

SHINGIRAI VAMBE  
versus  
RUSAPE TOWN COUNCIL

HIGH COURT OF ZIMBABWE  
MWAYERA AND MUZENDA JJ  
MUTARE, 16 and 25 July 2019

### **Civil Appeal**

Appellant in person  
*M Chiwanza*, for the accused

MUZENDA: Appellant instituted summons at Rusape Magistrate Court claiming \$5000-00 from the respondent being general damages arising from the alleged unlawful destruction of appellant's temporary structure constructed at No 7688 without a valid court order as well as for harassing appellant's wife at the latter's work place without appellant's consent. After the issuing out of the summons the appellant served the respondent with various court processes and on 9 April 2019 appellant filed an application for default judgment. Unfortunately on 19 April 2019 the learned magistrate dismissed the application. Unamused by the dismissal the appellant noted an appeal on 16 August 2018 outlining the grounds of appeal as follows:

1. the respondent failed to plead hence the request for default judgment.
2. the learned magistrate erred to take into cognizance the appellant served the respondent with all the papers including the ones he further requested, but for the second time he defaulted to submit his plea.
3. the learned magistrate erred in failing to take cognizance that the appellant had stated in case No. 2030/17 that the demolition of the temporal structure was illegal and it would attract costs.
4. the learned magistrate erred in failing to take into cognizance that the appellant applied for an interdict against the respondent in case 2030/17 and (he), the respondent went further to demolish the appellant's structure without a court order.
5. the learned magistrate failed to consider that the appellant was allowed to erect a temporal structure, after he had approached the Housing Director for approval.

6. the learned magistrate erred in failing to take into cognizance that no building plan is required in the Model Building By Laws Part 4 s 39 (1, 2, 3 and 4).
7. the learned magistrate erred in failing to take cognizance that the section she quoted from the respondent's papers does not apply to the contract and structure that the appellant had put up, the section consists of enforcement and prohibition orders.
8. the learned magistrate failed to take into cognizance that the respondent had harassed the appellant's wife without any reason to do so, on the matter she was not aware of.
9. the learned magistrate failed to take into cognizance that it was not the respondent's call to demolish the structure without a court order, thus no need for the appellant to appeal for case no 2030/17.

When the respondent was served with the summons it entered appearance to defend providing its address of service as 294 Chimurenga Street, Box 414 Rusape, its legal practitioners' offices. The appellant filed a notice to plead and other subsequent pleadings not on this given address but at 398 Manda Avenue Rusape, the Rusape Town Council's Offices. The subject notice to plead dated 28 March 2018 which led to the appellant applying for default judgment was not served on the respondent's address of service but at the town council's physical address.

Order 10 (3) (b) of the Magistrates Court (civil) Rules, 2019 SI 11 of 2019 provides as follows:

“(b) subject to sub rule (2), given an address for service within a radius of 15km of the courthouse from which the summons was issued, and.”

The operative clause relating to the issue of address of service is identical to the one which was in SI 290 of the Magistrate (civil) Rules, 1980. Once a party has notified the clerk of court of its address of service the other party shall serve all proceedings, pleadings or processes on the chosen address. Service of process on any other address other than the chosen address of service provided by the litigant in my view will not be in terms of the rules and will be a nullity.<sup>1</sup> On 9 April 2018 when the appellant filed a request for default judgment on the basis that the defendant had been duly served and had not submitted its plea, it was not correct. The appellant had failed to serve the process on the supplied address of service for the respondent which was Messrs Chiwanza and Partners Legal practitioners, 294 Chimurenga Street. P. O Box 414 Rusape. That was the address of service to be used by the respondent and

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<sup>1</sup> See order 7 rule 5 (2) (b) of the Magistrates Court (Civil) Rules, 2019 cited herein

that was where the messenger of Court was to serve the process or pleadings. The appellant did not follow the procedure in the rules of the court *a quo* and the application for default was not properly before the court, the appellant's papers were not in order and the learned magistrate ought to have given directions to the appellant to comply with the rules than to dismiss the application on merits. In doing so the learned magistrate misdirected herself.

In an application for default judgment where the plaintiff is claiming damages as *in casu*, the plaintiff has to comply with order 11 (4) (5) (a) of the Rules which provides

“5. The clerk of court shall refer to the court any request made for the entry of judgment on a claim for damages and –

(a) the plaintiff shall furnish to the court evidence, either written or oral, of the nature and extent of the damages suffered by him or her;”<sup>2</sup>

The order of the court *a quo* in dismissing the application was in my view not proper in the sense that the appellant's claim was prematurely terminated and for certain the appellant did not know the way forward in the circumstances. In his mind he believed that the respondent had failed to file its plea within the time expected of it albeit the wrong method of service of process. As already ruled above, the court ought to have given the appellant an opportunity to comply with the rules and resubmit its application in the event that the respondent continued to be in default of filing its plea or other processes.

There is also need to comment on the appellant's claim pertaining to his wife where appellant claimed damages from the respondent “for harassing my wife at her work place, without my concern (sic) (including my family to my personal business) (whatever appellant meant by that), the wife is an adult, she can sue the respondent for relief in her own capacity not through the appellant. The appeal succeeds on the reasons outlined herein and the following order is returned:

1. the appeal is upheld.
2. the matter is remitted to the magistrate court for continuation before any magistrate.
3. the plaintiff is granted leave to issue a fresh notice to plead in terms of the Magistrate Court Rules and serve it on the defendant at the registered address of service.
4. Costs to be in the cause.

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<sup>2</sup> See also matter of Mavheya v Mutangiri and Others 1997 (2) ZLR 462 at 463 B

MWAYERA J agrees \_\_\_\_\_

*Chiwanza & Partners*, respondent's legal practitioners