

MGCINUMUZI NKOMO

Versus

NABOTH CHIORESO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & DUBE-BANDA JJ
BULAWAYO 18 OCTOBER 2021

Civil appeal - *Ex tempore* judgment

L.Z.K. Dube, for the appellant
Respondent in default

DUBE-BANDA J: This is an appeal against the whole judgment of the Magistrates' Court sitting in Bulawayo. The court *a quo* dismissed applicant's rescission of judgment with costs of suit. The basis of the dismissal was that appellant was in wilful default and that he has no prospects of success on the merits. Aggrieved by the judgment of the court *a quo*, appellant noted an appeal to this court. The grounds of appeal as framed in the notice of appeal are that the magistrate *erred* in finding that appellant was in wilful default and that his application for rescission of judgment had no prospects of success.

This appeal will be better understood against the background that follows. On the 9 December 2019, respondent (as plaintiff) caused a summons to be issued against the appellant (as defendant), claiming payment in the sum of USD750.00. It being alleged that appellant signed an affidavit acknowledging his indebtedness and promising to pay before the 31st August 2019. Appellant defaulted in payment. On the 18 February 2020, appellant filed a notice to defend, and he did not file his plea within the timeline allowed by the Magistrates Court Civil Rules, 2018. On the 3rd March 2020, respondent caused to be issued a notice to plead, such notice was served on the appellant on the 5th March 2020. On the 10th March 2020, appellant filed a request for further particulars. On the 19th March 2020, respondent applied for a default judgment. Default judgment was granted on the 6 June 2020. Appellant then made an application for rescission of judgment, which application was dismissed by the court *a quo*. It is against this background that appellant noted this appeal praying that it succeeds and the application for rescission of judgment be granted.

Regarding wilful default, appellant filed his notice of appearance to defend, and did not file his plea within seven days of the date of filing his notice to defend. He was then served with a notice to plead, instead of filing a plea, he chose to file a requests for further particulars. The notice to plead does not call upon a litigant to file a request for further particulars. It calls upon him or her to file and deliver a plea. Once a litigant has not filed a plea within the timeline allowed by the rules of court, and has been served with a notice to plead, it no longer has the option or luxury to file what it wants, it just has to comply and file a plea. Therefore, appellant's contention that he was not in wilful default because he had filed a request for further particulars holds no water. Appellant completely went off-tangent. This jurisprudence was clearly set out in the case of *Russel Noach (Pvt) Ltd v Midsec North (Pvt) Ltd* 1999 (2) ZLR 8 (H). Appellant was clearly in wilful default.

On the merits, appellant deposed to an affidavit acknowledging his indebtedness and giving a date of payment of the debt. The allegation of duress is just a red herring which has no basis on the facts. Appellant has no *bona fide* defence to the respondent's claim. I could not award respondent costs as he was in default at the hearing of this appeal,

It is on the basis of the foregoing reasons that this appeal is dismissed in its entirety with no order as to costs.

Makonese J I agree

Mathonsi Ncube Law Chambers, appellant's legal practitioners