

McDONALD MASIMBA
versus
CHIEDZA CHADO

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 9 July 2018 and 15 January 2020

Application for rescission of judgment

K. Ncube, for the applicant
C Tawanda, for the respondent

PHIRI J: This was an application for rescission of judgment granted against the applicant on the 23rd August, 2017.

In that judgment it was ordered that;

- “a) 2nd and 3rd defendant to pay to plaintiff the sum of US\$13 246.50 being delictual damages suffered by the plaintiff as a direct result of a motorbike accident.
- b) 2nd and 3rd defendant pays costs of suit.”

MaCdonald Masimba was the third defendant.

The Law

For an application of this nature to succeed the applicant must show “good and sufficient cause” for the court to set aside the judgment granted in default. This is in terms of order 9 Rule 63 of the High Court Rules, 1971.

In the case of *Stockid v Griffiths* 1992 (1) ZLR 172 (5) the learned Chief Justice (as he then was) stipulated the criteria to be used as follows;

- i. The reasonableness of the applicant’s explanation for default.
- ii. The *bona fides* of the application to rescind the judgment and
- iii. The *bona fides* of his defence on the merits as well as the prospects of success.

Also see the judgment of SANDURA J, in *Beitbridge Rural District Council v Russell Construction Company (Pvt) Ltd* 1998 (2) ZLR (5) at page 190.

In the present application the applicant avers that he entered an appearance to defend this matter and subsequently issued a request for further particulars and his plea on the 28th August, 2017.

Applicant avers that he was taken aback when he was notified that respondent's legal practitioners had obtained default judgment against him.

He averred that his aforesaid request for further particulars was issued about the same time that the notice to plead was also issued against him.

Applicant avers that as he had filed his plea he was under the impression that the ...matter was to proceed to trial.

He also submitted that the default judgment was also obtained against one Kudakwashe Garise but does not stipulate or render liability jointly and severally argument the two defendants.

Prospects of success

Applicant submitted that in the plea he has already filed of record he has raised various issues with respect to the respondent's claim namely;

- (a) That the claim has prescribed.
- (b) That respondent is to blame for the accident in dispute.
- (c) Respondent had to quantify and prove damages.

All these issues, the applicant maintained would have to be canvasses at the trial as they are, triable issues.

This court is satisfied that the applicant was not in wilful default as clearly applicant entered an appearance to defend, request for further particulars and even filed a plea in pursuance of this matter.

There was a time lapse occasioned by inaction on the part of the respondent. The matter had to be reinstated on the court roll.

In the matter of *Zimbabwe Banking Corporation v Masendeke* 1995 (2) ZLR 400 at 402 D-E Mc Nally JA stated that

“Wilfully default occurs when a party, with the full knowledge of the service or set down of the matter and of the risks attended upon default, freely takes a decision to refrain from appearing....”

Clearly in the present matter applicant did not sit on his laurels. He clearly took action to defend the proceedings there was also further correspondence between applicant's and respondent's legal practitioners seeking explanation as to what exactly transpired as regards circumstances under which the default judgment.

This court is also satisfied that the applicant has enjoys and demonstrated that there are prospects of success in the main action.

Accordingly rescission of judgment is hereby granted and that the costs shall be costs in the cause.

Gill Goldton & Gerrans, applicant's legal practitioners
Tawanda Law Practice, respondent's legal practitioners