

CBZ BANK LIMITED
versus
LUXAFLO ROSES (PRIVATE) LIMITED
and
BERNITO ENGINEERING AND FABRICATION (PVT) LTD
and
AJAT INVESTMENTS (PRIVATE) LIMITED
and
YAKUB MAHOMED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 13, 21 & 27 June 2022

PTC –FAILURE TO ABIDE WITH JUDGE’S DIRECTIVE

O Mutero, for the plaintiff
S Mjungwa with *J Tusso* for the 1st, 3rd and 4th defendants
2nd defendant in default

MANZUNZU J This matter came before me for a pre-trial conference hearing on 13 June 2022. In attendance was Mr *Mutero* with a representative of the plaintiff and Mr *Tusso* representing the first, third and fourth defendants. The second defendant was in default despite proper service of the notice of set down at the last known address for service given by its erstwhile attorneys as they renounced agency. Mr *Tusso* applied for the postponement of the hearing because the fourth defendant who also represents the first and third defendants had travelled to Netherlands. The hearing was postponed to 21 June 2022 with the first, third and fourth defendants being ordered to pay the plaintiff’s wasted costs for the day.

On 21 June 2022 there was attendance as in para 1 above with the additional presence of the fourth defendant. It emerged during hearing that fourth defendant on his own behalf and on behalf of first and third defendants was not denying liability and was desirous for the parties to have the matter settled. The plaintiff expressed a similar desire. It was in the wake of affording the parties another chance to meet and discuss the matter that I allowed another postponement of the matter to 27 June 2022, with the consent of the parties, but this time with specific directions. I directed the parties and their legal practitioners with their consent, to meet for another roundtable meeting on an agreed date, venue and time before 27 June 2022 so as to

look at the possibilities of a settlement. The direction was given in terms of R 49 (11) of the High Court Rules, 2021 which reads;

“(11) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter including the granting of condonation in respect of this or any other rule.”

On 27 June 2022 Mr *Mutero* said despite the parties’ agreement to meet at his office on 23 June 2022 the fourth defendant and his legal practitioners did not turn up. Instead he received a telephone call from Mr *Mjungwa* proposing the terms of payment. The conversation did not yield any positive results as the same was centred on the same old story by the fourth defendant of how the defendants had encountered a challenge to pay due to covid 19 lockdown restrictions.

Mr *Mutero* applied that the first, third and fourth defendants’ defence be struck out for their failure to comply with the Judge’s direction. He also applied for judgment as per summons. The oral application was made in terms of Order 49 (12) of the High Court Rules, 2021 which provides that;

“(12) A judge may dismiss a party’s claim or strike out his defence or make such other order as may be appropriate if—
(a) the party fails to comply with directions given by a judge in terms of subrules (8), (10) and (11) or with a notice given in terms of subrule (8); and
(b) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order.”

Mr *Mjungwa* conceded that the directive was given. He said he called Mr *Mutero* to tell him that the defendants were not able to attend and to explain the efforts by the defendants to settle the matter. I did not hear Mr *Mjungwa* give reasons why the defendants could not attend. Mr *Mutero* said such reasons were also not disclosed to him.

It is clear there was no compliance by the defendants to the direction given. The *onus* was on the defendants to give a reasonable explanation why they could not attend the roundtable meeting. There was no explanation for the default. It can only be classified as wilful.

Mr *Mjungwa* was correct to say the court has a discretion to strike out the defence or not because of the use of the word “may”. What he did not succeed to do is to go further and say why the discretion should be exercised in favour of the defendants. The oral application succeeds and the following order is made. The second defendant is already recorded in default.

IT IS ORDERED THAT:

1. The application by the plaintiff to strike out the 1st, 3rd and 4th defendants' defence in terms of Rule 49 (12) of the High Court Rules, 2021 be and is hereby granted.
2. The 1st, 3rd and 4th defendants' defence is hereby struck out.
3. The matter is referred to the unopposed roll as unopposed as against the 1st, 2nd, 3rd, and 4th defendants.

Sawyer and Mkushi, plaintiff's legal practitioners

Tavenhave and Machingauta, 1st, 3rd and 4th defendants' legal practitioners