REVEREND CLIFFORD NUNU NDLOVU
versus
LA FONTAINE COLLEGE
and
OSWELL MADYA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 12 & 26 May 2022

Civil Appeal

A Masawi, for the appellant
KM Manyengawana with Mr KK Manyengawana, for the respondent

TSANGA J**:** The appellant issued summons in the court below claiming US750.00 for the value of his generator leased to the respondents including interest at the official rate and costs on the higher scale. The respondents had failed to pay for the generator as agreed which he now wanted returned in terms of its value. The appellant had applied for summary judgment a month after the respondents had filed a special plea which had however not been pursued prior to this application for summary judgment. The special plea was in essence that the same matter was *lis pendens* under 1311/20 in which he had sued for outstanding amounts in respect of the generator plus holding charges. The special plea was upheld by the court below at the hearing of the application for summary judgment on the basis that this was the same cause of action and that it disposed of the application for summary judgment. The court also remarked that in any event summary judgment would not have been granted because the claim was not based on a liquid document.

Dissatisfied with this outcome, the grounds of appeal against the upholding of the special plea are essentially that:

1. There was an error in law by dismissing the application for summary judgment on the basis that it was not a claim for a liquidated amount when it was.

2. The court erred when it proceeded to hear a special plea when there was no special plea any longer before the court since the respondent had failed to set it down.
3. That it was a gross misdirection to have heard the special plea with the application for summary judgment as a special plea had been filed before the summary judgment.
4. That there was a gross misdirection in law when the court found that the claim in case 184/21 was pending in case 1311/20 when the two claims were different as evident from the summons and particulars of claim and prayers and the default judgment in case 1311/20.
5. That there was a serious misdirection when the court found the claim in 1311/20 contains a claim for the generator in issue when it does not.

Submissions by the parties

The appellant withdrew the first ground of appeal that the claim for the generator was a liquid claim. As for grounds two and three on the hearing of the special plea, the essence of the applicant's submission was that the *dies induciae* or time period for hearing of the special plea had lapsed. The appellant argued that it is only possible for the special plea to be heard simultaneously with summary judgment if the application for summary judgment had been filed first. Herein the application for summary judgment was lodged after the special plea and that the special plea could therefore not have been heard when the summary judgment was heard. The appellant relied on Order 14 r 6(3) n and (4) whose relevant provisions are follows:

Order 14 Rule 6
……...

> "(3) If no application by the plaintiff for summary judgment has been made, either party may, on seven days' notice, set down such special plea for hearing before the trial.
> (4) If an application by the plaintiff for summary judgment has been made, a special plea shall, if particulars thereof have been delivered before the hearing of such application, be heard and determined at the hearing of such application."

Order 14 r 7 then purports to spell out the procedure to be observed in greater detail:

> ***"Procedure on filing special plea, exception or application to strike out***
> When a special plea, exception or application to strike out has been filed—
> (*a*) the parties may consent within seven days of the filing to such special plea, exception or application being set down for hearing in accordance with rule 1(4), 3(3) or 5(3), as the case may be;
> (*b*) failing consent either party may, within a further 48 hours, set the matter down for hearing in accordance with rule 1(4), 3(3) or 5(3), as the case may be;

> (*c*) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of 48 hours plead over to the merits if he or she has not already done so and the special plea, exception or application shall not be set down for hearing the trial."

The reference to 5 (3) is evidently an error as the applicable provision is r 6(3) in Order 14. Rule 7 (c) also appears to contain some missing words in the last sentence which states that "the special plea exception or application shall not be set down for hearing the *(sic)* trial". There is a word missing but it is fairly clear that the intention is that the special plea shall thereafter not be set for hearing before the trial. In other words, the essence of order 7 is that where a special plea has been filed the parties may consent to its hearing within **7 days of the filing** of that special plea. If they do not agree, either party may still within 48 hours set the matter for hearing. If there is no such application then within the next 48 hours the party pleading specially, excepting or applying to strike out, is required to plead to the merits and the special plea can no longer be set down for hearing presumably before the trial. Order 7 is therefore clear in providing an automatic bar against the defendant who fails to have a special plea, exception or application to strike out heard within the times stipulated in the rules. The special plea for instance, falls away.

In this instance, the appellant submitted that the application for summary judgement was in fact filed a month after the application for a special plea had been filed. The appellant is therefore procedurally correct that that the application could not have been heard with the summary judgment as the time frame for the special plea had long since passed. It was indeed incorrect for the court below to have allowed the special plea to be carried on the back of a summary judgment when the special plea had not been set down. Grounds 2 and 3 hold merit. The argument by the respondent that in terms of Order 14 r (2) and (3) it was not necessary to lead over to the merits misses the point that this relates to a special plea that has been properly taken and pursued.

Appellant also submitted that the argument of *lis pendens* would not have applied because nowhere in case 1311/20 was the value of the generator being claimed. However, this argument takes us back to the special plea. Once it is argued that there was no special plea that was properly before the court, then all the grounds that relate to the hearing of that special plea must succeed. Grounds 2, 3, 4 and 5 were all not properly before the lower court in the hearing of the application for summary judgment because the special plea was now out of time.

The appellant conceded herein that the application for summary judgment was not based on a liquid claim, the magistrate having indicated in her judgment that she would not have granted it for that reason.

In the circumstances it is ordered as follows:

1. The appeal partially succeeds with costs.
2. The judgment of the court quo is substituted to read:
    a. The special plea being invalidly before the court for non-compliance with the rules is struck off.
    b. The application for summary judgment is dismissed
    c. Each party to pay their own costs.

MAXWELL J……..Agrees

Mufuka and Associates, Appellant's Legal Practitioners
Manyengawana Law Chambers, Respondent's Legal Practitioners