

**RACHEL MAKIWA**

**Versus**

**BRIAN ROBERT YOUNGMAN**

IN THE HIGH COURT OF ZIMBABWE  
BERE J  
BULAWAYO 18 OCTOBER 2007 & 2 MARCH 2017

**Judgment**

..... for plaintiff  
*B. Moyo* for the defendant

**BERE J:** The brief background of this case as presented by defendant’s counsel and confirmed by the court file can be summarised as follows:-

On 27<sup>th</sup> April 2007 plaintiff’s erstwhile legal practitioners Messrs Joel Pincus, Konson & Wolhuter were served with a notice of a set down for a pre-trial-conference by defendant’s legal practitioners, then Messrs Dube & Partners. The notice of set down was calling upon the plaintiff to attend a pre-trial-conference before my brother NDOU J on 18 May 2007.

Upon being served with the notice for a pre-trial-conference the plaintiff’s legal practitioners moved swiftly to renounce agency on 10 May 2007. Before the scheduled hearing date for the pre-trial-conference the defendant’s counsel sought directives from the pre-trial-conference presiding Judge who directed him to personally serve the notice of hearing on the plaintiff. On 16<sup>th</sup> of May 2007, the plaintiff was served with a notice of hearing of the pre-trial – conference at her last known address, viz No. 43 Southway, Burnside, Bulawayo.

On the hearing date Mr *Mcijo* of Messrs Lazarus & Sarif Legal Practitioners pitched up for the pre-trial-conference hearing on behalf of the plaintiff but without the plaintiff and with no pre-trial-conference papers having been filed. The defendant’s counsel also appeared with all his papers in order for the pre-trial-conference hearing. At this hearing the plaintiff’s counsel successfully pleaded with the presiding judge to grant him further indulgence in order to bring

his client after filing the requisite pre-trial-conference papers. The matter was then postponed *sine die* on 18 May 2007.

The defendant's legal practitioners then set the matter down for yet another pre-trial-conference hearing on 16 October 2007, this time before me. Upon being served with the notice of set down the plaintiff's legal practitioners immediately wrote to the defendant's legal practitioners on 9 October 2007 as follows:

"We are in receipt of the notice of set down for pre-trial-conference in this matter but have to advise that not only will Ms Ncube be out of the country till the end of October but our client has informed us today that she will be leaving the country tomorrow and will only be back in Zimbabwe sometime in November 2007.

We will be in contact with you again when we have further instructions from our client."

This letter did not go down well with the defendant's legal practitioners who responded as follows:

"Your letter of the 9<sup>th</sup> October 2007 refers.

We note that your client has on two different occasions avoided the Pre-trial Conference. This time she is at it again. Surely this matter must be brought to a finality. She knows that she has to attend a Pre-trial Conference on the 16<sup>th</sup> October 2007 and she does not attend, she would have done so at her peril. The instructions we have are that we proceed with the matter and cannot entertain your client's attempts to derail the wheels of justice.

We are also informed by ours that yours has sold the disputed property to a third party. This yours has done despite full knowledge that this is a pending matter in respect of the said property. This maybe explains why she is not prepared to go to court.

Please inform your client of the importance of attending the Pre-trial Conference. At the conference we shall place it on record that she has sold the property to a third party."

On the scheduled date for the pre-trial-conference hearing *viz*, 16 October 2007, the plaintiff's legal practitioner was not only in attendance but had filed no pre-trial-conference papers at all. The plaintiff herself was not in attendance and no explanation was given for the default. Even as I write this judgment years after the abortive pre-trial hearing there is no

indication that the plaintiff has enthused herself in having this mater finalised. The plaintiff appears to be quite content on leaving things as they are.

In the absence of the plaintiff and her legal practitioners, it was inevitable for the defendant's legal practitioners, not to apply for the plaintiff's dismissal, this he did. The defendant's legal practitioner also applied that the defendant be granted leave to set down his counter claim on the unopposed roll.

This case is one of the numerous cases that have inundated our courts where the plaintiff shows so much zeal and excitement in initiating legal proceedings but finds no enthusiasm to see the process go through its logical conclusion.

Under normal circumstances it is the defendant who would be expected to drag his/her fact in moving the curt process and not the plaintiff. The plaintiff in this case had demonstrated remarkable determination to deflate the court process.

It is for this reason that I make the following order:

It is ordered-

- (1) That the plaintiff's case be and is hereby dismissed
- (2) The defendant be and is hereby granted leave to set his claim in reconvention for finalization on the unopposed roll.

*Lazarus & Sarif* plaintiff's legal practitioners  
*Dube-Banda, Nzarayapenga & Partners*, defendant's legal practitioners