

**KEVIN JAMES SHADWELL**

**And**

**REVCO (PVT) LTD**

**Versus**

**RAYMOND MAVENGANISE SVONDO**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 14 & 6 JULY 2017

**Court Application for Rescission of a Default Judgment**

*N. Mangena* for applicants  
*S. Siziba* for respondent

**KAMOCHA J:** In this matter the applicants failed to attend a pre-trial conference before a judge on 21 July, 2015. Their failure to attend led to their defence being struck out and the plaintiff being granted leave to set the matter down on the unopposed roll. A default judgment was then granted a month later on 20 August, 2015. It is in respect of that judgment that the applicants who were defendants in the matter seek an order in the following terms:

“It is ordered that:

- (1) The judgment in case number HC 1261/14 granted on 20 August 2015 be and is hereby rescinded.
- (2) The applicants’ defence to the summons be and is hereby reinstated and the registrar be and is hereby instructed to set the special plea down for hearing.
- (3) Costs shall be in the cause.”

The background of this matter is that Mr Raymond Mavenganise Svondo herein after called “the respondent” and the two applicants had been involved in a dispute regarding a claim for payment arising out of a shareholders’ agreement entered into between him and 20 others and Kevin James Shadwell – “the first applicant”. The respondent and 20 others had been afforded

the opportunity by the 1<sup>st</sup> applicant to subscribe for shares in Revco (Pvt) Ltd – “the 2<sup>nd</sup> applicant” as its employees. The respondent left the employ of the 2<sup>nd</sup> applicant and claimed payment of the sum of US\$20 000,00 as equivalent to the value of his shares.

The respondent issued summons against the two applicants who entered appearance to defend. The applicants filed a special plea in which they raised issues of mis-joinder and non-joinder and jurisdiction. Both parties filed their heads of arguments in respect of the special plea and thereafter awaited a date for the hearing of the special plea.

Notwithstanding the fact that the special plea was yet to be heard, and the applicants had not filed a plea to the merits, respondent proceeded to file his discovery documents and a pre-trial conference minute. The legal practitioners of the applicants addressed a letter to the respondent’s legal practitioners on 13 March 2015 in the following terms:

“Reference is made to the above matter and to your pre-trial conference documents received on 12 March 2015.

We believe that the same have been filed prematurely in light of the fact that the special plea is yet to be heard. The outcome of the hearing will have material effect on the filing of any other documents. We therefore request that you withdraw the same.

We advise accordingly.

Yours faithfully”

The respondent’s legal practitioners did not respond to the above letter. Instead on 30 June 2015 the applicants received notice of set down which they believed was a notice of set down for the special plea, but turned out to be for a pre-trial conference. The legal practitioners of the applicants again wrote the respondent’s legal practitioners on 10 July 2015 thus:-

“Our letter of 13 March 2015 refers. We have received notice of the set down of this matter for a pre-trial conference. Notwithstanding, we believe that you pre-trial documents were filed prematurely and this matter should not have been set down.

HB 188/17  
HC 2422/15  
X REF HC 121/17

We must remind you that we filed a special plea which is yet to be heard. The outcome of that hearing will have a material effect on the filing of any other documents. In any event, we have not filed a plea on the merits and have not been called upon to do so. Pleadings are therefore not closed in terms of Order 26 as read with Order 16 of the High Court Rules, 1971 and it is our view that the pre-trial conference cannot proceed.

Kindly attend to the withdrawal of your pre-trial conference documents and removal of the matter from the pre-trial conference roll to avoid any wasted costs which would be incurred in having to attend the same.

Yours faithfully”

The respondent’s legal practitioners had written the following letter to the applicants’ legal practitioners presumably in answer to the letter of 13 March 2015.

“We refer to the above matter.

We propose a roundtable meeting in this matter. We suggest the 15<sup>th</sup> or 20<sup>th</sup> of July at 2:30 at our offices.

Kindly revert back to us with a suitable date at an earliest convenience.

Yours faithfully”

What comes out clearly from the correspondence between the legal practitioners and the affidavits by the parties is that the applicants had filed a special plea which was yet to be heard. Requests for the special plea to be heard were made to the registrar who promised that the matter would be set down when dates would be available. The applicants had not pleaded on the merits. The pleadings were therefore not closed. Consequently there should not be pre-trial conference before pleadings are closed. The parties’ legal practitioners who are officers of the court ought to have brought that to the attention of the judge conducting the pre-trial conference instead of seeking the defendant’s defence to be struck out and have the matter enrolled on the unopposed roll.

The respondent's legal practitioners were fully aware of all that was happening in this matter but were not candid with the judge. This court takes a very dim view of legal practitioners who conduct themselves in that manner.

This court holds that the applicants have proffered a reasonable and acceptable explanation for failure to attend the pre-trial conference meeting.

Turning now to the prospects of success this court is satisfied, from the submissions made by both counsel and the papers filed of record, that the applicants outlined facts which disclose a defence *ex facie* which cannot be rejected out of hand and warrants investigation. The defence in *bona fide* in my view.

In the result I would grant the application in terms of the draft order.

*Honey & Blanckenberg*, applicants' legal practitioners

*Mweli Ndlovu & Associates*, respondent's legal practitioners