

**DERICK MASEKO**

**Versus**

**MPIKELELO NGANEZWE KHUMALO**

**And**

**THE DEPUTY SHERIFF**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 7 OCTOBER 2011

*R Mahachi* for applicant

..... for 1<sup>st</sup> respondent

No appearance from 2<sup>nd</sup> respondent

*Ex Tempore*

Opposed Court Application

**KAMOCHA J:** The legal representative of the first respondent informed the applicant's legal practitioner that he was on leave and would therefore not be able to come to court to argue this matter. He suggested that the applicant's legal practitioner should seek for a postponement of the matter to some future date when he will be available.

This, of course is unacceptable as it shows lack of seriousness on the part of the legal practitioner. The fact that he was on leave does not mean that all business at their law firm comes to a standstill. Another lawyer from that firm should have come to court to argue the matter. In the result, this court does not accede to the request for a postponement.

In any event the legal practitioner had not even filed the respondent's heads of argument as required by rule 238 (2a) the rules of court and is accordingly barred in terms of rule 238 (2b) of the rules of court which provides that:

“(2b) where heads of argument that are required to be filed in terms of sub-rule (2) are not filed within the period specified in sub rule (2a), the respondent concerned shall be barred and the court or Judge may deal with the matter on merits or direct that it be set down for hearing on the unopposed roll.”

The court then proceeded to deal with the matter on merits.

The applicant in this matter was seeking an order in the following terms:

“It is ordered that:

- 1) The 1<sup>st</sup> respondent be and is hereby ordered to pay the applicant US\$2 860,00 within 5 days of service of this order;
- 2) The 2<sup>nd</sup> respondent be and is hereby ordered to take into its custody a motor vehicle Toyota registration number ABQ 7703 and to sell the said motor vehicle by public auction on failure by 1<sup>st</sup> respondent to comply with number 1 above;
- 3) The 1<sup>st</sup> respondent be and is hereby ordered to pay costs of suit on attorney – client scale.”

According to applicant the respondent borrowed some money from him in the sum of \$2 860,00. On 23 September, 2010 the transaction was recorded by the respondent thus:

“23/09/10

To whom it may concern

I, Mr M.N. Khumalo, of 14585 Ihlosi Rd, Selborne park, I.D. No. 2508124 A 19 have borrowed \$2 860,00 from Mr D. Maseko which I promise to pay back on the 28<sup>th</sup> of October 2010.

I acknowledge that Mr Maseko has the right to institute legal proceedings against me in the event of failure to meet my obligation of payment. Surety is my newly imported Toyota Raum (Reg ABQ 7703)

M.N. Khumalo

(I.D. No. 250814 A 19”

The above was witnessed by D. Maseko the applicant and one S. Gumede. The respondent failed to pay by due date as promised. The respondent was reminded of his failure to pay as promised. Whereupon he again made another promise and wrote the following.

“29/11/10

To whom it may concern

I Mr M.N. Khumalo of 14585 Ihlosi Rd, Selborne park I.D. No. 250814 A 19 have failed to pay \$2 860,00 to D. Maseko as I had promised, hence will pay it back on the 29<sup>th</sup> of December 2010.

I acknowledge that Mr Maseko has the right to take legal proceedings against me if I fail to meet my obligation of payment. Surety is my newly imported Toyota Raum (Reg No. ABQ 7703)

M N Khumalo I.D 250814 A 19”

This was also witnessed and signed by the applicant and one S. Gumede.

Needless to say the respondent still failed to meet his obligation prompting applicant to institute these proceedings. The respondent’s reply was that he at no stage disputed his indebtedness to applicant adding that he had in fact always acknowledged his indebtedness to applicant without the need for applicant to look for him. He complained that he had always wanted to negotiate with applicant who was not prepared to give him audience but instead was bent on just wanting to drag him to court unnecessarily thereby exposing him to unnecessary legal costs.

Suddenly the respondent started to approbate and reprobate by denying having borrowed the said amount from applicant. His suggestion does not need any serious consideration and must be rejected in the light of what he wrote himself. He said he had always acknowledged his indebtedness without being prompted by the applicant and now turns to say he did not borrow that money. That does not make sense at all.

Similarly his suggestion that he had paid \$400 on 28 October 2010 and \$800,00 on 29 November 2010 does not make sense as well. If he had paid a total of \$1 200 by the 29<sup>th</sup> of November 2010 he would have said so in his second acknowledgement of debt which he wrote on that day. Instead he wrote that he had failed to pay the \$2 860 to the applicant. The respondent is an unreliable person who is abusing court process. He must pay punitive costs for his behavior.

The applicant has abandoned paragraph 2 of the order being sought. In the result I would issue the following order:

It is ordered that:

- 1) The 1<sup>st</sup> respondent be and is hereby ordered to pay the applicant the sum of US\$2 860,00 within 5 days of service of this order; and
- 2) The first respondent shall pay costs of suit on an attorney and client scale.

*Messrs T. Hara & Partners* applicant’s legal practitioners

*Advocate S.K.M. Sibanda & Partners* 1<sup>st</sup> respondent’s legal practitioners