PRUDENCE CHIRISA
versus
PISIRAYI MANGWENGWENDE
and
TAFADZWA MITI N.O.
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 28 May 2020 & 11 June 2020

URGENT CHAMBER APPLICATION

T Biti, for the applicant
L Chimuriwo, for the 1st respondent

MANZUNZU J This is an application brought on urgency for the review of the judgment of the Magistrate court. The applicant seeks an order in the following terms:

> "TERMS OF THE FINAL ORDER SOUGHT:
>
> 1. The default judgment granted by the 2nd Respondent under MC 306/20 be and is hereby declared unlawful and is set aside.
> 2. The 1st Respondent to pay costs on an attorney-client scale.
>
> TERMS OF THE INTERIM RELIEF GRANTED
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> Pending determination of this matter, the Applicant is granted the following relief:
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> 1. Pending the granting of the final order, the operation and execution of the court order granted by the 2nd Respondent in the matter of Pisirayi Mangwengwende vs Prudence Chirisa Case No. 306/20 be and is hereby suspended."

This judgment relates to two preliminary points raised by the first respondent which shall dealt with later in this judgment.

Background

A customary law union between applicant and first respondent (the parties) has faced some challenges. There are three children born of this union namely, Simbarashe Mangwengwende born 20 April 2010, Akudzwe Mangwengwende born 18 June 2012 and Chidiwa Mangwengwende born 3 March 2015. The parties differ on the duration of the union and on whether the same still subsists or not. It matters not for this judgment.

Following the parties' differences the first respondent has on 29 January 2020 issued summons for ejectment against the applicant from the property, which the applicant considers to be their matrimonial home, known as Stand 371 Beeston avenue, the Grange, Harare. This is the matter under Case No. 306/20, the summons of which is attached as annexure "A" to the application. The applicant filed an appearance to defend the summons on 4 February 2020 followed with a plea and counterclaim on 26 February 2020. This was after an exchange of further particulars between the parties.

On 2 March 2020 the plaintiff withdrew her plea and counter-claim and served such notice on the first respondent's legal practitioners on the same day. On 3 March 2020 the first respondent filed an application for default judgment which was granted by the magistrate, the second respondent, on 23 March 2020. In the meantime, the applicant filed a new plea and new counter-claim on 11 March 2020. A copy of the judgment was not attached neither was a full record of the lower court made available.

The applicant has alleged that the judgment must be declared a nullity it having been obtained or snatched fraudulently.

Preliminary points

The first respondent raised two preliminary points. I heard full argument by counsels on them. The first point *in limine* was that this matter is not urgent and the second was that this matter is improperly before the court and the court should decline jurisdiction to hear it.

- **Urgency**

Mr *Chimuriwo* for the first respondent made a serious attack on the certificate of urgency which he said failed to serve its purpose. It is peremptory that a certificate of urgency be filed together with an urgent application, see rr 242 and 244. The certificate of urgency must assist the court to show that the requirements of urgency have been met. This means the legal practitioner, who happens to be the author, must set out the reasons why in his belief he says the matter is urgent.

In the matter of *Bonface Denenga & Anor* v *Ecobank Zimbabwe Pvt Ltd*, HH 177-14 MAWADZE J summarized what constitutes urgency as it obtains in case law. At p 4 of the judgment he sates:

> "The general thread which runs through all these cases is that a matter is urgent if,
> (a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought.
> (b) There is no other alternative remedy.
> (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or a sufficient reason for such a delay.

(d) The relief sought should be of an interim nature and proper at law."

The certificate of urgency was attacked on five grounds namely that it fails to disclose why the High court is approached for a remedy readily available in the magistrate court, does not say when the urgency arose, does not disclose the irreparable harm to be suffered by the applicant, does not justify why the court should hear the matter on urgency and does not say when harm is to visit the applicant.

Mr *Biti* for the applicant said the matter was urgent because if the court fails to act now the applicant will suffer irreparable harm. A number of authorities were cited. He relied on a letter which threatened the applicant to vacate the house in 5 days. He also said a warrant for the eviction of the applicant was being processed by the clerk of court, although no proof was furnished to that effect.

A close reading of the certificate of urgency, in my view, falls far short of what is expected of a certificate of this nature. It does not say when the need to act arose neither does it show that the requirements of urgency were met.

Whether matter is properly before the court:

It was argued for the first respondent that the matter was improperly before the court. Firstly, in that the court was being asked to review a default judgment granted by the Magistrate Court when the applicant ought to have applied for rescission of the same before that same court. Mr *Biti* argued that the judgment was not a default judgment subject to rescission through the normal rules of the Magistrate's Court. He said it was a judgment obtained fraudulently and must be treated as such and be subjected to an order for its nullity. He said it was a fraudulent judgment because it was granted by the Magistrate and not by the clerk of court as contained in Order 11 r 4 of the Magistrates Court (Civil) Rules 2018, was granted in the face of an appearance to defend and with no notice to plead having been issued.

I have no doubt in my mind that the judgment by the Magistrate is nothing other than a default judgment. I find no other description to it. Even the applicant refers to it as a default judgment in the final relief being sought. It is incorrect, in my view, to describe it as a fraudulent judgment based on the three grounds submitted by Mr *Biti*.

There is nothing amiss in a Magistrate granting a default judgment following an application requesting for the same. This is because Order 11 rule 4 subrule (8) provides in part that:

> "The clerk of the court may refer to a magistrate any … request for judgment, and the magistrate may thereupon—
> (*c*) enter judgment in terms of the plaintiff's request or for so much of the claim as has been established to his satisfaction;"

While granting of default judgments is part of the clerk of court duties as *per* Order 11 r 4 of the rules, such functions can be performed by the Magistrate per Order 3 r 3 which provides;

> "Any act which is required to be done by the clerk of the court may be done by a magistrate."

A judgment which is granted, even in error in the application of the rules, is not necessarily a judgment obtained by fraud, it remains a default judgment. In any event in terms of section 39 of the Magistrates Court Act [*Chapter 7:10*] one can apply for rescission of a judgment even one obtained by fraud before the same court. It states

> "(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*) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
> (*c*) correct patent errors in any judgment in respect of which no appeal is pending."

A party against whom a default judgment has been granted can apply for its rescission in the same court under order 30. It is improper in the circumstances of the present case to seek for review and more so on an urgent basis.

Rule 256 of the High Court Rules on review proceedings provides that;

> "Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, **shall be by way of court application** directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected." (underlining and boldness is mine)

An application for review is by way of a court application and it is peremptory that it be in that form because of the use of the word shall. What is before me is a chamber application. Furthermore, an application for review cannot be heard in the absence of the record to be reviewed see r 260 of High Court Rules.

Despite the detailed submissions by Mr Biti much of it was sympathetic to the best interests of the children. But that was not the main thread of the points *in limine*.

I failed to understand why the applicant insisted in proceeding with this matter in the face of the very meritorious points *in limine* and more importantly so in the face of the

willingness by the first respondent to consent to the rescission of judgment in the event such an application was made. Mr *Chimuriwo* was clear in expressing that willingness by the first respondent which he said was communicated to the applicant and her counsel before the matter proceeded. I did not hear Mr *Biti* say such was not communicated or if it was, that it was not made in all earnest.

I am not satisfied that the applicant has made able to make a case for the matter to be heard on an urgent basis neither has it been shown that the matter properly sits with this court. If this matter only lacked urgency without more, I would have been inclined to strike it off the roll of urgent matters, but the matter is improperly before this court. The High court cannot be used to deal with the rescission of the judgment of the Magistrate Court under the guise of a review. The magistrate court, being a creature of statute, has the power to deal with its own processes within the boundary of the relevant statute.

On the issue of costs first respondent asked for costs on a higher scale. This court has a discretion when it comes to the award of costs. The applicant persisted with a matter which clearly should have been before the Magistrate's Court more so in the face of the first respondent offering to consent to the rescission of judgment. The applicant without any justifiable ground tainted a picture of impropriety on the conduct of the respondents and to some extend to counsel of first respondent. That is unfortunate and was not called for. The first respondent was forced out of pocket and applicant must make good the loss with an award of costs at a higher scale.

IT IS ORDERED THAT:

The application be and is hereby dismissed with costs on an attorney and client scale.

Tendai Biti Law, applicant's legal practitioners
Lawman Law Chambers, 1st respondent's legal practitioners