Judgment No. HB 127/11
Case No. HC 689/10
X REF HC 415/10 & HC 563/10

CHARLES KASTO

Versus

CHENGETAI SITHOLE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 4 JANUARY, 9 & 15 SEPTEMBER 2011

Applicant in person
Miss N. Ncube for respondent

Opposed Application

NDOU J: This is an application for rescission of judgment. The salient facts of the case are the following. The respondent issued summons for debt collection against the applicant under case number HC 514/10. The applicant was served with the summons on 8 March 2010. The applicant entered an appearance to defend the action on 22 March 2010 but did not serve the notice on the respondent. The applicant's legal practitioners renounced agency on 31 March 2010. The respondent made an application for default judgment in terms of Order 9 Rule 57 and it was granted on 1 April 2010. A warrant of execution against property was issued by respondent on 14 April 2010. The Deputy Sheriff attached property at the applicant's address and failed to remove because the premises were locked. On 22 April 2010, the respondent's legal practitioners were served with a provisional order granted by this court staying execution of the order under case number HC 415/10. The applicant also served the respondent with an application for rescission. It is beyond dispute that the applicant did not serve his notice of appearance to defend on the respondent. He was required to do so by Order 7 Rule 49 of the High Court Rules, 1971. The notice was not in the file at the time the respondent made his application for default judgment. The applicant was barred from the foregoing.

The applicant's notice of appearance was not good or proper as it does not comply with Order 7 Rule 49. In terms of Rule 49 a defendant shall within 24 hours of entry of appearance serve a written notice on the plaintiff or his legal practitioner. In terms of Rule 50, the defendant shall be deemed to be barred for failure to comply with the provisions of Rule 49.

The applicant was therefore in willful default at the time the respondent applied for a rescission of judgment – *Zimbabwe Banking Corporation* vs *Masendeke* 1995 (2) ZLR 400 (S) and *V. Satis & Co (Pvt) Ltd* vs *Fenlake (Pty) Ltd* 2002 (1) ZLR 378 (H). From these authorities the test

for rescission of judgment under Rule 63 of the High Court Rules, *supra*, is whether the applicant has established a good and sufficient cause for the relief sought. Absence of willful default does not necessarily mean that rescission must be granted; the applicant must still establish a good and sufficient cause for rescission. *In casu*, the default was willful on account of failure to comply with Rule 49, *supra*. The applicant's argument on the merits is scant. He merely makes a naked averment that he denies receiving the amount of the loan and agreeing on the rate of interest. His case is weak on the merits. The cumulative effect of the willful default and a weak case on the merits is that the application is devoid of merit.

Accordingly, the application for rescission it dismissed with costs.

Webb, *Low & Barry*, respondent's legal practitioners