HC 10058/02

STUTTARFORDS HOLDINGS LIMITED
versus
ALICE MADZUDZU

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 18 December and 5 March 2003

Mrs B Mtetwa, for the applicant
Ms Siveregi, for the respondent

MAKARAU J: The applicant filed the above application on 13 November 2002. In the application, it sought an order that the respondent delivers to it a certain motor vehicle, registration no 744-046V, within 48 hours of service of the order.

The application was served upon the respondent at the offices of her legal practitioners on the same day it was filed with the court. In terms of the rules, a notice of opposition and opposing affidavit were to be filed within 10 days of service of the application. The 10-day period expired without the respondent having done so.

The respondent filed a notice of opposition to which was attached a counter- application and an affidavit headed" opposing Affidavit in Support of Counter Application". The papers were filed two days out of time.

On 11 December 2002, the applicant's legal practitioners requested the registrar of this court to set the matter down for hearing on the unopposed roll of 18 December. The Registrar declined the request. He indicated that the matter had now become opposed. The plaintiff's legal practitioners then addressed a letter tot he Registrar, that reads in part:

> *"We kindly request you to set this matter down on the unopposed roll for the 18th December, 2002. You will note from the certificate of service that the notice of opposition was filed out of time and no attempt has been made to apply for the upliftment of the automatic bar."*

The matter was duly set down before me. When the mater was called up, Miss *Siveregi* appeared for the respondent and moved for a postponement of the matter to enable the respondent to file an application to uplift the bar against her. Mrs *Mtetwa* vigorously opposed the application.

In support of her application for a postponement, Miss *Siveregi* intimated that the respondent was not readily available to attest to an affidavit in support of an application for the upliftment of the bar. No explanation was given in the oral application as to why the affidavit was not attested to before the opposing papers were drawn up.

In opposing the application for a postponement, Mrs *Mtetwa* made submissions whose net effect I understood to be as follows: the rules of the court are clear as to the time limits for the filing of a notice of opposition and opposing affidavits to a court application. Legal practitioners simply ignore the clear provisions of the rules, banking on a sympathetic attitude exhibited by the court in such cases. When the matter is set down on the unopposed roll, the same legal practitioners find time to appear and apply for a postponement of the matter to enable their clients to apply for the bar to be uplifted. In so doing, the legal practitioners who are not conscientious of their duties to their clients and to the court to abide by the rules, prejudice the clients of the conscientious legal practitioners in costs and, generally inconvenience the court and their counterparts.

The issues raise in this application are not new to this court. The same issue has been raised time and again in connection with

applications for default judgments in situations were the defendant enters appearance to defend out of time or improperly. Such a situation confronted GILLESPIE J (as he then was) in *Founders Building Society v Dalib (Private) Limited 1998 (1) ZLR 526 (H).* Although in that matter the learned judge was dealing with an appearance to defend an action commenced by summons, his remarks apply with equal force to a notice of opposition to an application. The bar that comes into effect against the respondent is also automatic.

In denying default judgment, the learned judge held that where there is a clear indication from the defendant that he or she intends to defend the matter, the legal practitioner intending to take judgment should warn the other side of the defect in their pleading before proceeding to take judgment. Failing to so warn the other side is unethical in that is discourteous conduct for a legal practitioner. The learned judge noted that "fair dealing (between practitioners) requires at least that a warning be given of an intention to make the appropriate application, should the technically barred opponent not take steps to cure the irregularity".

The same issue presented itself to ADAM J in the case of *HPP Studios (Private) Limited v Associated newspapers of Zimbabwe Limited HH51/00.* While not following the approach taken by GILLESPIE J in the earlier case, Adam J reiterated the general approach of this court in such matters. This is to allow the defendant who is technically barred, in a proper case, the opportunity to either apply for condonation for the late filing of the entry of appearance to defend or for the upliftment of the bar.

The difference in approach between the two judges is that while Gillespie J was of the view that a formal application be made to strike out the irregularly file opposition, ADAM J held that this was not necessary

and that it was not in keeping with the established practice of this court. In his view, the defendant should be given directions to rectify the irregular pleading within a specified period, failing which the plaintiff should be entitled to take default judgment. I am not to enter into a discussion of which of the two judgments reflects the accurate procedure to be adopted. For my purposes, it is sufficient that both judges acknowledge the need for the party who is technically in default and who wishes to be granted leave to defend or oppose the proceedings, to make out a proper case for the indulgence sought. The indulgence cannot be had for the mere asking. Both judges further acknowledge that the plaintiff or the applicant is as of right, entitled to take judgment in terms of the rules. The court may however use its discretion to withhold judgment in a proper case.

What then constitutes a proper case is the next inquiry. While the grounds upon which a court may withhold judgment to enable a technically defaulting party to put its house in order are varied and each case should be determined on its merits, the following are in my view, some of the reasons that may influence the court's discretion:

1. there must be an indication that the defaulting party intends to oppose the granting of the judgment or application;
2. the delay resulting in the technical default must not be inordinate;
3. the reason for the delay must be reasonable;
4. the filing of the opposition or entry of appearance to defend must be a genuine attempt to defend the proceedings and must not be an attempt to delay or frustrate the granting of the relief sought.

It is my further view, that in considering the above factors and any other that may present themselves to it, a court should be guided by the spirit behind the crafting of the rules of court. It is trite that rules are made for the court and no the court for the rules. The ultimate aim of the rules of court is to achieve justice between the parties. Rules of the

court should therefore be applied to ensure as far as is possible, that the real dispute between the parties is aired, that the parties are treated on an equal footing, that the proceedings are completed expeditiously and inexpensively and that real justice is done between the parties.

In the application before me, the respondent prayed for the matter to be postponed to enable her to file an application to uplift the bar against her. Although an oral application was made for a postponement on 18 December 2002, no such application was filed until 14 January 2003. This alone gives the impression that the respondent is most casual about the time limits set by the rules and gives credence to the submissions made by Mrs *Mtetwa*. In the written application, the reason given for default is blamed on alleged lack of communication between the respondent and her legal practitioners and the fact that her legal practitioners left matters to the last minute. This is the very point that Mrs *Mtetwa* makes in her submissions that legal practitioners are developing the (mal) practice of leaving matter until too late and then praying on the mercy of the court to grant their clients time to apply for the upliftment of the bar. Judicial sensitivity is in turn fast turning into a breeding ground for professional laxity. I take this as fair criticism of both the courts and the profession which cries out for rectification.

Turning now to a disposition of the application before me, in view of the fact that the respondent has now filed an application for the bar against her to be uplifted, it will not be in the interests of justice for me to deny the application for a postponement. However, not to be seen to be encouraging tardiness by legal practitioners, I will order that the respondent bears the applicant's wasted costs on the legal practitioner and client scale. It is so ordered.

Kantor & Immerman, legal practitioners for the applicant.
Dube Manikai Hwacha, legal practitioners for the respondent.