

PALATIAL GOLD INVESTMENTS (PRIVATE) LIMITED  
versus  
DANIEL BANDA

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE 10 March, 2020 and 7 July 2021.

### **Pre-Trial Conference**

*G Ndlovu*, for the Applicant  
*Defendant* in default

CHITAPI J: The defendant was in default at the scheduled pre-trial conference held on 10 March, 2020. The Deputy Sheriff's return of service of the notice of set down on the defendant of pre-trial conference was filed of record on 4 March, 2020. The return of service is advice No. 180686. It shows that service of the notice of set down was effected on 4 March 2020 at the offices of Mutandiro Chitsanga and Chitima legal practitioners for the defendant at 13:58 hours on Sheila Danda who accepted service thereof. The service address was 3 St Quintin Avenue, Eastlea, Harare. The pre-trial conference was set down at 09:00 am. There was no appearance by the defendant nor his legal practitioner at 9:30 am, an extension of 30 minutes having been granted by the judge to cater for possible unforeseen delays. The applicant's legal practitioners was in attendance with the Plaintiff's representative. The applicant's legal practitioners then applied for the striking out of the defendant's defence and for judgment to be entered in favour of the plaintiff. I indicated that I would write a judgment on the applicant's prayer.

The facts alleged in the summons and declaration which on account of the defendant's defence having been struck out must be taken as undisputed were that the plaintiff is the owner of an immovable property, viz Colney House, Chakari. The defendant was in wrongful occupation and possession of the house in that the continued occupation was without the consent of the plaintiff. The plaintiff made demand of the defendant to vacate the property. The defendant refused to deliver vacant possession of the house to the plaintiff. The plaintiff claimed holding over damages of USD450 per month. The relevant paragraphs in the plaintiff's declaration are paras 6 and 7 which read as follows:

- “6. Despite lawful demand, the defendant has refused to deliver vacant possession of the said house to the plaintiff.
7. For the period that defendant remains in occupation of this property plaintiff will suffer damages at the very least in the amount equivalent to the market rental of that house being the sum of USD\$450.00 per month”

The plaintiff couched its prayer for relief as follows:

“Wherefore Plaintiff prays for judgment against defendant as follows:

- (a) Delivery of vacant possession of Colney House, Chakari, within five days of the date of this judgment
- (b) In the event of Defendant failing to deliver vacant possession of Colney House, Chakari in terms of paragraph (a) herein the Sheriff of this Honourable (sic) or his authorized Deputy be and is hereby authorized to evict the Defendant, his assignees, and anyone claiming through him from Colney house, Chakari.
- (c) payment of USD\$450.00 per month as from 1 January, 2018 to date of vacation as holding over damages
- (d) Costs of suit”

The other pleadings which constitute the plaintiff’s claim were the replication to the defendant’s plea in which the plaintiff denied the defendant’s assertion that he was an employee of the plaintiff entitled to retain possession and occupation of the house as his allocation of the house was an allocation made under an employment contract between the plaintiff and the defendant, the contract being extant. The plaintiff further denied the assertion of the defendant that the defendant’s right to occupation was an employment issue to be determined between the plaintiff and the defendant. The plaintiff also persisted in its claim for holding over damages following the denial by the defendant that he was liable for any holding over damages.

The plaintiff also filed a discovery affidavit. In that affidavit the plaintiff discovered the following documents in the first part of the First Schedule-

- “1 All pleadings in the matter.
2. Letter from plaintiffs legal practitioners to defendant
3. Letter from defendants’ legal practitioners
4. Valuation report of immovable property.”

The plaintiff further filed the plaintiff’s summary of evidence. The summary of evidence outlines the paper trail in regard to the relationship between the plaintiff and defendant, in particular that there was no employment contract between the parties. The plaintiff stated in the summary aforesaid that the defendant resisted vacating the house in issue arguing that he was allocated the house as part of his employment with another company which used to employ the defendant but was taken over by a successor company, the plaintiff. The plaintiff outlined that the

plaintiff had since the takeover aforesaid found other employment hence repudiating his previous employment. The defendant could not therefore rely for continued occupation of the house on a repudiated contract. There is no reference or mention in the summary of evidence of holding over damages or how they are computed.

As I have already indicated, the plaintiff prayed for striking out of the defendant's defence and for default judgment as prayed for in the summons. I have no issue with the prayer for striking out of the defendant's defence. That prayer, I will grant. It is the prayer for relief as set out in the summons and declaration which I have problems with. This part of the prayer concerns an order of eviction and holding over damages. A pre-trial conference is a chamber hearing. If the defendant's defence is struck off, and the plaintiff applies for judgment in terms of the summons and declaration, the application becomes one of default judgment where the defendant has not defended the summons. This is so because the striking out of the defendant's defences necessarily means that the appearance to defend and all subsequently filed pleadings of the defendant no longer have relevance and the judge cannot consider them. The plaintiff is placed in a position of a plaintiff who seeks judgment where there is no appearance to defend.

The question which arises is whether it is competent to grant judgment by chamber application where the relief sought is for default judgment in a claim for eviction and/or holding over damages. Chamber applications for default judgment are provided for in r 57 of Order 9 of the High Court, Civil Rules, 1971. In terms thereof, any claim not being for provisional sentence, but being one for "a debt or liquidated demand only" (own underlining) and the defendant has not entered appearance to defend or has been barred in default of appearance to defend or in default of plea, can be granted by chamber application made by the plaintiff for judgment in terms of the summons. The judge dealing with the chamber application may grant judgment as prayed for or in terms of such order as the judge considers appropriate to make upon a consideration of the summons and declaration. All other default judgment requests must be made in terms of rule 58 which provides that such requests for default judgment be dealt with in terms of rule 223, that is to say the applications should be set down on the unopposed roll. It is for these reasons that I cannot grant the second part of the applicant's prayer for eviction and holding over damages.

In terms of the provisions of rule 182(11), the judge dealing with a pre-trial conference may dismiss the plaintiff's claim or the defendant's defence for failure by the party in default to comply with directions given by the judge in terms of sub rules (4); (6); (8) or (10). Sub rule 4

deals with default to attend a pre-trial conference as ordered by the judge as was the case in this matter. The judge in terms of the provisions of sub rule (11) aforesaid has power in addition to dismissing the claim or striking out the defence, to “make such other order as may be appropriate.” This power is very wide and can be used to expeditiously dispose of a matter where the defendant is in default and the claim for which default judgment is sought is one which is not for a debt or liquidated demand only. The pre-trial judge may in my view properly accede to hearing evidence in support of the liquidated demand and grant the relief sought to the extent proven by the plaintiff. The judge may direct that evidence be led in such manner as deemed appropriate, which may be by affidavit or in open court. The powers of the judge are wide and intended to be applied to dispose of a matter expeditiously. My view however is that such disposal should be invoked where the plaintiff so requests and the judge finds that he or she can conveniently dispose of the matter in that manner. Since r 58 provides for judgment in matters which are not for a debt or liquidated demand only, it will be in the discretion of the judge to dispose of the matter other than by reference to r 58.

*In casu*, the plaintiff’s counsel did not request leave to adduce evidence on the claims for eviction and holding over damages. I was asked to grant judgment in terms of the prayer in the summons and declaration and in view of what I have discussed on the competence of granting the relief sought, I can only grant the first part of the relief prayed for.

The following order is hereby made:

1. The defendant’s defence is struck off for default at pre-trial conference.
2. The plaintiff if advised may seek default judgment for eviction and holding over damages by application made in terms of rule 58 as read with rule 223 of the rules of court.
3. The prayer for costs is reserved for determination in an application brought in terms of paragraph (2) above.