

MICAH MATSHIYA t/a GADI BUTCHERY

versus

GANGARAMS INVESTMENTS (PVT) LTD

and

THE MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
KAMOCHA & CHEDA JJ
BULAWAYO 13 AND 23 MAY 2002

A J S Sibanda for the appellant
B Sibanda for the 1st respondent
No appearance from 2nd respondent

Civil Appeal

KAMOCHA J: The first respondent applied for and was granted summary judgment by default. The appellant applied for the rescission of that judgment without success. He now appeals against the magistrate's decision.

For the purposes of this judgment I shall refer to the appellant as the defendant

and the first respondent as the plaintiff.

The sequence of events in this matter are briefly these. The plaintiff issued

summons on 13 April 1999 claiming the following:

- (a) Payment of the sum of \$3 050,00;
- (b) Ejection of defendant/appellant;
- (c) Damages at the rate of \$101,67 per day reckoned from the 1st of May 1999 to the date of ejection;
- (d) Interest a tempore morae, and
- (e) Costs of suit

The defendant entered appearance to defend on 22 April 1999.

Because the plaintiff held the view that defendant had entered appearance to defend

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just to buy time and had no genuine defence it applied for summary judgment on 11

June 1999. The appellant was served with the application on 16 June 1999.

On receipt of the application the appellant went to a pressure group known as

Affirmative Action Group to seek advice on the way forward. The defendant who was a businessman of long standing should have gone to a law firm to seek advice instead of a pressure group. As it turned out the pressure group did nothing about the matter until summary judgment was granted by default.

The defendant applied for the rescission of that judgment but his application failed because the court a quo found that he was in willful default. The court a quo held the view that since the appellant chose to spend most of his time dealing with Affirmative Action Group and only decided to consult legal practitioners as a last resort he was in willful default.

In his appeal the appellant pointed out that the defendant was not properly before the court a quo because the application for summary judgment was made way out of time. It should have been made within seven days after receiving notice of appearance to defend as required by order 15 rule 1(2) of the Magistrates' Court Rules.

The appellant is correct because the Magistrates' Court Rules unlike the High Court Rules which allow an application for summary judgment to be made any time after appearance to defend has been entered provided it is before the holding of a pre-trial conference. Order 15 rule 1(2) of the Magistrates' Court Rules reads as follows:

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“(2) An application in terms of sub rule (1) shall be made on not less than seven days' notice delivered not more than seven days after the date of defendant's appearance to defend and the plaintiff shall deliver within such notice ...”

In casu the application for summary judgment was made after about 50 days.

The situation is made worse by the fact that having been out of time for such a long time the applicant made no attempt to apply for condonation. The application was simply lodged as if everything was in order. The trial magistrate does not seem to have been aware of the defect non compliance with the rules.

An application for summary judgment should ensure that there is compliance with the rules governing such applications as failure to do so may result in a fatal defect. In this case the provisions of the rules are peremptory and no explanation was given for failure to comply with the rules. The court a quo should have granted the application for rescission of judgment.

In the circumstances the appeal succeeds. The judgment of the court a quo dismissing the application for rescission of judgment with costs is hereby set aside. It is substituted with an order that the application for rescission be and is hereby granted with costs. The respondent shall pay the costs of this appeal.

Cheda J: I agree

Joel Pincus, Kenson & Wolhuter appellant's legal practitioners
Messrs Sansole & Senda first respondent's legal practitioners