

OWEN MAKWENA
(in his capacity as executor dative for
Estate Late Alexander Makwena under DR 1690/01)
and
JOYCE MACHIROWANDA
versus
SARUDZAI MAKWENA (NEE MUDZAMIRI)
and
MASTER OF THE HIGH COURT
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 9 October & 9 November 2023.

Opposed Matter

G Mapaya, for the applicant
L Ziro, for the 1st respondent
No appearance for 2nd and 3rd respondents

MAXWELL J

At the hearing of the matter, I granted the application for rescission of a default order. A request for the reasons was made. These are they.

BACKGROUND

On 26 May 2022, a default judgment was handed down in case number HC 6499/21. First respondent was the plaintiff in that matter. The default order declared her to be the surviving spouse of the deceased Alexander Makwena entitling her to inherit in the deceased's estate and ordered second and third respondents to include her in the final administration account and distribution plan. The present application was filed on 6 October 2022. The founding affidavit gives the following background. First applicant alleged that he became aware of the default order on 5 September 2022. First applicant is a son of the deceased Alexander Makwena. He was appointed executor when his father's estate was registered. As he was still a minor, he

was assisted by second applicant. On 5 September 2022 he visited the immovable property in the estate of his late father, house number 43 Zizi New Mabvuku, Harare, to collect rentals from tenants who use the property. He was given a letter which gave notice to the existing tenants to vacate and pave way for first respondent. He notified second applicant on 8 September 2022. The estate of the late Alexander Makwena was wound up in 2000 and the remaining property was allocated to first applicant and his siblings. First respondent was excluded as she was merely a girlfriend. Service in HC 6499/21 was effected at number 43 Zizi New Mabvuku where both applicants do not reside. First applicant submitted that the address at which service was done was a ploy to snatch judgment as first respondent knew the addresses for both applicants, his in Marondera and second applicants in Bluffhill. On the merits, first applicant indicated that first respondent's claim had prescribed and in addition the claim that first respondent was married to the deceased is severely contested. First applicant prayed for the rescission of the default order with costs. Alternatively, he argued that the non-citation of his siblings who are beneficiaries is a miscarriage of justice warranting rescission. He further argued that the failure to mention that the estate had been wound up was misleading to the court. He prayed for costs on a punitive scale. Second applicant deposed to a supporting affidavit confirming that she got to know of the order on 8 September 2022.

In opposing the application, first respondent raised two preliminary points. The first was that the applicants are approaching the court with dirty hands as they have not complied with the order issued in HC 6499/21. The second was that the application is out of time as applicants became aware of the order on 5 July 2022 when they went to collect rentals from tenants who had been informed of the order. On the merits, she insisted that she was legally married to the deceased and that the estate was not finalized as the immovable property was not transferred to the alleged beneficiaries. She submitted that the Marondera address for first applicant was given over twenty years ago when he was a minor and could not be relied upon. She indicated that she was not aware of the Bluffhill address for second applicant, that the Mabvuku address is more reliable as applicants collect rentals from there and it was the matrimonial home. She submitted that a declaratur does not prescribe and that non-citation of a party is not fatal. She prayed for the dismissal of the application with costs on a higher scale.

In heads of argument applicants submitted that they were not in willful default as they were neither notified nor served with the court action by first respondent in case number HC 6499/21. They argued that first respondent knew from the Letters of Administration that the address for service for first applicant is number 70 Chimbanda Estate Marondera. Further that first respondent was aware that second applicant stays in Bluffhill because second applicant was staying with first respondent's biological son during the time the court action was served. They argued that the default judgment is a product of deceit and it must be set aside. First respondent insisted that applicants have dirty hands and the application was filed out of time. She argued that applicants were in willful default as they were ignoring compliance with the order. Further, that applicants have no prospects of success as she is indeed the surviving spouse and beneficiary of the estate of the late Alexander Makwena.

PRELIMINARY POINTS

I formed the view that the preliminary points are closely linked to the merits of the application for rescission of the default order. For one to have dirty hands, one must be aware of an order of court and disregard it. Applicants argued that they were not aware of the order until 5 and 8 September 2022. First respondent argued that they became aware of it in July 2022. The reasons for each party's position are essential for the determination of whether or not the order should be rescinded. I was not persuaded first respondent established that applicants were deliberately ignoring a court order they were aware of. Because it was not established that the applicants became aware of the order in July 2022, no basis was laid for the argument that the application for rescission was out of time. Considering that no personal service of the order was effected on the applicants, I dismissed the preliminary points.

WHETHER OR NOT APPLICANTS WERE IN WILFUL DEFAULT

Willful default was defined in *Zimbabwe Banking Corporation v Masendeke* 1995 (2) ZLR 400 (S), where MCNALLY JA (as he then was) said; -

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

Also in *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Limited* 1994 (3) SA 801 KING J stated that; -

“More specifically, in the context of a default judgment, ‘wilful’ connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e., its legal consequences and a

conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be,”

First respondent had the onus of proving that applicants had full knowledge of the service or set down and that they freely took a decision to refrain from appearing. Applicants’ position was that they were not served with any process deliberately as first respondent was aware of their addresses. First respondent did not deny being aware of first applicant’s address. Her argument was that it was 20 years old and she adjudged it not reliable. This is the address that is on the Letters of Administration issued to first applicant. First respondent did not give a reason for thinking that it was no longer applicable. Her argument was that first applicant has other addresses he uses as well. She did not refer to the address that was used as one used in official communication to the first applicant in relation to the deceased estate, because it was not used at all. None of the correspondence she attached has that as first applicant’s address. In relation to the second applicant, first respondent did not dispute the fact that her biological son was staying with second applicant in Bluffhill at the time service was effected. The service of the summons and declaration for both applicants was by

“affixing to a white and brown wooden door with a glass window after hooting and knocking with no response.”

Whilst affixing process to a door would be proper service in circumstances where the door is on the address given by a party as the one for service, I am not persuaded that it is appropriate where a plaintiff has used an address at which the defendant is not resident and which defendant has not confirmed as his address for service. First respondent’s actions to that end were fraudulent and meant to mislead the court that proper service was effected. I therefore found that first respondent did not establish that applicants were aware of the process and deliberately chose to ignore it.

First respondent’s reason for insisting that applicants had knowledge of the court order was that it was served at a house with tenants from whom applicants collected rentals every month. In para 4.2 of the opposing affidavit, she stated

“4.2 The Application for rescission was made out of time. The Applicants were aware of the order since 5 July 2022 when their tenants whom they collect rentals from on the property were informed of the order.....”

She did not even say applicants were informed by the tenants. It is trite that he who alleges anything against another person must prove such allegation. See *ZIMASCO (Pvt) Ltd v Jameson Chizema* SC 38/07. First respondent's argument was that because the tenants knew, applicants are presumed to also have known of the court order. She attached Annexure M which is a letter to the Master copied to applicants. It is endorsed

“Received by:-
43 Zizi New Mabvuku.
ELIZABETH MANDIRIPO (DAUGHTER TO TRACY MUJURU)
TIME: - 11:20 AM
SIGNED:-”

The endorsement of “daughter of.” suggests that Elizabeth was not the tenant. Though first respondent says from the 5th of July 2022, Applicants were aware of the order, the letter to which the order was attached was received at the Master's Office on 6 July 2022. The date of receipt by Elizabeth is not clear. There is no affidavit from Elizabeth confirming that after receiving the letter she subsequently handed it over to the applicants.

First respondent referred to several annexures to prove that Applicants were aware of the order. The first annexure is “H”. This is a receipt for paying \$1 for photocopying five pages of DR 1690/01. It was not explained how this proves that applicants were aware of the order. The next is Annexure “I”, a letter written to the Master and copied to the applicants. There is no proof that the copies reached the applicants. Only cell phone numbers are indicated against applicants' names. Their addresses are not indicated. Annexure “J”, dated 26 July 2022 is a letter to first applicant addressed to a Kambuzuma address. There is no proof of receipt by first applicant. Annexure “K” is a letter to Applicants' legal practitioners dated 7 September 2022 in which reference was made to a recorded call between first applicant and first respondent's legal practitioners. The recording was not placed before the court. There is also reference to first applicant receiving a letter from the Master dated 29 July 2022. The letter or proof of receipt is not on record. The letter on record is dated 26 July 2022. Annexure “L” is a document with a title “Follow up notes” according to which a message was sent to a cell number. No proof of the delivery of the message was placed before the court. There was no affidavit from the author of the notes confirming that the message was sent, delivered and read. Annexure “M” has already been discussed above. Annexure “N” on the consolidated index is a letter from Ronros Estate

Agents which unfortunately was not uploaded to form part of the record before the court. From the above analysis, it was not established that from the 5th of July 2022 Applicants were aware of the order.

On the prospects of success, I was convinced that applicants have an arguable case. Their position is that the estate of the late Alexander Makwena was administered properly and procedurally. First respondent claimed that there was an error and made reference to the Master's Report dated 18 February 2022. The Estate of the late Alexander Makwena was finalized on 4 September 2000. The question that arises is how it was finalized excluding first respondent if indeed the marriage certificate was on record. In my view that issue needs to be ventilated in a full hearing.

For the above reasons I granted the application with costs.

Mapaya & Partners, applicants' legal practitioners
Takaindisa Law Chambers, first respondent's legal practitioners.