06 the court dealt with an appeal filed out of time and held as follows:

> "Where an appeal is noted out of time, before the matter can be heard by this Court an application for condonation has to be made and such condonation granted before the appeal can be entertained. A matter that is set down for hearing without condonation being first granted will be struck off the roll, as happened in this case.''

39. Where a foundational pleading is filed out of time, an application for condonation must be made and granted before the court can entertain the matter. Equally, as laid down in the Sammy's case, there must be an explanation, by way of an application for condonation, before a special plea filed out of time may be entertained by the court. The court was alive to the fact that the special plea had been filed out of time. Even so, it still accepted that condonation could still be sought and granted and did not find that it was required that the application for condonation precede the filing of the special plea. Consequently, courts do not entertain a special plea filed outside the rules in the absence of condonation.
40. The defendant is required to make an application for condonation of late filing of a special plea as soon as the non-compliance with the rules becomes apparent to him. Filing for condonation before filing of the pleading is only possible where a party becomes aware before filing the pleading or other document that he is out of time. The defendant seems not to have been aware that he filed the special plea outside the time specified in the rules. He seems to have been alerted to this fact at the hearing of the special plea resulting in him seeking to apply for condonation for failure to comply with r119. The position at law therefore is that where a pleading or document is filed out of time, it is permissible to apply for condonation for non-compliance with the rules after filing, in which case the defendant requests that the pleading or document be deemed to have been regularly filed.
41. What is surprising about the attitude of the defendant is that instead of simply addressing the preliminary points raised by the plaintiff , the defendant did exactly that which had been objected to and requested the court to indulge him and condone the non-compliance in terms of r4C (a) in the interests of justice. It appears that the defendant forgot that he had requested that the special plea be removed from the roll to enable him to apply for condonation. He went on to make the application for condonation. The application for condonation made in supplementary heads of argument is not properly before the court. The defendant accepts that the special plea cannot readily proceed to argument. The

defendant is at liberty to make a proper application for condonation of failure to comply with the rules. Consequently, the court cannot deal with the special plea in these circumstances.

42. I am also perturbed by the attitude of the defendant in seeking to bar the defendant from making an application for condonation in this matter. Whether the defendant is entitled to apply for condonation is not an aspect that this court ought to be dealing with at this stage. What the plaintiff was supposed to do is to let the defendant file the application for condonation and later challenge it on any basis including that he has no entitlement to make the application .The court cannot stop a litigant from making an application he wishes to make, especially one for condonation whether or not it views that the application sought to be made has no merit.
43. It will not be prudent for the court to determine whether the special plea was properly set down before the question of the validity of the special plea has been addressed. The defendant asked for an indulgence when he asked that the matter be removed from the roll to afford him an opportunity to make an application for condonation. He will have to bear the wasted costs of this hearing. I find no justification for a punitive order of costs.

Accordingly,

1. The special plea is improperly before the court and is removed from the roll
2. The defendant is to pay the wasted costs of this hearing.

Wintertons, defendant's legal practitioners
Mafongoya and Matapura, plaintiff's legal practitioners