

SHEPHERD SINGADI

versus

TASARIRAVONA TASISIO MANDABA

And

MESSENGER OF COURT, MASVINGO N.O.

HIGH COURT OF ZIMBABWE  
MAWADZE J & WAMAMBO J.  
MASVINGO, 27 November 2019 and 4 March, 2021

### **Civil Appeal**

*F.R.T. Chakabuda* for appellant  
*T. Mbwachena* for 1<sup>ST</sup> respondent  
No appearance for 2<sup>nd</sup> respondent

WAMAMBO J: This is an appeal against a judgment of a Magistrate sitting at Masvingo. At the centre of the dispute is a Toyota Corona motor vehicle registration number AND 4042 (*hereinafter called the vehicle*). The vehicle was sold to appellant by first respondent. What transpired thereafter is not agreed between the parties. The appellant and 1<sup>st</sup> respondent were plaintiff and defendant respectively in the court *a quo*.

When referring to the proceedings before the Magistrates Court I will refer to them as plaintiff and defendant.

Plaintiff issued summons claiming for an order, against defendant for the delivery of the motor vehicle alternatively the payment of the replacement costs of same, damages for loss of income, interest and costs of suit.

On 30 April 2019 plaintiff issued a notice to plead which was served on defendant on 17 May, 2019. Thereafter instead of pleading defendant filed a Request for further particulars. Plaintiff then applied for and obtained a default judgment.

Defendant applied for rescission of judgment. According to the record up to this stage defendant was acting as a self-actor. The application for rescission was filed by Ruvengo, Maboke and Company who represented defendant in this matter.

In the application for rescission defendant avers as follows;

He only became aware that a default judgment had been entered against him on 13 June, 2019. *Mr Foroma*, plaintiff's legal practitioner approached him early in the year and informed him he had issued summons against him. This was before service of the summons on defendant. *Mr Foroma* introduced defendant to one gentleman by the name of Chihanga, who he said was a legal practitioner who would assist him in the matter. Defendant and *Mr Foroma* have been "long time" friends, grew up together and share the same totem. Because of the trust emanating from this background defendant engaged Mr Chihanga as his legal practitioner. Mr Chihanga charged him a deposit of RTGs450.00 for legal services he would apparently render. It is Mr Chihanga who filed an appearance to defend and a request for further particulars. Defendant was satisfied that he had engaged a legal practitioner to represent him and was of the view that he was in safe hands.

Defendant made inquiries after learning of the default judgement and discovered that Mr Chihanga is not a registered legal practitioners but a bogus one. Had he not been approached by Mr Foroma to engage Mr Chihanga he would have engaged the services of a registered legal practitioner. He was thus not in wilful default and has a bone fide defence if allowed to properly defend himself. On 8 November 2017 he entered into an agreement of sale for his vehicle with plaintiff for RTGs2 600 which 1<sup>st</sup> respondent paid in full.

The defendant further avers that he delivered the vehicle and the registration book to plaintiff who in the same month of November 2017 approached him and informed him the vehicle had serious mechanical challenges and intended to cancel the agreement. A long

discussion took place resulting in the contract being cancelled by mutual consent. It was agreed that defendant would refund plaintiff his full purchase price in instalments.

Plaintiff delivered the vehicle and registration book. Plaintiff then proceeded to make various payments to defendant including one through his mother Maina Mandava. The summons erroneously refers to a motor vehicle with registration number AND 4042 while the correct ones are ADN 4042.

It is noted that this error does not change the complexion of the case as the plaintiff's particulars of claim at page 23 clearly depict the correct registration numbers in any case.

One Alois Jaka in a supporting affidavit avers that defendant paid plaintiff 850 bond in his presence for what he understood was a refund of the purchase price of the motor vehicle.

Maina Mandava in a supporting affidavit confirms making a transfer of RTGs1000 on 8 February, 2018 to plaintiff for purposes of refunding plaintiff the purchase price he had paid to defendant.

Plaintiff opposed the application for rescission. He avers as follows: the allegations against his legal practitioners are being made to persuade the court to believe plaintiff was not in wilful default. Plaintiff corrects the sale price alleged by defendant to USD2 600.00. He further avers that he never drove or took possession of the motor vehicle. No agreement was cancelled and defendant is not telling the truth. Payment of 850 bond was a refund of money paid to defendant as agent fees for a residential stand in another business transaction. Other payments were for rental of the vehicle. Plaintiff avers that he never met defendant's mother Maina Mandava nor Alois Jaka.

The trial Magistrate in his judgment found that the application for rescission of judgment was meritorious and ruled in favour of the plaintiff.

In his judgment the Magistrate found that although defendant was in wilful default he had prospects of success. The reasons given justifying that there are prospects of success is that there are triable issues on whether or not there was a rental agreement. Further that defendant established a *bona fide* defence.

In the heads of argument and oral argument *Mr Chakabuda* for the appellant submitted that once the court *a quo* made a finding that 1<sup>st</sup> respondent was in wilful default that was the end of the matter.

He referred to Order 30 Rule 2 of the Magistrates Court (Civil) Rules 2019 S.I. 11/2019.

Further that there are no factual or legal representations challenging the existence of the rental agreement. It was submitted that once the court *a quo* found 1<sup>st</sup> respondent in wilful default the court had no mandate to deal with the prospects of success. *Mr Mbwachena* strenuously submitted that an interpretation of Order 30 Rule 2 of the Magistrates Court (Civil) Rules) 2019 is to the effect that the court should consider whether applicant was in wilful default and whether there were good prospects of success. He further submitted that the new Rules empower a Magistrate to adopt a holistic approach and consider prospects of success even if applicant was in wilful default.

It became clear that the *Mr Foroma* being referred to by 1<sup>st</sup> respondent is the appellant's legal practitioner both in the court *a quo* and before this court. We were of the candid view that ethically he should either have disclosed this prior to the hearing or better still to instruct another legal practitioner to argue the matter. This is in the light of the dark aspersions cast on him as a legal practitioner by the 1<sup>st</sup> respondent. *Mr Chakabuda* conceded this and tendered an apology.

A close analysis of Order 30 Rule 2 of the Magistrates Court (Civil) Rules 2019 is necessary in the circumstances. It reads as follows:

2. *Orders which court may make*
  - (1) *On hearing an application terms of rule 1 and being satisfied that –*
    - (a) *applicant was not in wilful default and*
    - (b) *there is a good prospect of 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*
  - (2) *The court may also make such order as it thinks just in regard to moneys paid into court by the applicant*
  - (3) *If an application in terms of rule 1 is dismissed the default judgment shall become a final judgment*

In the instant matter the court *a quo* found that the 1<sup>st</sup> respondent was in wilful default.

However the court *a quo* went further to find that there were prospects of success on appeal.

In considering whether or not the court *a quo* was correct law when it granted the rescission of judgment we note the grounds of appeal which are as follows:-

- “1. *The court a quo erred and misdirected itself in rescinding judgment when it had made a finding that 1<sup>st</sup> respondent was in wilful default for want of compliance with the rules of court.*
2. *The court a quo erred and misdirected itself in making a finding that there were triable issues when none had been placed before it.*
3. *The court a quo erred and misdirected itself when it rescinded judgment when it was clear that the 1<sup>st</sup> respondent had no defence on the merits.”*

Order 30 Rule 2 clearly provides the grounds justifying the granting of a rescission of judgment as wilful default and prospects of success.

We find that the court *a quo* was correct to find that appellant was in wilful default. The reasons given are summarily as follows:-

The appearance to defend and request for further particulars were filed by 1<sup>st</sup> respondent himself and not the alleged legal practitioners, Mr Chihanga. This is indeed borne by the record.

The notice of appearance to defend indeed reflects that 1<sup>st</sup> respondent is the one who filed it and it also bears what purports to be his signature. The same applies to the request for further particulars. Nowhere does Mr Chihanga's name or the law firm he represents or purports to represent appear in both the notice of appearance to defend and the request for further particulars.

The court *a quo* also found that a diligent reasonable man would have taken steps to inquire on the progress of his case.

Indeed there is nothing on record reflecting that 1<sup>st</sup> respondent made enquiries on the progress of his case.

The court *a quo* also found that 1<sup>st</sup> respondent ought to have taken steps to establish whether Mr Chihanga was indeed a legal practitioner and also establish which law firm he worked for. The record is silent on where Mr Chihanga was introduced to 1<sup>st</sup> respondent. Further it is unknown were exactly 1<sup>st</sup> respondent paid the deposit to Mr Chihanga. Surely 1<sup>st</sup> respondent should have been able to establish at which law firm he paid a deposit.

We find that the court *a quo* was correct when it found that 1<sup>st</sup> respondent was in wilful default in the circumstances.

Clearly the requirements are conjunctive and must be read together.

In other words for a rescission application to succeed the applicant has to satisfy both requirements. In this case the applicant failed to establish the first requirement. The word and in Order 30 Rule 2 is decisive.

On prospects of success the court *a quo* analysed the evidence and concluded that 1<sup>st</sup> respondent had prospects of success on appeal.

The court *a quo* analysed the evidence in detail and concluded that 1<sup>st</sup> respondent had a bona fide defence. We find that findings on prospects of success were misplaced.

The affidavit by 1<sup>st</sup> respondent appearing at page 62 of the record reflects the sale of the vehicle by appellant to 1<sup>st</sup> respondent. There is no agreement reversing the sale nor an affidavit by either party confirming the reversal of the sale.

While 1<sup>st</sup> respondent avers that he paid for a refund of the vehicle in RTGs dollars through transfer there is no such proof.

Annexure 'D' clearly confirms the sale of the vehicle and does not talk of the reversal of the sale.

Annexure 'D' was signed on 8 December 2017 yet 1<sup>st</sup> respondent avers that on that date he paid a refund of RTGs750 to appellant. The agreement however is silent on the cancellation and refund of money. In fact the agreement Annexure 'D' reflects that there was an agreement to extend the collection of the vehicle to 8 January, 2018. It does not make sense that according to 1<sup>st</sup> respondent's version that there was a cancelled agreement on the one hand an agreement of sale extending the collection of the motor vehicle.

The supporting affidavits do not seem to strengthen 1<sup>st</sup> respondent's case.

Alois Jaka notably accompanied 1<sup>st</sup> respondent to appellant's home and is 1<sup>st</sup> respondent's uncle.

There are no supporting document to justify the payment of a refund of a total of USD2 600.00 which is the sale price of the vehicle, even according to Annexure 'D', 1<sup>st</sup> respondent's own affidavit.

There are thus no prospects of success on the merits either.

Clearly the learned trial Magistrate erred in finding that the requirement of Order 30 Rule 2 were satisfied.

To that end we find that the rescission of judgment was erroneous and ought to be reversed.

To that end we make the following order:-

1. The appeal be and is hereby upheld
2. The decision of the court *a quo* be and is hereby set aside and is substituted with the following:-
  - The 1<sup>st</sup> respondent's application for rescission of judgment be and is hereby dismissed with costs.
3. The 1<sup>st</sup> respondent pays appellant the costs of this appeal.

MAWADZE J. agrees .....

*Chakabuda Foroma Law Chambers*, appellant's legal practitioners  
*Ruvengo Maboke and Company*, 1<sup>st</sup> respondent's legal practitioners