HB 304/16
HC 2419/14

JOSEPH BAKURU TAYALI

And

ASSISTANT INSPECTOR KAMUTINGONDO

Versus

LLYOD GARIKAYI NDANGARIRO

And

SHERIFF OF ZIMBABWE, NO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 15 JUNE 2015 & 3 NOVEMBER 2016

Opposed Court Application

Advocate L. Nkomo for applicants
1st respondent in person
No appearance from 2nd respondent

KAMOCHA J: The applicants in this matter were seeking for the following order:-

"It is ordered that:-

(1) the default judgment or order granted on 18 September 2014 be and is hereby rescinded;
(2) the 1st and 2nd applicants be and are hereby granted leave to file their opposing papers or notice of appearance to defend within 10 days of granting of this order; and
(3) the 1st respondent only is to pay costs of suit on an attorney-client scale if the relief sought be opposed."

On 18 September 2014 a default judgment was granted by this court wherein it was ordered that the defendants, jointly and severally the one paying the other to be absolved, pay to the plaintiff:

"(a) The sum of US$8 000,00 as damages for unlawful arrest and detention;

(b) The sum of US$12 000,00 unlawfully seized from applicant upon his unlawful arrest;

(c) The sum of US$2 000,00 for impairment of dignity.

A total of $22 000,00 together with interest thereon at the prescribed rate from the date of summons to the date of payment in full."

The applicants, in an endeavour to persuade the court to grant the application for rescission submitted that they each had;

(a) a reasonable or acceptable explanation for the default;
(b) *bona fide* defence on the merits with prospects of success; and
(c) that the application was *bona fide* in the sense that it was for the purposes for defending the matter and not as mere delaying tactic.

In relation to reasonable explanation the first applicant was properly served with summons which he handed over to his legal practitioners Messrs Cheda and Partners. He instructed his legal practitioners to defend but they failed to do so and take the blame for failure to enter appearance to defend. They proffered some explanation which may not be acceptable for their failure. The fact remains that the first applicant thought and believed that the matter was being defended.

The second applicant submitted that service was not effected on himself as required by the rules of court regarding service of process upon officers of state as required by rule 43B (a) and (b) as read with the 7th schedule of the rules of court. Instead summons was served on his wife who denies receiving the summons. He denied seeing the summons. It was, therefore, submitted that there was no proper service. In conclusion he claimed that his explanation was reasonable and should be accepted.

As regards *bona fide* defence on merits the first applicant submitted that the only allegation made against him was that he made a false report to the police in Gweru that 1st respondent had stolen gold in the Shangani area. He was taken to Gweru CID Offices by the 2nd

applicant for questioning in respect of the allegation of stealing gold from the first applicant's farm.

During the interrogation the second respondent ordered him to surrender all the cash that he had in his possession. In obedience to that order first respondent surrendered US$12 000,00.

He was subsequently charged with theft of gold. But when he was taken to court the public prosecutor declined to prosecute him due to insufficient evidence.

Strangely, after declining to prosecute him his $12 000,00 was never returned to him. He then claimed that the $12 000,00 be paid by the two applicants.

The first applicant appeared in the Magistrates' Court facing a charge of stealing the $12 000,00 but was found not guilty and discharged. It was then concluded that the first applicant has a *bona fide* defence to the allegation of theft of that money, which had prospects of success.

Similarly it was concluded he had *bona fide* defence with prospect of success on the claim for damages in the sum of $100 000,00 as there was no clear and competent cause of action pleaded against first applicant.

The second applicant contended that he had a *bona fide* defence with prospects of success. He said as an officer of the state he was not given notice in terms of section 6 of the State Liabilities Act [8:14] which required that he should have been served with written notice of the intention to sue him at least 60 days before instituting the proceedings.

This is in fact common cause. In the result, the summons was of no force or effect as it was a nullity.

Similarly, there was no competent reason for the claim of $100 000,00 and he also submitted that he had a *bona fide* defence which has prospects of success.

The first respondent contended that the applicants were in willful default and moved that there was no need for this court to entertain the application for rescission. His submissions clearly ignore those of the applicants even the fact that he did not comply with the mandatory provisions of the State Liabilities Act.

I prefer the submissions made by the applicants and hold that there is merit in the application and allow it so that applicants can defend.

I, however, see no reason why the costs should be on a punitive scale.

Consequently, I would grant the application in terms of the draft but with costs on the ordinary scale.

Cheda & Partners, applicants' legal practitioners