PINELONG INVESTMENTS (PVT) LTD
versus
THOMAS VALLANCE
and
PARADDIGM TRUST (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 11 June 2009 and 11 November 2009

Opposed Matter

J.M. Mafusire, for the applicant
Respondent in person

MAKONI J: On 26 July 2008, the applicant issued summons, out of this court, claiming eviction and other ancillary relief against the respondents. On the same date the summons were served by the Deputy Sheriff on the second respondent who also accepted service on behalf of the first respondent. The *dies induciae* expired on 6 August 2008.

The fist respondent entered an appearance to defend for himself and on behalf of the second respondent on 6 August 2008. He did not serve the notice on the applicant's legal practitioners. On the morning of 14 August 2008, the applicant filed an application for default judgment. On 2 September 2008, the application was returned with a comment from a Judge that an appearance to defend was entered timeously on 6 August 2008. In the afternoon of 14 August 2008, the first respondent served the notice on the applicant's legal practitioners.

On 20 August 2008 the applicant's legal practitioners wrote a letter to the first respondent pointing out the irregularities of the notice of appearance to defend. The 1st point was that the respondents had not complied with or r 49 of High Court of Zimbabwe Rules (1979) (The Rules) which provides for service of a notice of appearance to defend within 24 hours of the entry of appearance to defend. The second point was that the notice did not comply with Form No. 8 in that it did not state the date on which the summons was served. The last point was that the respondents did not comply with S 51 of the High Court Act [*Cap 7:06*] (The Act) as the second respondent had entered an appearance to defend for both himself as well as the second respondent, a duly registered company. There was no response to this letter by the respondents.

On 24 September 2008 the applicant filed the present application whereby he seeks an order that the notice of appearance to defend filed by in these proceedings on 6 August

2008 be struck off and that the registrar be directed to expunge it from the court record. He also seeks costs from both respondents jointly and severally.

The applicant contends that he is proceeding in terms of a direction given by GILLESPIE J in *Founders Building Society v Dalib (Pvt) Ltd and Ors* 1998(1) ZLR 526 at 534. The directive was to a following effect

> "In any action, where the plaintiff's legal practitioner contemplates an application for default judgment, but is aware of some proceedings being taken by the defendant which is an attempt at opposition but 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 procedural step. Having done so, he may then choose between -
>
> (a) an application for default judgment; or
> (b) an application, on notice to defendant to struck out the irregular proceeding p 534C".

It was submitted on behalf of the applicant that the first respondent's notice was irregular in that it was not properly delivered. It was not served on the applicant's attorney within 24 hours of entry as is provided for in r 49. It was not in Form No. 8 in that it did not state the date on which the summons was served. No proof of service was filed in accordance with R 42B.

It was further submitted that an irregular entry of appearance triggers the choices available to the plaintiff as directed by GILLESPIE J in the Founders Building Society case *supra*.

The applicant also referred to *HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 at 334 in support of its contention. It was submitted that ADAM J. was far less generous than GILLESPIE J. According to ADAM J, a plaintiff who has given notice of the irregular appearance and is ignored should not be burdened with a further court application to strike out, before he can obtain default judgment.

The second respondent concedes that the notice was not served timeously as is provided for in terms of the rules but argues that that does not invalidate the notice. He submitted that the applicant fails to appreciate that the criteria for determining whether the notice is valid is the issuing and entry of the notice in the Appearance Book kept by the Registrar and not service on the plaintiff.

The first issue for determination is whether the notice is irregular for want of service on the plaintiff's legal practitioners.

Rule 49 provides that within twenty four hours of the entry of appearance to defend, written notice thereof should be served on the plaintiff or his legal practitioner at the

plaintiff's address for service and such notice shall be in Form No. 8. The rule is couched in peremptory terms. It does not give the defendant a choice. It is couched in such a manner to assist in the expeditious resolution of disputes and to avoid incurring unnecessary costs. If such notice is not served, the plaintiff, after the expiry of the *dies induciae*, might apply for default judgment as what happened *in casu*. In my view, such notice would be irregular.

The point is made in Herbstein and Van Winsen, The Civil Procedure of the Supreme Court of South Africa 4th Edition at p 431 where it is stated:-

> "A notice of intention to defend will be irregular if the defendant,
> having filed the original notice with the registrar, fails to serve a copy on the plaintiff on his attorney".

It is therefore my finding that the notice is irregular.

Having determined that the notice is irregular, the next issue is whether such notice should be struck off the record.

Rule 48 provides that a defendant wishing to defend an action must enter an appearance to defend in the manner prescribed in the Rules. Rule 49 provides for service of the notice on the plaintiff or his legal practitioners. Rule 50 provides the sanction for failure to enter appearance in terms of R 48.

The rules are silent as to the sanction for failure to serve the notice in terms of R 49. Mr Mufusire conceded the point but argued that the sanction has been interpreted in case law. He referred to the Founders Building Society and HPP Studios cases *supra*.

In my view, the two cases can be distinguished from the present matter. In Founders Building Society *supra*, the defendant after having been served with the summons did not enter appearance in the form prescribed by the rules but filed a notice of assumption of agency. On the same day the defendant, through his attorneys, filed a request for further particulars. The plaintiff's attorney then simply ignored these two proceedings and applied for default judgment. No appearance to defend was entered.

In HPP Studios (Pvt) Ltd, *supra* the facts are that on 18 June 1999 after the respondent had been automatically barred a notice of appearance to defend was served on applicant's legal practitioners. It stated incorrectly that appearance to defend had been entered on 17 June 1999, the last day on which they could have done so. The appearance book revealed that appearance to defend was entered on 18 June 1999. The appearance to defend was entered out of time.

In *casu*, the appearance to defend was not only entered but was entered timeously. The applicant did not refer the court to a case whereby an appearance to defend was entered timeously but was not served in terms of the rules. The two authorities cited by the

applicant do not assist the court as they are clearly distinguishable from the present matter. The rules are silent on the issue of what the court can do with a defendant who enters appearance to defend timeoulsy but does not serve the notice as provided for in the rules.

Herbsten and Van Winsen *supra* a p 431 states:-

> "in the event of failure to serve the notice on the plaintiff's attorney's the plaintiff will be entitled to assume that notice of intention to defend has not been given. If however, he does so and moves for judgment, the court will not grant judgment, but will order the defendant to pay the wasted costs occasioned by his omission".

I associate myself fully with the above remarks.

The applicant's only remedy lies in a claim for costs for the application for default judgment. The irregularity does not warrant the punishment of having the notice of appearance struck off and that it be expauged from the record. Such a relief would be too drastic in view of the fact that the notice was entered timeously. In view of the above the applicant's argument on this point cannot succeed.

The second issue is whether the notice of appearance to defend entered by the first defendant in respect of the second respondent is properly before the court. It was submitted on behalf of the applicant that the second respondent, a juristic person, has no right to be heard in court except through legal representation.

The first respondent, in his notice of opposition dealt with the above issue in para 4. He did not plead any facts which would establish a basis why he entered appearance to defend on behalf of the second respondent. He gave what he considers to be the law relating to the issue at hand.

In terms of s 51 of the High Court Act [*Cap 7:06*] and S 9 of Legal Practitioners Act [*Cap 27:7*], the first respondent has no right of audience before this court except through legal representation. This position has been laid down in a number of cases in this jurisdiction. See *Diana Farm (Pvt) Ltd v Madondo N.O. & Anor* 1998(2) ZLR 410(H), *Pumpkin Construction (Pvt) Ltd v Chikaka* 1997(2) ZLR 430(H) and also *Lees Import & Export (Pvt) Ltd v Zimbank* 199(2) ZLR 36(S).

In the Less Import case, *supra* the court recognised exceptions to the rule that a corporate body can appear through its alter ego. One has to seek leave of the court to appear on behalf of a corporate body. The same technicality that bedevils the first respondent in the main matter also affects it in the present proceedings. It has no right of audience and is not properly before me. I cannot therefore deal with the issue relating to the first respondent.

In view of the above the applicant cannot succeed.

Accordingly it is ordered :-

1. that the application is dismissed.
2. Applicant to pay the second respondent's costs.

Scanlen & Holderness, applicant's legal practitioners