CBZ LIMITED
versus
ZIYAMBI ZIYAMBI
and
SUSAN MASVOSVE
and
EVANGELISTA MUNYUKI
and
TSITSI CHIWAWA
and
BRENDA CHIRWA
and
INNOCENT MAJAYA
and
TAFADZWA ZIYAMBI
and
JOSEPH ZIYAMBI
and
FANIKISO NDABA
and
NOEL MUNYUKI
and
LAZARUS ZIYAMBI
and
DINGANI KANA
and
SIBONGILE HOJA
and
WURAYAYI ZIYAMBI
and
REBECCA NYAMUKACHI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 February, 2017

Chamber Application for Default Judgment

CHITAPI J: In this matter the applicant applies for default judgment. The chamber application does not specify the rule which is being relied upon for seeking default judgment. As a matter of practice it is important that where a party files a chamber application for default judgment, the chamber application should specify the rule being relied upon. The

specification of the relevant rule will assist the judge to appraise itself of the contents of the rule. The judge will then consider whether the papers being relied upon by the party seeking default judgment comply with the rule in question. This judgment does not however seek to dwell on the format of chamber applications but on the imperfections apparent on the Sheriff's returns of service.

The plaintiff's case is for recovery of money loaned and advanced to the defendants. The defendants were described in the summons read together with the declaration as farmers within Chakari area in Kadoma. They associated as a group called Imperani Farmers and open a bank account with the plaintiff. The plaintiff extended banking facilities to the group to finance the members' cropping requirements.

The copy of the facility agreement extended to the group was attached to the summons and declaration. The facility was in the nature of an overdraft granted on 19 November, 2010 and it was to expire on 30 September, 2011. The facility was to be guaranteed by what is referred to in the facility agreement as "group guarantee". The borrowers were to ensure that any money due or outstanding on the facility had been cleared by the date of the expiry of the facility.

The first, second and third defendants individually guaranteed and bound themselves jointly and severally as sureties in solidum and co-principal debtors for the due payment of all monies under the facility which may be outstanding or due. In terms of the facility, all charges incurred by the plaintiff in recovering any amounts due as a result of default in payment by the defendants including legal practitioner and client costs and collection commission would be paid by the borrower or defendants.

From a reading of the declaration, all the defendants except the first defendant are described as residents of different plots of Imperani Farm Chakari, Kadoma. The farm was obviously subdivided into various plots. The first defendant's address was given as Lot 3 of Railway Farm, Chakari.

The defendants defaulted in acquitting the facility monies due and hence the resultant institution of these proceedings to recover the amount allegedly owed to the plaintiff. The summons filed on 15 May, 2015 claims a capital of US$113 117,07; US $ 119 854,51 as interest up to 21 May, 2015; further interest on US$113 117,07 at 28% per annum from 22 April, 2015 to date of full payment; US$3 702,92 collection commission; US$378,00 outstanding charges and costs on the scale of legal practitioner and client scale.

In the declaration however the claim for capital in the prayer is crossed out. The crossing is not initialled by either the plaintiff's legal practitioner nor the registrar. The draft order in the chamber application claims the capital. There are other alterations in the declaration corrected in pen. They are similarly not initialled. A summons may be amended before or after issue but before service as the plaintiff may so wish. However the registrar should initial the amendment. Rule 14 provides for such procedure. In terms of r 115, the plaintiff may in the declaration alter, modify or extend the claim which is stated in the summons whereafter the summons will be deemed to have been amended to the extent set out in the declaration. The defendant if he or she demonstrates that the amendments have a prejudicial effect can object to the amendment and the court will make an order of costs as it deems fit. In this case, the declaration was filed together with the summons in terms of r 113. Any amendments made to it as with the summons which accompanies it would need to be initialled by the registrar. As the alterations in the declarations and summons are not initialled, I cannot hold that the alterations are valid. In any event, the draft order still claims an order on the capital sum and on this basis, I can safely infer that the cancellation was not intended. However, I must emphasize that legal practitioners need to be meticulous in the presentation of pleadings so as not to confuse the other party and similarly the court or judge. Shoddily drawn pleadings should be considered as an indictment on the organisational abilities of a legal practitioner. No legal practitioner worth his name should be associated with shoddy work. It is a dishonour to the profession and an unnecessary strain and testing of a judge's patience when it is left to the judge to figure out the content and meaning of a pleading.

I now deal with the issue of service of the summons and declaration which I considered to be lacking in particularity with respect to certain of the defendants as I shall set out below. I considered the Sheriff's returns of service of process. In respect of all the returns of service, the Assistant Sheriff by the name Tewe purportedly effected the service. The copies of the 15 returns of service which are attached to the chamber application are numbered 028111B-028125B.

I do not have problems with the returns of service where personal service was effected. The defendants who were personally served are fourth, fifth, sixth, tenth and twelfth defendants. With respect to the first defendant, service was effected on a person named Naomi who is described under the remarks column as "a daughter of the defendant". Service on the second defendant is recorded as having been effected on Naomi described as "a close

relative" at "defendant's residence" at Plot 8 Imperani Farm. On third defendant service was effected on "Mrs Ziyambi" at the defendant's residence at Plot 13 Imperani Farm. Service on the first defendant was effected on Naomi a sister to the defendant at the defendant's residence, Plot 10 Imperani Farm. Service on eighth defendant was effected on Ms. Ziyambi at defendant's place of residence, Plot 11 Imperani Farm. Ms. Ziyambi is described as a sister to the defendant. Service on ninth defendant was effected on "Naomi" described as "a relative to the defendant" at defendant's place of residence, Plot 12 Imperani Farm. Service on 11th defendant was effected on "Naomi Ziyambi" described as a "sister for the defendant at defendant's residence. Plot 3 Imperani Farm. Service on 13th defendant was effected on "Naomi" described as "a close relative and also neighbour to the defendant" at defendant's place of residence Plot 4 Imperani Farm. Service on 14th defendant was effected on "Naomi Ziyambi" described as "a relative to the defendant" at defendant's residence Plot 1 Imperani Farm. Service on 15th defendant was effected on "Ms Ziyambi" described in the remarks column as "Naomi Ziyambi who also accepted service on behalf of the defendant."

The criticisms I have considered necessary to make are meant to bring the Sheriff's attention to the need to be meticulous in the preparation of the returns of service. All the returns to service do not indicate that what was served was the summons and declaration yet the documents were in fact attached to each other. A description that the person served is "a relative" or "close relative" of the defendant is hardly adequate. It begs the question what sort of relationship is there between the person on whom service has been effected and the defendant concerned. For example with respect to the first defendant, a named person Naomi accepted service of the process. He was described as a daughter to the first defendant. The returns of service refer to "Naomi", "Naomi Ziyambi"; "Ms. Ziyambi" and "Mrs Ziyambi." The question is whether or not this is the same person. In respect of the said described person(s), service of process is endorsed in all instances as having been effected at 1414 hours. The place where service was allegedly effected in each instance is described as "defendants'' residence". The various defendants are described in the summons as residing at different plots within Imperani Farm. Process on the first defendant was served on "Naomi" at Lot 3 Railway Farm, Chakari at 1444 hours being the first defendant's residence and Naomi being first defendant's daughter. A question arises as to how the Assistant Sheriff could have been at different plots at the same time at 1444 hours serving the different defendants upon their relative, Naomi", "Naomi Ziyambi"; "Ms. Ziyambi" and "Mrs Ziyambi."

Service of court process should be effected in terms of the rules of court. Order 5 rr 39 and 40 should guide the Sheriff. In this case, the process did not effect the liberty of any of the defendants in which case personal service would have been required to be effected. The Sheriff was therefore required failing personal service, to serve the process on the defendants "duly authorised agent" in terms of r 39 (2) (a) which option was not appropriate as there was no duly authorised agent pleaded in the summons or declaration or who declared himself or herself as such to the Sheriff. The next option was to resort to r 39 (b) which reads as follows;

> (b) By delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service."

If the Sheriff had failed to find a responsible person as contemplated by r 39 (2) (b), that is, at the places listed, he was supposed to consider the option in r 40 (b) which reads in the operative part as follows:

> "…..it shall be sufficient service to leave a copy of the process in a letter-box at or affixed to or near the outer or principal door of, or in some other conspicuous position at, the residence, place of business or employment, address for service or office, as the case may be."

The Assistant Sheriff as I indicated did not attempt to go to the places mentioned in rr 39 and 40 in search of the defendants or a responsible person thereat. He just identified one person Naomi the daughter of the first defendant at the first defendant's place of residence at 1444 hours on 1 July 2015 as per the returns of service. Naomi", "Naomi Ziyambi"; "Ms. Ziyambi" and "Mrs. Ziyambi" purported to know or to be related to the defendants in one way or the other as sister, close relative or just a relative or neighbour. The Assistant Sheriff then served the process in respect of 3rd, 7th, 8th, 9th, 11th, 13th, 14th, and 15th defendants on the person or persons described by the above names.

The issue arising is whether or not it can be held that service was properly executed. I think not. The returns of service in respect of the above defendants do not reflect or record a process of service as provided for in the rules. The plaintiff's legal practitioner was not astute in not checking and identifying the shortcomings in the returns of service. It is important for legal practitioners to pay attention to detail and not just perfunctorily gloss over documents intended as evidence in support of a litigant's case in which they act for the litigant. In terms of r 42 (2) the name of the responsible person should be stated on the return of service. To simply endorse 'Naomi'; Ms Ziyambi or Mrs Ziyambi cannot be said to be r 42 (2) compliant. Full names must be endorsed e.g John Nyika.

The purpose of the rules on service and why the rules must be adhered to is meant to safeguard the rights of persons who will not have been served with process and therefore being in the dark that a claim has been made against them from having default judgments granted against them. Save as the law may specify by way of limitation or denial of such right, the *audi alteram partem* rule or doctrine must always be followed. If courts grant orders against persons without giving them an opportunity to defend themselves which opportunity a person can only utilize or elect not to utilize after service of process, the administration of justice will fall into disrepute. A court allowing this would be breaching the rights of such defendant to administrative justice and a fair hearing as provided for in the operative or relevant provisions of ss 68 and 69 and 165 (1) (a) of the Constitution. In short a person is entitled to notice of proceedings against such person. See *Steinberg* v *Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892 B – C. The plaintiff's legal practitioner as I have indicated has been sloppy in preparing this application by not paying attention to detail. This is a matter in which the legal practitioner could have requested the Assistant Sheriff and/or the responsible person referred to in the returns of service to depose to an affidavit confirming if 'Naomi'; 'Naomi Ziyambi'; 'Ms Ziyambi' or 'Mrs Ziyambi' is the same person, how exactly the person is related to the respective defendants against whom she is recorded as a relative close relative or neighbour and more importantly to confirm whether the said responsible person passed over the process to the defendants concerned. In such circumstances I could have considered invoking the powers granted in r 4 C of the court rules to condone a departure from the provisions of rules 39 and 40 as ventilated herein because the purpose of the rules on service being that the person being sued should receive notice of the case would have been realized.

The law is clear that once service of process is defective then the process is of no force or effect. See *Featherstonehaugh* v *Suttie* 1913 TPD 171 at 178 where it is stated thus, "if there has been any defect in the service, the summons is of no force; and everything following thereupon is invalid as if the summons had been totally absent." See also *Van Nekerk* v *Barket* 1922 OPD 164. I accordingly refuse to grant the plaintiff's prayer as claimed but will grant it in part and also absolve the second defendants as she has been so absolved in the draft order.

Accordingly I issue the following order and leave it open to the plaintiff if it so wishes to properly serve the defendants to which this order does not relate.

1. Judgment for the plaintiff.

2. The 1st, 5th, 6th, 10th and 12th defendants the one paying the other to be absolved shall pay the plaintiff the following amounts.

(a) US$110 854 – 51 being interest accrued on the capital sum of US$113 117-07 as at 21 February, 2015.

(b) US$113 117-07 being the capital sum outstanding with interest thereon at 28% per annum from 22 April 2015 to the date of full payment.

(c) Costs on the legal practitioner and client scale and collection commission on the sum of US$113 117-07 calculated in terms of By – Law 70 of Law Society of Zimbabwe By – Laws 1982 as amended.

(d) US$378-00 being outstanding charges as at 21 April 2015.

Gutu & Chikowero, plaintiff's legal practitioners