

**MISHECK RUEBEN CHIPISA**

**Versus**

**ESTATE LATE BOB RIVETE**

**And**

**THE MESSENGER OF COURT**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA AND MOYO JJ  
BULAWAYO 21 JUNE AND 21 OCTOBER 2021

**Civil Appeal**

*T Ndlovu*, for the appellant  
*J Tshuma*, for the respondent

**MOYO J:** The appellant had his application for rescission of judgment dismissed by the Magistrate's Court on the reasoning that the security for costs had not been paid. At the hearing of the matter, we dismissed the appeal *ex tempore*. Appellant requested for written reasons. Here are the reasons.

The grounds of appeal are that:-

1. The court *a quo* misdirected itself by dismissing the appellant's *ex parte* and rescission application on the basis that the security for costs had not been tendered and paid and yet there is evidence by way of receipt that the security costs were paid on 2 March 2020.
2. That the court *a quo* erred at law by dismissing appellant's *ex parte* and rescission application instead of proceeding by removing the matter from the roll.

The relief sought was that the appeal be upheld and the point *in limine* relating to the security costs be dismissed and the court *a quo* should proceed to hear the matter on the merits.

The facts of the matter were that appellant launched an application for rescission of judgment before the Magistrate's Court on 6 February 2020. 1<sup>st</sup> respondent filed a notice of opposition on 20 February 2020. The 1<sup>st</sup> respondent raised a point *in limine* that appellant could not be heard without payment of the security costs. In the answering affidavit at

paragraph 3 the applicant averred that the security costs had been paid. It was sworn to on 25 February 2020. No proof was attached to the answering affidavit as clearly when this averment was made it was untrue, appellant was not telling the truth as page 224 of the court record will show that the security costs were only paid on 2 March 2020.

Clearly, from the record of the court *a quo*, the learned Magistrate could not have been expected to fish out for the receipt for the security costs. Appellant was dutybound, having been challenged on that point to attach proof to the court in the answering affidavit that the costs had been paid. Appellant could not do so because clearly at the time of filing the answering affidavit the costs had not been paid.

While appellant on the second ground of appeal submitted that the learned Magistrate should have struck the matter off the roll, instead of dismissing it, he however sought an order that this court should dismiss that finding and order the court *a quo* to proceed and hear the matter on the merits. This court could not proceed in that manner as clearly the proof of payment for security costs had not been tendered before the learned Magistrate at the time of dealing with that issue. We thus held the view that we could not find that the learned Magistrate misdirected herself on the point given that appellant boldly asserted that costs had been paid by 25 February 2020 when they had not been paid and thus could not attach the proof.

The appellant sought the relief that the decision of the learned Magistrate on the payment of the costs for security should be set aside and the matter ordered to proceed on the merits. It is common cause that at the time appellant filed an answering affidavit in the Magistrate's Court, he failed to prove to the learned Magistrate that the costs had been paid because they had not been paid as at that date. The appellant was thereafter duty bound to alert and prove to the court that the costs had been paid since the issue of payment of such costs was an issue before the court.

We thus find no misdirection on the part of the learned Magistrate and we accordingly dismissed the appeal.

Takuva J ..... I agree

*Sansole & Senda*, appellant's legal practitioners  
*Scalen & Holderness c/o Webb, Low & Barry*, 1<sup>st</sup> respondent's legal practitioners