OLIVER MUSHUMA
versus
SWEEN MUSHONGA

HIGH COURT OF ZIMBABWE
HLATSHWAYO & MAWADZE JJ
HARARE, 28 September and 4 October 2012 and 14 February 2013

Civil Appeal

Appellant in person
Respondent in person

MAWADZE J: This is an appeal against the whole judgment of the Harare magistrates court delivered on 28 October 2011 in which the magistrates court set aside a default judgment which had been granted in the appellant’s favour.

The facts giving rise to the appeal can be summarised as follows:-
The appellant on 25 May 2011 filed a court application in the magistrates court seeking payment of US$18716.06 together with interest thereon at the rate of ten percent (10%) per annum from 20 April 2011 to date of payment in full together with costs of suit on a higher scale. The cause of action is based on an acknowledgement of debt. In terms of the acknowledgement of debt signed by the respondent and duly witnessed by the appellant on 13 April 2011 the respondent agreed to pay the amount owed of US$18716.06 on the following terms;- payment of US$3000 by 29 April 2011, and thereafter five (5) months instalments of US$3000 from 31 May 2011 to 30 September 2011 and the last instalment of $716.06 by 20 October 2011. The acknowledgement of debt was attached to the appellant’s founding affidavit in the court *a quo.* The respondent did not comply with the provisions of the acknowledgement of debt the whole debt became due. The respondent had also as per the acknowledgement of debt consented to the jurisdiction of the magistrates court. The appellant on 4 May 2011 wrote a letter of demand to the respondent which letter illicited no response hence the court application.

The record of proceedings in the court *a quo* shows that the respondent was served with the court application on 12 May 2011 and the matter was set down for hearing on 24 May 2011. The respondent was duly served with the notice of hearing and on 24 May 2011 both the appellant and the respondent attended court. As per the record of proceedings in the court a quo, the respondent sought a postponement of the hearing to enable him to file opposing papers. The matter was postponed to 1 June 2011. However on 1 June 2011 the respondent did not attend court and the appellant successfully applied for a default judgment.

On 13 August 2011, the respondent approached the court *a quo* seeking the rescission of the default judgment basically on two grounds. Firstly the respondent contended that he was not in wilful default on 1 June 2011 as he was not aware of the court dates, either of 24 May 2011 or 1 June 2011. In fact the respondent submitted that he had not been served at all with both the court application and the notice of hearing. Instead the respondent submitted that the proof of such service upon him filed of record was manufactured by the appellant. Secondly the respondent contented that on the merits he has a *bona fide* defence. The respondent submitted that the appellant was his erstwhile legal practitioner and that the alleged debt arises from the legal services rendered by the appellant to the respondent. The respondent however contends that the amount claimed of US$18716.06 is both excessive and unjustified. The respondent puts into issue how the total figure was calculated and stated that he was not served with either the itemised or taxed bill of costs. As regards the acknowledgement of debt which is the basis of the cause of action, the respondent denied signing the acknowledgement of debt and alleged that the appellant had forged the respondent’s signature. All in all the respondent in seeking the rescission of the default judgment submitted that the appellant had improperly obtained the judgment against him and that on the basis of such a judgment the respondent’s property was at the risk of being attached.

The application for rescission of default judgment was opposed by the appellant. In doing so the appellant took the following points *in limine;*-

a) that the application for rescission of judgment was made out of time.

b) That the respondent had not complied with the requirements of order 30 Rule 1 (3) of the Magistrates Court (Civil) Rules 1980 with relates to payment into court.

c) That the respondent had approached the court with dirty hands as his founding affidavit in the court *a quo* is replete with outright falsehoods designed to mislead the court.

As regards the merits of the application for rescission of judgment, the appellant submitted that the respondent was in wilful default and has no *bona fide* defence as the respondent had had deliberately not attended court on 1 June 2011 and that the cause of action is based on the acknowledgement of debt.

The court *a quo* was apparently persuaded by the respondent and granted the application for rescission of judgment. In brief the court *a quo* dismissed the points in *limine* raised by the appellant and proceeded to find that the respondent was not in wilful default and that he had a *bona fide* defence to the claim. It may be insightful at this stage to quote the reasons given by the learned magistrate as the judgment is very brief;-

"<u>RULING</u>

This is an application for rescission of judgment wherein the appellant is stating that he was not in wilful default and has no *bona fide* defence on the merits of the main application. The application is opposed and both parties filed comprehensive heads of argument in support of their respective positions regarding this application.

After perusing and recording the papers filed of record it is this court's finding that the points in *limine* raised by the respondent appear to be technical issues which if considered by the court as this juncture would result in the premature life of an otherwise arguable case on merits. As such the points in *limine* are dismissed.

On the merits of the application for rescission of judgment the court felt persuaded and bound by the decision in the case of *Roland & anor vs Mcdonell* 1986 (2) ZLR 216 (S) where it was held that the court should consider the defendant's explanation for his default, the *bona fides* of the application to rescind the judgment and the bona fides of the defence on the merits. It was held further that the court should also consider the public question of the need to reach finality in litigation.

The respondent has explained his reasons for the default which in deed appear to show *bona fides* of his application. His challenge to the authenticity of the acknowledgement of debt and his denial of the indebtedness appear to show presence or otherwise of some material dispute of facts which require the matter to be heard on the merits and brought to finality in the spirit of the public policy question of the need to reach finality in litigation.

As a result of the foregoing, the application for rescission of judgment succeeds."

This reasoning by the Learned magistrate did not find favour with the appellant who proceed to file a notice of appeal with the court on 1 November 2011. The grounds of appeal are quite lengthy but it is prudent to set out all of them as couched by the appellant;

"GROUNDS OF APPEAL

1. The court *a quo* erred on a point in law in making a finding to the effect that the three points raised in *limine* by the appellant "appear to be technical issues which if considered by the court at this juncture would result in the premature life (sic) of an otherwise arguable case on the merits." The court a quo fundamentally erred in dismissing the three points raised in *limine* even considering the same as it was enjoined to do at law.
2. The court *a quo* erred on a point in law and fact in failing to find that;-
   a) The respondent (appellant in the court application for rescission of default judgment in the court *a quo*) had approached the magistrates court with dirty hands and for that reason to deny him audience.
   b) The purported application for rescission of default judgment was filed well out of time without a formal application for condonation of extension of time and that therefore the application was fatally defective and improperly before the court.
   c) As the application for rescission of default judgment was set down in contravention of 030 R 1 (3) of the Magistrates (Court) Civil Rules, 1980, it was improperly set down.

3. On the merits the court *a quo* erred on a point of law and fundamentally misdirected itself in failing to apply 030 R 2 (1) of the magistrates court (Civil) Rules, 1980 in arriving at its decision to grant an order rescinding the default judgment.
4. The court *a quo* erred on a point of law and fact by failing to find that on the facts of the matter before it, the respondent was in wilful default.
5. The court *a quo* fundamentally erred on a point of law in failing to distinguish the effect of wilful default in terms of 030 R 2 (1) of the magistrates court (Civil) Rule, 1980 and Rule 63 of the High Court Rules upon which reliance was placed through the case law authority cited in which R63 was in issue and not 030 R 2 (1) of the Magistrates Court (Civil) Rules 1980.
6. In any event the court *a quo* erred in finding that the respondent had shown good and sufficient cause to warrant granting of a rescinding the default judgment when in fact the respondent had dismally failed to demonstrate good and sufficient cause and his defence was based on downright falsehoods which had been proved to be such on the evidence before the court.
7. The court *a quo* therefore erred in making a finding to the effect that the respondent’s explanation for the default was *bona fide* when in fact it was palpably false; that the respondent’s challenge of the authenticity of the acknowledgement of debt and his indebtedness “appear to show the presence or otherwise (sic) of some material disputes of facts” when in fact no such material dispute existed in light of the palpable falsehoods the respondent relied upon as was clear on the evidence before the court.”

It is clear to my mind that the court a quo in its reasons for rescinding the default judgment did not address its mind to the pertinent issues of law and fact raised by the appellant. This aspect should not detain me at this stage. I shall revert later to the issue.

The respondent in the heads of argument did not seek to deal with the grounds of appeal as outlined by the appellant or rather the merits of the appeal. Instead the respondent raised a single question of law, that is, whether or not the judgment of the court a quo rescinding the default judgment is appealable. It is the respondent’s

contention that the order setting aside the default judgment is not a final judgment but merely incidental to the main dispute between the parties. The respondent relied on a number of authorities on the test to be applied in determining whether or not an order is interlocutory or incidental to the main application. See *South Cape Corporation Pvt Ltd v Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (A*); Hunt v Hunt* 2000 (1) ZLR 105 (H)

I intend to dispose of this issue at this stage. Section 39 of the Magistrate Court Act [*Cap 7:10*] deals with the rescission and alteration of judgment: It provides as follows:

"39 Rescission and alteration of judgment

(1) In civil cases the court may________

a) Rescind or vary any judgment which was granted by it in the absence of the party against whom it was granted;

b) …………………………..

c) …………………………..

It is important to note that in relation to appeal against decisions from the magistrates court regard is to be given to the provisions of section 40 (2) especially section 40 (2) (b) of the Magistrates Court Act [*Cap 7:10*] it provides as follows:-

"40 Appeals

(1) ……………………………………

(2) Subject to subsection (1) an appeal to the High Court shall be against_____________

(a) any judgment of the nature described in section eighteen or thirty nine;

(b) any rule or order made in a suit or proceeding referred to in section eighteen or thirty-nine and having the effect of a final and definitive judgment including an order as to costs.

(c) ……………………………………………………………….."

It is an accepted general principle of law that an order rescinding a default judgment is not a final order and therefore would not be appealable unless it has the effect of a final or definitive judgment or such an order has been obtained on the grounds that the default

judgment is invalid or such an order has been obtained by fraud or mistake. See *Nyamuswa v Mukanya* 1987 (2) ZLR 186 (S). The question to be answered therefore is whether the order rescinding the defAULT judgment by the court a quo is a final order or default judgment or it leaves the rights of the appellant unaffected and the issues in the main court application undisturbed.

In the case of *Blue Rangers Estates (Pvt) Ltd v Muduviri & anor* 2009 (1) ZLR 368 (S) MALABA DJC explained the correct test to be applied in determining whether an order / judgment is final and definitive or is interlocutory and not appealable. The Learned DCJ had this to say at 376G.

“To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court.

The Learned DCJ continued at 379 supra,

> “Many orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders.”

It is trite law therefore that while an order setting aside a default judgment, generally is not a final order and therefore not appealable there are other instances at law where such an order or judgment is deemed at law to be final or determines issues raised in the proceedings in a definitive way such that at least in respect of those specific issues it is final and therefore appealable. It is also recognised in our law that a judgment setting aside a default judgment is appealable where the rescission was granted on the grounds of fraud or mistake or where the judgment is invalid. I now proceed to apply this principles to the facts of this matter.

It is common cause that in setting the rescission of the default judgment in the court a *quo*, the respondent in his founding affidavit alleged that he had not been served with the court application and the notice of the set down date hence his non appearance both 24 May 2011 and 6 June 2011. The respondent further alleged that the proof of service filed of record upon which the default judgment was premised was manufactured by the appellant which then enabled the appellant to snatch a judgment against the respondent. It

is therefore clear that the respondent made allegations of fraud and impropriety against the appellant who is alleged to have fraudulently obtained the default judgment. The allegations of fraud against the appellant do not end there. The respondent alleges further that it even relates to the cause of action. The respondent in the founding affidavit denied ever signing the acknowledgement of debt and further alleged that the signature on the acknowledgement of debt purported to be his was not his. The sum total of the respondent’s allegations in seeking the rescission of the default judgment is that to all intends and purposes the appellant forged an acknowledgement of debt, on the basis upon which he proceeded to fraudulently secure a default judgment against the respondent who was not even aware either of the existence of such an application and the set down date.

The question to consider is whether as a fact these allegations are true. The court a quo seemed not to appreciate this important fact and proceeded to misdirect itself by glossing over such a fundamental allegation. The reasons for judgment by the court *a quo* do not show the findings made in this respect. Suffice to state that by rescinding the default judgment the court *a quo* should have found in respondent’s favour. This in essence means that the appellant cannot go back to the court *a quo* to continue with his claim unless the findings by the court *a quo* are set aside on appeal.

Both the appellant and the respondent filed detailed pleadings and heads of argument in the court a quo. It is clear that despite allegations of fraud made by the respondent, the respondent was being untruthful. It is also clear that on 24 May 2011 the respondent attended court. The record speaks for itself. It is the respondent who sought postponement to 1 June 2011. The finding of fact in this regard made by the court a quo is therefore incorrect and constitutes a misdirection. It is apparent that the respondent, even in the court *a quo* showed scant regard for the truth as it relates to his default. In his answering affidavit the respondent, after being exposed by the appellant in the opposing affidavit, shifted ground and was now alleging that he was indeed served with both the court application and the notice of hearing for 24 May 2011. In fact he confirmed attending court and being advised of the postponement to 1 June 2011 at his behest. The respondent now gave another reason why he did not attend court, now on 1 June 2011. The respondent was heard to say after the initial hearing on 24 May 2011 and before I

June 2011 he had discussions with the appellant who agreed to have the dispute resolved amicably (whatever that means) and therefore decided not to attend court on 1 June 2011. Needless to say this is at variance with the respondent’s explicit pronouncements in the founding affidavit and was further disputed by the appellant who sought and got leave to file supplementary affidavit on account of the respondent’s inconsistent explanation.

The court *a quo* misdirected itself in making a finding that the respondent has explained his default, which reasons according to the court a quo showed the respondent’s bona fides in the application for rescission of judgment. The truth of the matter is that the respondent simply lied and proferred no tangible explanation for his default.

The court *a quo* also misdirected itself in failing to appreciate that the respondent was making an allegation that the default judgment was obtained through fraudulent means by the appellant. Again as a fact this is incorrect. Most importantly, This finding disposes of the argument raised in this court by the respondent that the order granted by the court *a quo* is not appealable. It is appealable because the respondent alleged, and the court *a quo* seemed to accept, that the default judgment was obtained through fraudulent means.

Having made the finding that the order granted the rescission of the default judgment in *casu* is appealable I now turn to the grounds of appeal.

The court a quo misdirected itself in its failure to deal with the three points in *limine* raised by the appellant, which points in *limine* are valid at law. The finding by the court a quo that the points taken in *limine* by the appellant were “technical issues which if considered by the court at this juncture would result in the premature life of an otherwise arguable case on the merits” is with all due respect a shocking indictment on the part of the court a quo’s failure to appreciate the very basic tenets of the law the court is enjoined to consider. The three points raised in *limine* are both meritorious and relevant to the very order the court a quo granted. I briefly illustrate why.

The three points taken in *limine* by the appellant in the court a quo are as follows:-

a) that the respondent had made an application for rescission of judgment out of time and had not sought or been granted condonation.

b) that the respondent had not complied with the provision of order 30 Rule (3) of the magistrates court (Civil) Rules 1980.

c) that the respondent had approached the court with dirty hands as he had lied in both the founding and answering affidavit as regards the reasons for the default and the authenticity of the acknowledgement of debt.

Order 30 Rule (1) of the magistrates court (civil) Rules 1980 provides as follows:-

"(1). Any part against whom a default judgment is given may, not later than one month after he has knowledge of thereof, apply to the court to rescind or vary such judgment."

It is common cause that the default judgment was granted on 1 June 2011. The respondent as is the norm has been evasive as to when he had became aware of the default judgment. The appellant's evidence that the respondent visited him at his offices on 8 June 2011 and that he advised him of the default judgment was not controverted. Be that as it may the respondent was served with a copy of the legal costs and the writ of execution by the messenger of court on 10 June 2011. One can therefore safely assume that as at 10 June 2011 the respondent was aware of the default judgment. The application for default judgment was only made on 30 August 2011 (after a period of 2 months and 23 days) which is well after the one month prescribed by the Rules. The respondent did not seek condonation in terms of order 33 Rule 1 (2) of the Magistrates Court Rules. See also *Karimazondo v Standard Chartered Bank of Zimbabwe* 1995 (2) ZLR 404 at 407C.

The fact that an application for rescission of the default judgment was made out of time is very clear from the pleadings filed in the court *a quo*. In fact the court *a quo* was alerted to this fact by the appellant who took the point *in limine* to that effect. Instead the court *a quo* failed to address this clear non compliance with the rules. It also did not state that it had condoned such conduct and why. This constitutes a misdirection.

Order 30 Rule 1 (3) of the magistrates court (Civil) Rules provides as follows;-

"3) Save where leave has been given to defend as a pauper under Order 5,

5) no application in terms of subrule (1) shall be set down for until the applicant has paid into court, to abide the directions of the court__________

a) The amount of the costs awarded against him under such judgment and,

b) The sum of ten dollars as security for the costs of the application."

It is uncontroverted that the respondent did not comply with the above stated obligations in respect of payments into court as is required by the Rules. It may be apposite to note that the requirements of order 30 Rule 1 (3) of the Magistrate Court (Civil) rules are mandatory. The point is therefore made that the application for rescission of judgment was improperly set down and no condonation for non compliance was sought and or granted again. The appellant took this point *in limine* and the court *a quo* in its wisdom decided to simply wish this valid point away. This constitutes a misdirection.

The last point the respondent took in *limine* was that the respondent had approached the court a quo with dirty hands and should not have been heard – commonly referred to as the dirty hands principle. This principle was well summed up by BARTLET J in *Deputy Sheriff Harare v Mahleza & anor* 1997, (2) ZLR 426 (H) at 426 B as follows;-

> "People are not allowed to come to court seeking the court's assistance if they are guilty of lack of probity and honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands It is a principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek the court's assistance, that the court risks compromising its integrity and becoming a party to underhand transaction."

From the evidence on record it is clear that the respondent lied in the court *a quo* both in the founding affidavit and the answering affidavit. The irrefutable facts are that the respondent lied on the following aspects;-

a) that he did not contest the matter due to the fact that he was not aware of the courts dates either on 24 May 2011 or 1 June 2011.

b) that the proof of service filed of record was manufactured by the appellant.

c) that the signature which appears on the acknowledgement of debt was forged by the appellant

d) that as a consequence the respondent was not in wilful default.

All the above issues were points put in issue by the appellant in the court *a quo*, but the court *a quo* did not deem it fit to deal with them. It is trite law that in all court proceedings standards of truthfulness and honesty should be observed by parties who seek relief in the same courts. See *Underhay v Underhay* 1977 (4) SA 23 (W) at 24 E-F. While it is clear from the evidence on record that the respondent approached the court with dirty hands by peddling falsehoods in both the founding affidavit and answering affidavit, it may not be in each such case that such a party should be denied audience. I however remain satisfied that failure by the court to deal with this issue and making a finding in that regard constitutes a misdirection.

All in all the failure by the court *a quo* to deal with the issues raised in l*imine* by the appellant on the basis that they were technical issues which will result in an unfavourable finding against the respondent is a misdirection.

Lastly I turn to the merits of the appeal. It is clear that the court *a quo* erred both on a point of law and fact in failing to find that on the facts of the matter before it the respondent was in wilful default and on that basis alone decline to grant the rescission of judgment.

Order 30 Rule 2 (1) of the Magistrates Court (Civil) Rules provides as follows;-

> “(1). The court may on hearing of any application in terms of rule 1 unless if it proved that the applicant was in wilful default:-
>
> a) rescind or vary the judgment in question; and
>
> b) give such directions and extensions of time as necessary for the further conduct of the action or application.”

In terms of order 30 Rule 2 (1) of the Magistrates Court Civil Rules 1980 wilful default therefore disqualifies an applicant from obtaining rescission of default judgment. See *Karimazondo v Standard Chartered Bank of Zimbabwe* supra.

In the case of *Zimbabwe Banking Corporation v Masendeke* 1995 (1) ZLR 400 McNALLY JA succintly explains what constitutes wilful default as follows;-

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

I have dealt at length with the aspect on how the respondent lied about his failure to attend court. The inference to be drawn is that the respondent was untruthful in that regard because he knew he had no good cause not to attend court. The court *a quo* misdirected itself in finding that the respondent was not in wilful default.

It may not be necessary once a finding of fact is made that the respondent was in wilful default, to consider the second requirement of "the grounds of defence to the action or proceedings in which the judgment was given or of the objective of objection to the judgment". However in *casu* the respondent has no *bona fide* defence to the action. The cause of action is based on an acknowledgement of debt. Initially the respondent denied signing the acknowledgement of debt later he changed the story and alleged that he disputes the amount owed as the bill of costs was not taxed. The respondent did not in that respect show good cause to warrant the granting of an order rescinding the default judgment.

In conclusion the appellant's objection as to whether the order of the court a quo is appealable or not is devoid of any merit and is dismissed. On the merits of the appeal, it is clear that the court a quo misdirected itself in the manner detailed above, that is, in failing to deal with the three points raised in *limine* and failure to apply the law in finding that the respondent was not in wilful default and has a bona fide defence to the action. Consequently the appeal should succeed with costs and the order of the court *a quo* be set aside in its entirety.

Accordingly I make the following order;-

1. The appeal is allowed.
2. The order granted by the court a quo is set aside in its entirety.
3. The following order is hereby substituted in its stead.

   The application for rescission of default judgment be and is hereby dismissed with costs.
4. The respondent shall pay the costs.

HLATSWAYO J: agrees………………………………