ZB BANK LIMITED

versus

GULLIVER CONSOLIDATED LIMITED

And

MORE WEAR CONSOLIDATED INDUSTRIES

PRIVATE LIMITED

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 16, 17, 21 and 6 June 2012

*O. Mutero,* for the plaintiff

*K. Chirenje,* for the defendant

MTSHIYA J: This is an application for default judgment.

The application is being made at the Pre-Trial Conference stage. The background to the application is as follows:-

On 13 December 2011 the plaintiff issued summons against the defendants claiming payment of:-

“a) US$1 024 015,97

b) US$408 057,67 being interest

c) US$164,00 being bank charges

d) Interest on the sum of US$1 024 015,97 at the rate of 45% per annum subject

to variation from time to time with effect from the 1st of December 2011 to

date of payment.

e) Costs of suit on a legal practitioner and client scale and collection commission

as provided for under the Law Society of Zimbabwe by-laws (1982)”

According to the plaintiff’s declaration the claim arose out of an agreement wherein the plaintiff, extended to the first defendant a revolving credit facility of up to US$1 000 000-00 with effect from 12 October 2010, being the date the defendant signed the facility agreement. The facility was guaranteed by the second defendant.

The credit facility expired on 30 June 2011 and as at that date the plaintiff had “advanced and disbursed to the first defendant on a revolving basis a total sum of US$2 931 743-58 and charged total interest of US$427 513-87 and bank charges of US$38 879-79 resulting in a total amount of US$3 398 136-23 payable by the first defendant. As at 30 November 2011 the outstanding amount from disbursements was US$1 432 237-64. This balance was made up as follows:-

Capital - US$1 024 015-97

Interest - US$ 408 057-67

Bank charges - US$ 164-00

TOTAL Balance - US$1 432 237-64

The above total balance is still due from the first defendant.

According to the defendants, the summons was served on them on 21 December 2011. On 6 January 2012, without legal representation, the defendants filed a notice of appearance to defend. The papers do not reveal the name of the person who signed the papers on behalf of both defendants who are registered companies. However, the current practice in the Supreme Court and High Court is that a company, being an artificial person, can only appear through a legal practitioner and accordingly summons or pleas being part of the legal process should be signed by a legal practitioner. “(See *Pumpkin Construction (Pvt) Ltd* v *Chikaka* 1997 (2) ZLR 340 (H) and *Lees Import & Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S)

On 1 February 2012 the defendants, again without legal representation, filed a request for further and better particulars. In, response to the request for further particulars, on 2 February 2012, the plaintiff’s legal practitioners addressed the following letter to the first defendant:-

“We acknowledge receipt of your request for further particulars date stamped 1 February 2012, which request was filed in response to our notice to plead and intention to bar.

The said request is improperly before the Court because once a plaintiff has filed a notice to plead, a defendant should file a plea or other answer and not a request for further particulars. (**See *Russel Norch (Private) Limited* v *Midsec North* *(Private) Limited* 1999 (2) ZLR (8).”**

**Further, See Order 18 Rule 119 of the High Court Rules**

Kindly file your plea forthwith failing which we shall file a bar and apply for default judgment. We believe that you are aware of the fact that as a company, you can not represent yourselves in a court of law but can only be represented by a legal practitioner.

Your papers are therefore improperly before the Court.” (my own underlining)

The notice to plead and intention to bar referred to in the above letter was not filed with these papers.

On 3 February 2012 the defendants, through Messrs Chirenje Legal Practitioners, filed their plea. The said legal practitioners subsequently filed a notice of assumption of agency on 7 February 2012.

On 14 February 2012 the plaintiff filed its replication to the plea together with its Pre-Trial Conference papers. The plaintiff also filed a notice to make discovery within 24 hours. The defendants never responded to the notice to make discovery.

The plaintiff then applied for a Pre-Trial Conference date and the matter was set down for a Pre-Trial Conference before me on 16 May 2012.

A Certificate of Service filed by the plaintiff’s legal practitioners on 11 May 2012 states that a copy of a notice of set down was served on the defendants’ legal practitioners on 10 May 2012.

On 16 May 2012 when the parties appeared for the pre-trial conference the defendants had not yet filed their pre-trial papers. However, on that date Mr Chirenje sent his assistant, Mr E.F. Maposa who said he had been instructed to apply for a postponement. I pointed out to Mr Maposa that the defendants’ pre-trial conference papers were not before me. I also pointed out that there appeared to be no notice of appearance to defend since the document purporting to be a notice of appearance to defend was not from a legal practitioner. Mr Maposa, who said he had simply been sent to apply for a postponement, did not respond to my queries since he was not seized with the matter. However, Mr Mutero for the plaintiff quickly indicated that at the next hearing he would be applying for a default judgment.

Having gone through the papers and against Mr Mutero’s wishes, I urged the parties to consider the possibility of an amicable settlement. I then postponed the matter to 17 February 2012.

On 17 February 2012 Mr Mutero insisted that a default judgment be granted because the defendants’ appearance to defend was a nullity and in any case there was no defence to the plaintiff’s claim. Furthermore, he argued, the defendants had not filed their pre-trial conference papers.

I also indicated to Mr Chirenje that the notice of appearance to defend was not acceptable.

In response Mr Chirenje said the defendants were prepared to consent to judgment provided there was an agreed payment plan. That proposition was not acceptable to the plaintiff who insisted on obtaining judgment first. The plaintiff’s position was that a payment plan could only be negotiated on the basis of an already existing judgment.

In the belief that a settlement could be possible, I again postponed the matter to 21 may 2012.

On 21 May 2012 the parties had still not reached settlement. The parties were maintaining their positions as spelt out to each other on 17 May 2012. It was after the impasse that Mr Mutero then made this application.

In making the application, Mr Mutero submitted that there was no appearance to defend and the defendants had not filed any pre-trial conference papers. Mr Murero said whereas there was room to cure an irregularity through an application, that was not the case with a nullity. He said the issue had been raised with the defendants as far back as 2 February 2012 through a letter. He said the defendants had not done anything since then.

Mr Mutero went further to state that he had indicated to both Mr Chirenje and his assistant that in the absence of a consent to judgment, he would be making an application for default judgment, which application could be made *viva voce*. Such an application, he said, could be raised at any stage since it was based on a question of law.

In response to Mr Mutero’s submissions Mr Chirenje, for the defendants, argued that although the appearance to defend was defective, it had been duly filed and could not therefore be treated as non-existent. He cited the case of *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H) where GILLESPIE J, said;

“I therefore hold as follows. In any action, where the plaintiff’s legal practitioner contemplates an application for default judgment, but is aware of some proceeding taken by the defendant, being an attempt at opposition, which does not constitute due and regular entry of appearance to defend, he ought to address to the defendant or his legal practitioner due warning of the irregularity of the offending procedural step. Having done so, he may then choose between an application for default judgment or an application, on notice to the defendant, to strike out the irregular proceeding – which latter application may be conjoined with an application for default judgment.

If he opts for the former course, then he must, in his application, and in fulfillment of the well-recognised duty of full disclosure in ex parte proceedings, inform the court (or the judge) of relevant irregularity and give reasons as to why the court’s discretion should be exercised in favour of the plaintiff. The fuller, and more preferable, course is an application on notice to strike out conjoined with a prayer for default judgment. This will never be regarded as an unnecessary proceeding, particularly where there has been a prior warning given of an intention so to proceed.”

Mr Chirenje, surprisingly, submitted that the plaintiff’s letter of 2 February 2012 did not refer to an irregular process that required regularization. The plaintiff, he argued, had not given due warning to the defendants and was therefore trying to snatch at a judgment. He said the rules (particularly rules 83 and 84 of the High Court rules 1971) allow a party who is barred to make a court application for the removal of the bar. Let me hasten to say such an application was never made and no indication was made to the effect that such an application would be made. In support of that submission Mr Chirenje cited the case of *HPP Studios (Pvt) Ltd* v *Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H) where similar issues were considered. He went on to submit that the application for default judgment was not being properly made before the court.

In dealing with this matter I shall confine my finding to the issue of default. That is the only issue before me at this stage.

I have already indicted that this application was made during a pre-trial conference hearing.

Order 26 of the High Court Rules, 1971 governs the conduct of pre-trial conferences. Under rule 182 (4) it is the practice of this court that at the hearing parties will have filed their pre-trial conference papers such as discovery affidavits, pre-trial conference minute containing issues for determination and summaries of evidence. The relevant rule (ie 182 (4)) provides as follows:-

“The registrar, acting on the instructions of a judge, may at any time on reasonable notice notify the parties to an action to appear before a judge in chambers, on a date and at a time specified in the notice, for a pre-trial conference or a further pre-trial conference, as the case may be, with the object of reaching agreement on or settling the matters referred to in subr (2), and the judge may at the same time give directions as to the persons who shall attend and the documents to be furnished or exchanged at such conference.”

As I have already stated, it is the practice of this court that the documents I have referred to above should be in place before the pre-trial conference commences. I have elsewhere indicated that despite being served with a notice to discover and notice of set down, the defendants did not submit their pre-trial conference papers. They did not do so even during the periods of postponement.

Rule 182 (11) provides as follows:

“A judge may dismiss a party’s claim or strike out his defence or make such other order as may be appropriate if –

1. The party fails to comply with directions given by a judge in terms of subr (4), (6), (8), or (10) or with a notice given in terms of subr (4); and;
2. Any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order.”

This application as can be seen is based on the above rule. The plaintiff elected to make an oral application as the rule permits. The application is therefore properly before me and the rules allow me to make an ‘appropriate order’ upon application. An application for default judgment has therefore been properly made before me.

I am satisfied that given the confirmed practice of the High Court and Supreme Court, the document filed by the defendants on 6 January 2012 as a notice of appearance to defend was not only irregular but was a nullity. Accordingly nothing can stand on that document. It could only be valid if, as the law requires, it had been filed by a legal practitioner. This means that any documents filed after 6 January 2012 based on the purported notice of appearance to defend are of no legal force. The irregularity was not disputed but nothing was ever done to rectify it.

I dismiss the notion that the applicant is trying to snatch at a judgment. It is clear to me that by 3 February 2012 the defendant’s legal practitioners were already aware of the shortcomings in the defendant’s papers. I also refuse to accept that the defendants had not passed on to their legal practitioners the plaintiff’s letter of 2 February 2012 where, in plain language, it told the defendants that as a company they could not represent themselves and as a result they were improperly before the court. I believe that was the kind of adequate warning referred to in Founders Building Society, *supra.*

I also fail to understand why the defendant’s legal practitioners could proceed to file a plea on 3 February 2012 in the face of the plaintiff’s letter of 2 February 2012 – which, I believe, caused their appointment. They knew the defendants were already barred. They had the opportunity to regularize the proceedings. That, they did not do and have still not done. HPP Studios (Pvt) Ltd *supra*, clearly places the burden to do the correct thing on the defendants. In properly warning the defendants that:-

1. their papers were not in order and were therefore improperly before the court; and
2. that it as a result would apply for default judgment, the plaintiff had discharged its ethical and professional obligation.

The patience exhibited by the plaintiff in *casu* does not reveal a desire of a litigant who is after snatching at a judgment.

I would probably have held a different view if the defendants had engaged the services of a legal practitioner at the last minute.

In view of the foregoing, my view is that everything militates against a refusal to grant the application prayed for. The defendants remain barred and nothing was done to remove the bar. Accordingly the application for default judgment is granted in favour of the plaintiff.

It is therefore ordered as follows:

1. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay the plaintiff as follows:-

a) US$1 024 015,97 being capital

b).US$408 057,67 being interest

c) US$164,00 being bank charges

d) interest on the sum of US$1 024 015,97 at the rate of 45% per annum

subject to variation from time to time with effect from 1 December 2011

to date of payment.

e) costs of suit on a legal practitioner and client scale and collection

commission as provided for under the Law Society of Zimbabwe by-laws

(1982).

*Messrs Sawyer & Mkushi*, plaintiff’s legal practitioners

*Messrs Chirenje Legal Practitioners*, defendants legal practitioners