CITY CENTRE PROPERTIES (PRIVATE) LIMITED
versus
PUWAYI CHIUTSI

CITY CENTRE PROPERTIES (PRIVATE) LIMITED
versus
PUWAYI CHIUTSI
and
TENDAI CHIMURIWO
and
TATENDA CHIUTSI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 26, 28 February 2013 and
6 March 2013

Civil Trial

Ms *D Ndawana*, for the plaintiff
The defendants in default

MATHONSI J: Unfolding events in these two matters must rank on top of what the Supreme Court decried very loudly in *Ndebele* v *Ndebele* 1992 (1) ZLR 288 (S) 290 C-E. It stated:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dorminientibus jura subveniunt* – roughly translated, the law will help the vigilant but not the sluggard."

These two matters were consolidated by consent of the parties for purposes of trial and a consent to consolidation of action in terms of Order 13 r 92 of the High Court of Zimbabwe Rules, 1971, was filed on 3 May 2012.

Without going into the checkered history of the litigation, which has seen the parties enter into a deed of settlement which was not complied with and two orders being granted by consent but failing to bring finality to the dispute, let it suffice to state that at the pre-trial conference held before HUNGWE J on 14 November 2012, the Honourable Judge made the following order:

"Judgment is entered by consent as follows:

(1) The first defendant is to pay to the plaintiff the arrear rentals and parking fees at rates in the schedule for the months of January 2009 to November 2012 as set out in the schedule filed of record. (January to December 2009 at $491-92 per month; January to December 2010 at $703-45 per month; January to December 2011 at $703-45 per month; January to November 2012 at $703-00 per month).
(2) The first defendant be and is hereby ordered to vacate the plaintiff's premises on or before 31 August 2012.
(3) All the rates i.e. rentals and parking do not include VAT which necessarily will be (factored) into the individual figures.
(4) Matter is referred to trial on interest and operating costs."

Meanwhile, a joint pre-trial conference minute incorporating the outstanding issues arising from both matters had been filed in terms of which the matters were referred to trial. The issues were identified as follows:

1. Whether or not the defendant in reconvention (City Centre Properties Private Limited) switched off power to the premises occupied by the plaintiff in reconvention (Puwayi Chiutsi).
2. If the answer to the above is in the affirmative whether or not the plaintiff in reconvention suffered damages as a result.
3. If the answer to the above is in the affirmative then what is the quantum of damages that the plaintiff in reconvention is entitled to recover.
4. What is the quantum of the operating costs that the defendants are obliged to pay to the plaintiff as well as interest on other charges.

The matter was initially set down for trial on 26 February 2013 at 9 am. The notice of set down for that date was duly served on the defendants on 10 December 2012. Despite such early notification of the trial date; it was not until 25 February 2013, a day before the commencement of trial, that the defendants addressed the following letter to the plaintiff's legal practitioners:

"Re: CITY CENTRE PROPERTIES v P CHIUTSI AND 2 ORS CASE NO HC 7593/11 AND HC 5708/10

1. We refer to our letters of 7th and 13th February 2013 and note that we have not received the discovered documents requested.
2. In the circumstances we are unable to proceed tomorrow with the trial.
3. Kindly confirm that you are agreeable to a postponement to enable us to prepare for the trial to obviate the need of us to appear in court."

It would seem that the plaintiff was not agreeable to a postponement and the parties duly appeared before me on 26 February 2013. The first defendant applied for a postponement to accord him an opportunity to peruse the plaintiff's bundle of documents. I intended to roll the matter over to the following day, 27 February 2013, but again the first defendant pointed out that he was committed in another court on that date despite the fact that he had been aware of the date of set down for well over $2^{1}/_{2}$ months and the parties had agreed on a set down of two days. Clearly the first defendant had double booked himself on 27 February 2012.

With the consent of both parties and taking into account the first defendant's predicament, I postponed the matter to 28 February 2012 at 9 am for commencement of trial.

A few minutes before commencement of court, the first defendant called at my chambers requesting to see me. I refused to do so advising him, through my clerk, that if he so desired he had to bring the other party. The parties eventually appeared in my chambers where upon the first defendant requested a delay of 10 minutes in the commencement of the trial as he had issues to sort out in the bail court. It was apparent that once again, the first defendant had double booked himself on 28 February 2013.

I acceded to his request to stood the matter down to 9.20 am to enable him to organise himself. He was nowhere to be seen at that time and I then decided to commence court at 10.00 am to accord the first defendant more time. Alas, even at 10.00 a.m., the first defendant was not in attendance and did not have to courtesy to send word of what had be-fallen him.

Ms *Ndawana* for the plaintiff submitted that she was reluctant to apply for default judgment as, in her view, the first defendant was deliberately stalling proceedings he having previously done the same only to apply for rescission of judgment thereby succeeding in delaying the finalisation of the matter. She initially suggested that the matter be deferred further. As such deferment would not be known to the first defendant, it was apparent it

would not help the situation at all. Ms *Ndawana* then made an application for default judgment. She submitted schedules setting out the plaintiff's claims which are self-explanatory.

As stated already, there is a discernable reluctance on the part of the first defendant to prosecute his case. Indeed, he has shown inexcusable dilatoriness in the conduct of this case which is lamentable and cannot be allowed to continue. The law cannot come to the assistance of the sluggard. At the same time the plaintiff should not continue suffering prejudice when a litigant abuses the benevolence of the court the way the first defendant has done. I must state as well that the second and third defendants also did not bother to attend.

In the result, I make the following order, that:

1. All the defendants' defences in HC 5708/10 and HC 7593/11 are hereby struck out.
2. The first defendant's counter claim in HC 5708/10 is hereby dismissed with costs.
3. Judgment be and is hereby granted in favour of the plaintiff as against the first, second and third defendants as follows:
   (a) Payment of the sum of $27 788-20 being operating costs together with interest thereon at the rate of 14% per annum from January 2009 to date of payment in full.
   (b) Interest on the rentals of $39 576-93 at the rate of 14% per annum from January 2009 to date of payment in full
   (c) Costs of suit on the scale of legal practitioner and client.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
P Chiutsi Legal Practitioners, defendant's legal practitioners