DEREKI MARIJENI
versus
MR MUFUDZE
and
MR MAJANGO
and
ZIMCAN SECURITY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 17 October, 2002

Chamber Application

Miss *N Moyo* for the plaintiff

MAKARAU J: On 8 January 2002, the plaintiff's legal practitioner filed a chamber application for directions in the above matter. Her predicament is on how to proceed in the matter in which she appears in *forma pauperis* on behalf of the plaintiff who, since June 2001 has not been in touch with her to give her further instructions.

The cause of the legal practitioner's predicament is fully revealed in the affidavit filed with the chamber application. It is as follows:

The plaintiff issued summons against the defendants claiming damages in the sum of $10 000-00 for pain, shock and suffering; $500-00 for medical costs and $3 800-00 being the anticipated cost of replacing one artificial eye, together with interest on the amount of $10500-00 and costs of suit. The damages arise from an alleged assault by the first and second defendants, the employees of the third defendant.

Pleadings in the matter were duly closed and the matter came before Justice Gowora on 19 June 2001 for a pre-trial conference. At the conference, the first defendant made an offer to settle the amount of the general damages, in the sum of $10 000-00, and the proven medical costs in the sum of $430-00. The first defendant further indicated that, upon being furnished with proof, he would also

consider settling the amount of $3 800-00, being the anticipated cost of replacing the artificial eye. The pre-trial conference was postponed *sine die* on the basis that the plaintiff would furnish the required proof. The presiding judge noted that once the parties reached final settlement, a minute to that effect could be filed and, presumably, a judgment by consent issued in favour of the plaintiff.

The plaintiff undertook to furnish his legal practitioner with the outstanding proof by a date in June 2001. The date came and went without the proof being furnished. Letters written to the plaintiff on the issue since that date have also gone without response. Feeling unsure as to how to proceed to settle the matter, the plaintiff's legal practitioner filed this chamber application for directions.

Advice to the plaintiff's legal practitioner by the Registrar that, since the matter was pending before Mrs Justice Gowora, she could apply for the pre-trial conference to resume, elicited this response:

> "You seem to have missed the gist of our application. The problem is that our client has disappeared, we have not heard from him at all. We therefore cannot apply for a pre-trial conference since he would not be available for it. We considered simply applying to the court for permission to renounce agency as we represent him on an in *forma pauperis* basis .....
>
> Please return this file to the judge for a final decision. We look forward to hearing from you shortly."

In my view, a final decision in the matter is yet to come. This is so because the matter is pending at the pre-trial conference stage, and until that stage is completed, no final decision can be made in the matter.

It appears to me that the circumstances of this application bring into focus the role and place of the pre-trial conference in this jurisdiction. This is not an issue that has been extensively dealt with in any judgments or texts, as the current practice on how to convene and dispose of pre-trial conferences is relatively new.

The pre-trial conference stage has always been a feature of the procedure in this jurisdiction. The rules of the High Court provide for when and how a pre-trial conference can be held. However, since 1995, there has been a deliberate and

noticeable shift in the way judges convene, participate in and dispose of pre-trial conferences. This has resulted in pre-trial conferences assuming a more meaningful place in the entire practice of litigation. There is a deliberate attempt on the part of the judiciary to introduce mediation at the pre-trial conference stage as an alternative to trials. More cases are now being settled at the pre-trial conference than before, as a result of the direct and active participation of judges.

GILLESPIE J, in one of the few judgements on the issue, had occasion to look at the purpose of a pre-trial in the case of *Doelcam (Private) Limited* v *Pichanick and others* 1999 (1) ZLR 390 (H). He had this to say:

> "A pre-trial conference has a two fold purpose. The primary aim is to assist towards the resolution of a dispute without recourse to trial. To this end the parties are given the benefit of appearing before a judge and of engaging off the record in a frank exchange concerning the merits and weight of the respective cases."

The learned judge went on to consider the duty of the judge presiding over a pre-trial conference. This is what he said, in part:

> "I likewise respectfully consider it to be the duty of the judge to do all that is necessary to achieve the two-fold aim of the conference. He or she ought not meekly accept the lawyer's say so that no settlement is possible. He should express a view on the law. He should express an opinion on the factual probabilities."

He then went on to detail the role of the presiding judge to settle the pleadings, in the event that the matter is not settled.

I respectfully consider it the role of the judge presiding at a pre-trial conference to engage the parties and their lawyers meaningfully, and to assist towards a settlement. He or she can give directions in the matter. Judges presiding at pre-trial conferences often do. Instances when judges request that pleadings be amended, that summaries of evidence be supplemented or that further discovery be effected are all examples of directions given at the pre-trial conference. They are aimed at facilitating a settlement or, where such is not possible, at bringing to the fore the real dispute between the parties. Where the facts in a matter are not in

dispute, the judge could direct that a stated case be prepared so that argument could be heard or the law and the legal issue could be settled.

It appears to me that the judge presiding over a pre-trial conference is not a mere observer. He or she should be an active participant at the conference. Where opportunities to settle the matter arise, he or she must point them out to the parties. It is the practice that the judge who presides at the pr-trial conference will not preside over the matter if and when it comes to trial. Therefore, he or she can take an active part in the proceedings without being accused of pre-judging the matter. The parties themselves should be encouraged to have their say, so that the issues are freely aired and each party knows exactly what case it has to meet. If agreement cannot be reached at a pre-trial conference, the parties should be encouraged to think a little more on the matter before deciding to proceed to trial. Postponements for that purpose should be readily granted. The judge must ensure that the parties are well aware of the costs of litigation, which today are very high.

Due to the unique position that the judge occupies at a pre-trial conference, I would suggest that all matters aimed at curtailing the proceedings or at settling the matter are properly before him or her and ought to be resolved by him or her. He or she is in control of the case until it is settled or referred to trial. It is in light of this role of the presiding judge at a pre-trial conference that the Registrar advised the plaintiff's legal practitioner to set the matter down for the resumption of the pre-trial conference. The directions being sought in the chamber application before me are the very matters that the judge presiding at the pre-trial conference is seized with.

The plaintiff's legal practitioner is of the view that a pre-trial conference date cannot be sought in the absence of any one of the parties. It is in the discretion of the judge presiding at a pre-trial conference how to proceed in the event that one of the parties is absent from the conference.

On the basis of the foregoing, the following directions are issued:

1. The plaintiff is to apply for the matter to be reset down before Justice Gowora for the resumption of the pre-trial conference.

2. The chamber application for directions as it relates to how to compromise the claim on behalf of the plaintiff is hereby referred to Justice Gowora for determination at the resumption of the pre-trial conference.

Coghlan Welsh & Guest, plaintiff's legal practitioners.
H Mukonoweshuro, Defendants' legal practitioners.