

STANLEY MPOFU
versus
SAMPSON SAMUEL MLAUDZI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 JULY 2018 AND 20 SEPTEMBER 2018

Opposed Matter

T Gamure for the applicant
D Moyo for the respondent

MOYO J: In this matter the applicant seeks condonation of the late noting of an application for rescission of judgment. At the hearing of this matter I dismissed the application and advised the parties that my detailed reasons will follow. Here are the reasons.

The facts of the matter are that a judgment was granted in default against the applicant and in favour of the respondent in February 2014. The summons that resulted in the default judgment had been served on an employee of the applicant, that is, at his former insurance company.

Applicant alleges that he never saw the summons but only saw the order and he then tried to engage the respondent. In paragraph 3.5 of the applicant's founding affidavit he avers that

“Pursuant to the order I have sought to have an amicable settlement of the matter to no avail but I have since paid \$20800-00 out of the \$50000-00 actual loan and I attach hereto a schedule of payment.”

Applicant further avers that he delayed to challenge the matter because of “a good friendship and personal relationship with the respondent.”

On the merits, applicant avers that he was loaned \$5000-00 by the respondent and not \$50000-00 as claimed in the summons.

Applicant has two immediate problems with his case. The first problem is that from his own affidavit he was indeed in wilful default. He deliberately refrained from doing something in time about the judgment because of the good friendship and personal relationship that he had with respondent. This then pokes holes in applicant's case because in essence it means there is no reasonable explanation for the delay to seek the reversal of the judgment. For applicant to be granted condonation, it is trite that he must proffer a reasonable explanation for his inaction. He has failed to do so. In fact he even made payments after being aware of the default judgment meaning he agreed with it. The default judgment was granted in February 2014 per applicant's own averments and although he does not tell us when precisely he became aware of this judgment, we have it on court record that in October 2015, applicant's then legal practitioners, made an offer to pay respondent's dues at the rate of \$2000-00 per month. In January 2015, applicant actually sought to apply to the High Court to set aside the sale of his immovable property which had been attached in execution of the judgment being the subject matter of this application meaning applicant did all other things like offering payment, seeking to set aside the sale of his immovable property, but never at that juncture thought of rescission because obviously deep down he knew he had to pay. In paragraph 5.1 of the founding affidavit in HC 2931/14 (which is the application to set aside the sale in execution), applicant stated thus:

“The amount I have liquidated so far from the judgment debt of \$50000-00 granted on 11 February 2014 is \$4000-00 and the amount left owing is \$46000-00.”

Applicant gave that statement under oath. Not only did applicant make that offer in court process but he had acknowledged indebtedness to respondent way back in 2012 in the sum of \$50000-00.

He also wrote a letter dated 14 March 2014 proposing a payment plan. This was about a month from the date judgment was obtained against him. Applicant is thus lying to this court when he seeks to disown the sum owing. He has also not filed this application in good faith as he knows he neither has a reasonable explanation for his inaction nor any prospects of success on rescission. He is in abuse of court process launching litigation dishonestly to achieve delays yet

he knows very well that there is absolutely no substance in the case he is making. It is for these reasons that I dismissed the application with costs at a punitive scale because applicant's conduct is mala fide. He is not seeking justice. He wants to use the court process to subvert justice. He must be penalized in that regard.

It is for the reasons stated herein that I dismissed the application with costs as at the legal practitioner and client scale.

Sengweni Legal Practice, applicant's legal practitioners
Samp Mlaudzi and Partners, respondent's legal practitioners