

WYNBOD ENTERPRISES (PVT) LTD
and
C.E. CHIMOMBE
and
I.C. CHIKANZA
and
M CHIKANZA
versus
FIRST MUTUAL LIFE ASSURANCE COMPANY
(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3 October 2011 and 2 November 2011

Urgent Chamber Application

BHUNU J: On 17 August 2011 I entered default judgment against the applicants in favour of the respondent in the following terms:

“IT IS ORDERED THAT:

1. The defendant’s plea be and is hereby struck out.
2. The first, second and fourth defendants shall, jointly and severally, the one paying the other to be absolved, pay to the plaintiff the following amounts:
 - 2.1 US\$14 816- 64 at the rate of 5% per annum from 1 February 2011 to date of payment.
 - 2.2 The plaintiff’s costs of suit on the legal practitioner and client scale.”

The applicants are now applying for rescission of judgment claiming that they were not in willful default. They blame their erstwhile lawyer Mr *Muparutsa* of Chigwanda Legal Practitioners for gross dereliction of duty in failing to enter a plea despite being reminded by the respondent’s legal practitioners.

It is therefore conceded that the default judgment was procedurally entered and no fault can be attributed to the respondent. In their application the applicants have sought to heap all the blame on their erstwhile legal practitioners without giving them a chance to explain themselves.

Apart from their mere say so there is however, no way of verifying whether Chigwanda Legal Practitioners were indeed negligent in the manner alleged or at all. I would hesitate to find the applicant's erstwhile legal practitioners guilty of the conduct alleged without affording them a chance to be heard as this might have serious consequences for the lawyer concerned.

The courts have however ruled that the lawyer being an agent of his client there is a limit beyond which a litigant can escape the inept conduct of his legal practitioners. In this case counsel for the respondent went out of his way to remind the applicant's legal practitioners to handle the matter properly to avoid default judgment. The legal practitioner ignored the warning with full knowledge to his client's peril.

The applicant should therefore be stuck with the conduct of his choice of an incompetent legal practitioner. The respondent who took all the necessary precautions to ensure that the matter was handled properly should not be prejudiced by the alleged inept conduct of the applicant's legal practitioner.

If the applicant's legal practitioner is indeed to blame in the manner alleged by his principal then, the applicant has recourse to him for a remedy. The issue of the prejudice arising from the negligent mishandling of this matter resulting in the issuing of default judgment is now an issue between the applicant and his erstwhile legal practitioners which has nothing to do with the respondent.

In the result it is accordingly ordered that the application for rescission of default judgment entered against the applicant on 17 August 2011 under case number HC1760/11 be and is hereby dismissed with costs.

Madanhi, Mugadza & Co. Attorneys, applicants' legal practitioners
Gill Godlonton & Gerrans, respondent's legal practitioners