

**C.G. TOMMY**

**Versus**

**MICHAEL JOHN GUNN**

**And**

**LINDY GUNN**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE & MOYO JJ  
BULAWAYO 11 FEBRUARY 2019

**Civil Appeal**

*D. Dube* for the applicant

*S. Tshumele* for the respondents

**MAKONESE J:** This is an appeal against the judgment of the magistrate sitting at Bulawayo on the 8<sup>th</sup> January 2018.

The respondents instituted action in the Magistrates' Court seeking amongst other things the eviction of the appellant and payment of arrear rentals in respect of a property known as number 4 Clocolan Road, Burnside, Bulawayo. The respondent defended the matter. The matter was set down for a pre-trial conference. The applicant and her legal practitioner failed to attend the hearing. The respondent applied for and obtained leave to file an application to strike out appellant's defence. The application was made and an order was granted.

The applicant has applied against the judgment of the magistrate striking off the appellant's defence. The issues raised in the notice of appeal are primarily:

- (a) Whether the appellant was in willful default in failing to attend the pre-trial conference
- (b) Whether the appellant had a *bona fide* defence to the respondent's claims

It is common cause that the appellant through her legal practitioner were duly notified of the pre-trial conference date. It was argued on appellant's behalf that her legal practitioner was seized with another matter in the High Court at Harare. There was no support for the allegations made in respect of the non availability of the appellant's legal practitioner. The appellant herself did not proffer any reasonable explanation on why she failed court as a litigant, in person, in the matter. The fact that a legal practitioner is unavailable to attend court does not absolve the litigant in his or her own capacity to attend court to explain why the legal practitioner is unavailable, in protection of his or her interests. The appellant failed to give a reasonable explanation for the default.

In the case of *Mdokwani v Shoniwa* 1992 (1) SA 269 (S), the court stated at page 271 as follows;

*“Clearly it was incumbent upon the appellant at the hearing before the magistrate to satisfy the court that he was not in willful default. He had to show that there was an acceptable reason for the late filing of the appearance to defend and that he has a bona fide defence to the respondent's action.”*

The meaning of willful default was aptly put by MURRAY CJ in the case of *Newman Pvt Ltd v Marks* 1960 (2) SA 170 (SR) at 173A-D, where he stated the principle as follows;

*“The true test, to my mind, is whether the default is a deliberate one- i.e when a defendant with full knowledge of the set down and the risks attendant on his default, freely takes a decision to refrain from appearing, .....”*

I have gone through the pleadings in this matter, and note with concern that the appellant has no *bona fide* defence. The appellant does not deny that arrear rates had accrued to the tune of US\$1 500,00 as at December 2016. The appellant alleges that she purchased the property from second respondent together with the late Richard Roberts for the sum of BWP41 000. There is no written agreement of sale between the parties. There is absolutely nothing in support of the appellant's allegations. The Estate of the late Richard Roberts has been wound up and there is no indication that the property in issue was ever part of the estate. 1<sup>s</sup> respondent remains the holder of real rights over the immovable property in question and remains the owner to date.

The applicant simply has no defence to respondent’s claims and this appeal has been made for the sole purpose of delaying and frustrating finalisation of this matter. This court takes a dim view at the appellant’s conduct.

I accordingly, find that the appeal has no merit and in the result the appeal is dismissed with costs.

Moyo J .....I agree

*Mathonsi Ncube Law Chambers* Applicant’s legal practitioners  
*Messrs Dube-Banda, Nzarayapenga & Partners*, respondent’s legal practitioners