

MILFORD HAVEN AGENCIES (PVT) LTD

And

PHILMON MATIKA

And

PATRICK MATIKA

Versus

HARRODS HOLDING

And

MESSENGER OF COURT

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

Civil Appeal

Miss T. Dube for appellants
S. Tsumele for the respondent

MAKONESE J: The appellants have noted an appeal to this court against the whole judgment of the Magistrates' Court sitting at Bulawayo on 2 October 2017.

The grounds of appeal are essentially these:

- (a) The learned magistrate in the court *a quo* erred in dismissing the application for rescission of judgment.
- (b) The learned magistrate erred in failing to appreciate that the default judgment was entered erroneously.

The background to this matter is that 1st respondent instituted an action in the Magistrates' Court against the appellants seeking payment in the sum of US\$10 400.00 being

arrears rentals and US\$2 850 in respect of operational costs and an order for ejection from the premises at shop 1, Sindhu House, 5th Avenue/Herbert Chitepo Street, Bulawayo. The respondents further claimed hold over damages at the rate of \$30, 00 per day with effect from November 2015 to date of eviction. The appellants expressed their desire to defend the action by filing an appearance to defend on 27th November 2015. On 17th December 2015 a notice of withdrawal of the appearance to defend was filed by appellants' erstwhile legal practitioners, *Messrs James Mutsauki Attorneys*. The respondents proceeded to file a request for default judgment. Default judgment was granted on 4 January 2016. An application for rescission of that judgment was made in the court *a quo*. The application for rescission of judgment was dismissed. The court held that there was no *bona fide* defence to the respondents' claims.

The legal position and requirements for rescission of judgment are well settled in our law. Even if a party satisfies the court that there was no willful default, the law requires that a party seeking rescission of judgment must set out its defence. If one has no valid defence to the claims, the matter ends there. There can be no basis to set aside a judgment where a defendant to the claim does not set out its defence to the satisfaction of the court. See the remarks by Tsanga J in *National Railways of Zimbabwe v Bruno Enterprises HH 23/16*. The heads of argument in this appeal are largely incoherent and a complete disservice to the appellants.

In the founding affidavit of their application for rescission of judgment the appellants state as follows:

"1st respondent has failed to give the applicant peaceful and undisturbed occupation of the leased property ..."

One wonders why the appellants remained in the leased property if they did not have beneficial use of the property. This simply does not make sense. It is the view of this court that the appeal is a desperate attempt to avoid the consequences of the default judgment. The appeal is an abuse of court process. The court frowns upon such conduct. Such matters only help to clog the court roll. Lawyers must assist the court in arriving at correct decisions and must avoid frustrating the justice system by bringing hopeless and frivolous appeals.

In the result, the appeal is hereby dismissed with costs on an attorney and client scale.

Moyo J I agree

Ndove & Associates, appellants' legal practitioners

Dube-Banda, Nzarayapenga & Partners, respondent's legal practitioners