MIKE BELINSKY
versus
TONDERAI CHIPERE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 14 January 2009 & 22 February 2012

Exception

D Kufaruwenga, for the excipient
P*C Paul*, for the respondent

HUNGWE J: the defendant filed a special plea on 20 October 2008. The following facts constitute the basis of the special plea.

1. The respondent (plaintiff in the main matter, hereinafter called "Plaintiff") issued summons under case number HC 190/08 claiming damages arising from a road traffic accident on 14 January 2008.
2. Pleadings were exchanged between the parties leading to a convening of the pre-trial conference before the judge in chambers in terms of rule 182 of the High Court Rules, 1971 ("the Rules").
3. The pre-trial conference was sent down for 22 April 2008 for the parties to attend with a view to either settle the matter or defining issues to be referred for trial.
4. Plaintiff's legal practitioners or his representatives failed to turn up.
5. Defendant made an oral application for the dismissal of the plaintiff's claim to the judge in chambers and obtained an order dismissing the claim with costs on the same day.
6. Thereafter plaintiff issued fresh summons based on the same cause of action claiming the same relief from the same party under case number HC 3349/08. This is the present action.
7. The matter has been set down for trial.

Defendant took exception to a fresh process issued by plaintiff. He argues that plaintiff ought to have applied for rescission of the default judgment in terms of either r63 or r 449 of the

Rules. Without having obtained rescission of the judgment, so the defendant contends, plaintiff's claim stands dismissed with costs. He contends that plaintiff is barred from instituting fresh action.

As I understood it, Mr *Kufaruwenga's* argument on behalf of the defendant, is this since the claim was dismissed in terms of r 182(11) plaintiff cannot, without first obtaining rescission of that judgment, issue fresh process as the dismissal still stands. The only course of action open to a party eager to pursue an action so dismissed is to first to seek rescission in terms of r 63 of the Rules.

Plaintiff disputes this contention. Mr *Paul*, for the plaintiff figured that r 63 was permissive. It gave the plaintiff against whom default judgment was entered two options. The first option was to seek rescission of that default judgment, and, after obtaining it, proceed on the same papers. The second option was to literally abandon those papers and issue fresh ones. So long as the order for costs has been discharged, according to this argument, it is open to the plaintiff to commence fresh action since the dismissal of the action at pre-trial conference stage is akin to absolution from the instance. This interpretation, argued Mr *Paul* accords with the tenor of Rules 59, 59A, 60, 61, 62 and 63.

It seems to me that the defendant's argument should meet with failure for two reasons. First, the defendant expressly abandoned the special plea of *res judicata* notwithstanding the fact that defendant had expressly couched that special plea which he had filed with this court on 20 October 2008 as the basis of the special plea. If this was meant to be just a preliminary objection (which it sounds more like), then defendant ought to have sought the dismissal of the plaintiff's case as he did, but a stay of proceedings till plaintiff had paid the costs in terms of the order in HC 190/08. (See *Western Cape Housing Development Board & Another* v *Parker & Another* 2005 (1) SA 462). Second, the rules grant the power to the court to enter judgment or make such order as it may think fit depending on the circumstances without hearing evidence. Rules 58, 59, 59A, 60, 61 & 62. It is said in a judgment obtained in this manner amounts to a default judgment. When the plaintiff had failed to appear in person or through counsel, for trial or in

obedience to the directive, generally an order for dismissal of his claim is entered. Such an order dismissing the plaintiff's claim is at law not the judgment for the defendant.

In *Munemo* v *Muswera* 1987 (1) ZLR 20 (SC**)** @ p22 McNALLY JA put the matter this way

> ".....The judgment relied upon was not the judgment for the plaintiff, nor was it a judgment for the defendant..... However, the judgment in 1979 was a judgment which read: 'The plaintiff's claim for ejectment is dismissed with costs." It is well established that such a judgment is in effect one of absolution from the instance. – see *Hassan* v *Billiat* S-132-86 (not reported); *Bulford* v *Bob White Service Station (Pvt) Ltd* 1972 (2**)** RLR 224 (AD); *Makayiseni* v *Musarurgwa* 1947 SR 160 at 162. The matter is succinctly put by Hoffman & Zeffertt *op cit* at p 263 in the following words;
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> > 'The decree of absolution from the instance (or an order dismissing the plaintiff's claim) is specifically intended to the man the plaintiff to bring another action if he can find a better evidence to support his claim. Absolution can never found a cause for action estoppels".

The dismissal of the plaintiff's claim, where it is obtained by default, is not as drastic and order as it may sound. In my view, this accords with the rationale of the Rules which is to achieve justice only after each party has had his or her day in court. To hold the otherwise would, in my view, subject the procedure to mere technicality without achieving the desired end, which is to do justice between the parties.

It is instructive that in terms of r 61 defendant may obtain an order dismissing the plaintiffs' claims where plaintiff who has been barred from declaring or making a claim. In terms of r 62 the defendant may also obtain an order absolving him where plaintiff makes default of appearance. Both rules use the permissive "may" not the peremptory "shall" to make provision for the options open to the party who has complied with the rules. Similarly, r 63 also uses the permissive "may" to confer discretionary power to the court before which the matter is placed. The court is not obliged to give judgment for either party hence in practice the matter is generally dismissed or postponed depending on the force of the application made by the party appearing before it.

Thus where an order such as the one granted on 22 April 2008, is in issue, it can hardly

be said that such an order determined the matter finally. In my view the plaintiff correctly opted to issue fresh summons, as it was entitled to do, rather than seek rescission of the judgment granted in default.

In the premises the preliminary issue raised by the defendant is dismissed.

Wintertons, plaintiff's legal practitioners
Dzimba Jaravaza & Associates, defendant's legal practitioners