

ZIMBABWE MANPOWER DEVELOPMENT FUND  
and  
MINISTER OF HIGHER AND TERTIARY  
EDUCATION SCIENCE & TECHNOLOGY DEVELOPMENT  
**versus**  
WALTER NYABADZA LAW CHAMBERS  
and  
WALTER NYABADZA

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 4 JULY 2017 AND 3 AUGUST 2017

### **Special Plea**

*C Dube-Banda* for the plaintiff  
*W Nyabadza* for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

**MOYO J:** The plaintiff in this matter instituted proceedings claiming arrear rentals. The defendants filed a special plea to the effect that the agreement of lease upon which the plaintiffs claim is based is null and void, that first plaintiff has no *locus standi*, and that the matter is *res judicata*.

At the hearing of the special plea, I struck it off the roll with costs at a higher scale and I stated that my reasons would follow, here are the reasons.

The plaintiff raised a point *in limine* against the special plea, regarding the procedure for setting it down. The plaintiff argued that the special plea was not set down in accordance with the procedure as given in order 2 rule 138 which provides thus:

When a special plea, exception or application to strike out has been filed:

- (a) the parties may consent within ten days of the filing to such plea, exception or application being set down for hearing in accordance with subrule (2) of rule 223, (b) failing consent either party may within a period of a further four days set the matter down for hearing in accordance with subrule 2 of rule 223

- (b) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before trial

It is clear from the procedure spelt out in this rule that firstly the parties must consent within ten days of the filing of the special plea on its set down.

Secondly, failing such consent, the defendant can set down the special within a further four days and failing both the consent and the setting down with a further four days, the special plea shall not be set down and heard prior to the main matter.

Plaintiff's counsel submitted that there was no consent ever sought by the defendants to set the matter down, and that therefore plaintiff failed to comply with rule 138 (a) and subsequently could not then embark on the second stage of rule 138 which is rule 138(b). Consequently the special plea could no longer be set down through any other means save in accordance with rule 138 (c), that is, it could no longer be set down before the trial.

First defendant argued that he believed rule 138 (b) was applicable as it meant that failing consent in terms of rule 138 (a) he could then proceed in terms of rule 138 (b). This is a lame argument in my view as rule 138 is clearly a rule that gives a step that precedes the next step. Defendants had to seek consent in terms of rule 138 (a), and then failing that consent, defendant would then proceed to invoke the provisions of rule 138 (b) within the following four days. To say that failure to obtain consent to set the matter down, includes just sitting back and doing nothing to set the matter down in terms of rule 138 (b), is anomalous as it defeats the whole purpose of that rule. That is why the rule goes further to provide that if a party fails to embark on the procedure in terms of rule 138 (a) and then (b) (upon failing on (a), the special plea shall thus no longer be set down prior to the trial. This rule is important in my view as it means that these interlocutory matters should be set down without undue delay failing which they should give way to the setting down of the main matter.

I am in agreement with the findings of MAKONI J in the case of *General Leasing Pvt Ltd v Allied Timbers Pvt Ltd* HH 76/15 where she held that rule 138 is peremptory.

The matter was thus struck off the roll, roll as it was set down in a flagrant breach of the rules of this court. First defendant although he acted for himself in this matter, he is a qualified

legal practitioner and should have researched on the point once it had been raised by the plaintiff. Research on the point could have meant that the defendants would forego the set down and leave the matter to be heard once and for all at the trial. To forge ahead, with an procedural hurdle amounts to a flagrant breach of the rules and puts the plaintiff unnecessarily out of pocket warranting that an order for punitive costs be granted as sought by the plaintiff. Refer to the case of *Zimbabwe Online Pvt Ltd v Telecontract Pvt Ltd* 2012 (1) ZLR 197 (H).

I accordingly for the reasons enunciated herein upheld the point *in limine* raised and struck the special plea off the roll with costs at a higher scale.

*Dube-Banda, Nzarayapenga & Partners*, plaintiffs' legal practitioners  
*W Nyabadza Law Chambers*, 1<sup>st</sup> & 2<sup>nd</sup> defendants' legal practitioners