NYAHUMA'S LAW GOLDEN STAIRS CHAMBERS
versus
JOSEPH MAKAMBA BUSHA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 17 June 2021 & 18 June 2021

Chamber Application – Default Judgment

R. Zimvumi, for the plaintiff
Defendant in Default

MUSITHU J:

INTRODUCTION

An application for default judgment under Order 9 Rule 57 of the High Court Rules, 1971 does not ordinarily prompt a written judgment. The nature of the relief sought, for which Rule 57 is invoked is such that a Judge should not over ruminate on whether or not the claim is one for a debt or liquidated demand. It must appear ex facie the summons, declaration with any supporting documents that it is a claim for a debt or liquidated demand. The extraordinary circumstances of this matter have impelled me to render a judgment nevertheless. The plaintiff is a law firm practising under the style Nyahuma's Law-Golden Stairs Chambers. The defendant is a President of a political party known as FreeZim Congress. The plaintiff's claim is for fees for legal services rendered to the defendant which remained unsettled despite demand. The relief claimed is couched as follows:

"i) Defendant pays Plaintiff the capital sum of R111 000.00 together with interest on that amount calculated at the prescribed rate of 5% per annum from the 1st of August 2020 to date of payment in full.

ii) Costs of suit as between legal practitioner and client scale."

The plaintiff issued summons accompanied by a declaration on 10 December 2018. The summons and declaration were served on a responsible person who accepted service on behalf of the defendant. The defendant failed to enter appearance by the time the *dies induciae* expired. The plaintiff then approached this court for a default judgment in terms of Rule 57.

BRIEF FACTUAL BACKGROUND

Sometime in early 2020, the plaintiff rendered some professional legal services to the defendant at the defendant's instance. Specifically, the plaintiff provided watch in brief legal services in a criminal matter in which the defendant had some interest. The plaintiff invoiced the defendant R12 000.00 (twelve thousand rand) for the services rendered.

In or around June 2020, the defendant further engaged the plaintiff to provide legal services in a land dispute pitting some mining entity and some villagers in the Mashonaland East Province. That dispute required the plaintiff to approach this court for urgent relief, which he did under HC 2696/20. The defendant allegedly undertook to pay the legal costs on behalf of the affected villagers. The plaintiff claims that the parties agreed on a fee of US$5 000.00 for those legal services. The defendant allegedly elected to settle the fee in South African Rand at the exchange rate of 19.80.

On 29 June 2020, the plaintiff invoiced the defendant a sum of R111 000.00, which was inclusive of the sum of R12 000; 00 for the services rendered earlier. The plaintiff claims that the defendant consistently acknowledged liability and undertook to settle the amount on divers occasions. The amount was not paid, nevertheless.

THE APPLICATION FOR DEFAULT JUDGMENT

The application was accompanied by a founding affidavit deposed to by Tichawana Nyahuma, the plaintiff's founding partner. The affidavit referred to invoices raised by the plaintiff in connection with the said services. The invoices were not attached. Attached were whatsapp chats between Mr Nyahuma, Ruth Zimvumi the legal practitioner representing the plaintiff, and the defendant. It was alleged that the defendant acknowledged his indebtedness to the plaintiff in those chats.

One such chat dated 20 October 2020, from Mr Nyahuma to the defendant referred to *"our invoice that has remained unsettled inordinately, Am afraid if payment is not made by this coming Wednesday then I shall have to take legal action against you. It's a matter of principle and business"*. To which the defendant responded, *"When I was in the bank to pay from my personal account, I made a couple of payments-then had to rush for meetings. Unfortunately, I am winding down things here-in preparation for my departure. I will see how much I can squeeze on Monday otherwise I have to wait for the 2nd when my income comes….."* The alleged outstanding amount was not stated in the exchanges. There followed

exchanges Ms Zimvumi and the defendant. She was following up on the payment. Again the alleged outstanding amount was not stated.

When the matter was placed before me, I raised four queries. These are as follows:

"1. Is the claim for a debt or liquidated demand per rule 57?
2. Where in the papers did the defendant expressly agree to settle the sum of US$5 000.00 in South African rand?
3. In the absence of an itemised bill or acknowledgment of debt, on what basis is it alleged the agreed fee was US$5 000.00?
4. Is it competent for this court to grant an order in the sum of R111,000.00 in light of the observations above?"

That simple, straightforward and matter of fact enquiry drew the ire of Mrs *Zimvumi* of Ruth Zimvumi Legal Practice, who is listed as the legal practitioner of record for the plaintiff (hereinafter referred to as "the counsel"). She not only accused the judge of descending into the arena, but she also reproached the judge for raising a defence on behalf of the defendant. I will reproduce hereunder the relevant excerpts from her letter of 28 May 2021, served on the registrar on 31 May 2021:

"RE; NYAHUMA'S LAW – GOLDEN STAIRS CHAMBERS vs JOSEPH MAKAMBA BUSHA-CASE NUMBER HC7444/2020

1. The above file is presently before the Honourable Musithu J, as a Chamber Application for Default Judgement in terms of Rule 57 of this court's rules. We have perused the file and noted the queries raised by His Lordship. However, before doing so, we point out that Plaintiff has come to court via Rule 57 because Defendant is **barred** for not having entered an Appearance to Defend despite having been properly served with the Summons and the Declaration. As such, we are of the respectful view that the queries raised almost amount to a defence for the Defendant being raised by His Lordship. In fact, we opine, again with the greatest respect, that his Lordship might just have descended into the arena. The issues raised are what the Defendant ought to have pleaded if he was minded to defend the claim. **It is submitted that Defendant by refraining from entering an Appearance to Defend, he effectively conceded to the claim thereby leaving the court with no choice but to grant the order prayed for.**
2. Having said that, we now deal directly with the issues *seriatim;….."*

Counsel insisted that the claim was for a debt arising from legal services rendered. The letter further made the point that rule 57 referred to a **"debt" or "a liquidated demand".** Counsel argued that the use of the word **"or"** was disjunctive rather than conjunctive**.** She went on to relate to the meaning of debt as defined in the Prescription Act[1]. She reasoned that

[1] [*Chapter 8:11*] Section 2 defines debt as follows: "debt", without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

the claim was a debt within the context of rule 57. In response to the query whether the parties expressly agreed to settle the bill in South African Rand, counsel had this to say:

> "It is conceded that there is nowhere in the papers where Defendant expressly agreed to the sum of USD5 000.00 to be settled in South African Rand. However, this would have been open to Defendant to deny but he acquiesced thereby admitting to the allegation. Now that Defendant is barred, it is submitted that assuming the allegation was false, which is denied, it has mutated into the truth by operation of law". (Underlining for emphasis).

Counsel proceeded to relate to order 15 Rule 104 (2)[2] to further advance her submission. In response to the query pertaining to the acceptability of the fee of US$5 000.00, in the absence of an acknowledgment of debt or itemised bill, counsel's response was that the mere allegation that the amount was the agreed fee was sufficient in the absence of a denial by the defendant. That allegation had to be taken as true.

On the last query about the competency of granting default judgment in light of the earlier observations made, counsel's comment was that the court could competently grant default judgment since the defendant was barred. Defendant was to be taken as having accepted the plaintiff's claim as pleaded. She went on to aver that the defendant was an aspiring presidential candidate in the last general election, and was also a business man of repute. He was therefore aware of the consequences attendant upon a failure to defend claims made against him.

On 1 June 2021, plaintiff's counsel filed an affidavit of evidence deposed to by Tichawana Nyahuma. It essentially regurgitated the contents of the letter of 28 May 2021, save for the unmerited attack on the Judge alluded to earlier on. Also attached were legal fees invoices for R99 000.00 and R12 000.00 all dated 29 June 2020.

THE ISSUES

Two issues arise for consideration herein. These are:

a) The role of the judge in an application for a default judgment under rule 57; and
b) Whether plaintiff's claim is one for a debt or liquidated demand within the scope of rule 57.

The role of the Judge in a rule 57 application

[2] Order 15 Rule 104 (2) states: "(2) Except as provided by rule 117, every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He shall admit or deny every allegation, or state that he has no knowledge concerning it, or confess and avoid it. Every allegation not so dealt with shall be taken to be admitted. The same rule shall apply to every allegation in subsequent pleadings, except where a joinder of issue is justified."

This issue arose from the sentiments expressed by plaintiff's counsel in her aforementioned letter, where she alleged that by raising the aforesaid queries, the judge was descending into the arena as well as pleading a defence for the defendant. She further alleged that once a defendant is barred, then the court or in this instance, the judge is left "with no choice but to grant the order prayed for". Such a crude proposition, made as it was with calculated assuredness betrays a grave misapprehension of the role of the court or the judge in the dispensation of justice. It is unscholarly and dangerous to the practice of law.

To accuse a judge of descending into the arena, and thereafter provide comments to the very queries raised by the judge smacks of arrogance by a legal practitioner who is ordinarily highly regarded by the court as an officer of the court. To allege that the judge is raising a defence on behalf of a litigant is not only impertinent and contemptuous of the judge. It also undermines the integrity of the judge concerned. Such accusations, coming as they do, from an officer of the court running her own legal practice for that matter, are highly unprofessional and should be avoided. Counsel could still have put across her point in a manner that is respectful and evincing the decorum that is expected of an officer of the court.

Rule 57 is clear on how a judge deals with an application for default judgment. It provides:

> ***"57. Claim for debt or liquidated demand only and no appearance entered***
> In cases where the plaintiff's claim, not being a claim for provisional sentence, is for a debt or liquidated demand only, and the defendant has failed to enter appearance within the period prescribed in the summons for entering appearance, or, having entered appearance, has been duly barred for default of plea, the plaintiff may without notice to the defendant make a chamber application for judgment, and thereupon judgment may be granted or such order may be made as the judge considers the plaintiff is entitled to upon the summons or declaration." (Underlining for emphasis).

Rule 57 is expressed in terms that are not difficult to comprehend. It accords the judge discretion to grant judgment after a consideration of the papers before him. It does not oblige the judge to grant default judgment. The plaintiff's counsel appears to have overlooked the use of the word "may", as opposed to "shall" in the rule. The duty of the judge is not to rubberstamp claims that are placed before him solely because a defendant has been barred.[3] In *Mzwakhe v Road Accident Fund*[4], an unreported judgment of the Gauteng High Court Local Division of South Africa, WEINER J said the following about a default judgment:

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[3] See *Micro Plan Financial Services (Pvt) Ltd v Chesets Trading (Pvt) Ltd & 3 Others* HH 513/15

[4] *(24460/2015) [2017] ZAGPJHC 342 (26 October 2017)*

> **"**[6] In being requested to make this an order of court the court is not merely a rubberstamp. The court has a duty to investigate the matter and ascertain whether or not the agreement is one which should be made an order of court……..."

The mere fact that a litigant has been barred does not divest such litigant of their right to have their cases determined in a fair and judicious manner. Even if a default judgment is granted, the door to approach the court is not closed to the defendant.[5] Section 165 of the Constitution entrenches the principles guiding the exercise of judicial authority. Paragraph (a) of section 165 (1) enjoins Judges to ensure that justice is done to all, irrespective of status, in the dispensation of the law. It constitutes a misstatement of the law for counsel to suggest that the non-filing of an appearance to defend leaves a judge with no choice except to grant the order sought without interrogating its propriety.

It would be an abuse of judicial authority for a judicial officer to turn a blind eye to anomalies that are clearly manifest in the pleadings simply because the matter before the judge is unopposed. The judge will only grant the order sought if the judge is satisfied that it is in the interests of justice to do so. In exercising the discretion to grant default judgment in terms of rule 57, the judge may raise queries in order to get clarification on any matters that may be unclear to the judge on the plaintiff's pleadings. Such an exercise of discretion can hardly be construed as descending into the arena or an exhibition of bias in favour of an absent litigant. For example, a worthless claim does not metamorphose into a meritorious one merely because it is unopposed. Such an intellection as proposed by the plaintiff's counsel shows a lack of understanding of the import and purport of rule 57.

Whether plaintiff's claim is one for a debt or liquidated demand as contemplated by rule 57

The rules of court do not define the words "debt or liquidated demand". Counsel referred me to the definition in the Prescription Act. I accept that the words "debt" are not synonymous with "liquid demand". The word "or" simply denotes a conjunction that connects two or more possibilities or alternatives. A claim may be based on a debt which may or may not have been acknowledged. It may also be based on a liquid document which *ex facie* shows the amount owed to the creditor.

The plaintiff contends that its claim is for a debt as defined in the Prescription Act. That Act accords the word 'debt' a rather broad and generous meaning. It starts by stating *"without limiting the meaning of the term"*, and proceeds to use the words *"<u>includes anything</u> which <u>may be sued for or claimed</u> by reason of an <u>obligation arising from statute</u>,*

[5] See section 69(3) of the Constitution of Zimbabwe

contract, delict or otherwise". (Underlining for emphasis). In my view, while the definition is useful as a starting point, it does not necessarily follow that all debts defined in that Act fit within the ambit of rule 57. There are some debts which still need to be proved, and for that reason they fall outside of the purview of rule 57. My perspective is that the debt referred to in rule 57 is one that can be readily ascertained. In *Lester Investments (Pty) Ltd v Narshi*[6], Van WINSEN AJ held that;

> "The debt must be liquid either in the sense that it is based on a liquid document or is admitted or its money value has been ascertained or in the sense that it is capable of prompt ascertainment" (Underlining for emphasis).[7]

At page 470D-E, the judgment continues:

> "The question is whether these facts are capable of speedy and prompt ascertainment in the sense in which these words are used by the various authorities.
> Before embarking on this enquiry it would be well to bear in mind that the decision as to whether or not a debt is capable of speedy ascertainment is a matter left for determination to the individual discretion of the Judge."[8]

A judicial discretion implies a range of 'correct' or perhaps better described, 'appropriate' outcomes which are, in turn, dependent on fact specific findings.[9] It is a discretion informed by the circumstances of each case.

It follows that not every debt warrants an approach for default judgment under rule 57. It does not mean that such debt loses its character as such. It simply means that the plaintiff has to proceed in terms of rule 58. Rule 57 must be read in the context of rule 58, which deals with a *"claim other than for debt or liquidated demand"*. The reference to a *"claim other than for debt or liquidated demand",* does not necessarily mean that debts falling outside the ambit of rule 57 are disqualified. They fall to be determined in terms of rule 58.

In regard to claims for legal fees for professional legal services rendered, the general view is that they constitute a "debt or liquidated demand". In *Deeb v Pinter*[10] the court dealt

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[6] 1952 (2) SA (C.P.D.) 467 at p469

[7] The learned Judge relied on the views of the Old Roman Dutch jurists Vinnius *Select. Jur. Quaestiones*, 1.50; Voet, 16.2.17; Zoesius *Comment,* 16.2.11; Pothier *Obligations*, 592. The approach was also followed in subsequent decisions in South Africa such as *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T); *Thaw Trading v Central Lake Trading 214 (Pty) Ltd* (1422/2012) [2013] ZANWHC 37 (14 March 2013), (an unreported judgment).

[8] At page 470 para D-E

[9] Per Sutherland J in *Standard Bank of South Africa v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ)

[10] 1984 (2) SA 507 at p509.

with a claim for fees and disbursements as a liquidated claim even in the absence of a taxed bill. KIRK-COHEN observed as follows:

> "In my judgment an attorney is entitled to sue for his fees and disbursements including those incurred in Supreme Court litigation. He may do so where he alleges that the fees have been agreed upon, or that they are fair and reasonable, or they are the usual or normal fees due for the work in question"

While the *dictum* in *Deeb v Pinter (supra)* is persuasive, it does not in my view, propose a one size fits all approach. The learned judge set out factors which would have to be established by the plaintiff before the fees and disbursements can be held to be liquidated. Thus in the *Micro Plan Financial Services v Chesets Trading* case (supra), BHUNU J (as he then was) when faced with a more or less similar situation in an application for default judgment under the same rule held:

> "I have no quarrel with counsel's interpretation of the contractual document. Counsel however misses the point. The question at hand has nothing to do with the interpretation of the contractual provisions but justice, equity and fairness among litigants."[11] (Underlining for emphasis).

Further down on the same page, the learned Judge held that:

> "Under the circumstances I felt quite strongly that failure to intervene according to law would amount to gross dereliction of duty and grave miscarriage of justice. Courts and judges are not slaves of the rules. For that reason the law does not require slavish adherence to the rules."

The Judge went on to decline to award the component of an interest claim that would have violated the *in duplum* rule. He also declined to grant the plaintiff's claim for costs on the punitive scale, opting to award costs on the ordinary scale since the claim was unopposed. A Judge will therefore interfere even where a claim is unopposed, where failure to do so will result in a miscarriage of justice. Having said thus, I now proceed to consider the propriety of the claim herein.

Whether the plaintiff's claim is capable of prompt ascertainment

In *casu*, there was indeed an exchange of communication between the parties. The invoice was only attached to Mr Nyahuma's affidavit after my queries. It was addressed to the defendant's South African address, being JM Busha Investment Group, 28 Bompas Road, Dankeld Road, Dankeld West, South Africa. The defendant's address for service that appears on the face of the summons is farm No. 1, Murehwa-Macheke Road, Murehwa. Summons and declaration were only served on an employee of the defendant at 54 Races Trust, 2nd floor, Malvern Corner, Harare. The declaration makes specific reference to the address on

[11] At page 4 of the judgment.

the face of the summons as the defendant's address for service. There is no explanation as to why service was then made on a different address. That is the first defect that afflicts the application for default judgment. There was no proper service.

The second defect is as follows. The communication between the parties does not expressly state the amount that was agreed to as the unpaid legal fees. While I would have ordinarily overlooked the absence of a specific agreement regarding the exact amount acceded to, on the assumption that the fees claimed are fair and reasonable, there is the added complication of the currency in which the amount is claimed. Section 22 (d) and (e) of the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act) states as follows:

> **"22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation**
> 1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—
> (a) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and
> (b) ……..; and
> (c) that such currency shall be legal tender within Zimbabwe from the first effective date; and
> (d) that, for accounting and other purposes (including the discharge of financial or contractual obligations), all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and
> (e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis; (Underlining for emphasis).

The issue that arises is whether the claim does not fall foul of section 24 of the Finance Act. The first effective date is defined in section 20 of the Finance Act as the 22nd of February 2019, being the date from which Statutory Instrument 33 of 2019 (which introduced the RTGS dollar), took effect. Section 23 (1) of the Finance Act declares that the Zimbabwean dollar shall be the sole legal tender from the second effective date. The second effective date is defined in section 20 of the Finance Act as the 24th of June 2019, being the date from which Statutory Instrument 142 of 2019 (which introduced the Zimbabwe dollar as the sole legal tender for all transactions in Zimbabwe) took effect. The effect of the law is that local transactions are to be paid for in the Zimbabwean dollar.

That position was further entrenched through Statutory Instrument 212 of 2019, being the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019. That instrument made the Zimbabwe dollar the exclusive currency for

local transactions. The instrument was further amended by Statutory Instrument 85 of 2020, which permits the payment for goods and services chargeable in Zimbabwe dollars, in foreign currency using one's free funds at the ruling rate on the date of payment. Statutory Instrument 185 of 2020 introduced the dual pricing and displaying, quoting and offering of prices for goods and services. Statutory Instrument 280 of 2020 permits the charging and tendering of foreign currency in payment of pension contributions and benefits and payment of insurance premiums and settlement of insurance claims. The relaxation of the law through the aforementioned instruments, to allow for services to be paid for in foreign currency in certain instances does not take away the position that the Zimbabwe dollar remains the sole legal tender in Zimbabwe as per section 23 (1) of the Finance Act.

The plaintiff rendered the legal services to the defendant in 2020, long after the currency regime had been changed by the aforementioned law. Can this court grant default judgment in any other currency other than the Zimbabwe dollar? In the absence of a clear agreement between the parties I do not think it is competent to do so. Even assuming that there was an agreement, the court can only sanction a payment in the Zimbabwe dollar at the prevailing interbank rate. Payment cannot be enforced in foreign currency under the current law. In *casu,* it was alleged that there was an agreement between the parties that payment would be in South African rand, but no such agreement was placed before the court. The communication between the plaintiff and the defendant does not specify any amount or the currency in which it was to be paid.

Note 4 of the Law Society of Zimbabwe General Tariff of fees for legal practitioners of May 2020 states that;

> "Where a legal practitioner intends to charge fees on a basis which is different from that which is set out in this recommended tariff, it is essential that the client be informed in advance and that the client's prior agreement to this should be obtained. It is preferable to record such agreement in writing. The Council will regard any rate which is higher than the upper margin of the recommended range as materially different.**"**

The requirement for a written memorandum where the basis for charging fees is different from that set out in the tariff is easy to make sense of. It was intended in my view, to make it easier to resolve any disputes emanating from the non-payment of fees pursuant to the provision of legal services. It is my further view that it matters not that the claim, as in *casu*, is uncontested.

Note 9 of the May 2020 General Tariff further provided that:

> "The recommended hourly ranges reflected in part II (which covers both general professional services and standard fees for basic work) will be reviewed periodically. The rates have been

> set in RTGS. Where fees are charged in another currency, the 2011 LSZ General Tariff shall apply and the market exchange rate for the US dollar shall be used."(Underlining for emphasis).

The 2011 general tariff was denominated in the United States Dollar. It follows that where a client is billed in another currency other than the Zimbabwean dollar, then that amount has to be converted at the prevailing market exchange rate if a legal practitioner wishes to enforce payment of that fee through the courts. The May 2020 general tariff was still applicable at the time that plaintiff rendered legal services to the defendant. In the absence of an agreement, the plaintiff's claim ought to have been expressed in Zimbabwean dollars but payable at the prevailing market exchange rate in line with section 22(1)(e) of the Finance Act, as read with Note 9 of the May 2020 Law Society of Zimbabwe General Tariff. It stands to reason that this court cannot grant a default judgment in a currency that is at variance with the law. Further, the absence of an agreement between the parties meant that the claim was incapable of speedy ascertainment. The fact that the application for default judgment was accompanied by an affidavit was a tacit admission that the claim was not capable of prompt ascertainment.

It was for the foregoing reasons that I declined to grant default judgment in this matter. The matter is accordingly struck off the roll of chamber applications.

Ruth Zimvumi Legal Practice, legal practitioners for the plaintiff