

WALKTALL (PVT) LTD
versus
SHEPHERD TUNDIYA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 16 September 2013

Application for judgment in default at pre-trial conference

N R Mutasa, for the plaintiff
J Ndomene, for the defendant

HUNGWE J: This is an oral application made in chambers at the instance of the plaintiff on the date set down for a pre-trial conference. On 26 February 2013 the parties appeared before me duly represented by their respective legal practitioners of record for the purpose of holding a pre-trial conference. That pre-trial conference was postponed *sine die* on specific conditions which were explained to all present. In brief the parties were to convene their own conference with a view to settle the matter. If they failed then they would have to set out those matters which would have been agreed and those on which agreement was not achieved in a minute addressed to me. I would, in that event, convene another pre-trial conference in terms of r182 of the High Court Rules, 1971.

On 16 September 2013, the matter was scheduled to continue before me as agreed and in terms of my directive. Mr *Mutasa*, for the plaintiff, applied for the striking-off of the defendant's defence as well as his counter-claim. He applied that a judgment in default of appearance be entered for plaintiff on the basis that the defendant, despite being served with a notice of set down of the matter, has chosen to wilfully absent himself from the pre-trial conference. Mr *Ndomene*, for the defendant, claimed that his client was appearing in the magistrate's court in Kwekwe and was therefore not in wilful default. Mr *Mutasa* countered this explanation by drawing Mr *Ndomene*'s attention that the well-known and time honoured practice was that this court takes precedence over the magistrate's court. As such defendant, if he wished to be in wilful default, had ample time to arrange his affairs accordingly and avoided being in default of appearance.

Rule 182 of the High Court Rules, 1971, is a useful tool in the rules of court aimed at disposing or curtailing proceedings. A party who wishes to have his matter dealt with expeditiously with the courts need only comply with this rule in order to achieve that goal. It would appear that, despite his counter-claim, the defendant is either unwilling or disinterested in the expeditious disposal of the present matter as it relates to both plaintiff's claim and his own counter-claim. If he indeed intended to proceed to finality he would have made arrangements in good time as would have allowed to attend to the pre-trial conference today. I am unable to hold that the matter at the magistrate's court was such that it could not, with appropriate diligence, put in abeyance pending the conference today. The defendant has in my view, failed to comply with my directive as envisaged in r182 (11) of Order 26 of the High Court Rules, 1971. In the event, I am satisfied that he is in wilful default. As such the plaintiff is entitled to the order it seeks, in the result I make the following order:

1. Defendant's defence and counter-claim be and is hereby struck out.
2. It is ordered that:
 - a. The lease agreement between plaintiff and defendant in respect of Stand No. 50 Kwekwe, otherwise known as No. 10 Nelson Mandela Way, Kwekwe, be and is hereby cancelled.
 - b. Defendant and all those claiming through him be and are hereby directed to vacate the premises at No. 50 Nelson Mandela Way, Kwekwe, forthwith, failing which the Deputy Sheriff, Kwekwe, be and is hereby authorised to eject forthwith the defendant and all those claiming through him from the said property.
 - c. Defendant pays to plaintiff the sum of US\$85 250, 00 in respect of arrear rentals as at 1 July 2012 together with interest thereon at the agreed rate of 10% per annum with effect from 1 August 2012 to date of payment in full.
 - d. Defendant pays to plaintiff holding over damages at the rate of US\$83, 33 per day with effect from 1 August 2012 to the date of vacation or ejection.
 - e. Defendant pays plaintiff collection commission thereon calculated in accordance with By-Law 70 of the Law Society By-Laws, 1982.
 - f. Defendant pays plaintiff costs on the legal practitioner and client scale.

Costa & Madzonga, plaintiff's legal practitioners
Thondhanga & Associates, defendant's legal practitioners