

DEEP RED SERVICES (PRIVATE) LIMITED
and
BIGBOY SYDNEY NDLOVU
and
NTOMBIZAMI NDLOVU
versus
UNIVERSAL BAGS (PRIVATE) LIMITED
and
THE DEPUTY SHERIFF, BULAWAYO

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO, 19 October and 16 November 2006

Opposed Application

Mr *S Nkiwane*, for applicants
Ms *P Dube*, for 1st respondent

KAMOCHA J: This is an application for rescission of a default judgment in case number HC 682/06 entered by this court on 29 May 2006 against the applicants following their failure to enter appearance to defend timeously. An automatic bar became operative. The applicants were invited by the lawyer of the other party, through their legal practitioner, to make a formal application for the upliftment of the automatic bar but they did not.

It is common ground that summons was served upon a responsible person at the company's premises on 29 March 2006 but the 2nd applicant was said to be out of Bulawayo. The 2nd applicant took the summons to the applicant's legal practitioners on 7 April 2006 who only entered appearance to defend on 20 April 2006.

It is not clear why the applicants did not immediately take the summons to their legal practitioners from 29 March 2006 to 7 April 2006. The fact that the 2nd applicant was out of town at that time was no excuse for the 3rd applicant's failure to hand the summons to their legal practitioners.

The legal practitioners received the summons on 7 April 2006. They also were of no help as they took no action for 13 days and entered appearance to defend out of time. Their explanation for the failure to do

so is not convincing at all. The legal practitioner who proffered an explanation for the failure to act timeously stated that he was perusing the records and seeking clarification. That explanation lacks persuasiveness. No one can accept that it would take 13 days for a legal practitioner to peruse records and to seek clarification. In my view the explanation given by the applicants and their legal practitioners are completely unconvincing and unacceptable. In the result I hold that their default was wilful.

I now turn to examine if the applicants have got a good and *bona fide* defence on the merits. Briefly the background to the matter is that on 2 September 2003 Universal Bags (Private) Limited and Deep Red Services (Private) Limited entered into an agreement of lease in respect of industrial premises situated at 18 Woodbury Road, Thorngrove, Bulawayo.

Deep Red Services (Private) Limited which is the 1st applicant herein allegedly breached the lease agreement by failing to pay rent. Infact failure to pay rent does not seem to be disputed. Correspondence filed of record reveals that applicants needed time to pay off arrears. Of late the applicants were refusing to pay any rentals at all yet they continued to occupy the rented premises. They breached a very vital term of the agreement of lease.

By failing or refusing to pay any rentals the applicants ceased being statutory tenants. In the light of the above it seems to me that the applicants have no *bona fide* defence and I would dismiss their application for rescission with costs.

Messrs Lazarous and Sarif, applicant's legal practitioners
Joel Pincus, Konson and Wolhuter, 1st respondent's legal practitioners