TAKAWIRA GATSI

versus

MARGARET CHINAMHORA

and

THE DEPUTY SHEIFF HARARE

HIG COURT OF ZIMBABWE

BERE J

HARARE, 7 and 9 November 2012

**Opposed Application**

*T.E. Mudambanuki*, for the applicant

*S. Mushonga*, for the 1st respondent

BERE J: This is a simple application for rescission of judgment obtained against the applicant by the first respondent in this court in case no HC 8216/11.

The law is clear and settled. The starting point in considering such an application is for the court to consider the reasons for the applicant’s default paving way for the granting of the default judgment. If this hurdle is not satisfied, the matter must end here. It is only when the court accepts that the default has some reasonableness in it that the court will then proceed to consider whether or not the applicant has a *bona fide* defence.

From the very beginning the authenticity of the appearance to defend allegedly entered by the applicant was put in issue by the first respondent. She came short of suggesting that this was a forged document and gave an explanation for that.

The first respondent specifically stated that there was no notice of appearance to defend which was ever entered by the applicant. She explained that the document referred to as an appearance to defend did not bear her legal practitioner’s stamp to demonstrate its genuineness.

Besides the first respondent specifically stated that there was no one by the name Loice at her legal practitioners who could have received the notice of appearance to defend.

The applicant’s situation was further compounded by the admission by the applicant himself that a wrong case number had been endorsed on the so called notice of appearance to defend.

The issue raised by the first respondent in her opposing affidavit could only have been controverted by the applicant’s erstwhile legal practitioners or by way of some answering affidavit as these are the documents which could have strengthened the applicant’s position.

There was no attempt at all by the applicant to rebut through her papers the alleged forgery on the appearance to defend. There was also no explanation from her erstwhile legal practitioners as to why the correct reference number was not put on the notice of appearance to defend. The nearest the applicant did was to speculate on what may have happened through her counsel’s submissions in court. But the applicant’s case is not built in the Heads of Argument but in the founding papers. The court does not derive any meaningful assistance from speculative submissions or unsubstantial postulations.

Even if one were to give the applicant the benefit of doubt and accept the reasonableness of her default (which I must emphasize I am not conceding to), one would struggle to find the possible defence which the applicant would have were he to be granted rescission of judgment.

The applicant has already conceded his liability for the outstanding rentals and up until now he has not made arrangement to settle that debt.

The applicant challenges the utility bills from ZESA and Harare City Council without attempting to provide exact alternative figures that he is owing to these service providers. Compare this with the documentary exhibits attached by the first respondent which tally with the amounts of claim as reflected on the summons.

When pushed to the wall the applicant then attempts to paint the first respondent as a very inconsiderate person who caused him to unceremoniously vacate the leased premises. Several months down the line no action has been initiated by the applicant to try and correct the civil wrong allegedly done to him. All he could do was to constantly remind the court in these proceedings that he is contemplating taking action against the first respondent for loss of business.

I am satisfied it would be a grave miscarriage of justice if the applicant were to be granted rescission of judgment in this situation. This application ought not to have been filed at all and it was solely filed to delay the day of reckoning and such reckless prosecution of matters must be discouraged and the only way to drive the message home loud and clear is to hit the applicant with a punitive order of costs.

Perhaps before I conclude, I need to comment on another disturbing feature of this case. After the parties had closed their submissions through their respective legal practitioners the following day I had a bunch of papers placed before me from the applicant’s counsel for further consideration.

That practice must be discouraged for it amounts to an attempt by a party to derive the court’s sympathy through the back door.

Once a matter has been argued and is awaiting determination no party should be allowed to smuggle in further papers into the court record. It is for this reason that I did not allow the papers smuggled into the court record to influence my determination.

Consequently the application is dismissed with costs on Attorney-Client Scale.

*Mudambanuki & Associates*, applicant’s legal practitioners

*Mushonga, Mutsvairo & Associates*, 1st respondent’s legal practitioners