

GODFREY MAFUTA
versus
MADONDO GUTU MODERN STORES

HIGH COURT OF ZIMBABWE
MAKARAU JP and MUSAKWA J
Harare 6 and 7 March 2008

CIVIL APPEAL

Mr J Mambara for appellant
Mr A Debwe for respondent.

MAKARAU JP: After hearing submissions from counsel in this matter, we set aside the judgment of the lower court and remitted the matter to the lower court for the filing of further pleadings and the continuation thereafter of the trial of the matter. We indicated that our reasons for so doing would follow. I now set them out.

BACKGROUND

The appellant issued summons against the defendant on 15 October 2002, claiming the delivery of 6 heifers or payment of the sum of \$198 000-00 as representing the value of the heifers. The appellant had the summons served upon one Tinashe Madondo, an accounts manager at the defendant's stores. No appearance to defend the action was filed and a default judgment was duly entered against the defendant. In due course, the default judgment was rescinded.

After the application for rescission of judgment was granted, no further pleadings were filed and exchanged between the parties. In particular, no plea was filed by the defendant. No pre trial conference was held as either as between the parties themselves or before a magistrate in chambers as is required by the rules.

The matter was set down for trial.

At the trial of the matter, the appellant gave evidence. His testimony is recorded as being very brief and was to the following effect: in June 1999, he went to the defendant with the intention of buying cattle. He met a Mr Madondo, who is the

managing director of the defendant. He was shown three heifers and was advised as to the cost of each. He made out a cheques to Lysdale Farm in the sum of \$10 000-00 as deposit for six heifers. He was taken to the defendant's son who in turn took him to Tinashe Madondo who receipted the cheques. In March 2000, he paid the balance in the sum of \$14 000-00. After paying the purchase price in full, he approached Mr Madondo for the delivery of the beasts. The delivery was not forthcoming, prompting him to issue process out of the court at Masvingo.

The appellant also referred to a receipt that was issued to him on 1 March 2000 by the defendant. It recites the cause of the issuance of the receipt as "deposit for heifers" and records the two amounts of \$10 000-00 and \$14 000-00 respectively.

After leading evidence, the respondent applied for absolution from the instance, arguing that the contract of sale alleged by the appellant was not clear and that the testimony led by the appellant was at variance with the allegations he had made in the summons. In particular, it was pointed out that in the summons he alleged that the agreement of sale had been entered into in March 2000 when in evidence he alleged that he paid the deposit in June 1999 and was issued with a receipt. Issue was also made as to who was the correct defendant in the matter.

After considering the matter, the trial magistrate granted the application and absolved the defendant from the instance. Aggrieved by that decision, the appellant noted an appeal to this court.

In his grounds of appeal, the appellant alleged that the trial magistrate had erred in granting absolution in the face of an earlier ruling that there was an agreement of sale between the parties although there had been no delivery of the sold beasts. It is in the first ground of appeal that a procedural irregularity attendant upon the trial of the matter is revealed in its true proportions. In this ground of appeal, the appellant notes that the trial magistrate "*failed to appreciate that the matter started off as an application for rescission of judgment that was referred to trial for the parties to lead evidence on a specific factual detail and that the application for rescission of judgment stood as the defendant's plea and the notice of opposition as the plaintiff's replication.*"

THE ISSUES

In my view, a number of issues arise from this procedural irregularity in the lower court.

In terms of Order 30 Rule 2 (a) and (b) of the Magistrates' Court Rules 1980, a court determining an application for rescission of judgment may rescind or vary the judgment in question and give directions as to the future conduct of the action or application.

In *casu*, the court determining the application simply rescinded the default judgment without giving any directions as to the future conduct of the action. Therefore, following the normal sequencing of the steps that one has to take to bring a matter to trial, if the plaintiff was desirous of proceeding with the matter, it was upon him to compel the defendant to file his plea in the matter. This he did not do.

It is trite that the magistrates' court has no inherent jurisdiction and cannot fashion remedies or procedures outside the magistrates' court act and rules even if the intention is to further interests of justice and expediency. The Magistrate Court Rules, 1980 shall apply to all civil proceedings in the magistrates' court.¹ There is no discretion on the part of the court to depart from any rule as is the case with the High Court which not only has inherent jurisdiction but has specifically provided in its rules that a court or a judge may condone or authorize departures from the application of the High Court Rules if it, he or she is satisfied that the departure is required in the interests of justice.²

It is thus not clear on what legal basis the matter proceeded to trial without any further pleadings having been exchanged between the parties. The matter could not have proceeded to trial on the directions of the trial magistrate for the application of rescission of judgment to stand as pleadings as magistrates do not have the power to make such directions that will have the effect of departing from the rules. It was in grave error that the matter proceeded to trial as it did. In our view, the error resulted in a gross procedural irregularity that cannot be cured other than through the order that we have made.

The error made by the lower court in setting this matter down for trial outside the rules of the court tends to indicate that the lower court did not make reference to its own

¹ See Order 1 Rule 2.

² Compare Rule 4C of the High Court Rules 1972.

rules in handling this matter. It is well worth remembering that Magistrates Courts in this country are formal courts of law that are bound by certain rules of procedure that have been found to regulate the conduct of trial in that court so that justice may be done in a fair and consistent manner. Departures from the rules are not permissible. Informality in procedure cannot be condoned. The court must conduct itself in terms of the rules at all times or risk having its judgment set aside as being incurably un-procedural.

It is also not clear how the trial court determined that the conclusion and the terms of the contract of sale were in issue in the trial before him in the absence of a plea from the defendant.

To their credit, both counsel did concede the error in procedure attendant upon the proceedings in the lower court and consented to the order that we made in the matter. Due to the consent of counsel, it is not necessary that we discuss the issue of the power that we, sitting as an appeal court, used to review the proceedings in the lower court as we did in the absence of a formal application requesting us to review the proceedings of the lower court.

It is on the basis of the foregoing that we made the order that we did on the turn.

Musakwa J agrees.....

J Mambara & Partners, appellant's legal practitioners.

Muzenda & Partners, respondent's legal practitioners.