

LENIN MAKECHEMU NGWARU
versus
WATSON GARA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 7 & 13 JULY 2022

PRE-TRIAL CONFERENCE

C Tafirei, for the plaintiff
V Revesai with *P Muvhiringi*, for the defendant

TAGU J: The plaintiff issued summons on 27 August 2021 against the defendant claiming USD\$ 25 000 being a refund of the money paid to defendant for the purchase of a residential stand as well as USD\$25 000 fruitful being damages for breach of contract and cost of suit. Pleadings having been filed and closed, the plaintiff applied for a Pre-Trial date. Parties held their Pre-Trial round table meeting on 7 February 2022 and thereafter drafted and signed their Joint Pre-Trial Conference minutes incorporating facts admitted by the defendant as well as issues to be referred to trial.

The file having been placed before me for Pre-Trial Conference I directed the Registrar to invite the parties to appear before me for Pre-Trial Conference. The return of service compiled by the Sheriff of Zimbabwe indicated that the parties were served with the Notice of Set down on the 4 July 2022 to appear before me on 7 July 2022.

At the hearing the plaintiff was not available but his legal practitioner and another witness appeared. The counsel for the plaintiff having outlined the points of contention and the fact that the parties had drafted and signed the Joint Pre-Trial Conference minutes incorporating the issues they perceived as issues for trial filed of record, the counsel for the defendant applied for the dismissal of the plaintiff's claim on the basis that the plaintiff was in willful default. He relied on the provisions of r 49 of the High Court Rules 2021.

In response the counsel for the plaintiff confirmed that indeed the plaintiff was not present but there was a witness who was representing the plaintiff on the Power of Attorney. He said the reason the plaintiff was not available to attend the Pre-Trial Conference was that he is based in the United States of America. When they received the Notice of Set Down they were given merely a three day notice hence there wasn't enough time to make travel arrangements to come to Zimbabwe to attend court hence the plaintiff was not in willful default.

The counsel for the defendant persisted with his application and indicated that when the counsel for the plaintiff told him out of court that plaintiff would be represented by another person on the strength of a Power of Attorney he demanded to see the Power of Attorney but none was availed. He said the plaintiff in his summary of evidence had said he would call one witness but did not state the issue of a Power of Attorney.

Rule 49 of the High Court Rules 2021 deals with curtailment of proceedings and pretrial conferences. Sub-rule (8) provides that-

“The registrar, acting on the instructions of a judge, may at any time on reasonable notice notify the parties to an action to appear before a judge in chambers, who need not be the judge presiding at the trial, on a date and at a time specified in the notice, for pre-trial conference or a further pre-trial conference, as the case may be, with the object of reaching agreement on or settling the matters referred to in subrule (2), and the judge may at the same time give directions as to the persons who shall attend and the documents to be furnished or exchanged at such conference, provided that all the parties to the action shall physically attend the pretrial conference held before a judge.”

Further, subrule (12) provides that:

“A judge may dismiss a party's claim or strike out his defence or make such 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.”

It is therefore correct that where a party who has been called upon to attend Pre-Trial Conference fails to attend, the party's claim may be dismissed or party's defence may be struck out. *In casu* it is not disputed by the defendant that the plaintiff is based in the United States of America. It is also not disputed that the Registrar gave the parties three days' notice to attend the Pre-Trial Conference. Subrule (8) says “The registrar acting on the instructions of a judge, may at any time on reasonable notice notify the parties to an action to appear before a judge in

chambers,...”. Surely the three days’ notice given to the plaintiff who is based in the United States of America is very unreasonable. The plaintiff was not given reasonable and adequate time to make travel arrangements to come to Zimbabwe to attend the pretrial conference. His legal practitioner who is based in Zimbabwe managed to attend on his behalf. The plaintiff cannot be said to be in willful default.

In any case subs (12) says “A judge may dismiss a party’s claim or strike out his defence or **make such other order as may be appropriate if...**”. (my emphasis). What this means is that the judge has a discretion to either dismiss the claim, strike out the defence or make any other order as may be appropriate. This is a case that deserves an appropriate order other than dismissing the claim. The parties having already signed a joint Pre-Trial Conference minute, and the court is satisfied that the joint Pre-Trial Conference minute captures the issues for trial will therefore order that the matter should proceed to trial on the joint pre-trial conference minutes with a minor amendment to the minute to include that the plaintiff will call one (1) witness.

IT IS ORDERED THAT:

1. The application to dismiss plaintiff’s claim is dismissed.
2. The matter is referred to trial on the basis of the joint Pre-Trial Conference Minute filed of record.
3. There is no order as to costs.

TAGU J:.....

Tafirei and Company, plaintiff’s legal practitioners
Zimudzi and Associates, defendant’s legal practitioners