

RUTH MAPFUMO
versus
KENNETH MAPFUMO
and
THE LEARNED MAGISTRATE MS n. MURANDU
and
THE DIRECTOR OF HOUSING KADOMA CITY COUNCIL

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 24 & 26 October, & 15 January 2024

Opposed Matter: Review

Mr *F Misihairabwi*, for applicant
Ms *T A Mashambanhaka*, for first respondent
No appearance for second and third respondents

MUCHAWA J: This is a court application for review made in terms of s 26 of the High Court Act, [*Chapter 7:06*] as read with Order 33 of the high Court Rules. 1971. The grounds for review are given as follows:

1. “The learned magistrate grossly erred at law and in fact in concluding that the default was wilful when the applicant was in court just after the default was passed. That the applicant saw that first respondent still at court.
2. The learned magistrate grossly erred in failing to treat this matter with fairness and the applicant was in wilful and deliberate default is very wrong. That the first respondent was employed as clerk at Kadoma Magistrate Court and in Kadoma and the issue of bias cannot be ruled out.
3. The learned magistrate grossly erred in concluding that there was no notice of opposition filled (sic) when in fact the notice of opposition was filed of record and first respondent duly served. This constitutes a gross irregularity in the part of the trial magistrate.
4. The learned magistrate grossly erred in concluding that the issue of the court sitting much earlier is untrue when in fact the court now sits much earlier, it now sits at 08.30hrs, while it used to start after 09.00hrs.
5. The trial magistrate grossly erred in failing to allow that the matter be heard on merit rather than on technicalities. The explanation for initial default is grossly in error and or bias in such an extent that no reasonable court in its proper function of duty could have come up with the same conclusion considering that the matter involved a house, shelter for the family.” (sic)

The first respondent raised points *in limine*, mainly that the grounds are raising points which should have been brought by way of an appeal and not an application for review. It had

been initially prayed that the matter be dismissed on this account, but this was revised to that the matter be struck off the roll.

After hearing the parties on the point raised, I upheld the point *in limine* partly as I concluded that the applicant had brought an appeal disguised as an application for review. I relied on the learned authors, Herbstein and Van Winsen, *Civil Practice of the High Courts of South Africa*, 5th edition at p 1271, who state as follows:

“The reasons for bringing proceedings under review or appeal is usually the same viz to have the judgment set aside. Where the reason for wanting this is that the court came to the wrong conclusion on the facts or law, the appropriate procedure is by way of appeal. Where, however the real grievance is on the method of the trial, it is proper to bring the case on review.”

It was my finding that all the grounds of review listed were largely questioning the conclusions on the facts and law and were therefore improperly brought by way of review. The only saving was on part of ground 2 which alleges bias whilst ground 5 was found to be vague and a repetition of the earlier grounds. Consequently, I struck out grounds 1, 3, 4, and 5 and part of ground 2. I then proceeded to hear the parties on the allegation of bias on the part of the trial magistrate.

Background facts

The common cause facts are that applicant, and first respondent are husband and wife who are married in terms of the then African Marriages Act [*Chapter 5:07*]. Ten children were born to this marriage. During the subsistence of the marriage, the parties acquired house number 1481 Waverly Kadoma. The house was registered in the name of the first respondent and applicant was listed as a dependent. In the course of time the applicant had filed a note with the third respondent barring the sale of the house without her consent.

The first respondent then purportedly sold the house to one Trymore Hamamiti on 9 August 2018 but could not complete the cession process due to the note filed by the applicant. This led him to file an application for an order compelling transfer of the property to Trymore Hamamiti. A default order was granted in favour of the applicant on 11 December 2019. Thereafter the applicant filed an application for rescission of judgment which was dismissed in a judgment of 4 February 2020 and stamped 6 February 2020. It is this last final judgment which is impugned in these proceedings.

Whether the trial magistrate was biased?

Mr *Misihairabwi* submitted that the court should note that the first respondent was a clerk of court in the same court. Reference was made to p 71/72 of the record to argue that

there was a caveat on the property in issue by the Kadoma City Council which party did not oppose the matter. For the court to have allowed a change of ownership in the light of the caveat was argued to constitute bias.

The court was further alleged to have been biased in having decided the matter solely based on wilful default without looking at other elements. The fact that the court did not acknowledge the presence of a notice of opposition some two months later was another indication of bias.

Furthermore, Mr *Misihairabwi* pointed to the deed of cession on record p 28 which gives the price of the house as USD 17 000.00 yet there is another affidavit from the alleged purchaser giving different figures on p 121 of the record. It was averred that something is therefore amiss in the deed of cession. When quizzed by the court whether such issues were raised before the court *a quo*, Mr *Misihairabwi* referred the court to para 9 of the court application for rescission wherein it was stated that there is no supporting affidavit from the alleged purchaser. In para 16 there is said to be talk of a tacit universal partnership and that the applicant was working at Julie Whyte for 18 years. In the light of these averments, it was argued that the court should not have dismissed the matter on technicalities as this matter touches on s 85 (3) (c) of the Constitution of Zimbabwe as there is a minor child whose shelter is at stake. The court is alleged to have failed to even consider its own record of proceedings. In addition, it was alleged that though the first respondent had claimed that there were other properties in existence, these were not available as shown in para 16 of the founding affidavit to the application for rescission.

The fact that the trial magistrate dismissed the *ex parte* application for stay of execution, yet it was not opposed was said to be further evidence of bias on the party of the court *a quo*.

The order sought by the applicant is as follows:

- “1. Second respondent’s default and final ruling in favour of first respondent dated 4 February 2020 be and is hereby set aside and be declared null and void and a hearing de novo before a different magistrate be and is hereby ordered.
2. If the respondent had made an action pursuant to the said default judgment, an order for the reversal of the status is now and hereby ordered.
3. The first respondent be and is hereby ordered to pay costs of this application on a higher scale.”

On the other hand, Ms *Mashambanhaka* submitted that there is no notice of opposition filed by the applicant who only said that she wanted to file on the date of issue of the default judgment and that it is misleading for the applicant to say she was filing her

opposition papers as there is nothing on the record and judgment had already been passed in default. It is contended that the magistrate was fair.

Reference was made to the case of *Bailey v Health Professions Council* 1993 (2) ZLR 17 (S) on the test for bias wherein it is stated that there must be a real likelihood of bias, a real danger or real bias test and that is that there must be a real likelihood that reasonable, right-thinking persons would see bias. The magistrate is said to have taken all relevant factors into account. The fact that the first respondent was an employee at the same court was said not to be sufficient to show bias as he too has a right to access justice. The applicant is alleged to be looking for far fetched reasons to justify the default. It was prayed that the application be dismissed.

The correct case authority applicable in this case is that of *Mpandasekwa v Green Motor Services Private Limited* SC 30/15 in which the following is held:

“The question of bias is considered differently before and after a hearing..... After a hearing has already been conducted the situation is different. A showing of bias is required to nullify the proceedings already concluded. It is not enough to show a possibility of bias as is the case prior to the hearing.”

In casu, Mr *Misihairabwi* failed to point the court to any evidence of the possibility of bias having been raised before the magistrate heard the matter. The test to be applied is therefore not the one in *Bailey supra* but this one in *Mpandasekwa supra*.

The first issue of fact resorted to, is that there was a caveat on the property and a note on p 72 of record which is dated 9 October 2017 is the alleged caveat. It was submitted to the City of Kadoma, Housing and Community Services. Unfortunately, it is written in Shona and is not translated.

The second point is that the court in considering the application for rescission simply decided based on wilful default and refused to delve into the prospects of success at law and even ignored that by the date of the application for rescission, there was a notice of opposition on record.

The magistrate correctly cited Order 30 Subrule 2 (1) of the Magistrates Court (Civil) Rules, 2019 which provides for the orders a court may make when an application for rescission is brought before it. The rule says:

“2. (1) On hearing an application in terms of rule 1 and being satisfied that-

- (a) the applicant was not in wilful default; and
- (b) there is good prospect that the proffered grounds of defence or the proffered `objection may succeed in reversing the judgment;

The court may-

- (c) rescind or vary the judgment in question; and

(d) give such directions and extensions of time as necessary for the further conduct of the action or application.”

Her interpretation of this provision is what is interesting. She says the following:

“The provision is clear that the first thing an applicant has to prove is that they were not in wilful default then they establish a reasonable defence to the claim. If the court finds that the applicant’s default was wilful, the inquiry ends there. This is unlike the higher courts with inherent jurisdiction where a court can still rescind a judgment in spite of the fact that the default was wilful.”

It appears to me that the trial magistrate took this interpretation, which was applicable to the old, repealed rules to shy away from considering the prospects of success on the merits as she should have done. The new rules are clear that the wilful default should be considered in conjunction with the prospects of success.

The repealed Magistrates Court (Civil) Rules, 1980 used to provide as follows:

“2. Orders which court may make (1) The court may on the hearing of any application in terms of rule 1, unless it is proved that the applicant was in wilful default— (a) rescind or vary the judgment in question; and—”

Applying the same interpretation for this case where clearly the legislature has included consideration of the merits or prospects of success can surely be seen as a showing of bias. The magistrate was duty bound to consider these in conjunction with each other.

The correct approach in the light of the new rules is that laid out in *Stockil v Griffiths* 1992 (1) ZLR 172 (SC). It was held as follows:

“The factors to be taken into account in deciding whether a default judgment should be rescinded are:

- a) The reasonableness of the applicant’s explanation for the default,
- b) The bonafides of the application to rescind the judgment, and
- c) The bonafides of the defence on the merits of the case and whether the defence carries some prospects of success”.

There was a notice of opposition filed by the applicant on 11 December 2019. It is therefore not true that the record does not contain a notice of opposition by the applicant to the first respondent’s application to compel transfer. See p31 Of record.

The test for bias as articulated for example in the case of *Nkomo v TM Supermarkets (Pvt) Ltd* 2013(2) ZLR 75 (H) is whether the person so challenged has associated himself with one of the two opposing views that there is a likelihood of bias or that a reasonable person would believe that he would be biased.

The applicant’s conclusion that a person in the second respondent’s position as a learned magistrate, cannot, outside of actual bias, use repealed rules to achieve an outcome

favourable to the applicant cannot be said to be unreasonable. There was no need to avoid looking at the merits of the case. The result is that her conclusion is so outrageous that no reasonable person in her shoes could have reached such a conclusion. She was duty bound to proceed to consider the merits of the case.

It is my finding therefore that the applicant has successfully motivated for the setting aside of the decision of the second respondent. I accordingly order as follows:

1. The judgment entered in favour of the first respondent on 4 February 2020 and stamped on 6 February 2020, be and is hereby set aside.
2. The matter is remitted to the court a quo for hearing de novo before a different magistrate.
3. Any action taken by the first respondent in execution of the 11 December 2019 decision and the judgment of 4 February 2020, stamped on 6 February 2020, be and is hereby stayed pending the outcome of the hearing de novo.
4. First defendant to pay costs on the ordinary scale.

Lawman Chimuriwo Attorneys at Law, applicant's legal practitioners
Mangwana & Partners, first respondent's legal practitioners