PUWAYI CHIUTSI
versus
THE SHERIFF OF ZIMBABWE
and
BARRIADE INVESTMENTS (PVT) LTD
and
ELLIOT RODGERS

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 July, 2021 & 15 September 2021

Default Judgment

T Magwaliba, for applicant
T Mapuranga, for 2nd respondent
D Kawenda, for the 3rd respondent

CHITAPI J: It is not usual that the judge writes a full judgment in an application for default judgment. The usual procedure for recording a default is to simply grant default judgment and make note of reasons for default. In *casu*, the default judgment was granted on account of the non-appearance of counsel and their clients. When a court considers it necessary to express its displeasure with the parties and counsel's conduct of proceedings, a judgment is advised because the court speaks through its judgment.

The background to this matter is as follows in summary. The applicant Puwai Chiutsi is a legal practitioner. The 1st respondent, who is the Sheriff of Zimbabwe is an officer of this court and is responsible for serving and execution of court process. The 1st respondent from the onset did not oppose this application. The 2nd respondent, Barriade Investments (Pvt) Ltd was the purchaser of a certain property belonging to the applicant being, the remainder of Subdivision C of Lot 6 of Lots 190-195 Highlands Estate of Welmoed situate in Harare. The 3rd respondent, Elliot Rodgers is the execution creditor in case number HC 3331/14 in which he obtained judgment against the applicant herein for payment of certain moneys. By virtue of the judgment granted in case number HC 3331/14, the applicant's property aforesaid was attached by the 1st respondent acting upon a writ of execution against property issued by the court at the instance of the 3rd respondent.

Following on the attachment of the applicant's property as aforesaid, the property was sold on 18 September, 2017 in a judicial sale to the 2nd respondent. After the sale, there followed a series of processes to challenge the sale at the instance of the applicant. The 2nd respondent also sued the 1st respondent herein for an order that transfer of the property be passed to him by the 1st respondent. The 1st respondent in consequence of the sale of the property to the 2nd respondent confirmed the auction sale. The applicant applied for the setting aside of the confirmation of the sale under case number HC 11349/17. The 3rd respondent applied under case number HC 2650/18 for an order that the property in issue be transferred to him by the 1st respondent herein. The two applications were consolidated for purposed of hearing. The applications were heard by MATHONSI J (as then he was). The applications were disposed of under judgment number HH 604/18 delivered on 30 October 2018. The operative part of that judgment reads as follows:

> "In the result, it is ordered that:
>
> 1. The application for the setting aside of the decision of the Sheriff to confirm the sale in execution made in HC 11349/17 is hereby dismissed.
> 2. The application for a declaratur in HC 2650/18 is hereby dismissed.
> 3. Puwayi Chiutsi, the applicant in HC 11349/18, shall bear the costs of suit on a legal practitioner/client scale.
> 4. This order shall not be suspended by any appeal by either party but shall remain in force notwithstanding such appeal."

This application before me was filed by the applicant in terms of r 449(1)(b) and (c) of the High Court Rules, 1971. The applicant seeks the following order

> "IT IS HEREBY ORDERED THAT:
>
> 1. The judgment by Honourable MATHONSI J in case number HC 11349/17 be and is hereby set aside.
> 2. The first respondent or any party opposing this application shall bear the costs of suit on the Attorney/Client scale."

The applicant's main basis for seeking the setting aside of the application was his allegation that the judgment was granted in error. The applicant averred that the 1st respondent misled the parties and the court by presenting the 2nd respondent as having participated in the auction sale of the applicant's attached property. The applicant averred that he had since discovered that the 2nd respondent did not participate and was not a bidder at the auction as mistakenly thought by the parties and acted upon by the court.

The 2nd and 3rd respondents vehemently opposed the application. I was therefore required to determine the veracity of the applicant's averments and whether there was a legal basis established by the applicant to justify the relief which he sought. The application has however ended up determined on the basis of a default judgment in circumstances which have necessitated my writing this judgment because of how the parties and particularly counsel for the 2nd and 3rd respondents conducted themselves.

The application was set down for hearing on 21 May 2021. The 2nd and 3rd respondents counsel without prior notice or warning made applications for my recusal and for dismissal of the application on the basis of a time lapse and that the applicant ought to have applied for condonation to file this application out of time. I reserved judgment. On 27 May 2021 I dismissed the application for my recusal. I indicated to the litigants that the full reasons for the dismissal would be made part of the judgment in the main matter. The matter was postponed for hearing to 9 June 2021 on which date that matter did not proceed and had to be postponed at the instance of the respondents. On 2 June 2021 the 2nd respondent's legal practitioners wrote a letter to the Registrar requesting for reasons for my order in which I dismissed the respondent's points in *limine.* The registrar responded to the letter indicating my position that I considered that the order which I made was holding and that I was now a *functus officio* on the issue of whether I could revisit my previous order that reasons for dismissing the point in *limine* would be contained in the main judgment.

On 9 June 2021 when the matter was called, Ms *Kawenda* was now representing the 3rd respondent in place of Mr *Biti*. I have recorded the fact of the change in legal practitioners because Mr *Biti* did not conduct himself in any manner which I found unacceptable since he did not appear before me as from the 9th of June 2021. The 2nd respondent for its part was now represented by two counsel after Mr T. *Mpofu* appeared with Mr *Mapuranga*. At the hearing the 2nd and 3rd respondents counsel applied for a postponement of the hearing. The reason for postponement was that the said respondents intended to file a written application for leave to appeal against the dismissal of their applications *in limine* since they had not made an oral application at the hearing upon the dismissal of the application as required by the rules of court as the default position.

The application for postponement was sustained and vehemently opposed by Mr *Magwaliba* for the applicant. After arguments, I postponed the application for postponement for judgment to 16 June, 2021. I was however only able to deliver my order on 6 July, 2021.

On that date, I issued the following order having resolved that I would in the interests of justice and for purposes of affording the second and third respondents an opportunity to make an informed decision whether or not to apply for leave to appeal after acquainting themselves with reasons for my order. I also considered that administratively, the respondents as with every party involved in litigation had a right to be furnished with reasons for every decision made by the court or tribunal; hearing their case.

> IT IS ORDERED THAT
> "1. Requested written judgment on dismissal of points *in limine* delivered in court. Parties may uplift the typed copies from the Registrars by 8 July, 2021.
> 2. The 2nd and 3rd respondents if as indicated by them that they wish to apply for leave to appeal shall if advised file the applications by 12 July, 2021.
> 3. The applicant shall if advised to oppose the application, file his opposing papers by 14 July, 2021.
> The 2nd and 3rd respondents if advised to reply should file their answering papers by 16 July, 2021.
> 5. The hearing of the application is set down for hearing 20 July, 2021 at 10:00am.
> 6. The wasted costs of 9 June, 2021 are reserved for determination in the application for leave to appeal."

As can be seen from the order of 6 July, 2021, the hearing was postponed to 20 July, 2021. I should underline that the date was fixed by consent because counsel were consulted in court to indicate their availability on 20 July, 2021 which they did. In fact on 9 July, 2021, failing the availability of the reasons for judgment, the 2nd respondent's legal practitioners wrote a letter to the Registrar to follow up on the reasons for judgment to enable them to meet the deadline for filing the leave to appeal application as ordered on 6 July 2021. The 2nd and 3rd respondents' legal practitioners collected copies of the reasons judgment. The 2nd and 3rd respondents would have been expected to file the applications for leave to appeal as ordered or applied for an extension of time to file them before or at the resumed hearing.

On 20 July, 2021, there was no appearance by counsel for the second and third respondents. The applicant appeared in person. He indicated that Mr *Magwaliba* was appearing in the Supreme Court and had asked for the matter to be stood down. The 2nd and 3rd respondents were called three times as per procedure and in their default, the applicant applied for judgment in default of the appearance of the 2nd and 3rd respondents.

It was in my view unacceptable that senior counsel practicing as advocates and as such highly regarded by the High Court of Zimbabwe which admitted and registered them as legal practitioners and therefore officers of the court would just absent themselves from court as they did in this case. It was counsel for 2nd and 3rd respondents who applied for a

postponement which was granted. They had exhorted the court to prepare reasons for dismissal of their points *in limine*. The date of postponement when they did not appear was set down by consent. It is not acceptable nor professional or ethical for a legal practitioner to fix by consent with the other parties a court date for hearing and counsel just absents himself or herself without any communication to the court or opposite party. It is not acceptable for an officer of the court to make an undertaking to appear before the court and then renege on the undertaking without explanation or the courtesy of advising the court. If such conduct is not nipped in the bud and corrected, the court's authority will risk being undermined. The judicial system should not allow counsel who are its officers to be discourteous to the court. It is an abuse of the privilege of practising in those courts for counsel to show disrespect to the court. They may have explanations for non-appearance but what is unacceptable was the lack of communication by them or their instructing legal practitioners on their non-appearance. It is such conduct, unexplained satisfactorily which results in a court ordering legal practitioners to pay costs *debonis propris*. I however do not issue such order because I did not give counsel the opportunity to address me on the issue.

Having expressed my disquiet over the conduct of 2nd and 3rd respondents' counsel, I revert to the application for default judgment and record that, I am satisfied that the respondents were in knowing default. I am satisfied that default judgment is deserved.

Disposition

It is therefore ordered that-

1. Judgment for applicant as prayed for in the draft order as amended as follows:
2. The judgment by Honourable Mathonsi J (as he then was) in case No HC 11349/17 be and is hereby set aside.
3. The 2nd and 3rd respondents shall bear the costs of the application on the legal practitioner and client scale.

Puwai Chiutsi, applicant's legal practitioner
Gill Godlton and Gerrans, 2nd respondent's legal practitioners
Biti Law, 3rd respondent's legal practitioners