SPEEDEX (PRIVATE) LIMITED

versus

WEDZERA PETROLEUM

(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 2 May 2012 and 23 May 2012

Ms *F K Maenzanise*, for the applicant

**Unopposed Application**

BHUNU J: On 27February 2012 the applicant filed acourtapplication in terms of r 233(3) against the respondent seeking to evict it from number 29 Craster Road, Southerton, Harare. The application was served on the respondent on 28 February 2012. In terms of the rules of court the respondent had ten days within which to respond. The *dies inducae* expiredon 13 March without any response from the respondent. The respondent however filed its notice of opposition a day later on 14 March 2012.

Despite the filing of the notice of opposition the applicant proceeded to file an application for default judgment the next day 15 March 2012 and then set down the matter on the unopposed role on 4 April 2012.

The application for default judgment is being brought in circumstances where the respondent has filed a notice of opposition albeit out of time by a single day. The case of *Founders Building Society* v *Dalib* (*Pvt*) *Ltd & Ors* 1998(1) ZLR526provides a guidelineon what a Lawyerfaced with such a situation ought to do. The head note reads:

*“*In any action where the plaintiff’s legal practitioner contemplates applying for default judgment, but is aware of some proceedings being taken by the defendant which is an attempt at opposition but does not constitute due and regular entry of appearance to defend, he ought to address to the defendant or his legal practitioner due warning of the irregularity of the proceduralsteps*.* Having done so he might then choose between;

1. An application for default judgment; or
2. An application on notice to the defendant to strike out the irregular proceeding.

The laterapplication may be joined with an application for default judgment.

If he opts for default judgment, he must inform the Court of the relevant irregularity and give reasons why the Court should exercise its discretion in the plaintiff’s favour. The fuller, and preferable, course is an application to strike out, coupled with a prayer for default judgment”.

Considering that the Court has discretion and the respondent was only out of time by a day I would rather exercise my discretion in favour of the defendant so as to give him notice of the alleged irregularity so as to give it a chance to deal with it.

In the circumstances of this case justice and fairness require that the applicant be stopped from snatching at a judgment. In the result the application cannot succeed.

**It is accordingly ordered that default judgement shall not be granted in this case until such time the applicant has complied with the above procedural steps. Costs shall be costs in the cause.**

*Mtetwa & Nyambirai* Incorporating *Wilmot & Bennett*, applicant’s legal practitioners

*Muringi Kamudefwere*, respondent’s legal practitioners