REPORTABLE ZLR (8)

Judgment No S.C. 13\2002

Civil Appeal No 143\99

(1) HEATING ELEMENTS ENGINEERING (PRIVATE) LIMITED (2) MAKWABARARA INVESTMENTS (PRIVATE) LIMITED (3) TONY TONGESAYI MAKWABARARA v THE EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK (PTA BANK)

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE MARCH 19 & APRIL 12, 2002

The appellants in person (first and second appellants appearing through *Mr T.T. Makwabarara*)

A. *P. de Bourbon S.C.,* for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellants' application for the rescission of a default judgment granted against them. The appellants appeared in person, with the first and second appellants appearing through their chief executive and *alter ego,* in accordance with the principles laid down by this Court in *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd* 1999 (2) ZLR 36 (S); 1999 (4) SA 1119 (ZSC).

The relevant facts are as follows. In October 1997 the respondent issued a summons against the appellants claiming payment of the sum of US$447 488.85

together with interest, collection commission and costs of suit.

The appellants duly entered appearance to defend the action and, on 4 November 1997, requested further particulars to the respondent's claim. After the further particulars had been furnished, the appellants requested further and better particulars on 30 March 1998.

The respondent refused to furnish the further and better particulars sought, alleging that in order to plead the appellants did not require such particulars. That was on 2 April 1998.

Subsequently, on 28 April 1998 the respondent filed a notice of intention to bar and, in response, the appellants, who were not legally represented, filed a further request for further and better particulars on 7 May 1998. In response, the respondent wrote to the Registrar of the High Court advising her that the request for further and better particulars was null and void and should be ignored.

Thereafter, in June 1998 the respondent filed a Chamber application in the High Court seeking a default judgment, which was granted on 11 September 1998, on the ground that the appellants had failed to file their plea and had been barred.

The appellants subsequently filed a court application in the High Court seeking the rescission of the default judgment. That application was dismissed with costs. Aggrieved by that decision, the appellants appealed to this Court.

In my view, this appeal may be disposed of by determining one issue only. That issue is whether the default judgment was properly granted. If it was not properly granted, *cadit quaestio,* (that is the end of the matter) and the appeal must be allowed.

Whether the default judgment was properly granted in this case depends upon whether the appellants were barred in terms of the High Court Rules, 1971.

The procedure for barring a party is set out in Rules 80 and 81 of the Rules of the High Court, 1971, which read as follows:-

> "80. A party shall be entitled to give five days' notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default.
>
> 81. On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. The endorsement on Form No. 9 shall be

duly completed before filing and it shall be signed by the party who has given the notice or his attorney." (the emphasis is added)

The endorsement on Form No. 9 referred to in Rule 81 above reads as follows:-

"To: The Registrar of the High Court,
at …

The time limited by this notice having expired, we hereby bar the plaintiff/defendant in terms thereof.

DATED at ……. this …… day of ……, ……"

After the endorsement appears the following note:-

"[Note: When a copy of this form is filed with the Registrar in terms of Rule 81, it should be accompanied by proof of service in the form of an endorsement or return of service (if it was served by the Sheriff or his deputy) or a certificate of service in Form No. 6 or 7, as the case may be]."

Form No. 6 referred to in the above note is a certificate of service by a legal practitioner. This should accompany the copy of the notice filed with the Registrar in terms of Rule 81 where the notice was served on the other party by a legal practitioner.

However, Form No. 7, which is referred to in the note, is a certificate of service by a person in the employ of a legal practitioner. This should accompany the copy of the notice filed with the Registrar in terms of Rule 81 where the notice was served on the other party by a person in the employ of a legal practitioner.

When the appeal was argued I drew the attention of Mr *de Bourbon*, who appeared for the respondent, to the fact that the photocopy of the copy of the notice of intention to bar, which formed part of the record of the proceedings in the

court *a quo*, and which was filed with the Registrar in terms of Rule 81, in order to bar the appellants, showed that the endorsement on the notice was not duly completed before filing, contrary to the provisions of Rule 81.

The relevant part of the endorsement in question reads as follows:-

> "The time limited by the Notice set out above having expired we hereby Bar the Defendants in terms thereof.
>
> DATED AT HARARE this …… day of …… 1998."

Quite clearly, the endorsement was not duly completed as required by Rule 81. The date on which the appellants were allegedly barred was not entered.

In addition, I indicated to Mr *de Bourbon* that as the notice of intention to bar had not been served on the appellants by the Sheriff or his deputy, a certificate of service should have been filed with the Registrar and that no such document formed part of the record of the proceedings in the court *a quo*.

Mr *de Bourbon* undertook to bring the two matters raised by the court to the attention of his instructing legal practitioners, and expressed the hope that the required documents would be sent to the Registrar of this Court as soon as possible.

After the Court had reserved its judgment and adjourned, the Registrar of this Court, at the request of the Court, obtained from the High Court the copy of the notice of intention to bar filed with the Registrar of the High Court in terms of Rule 81. It clearly showed that the endorsement was not duly completed.

However, Mr *de Bourbon's* instructing practitioners subsequently sent to the Registrar of this Court a copy of the notice of intention to bar whose endorsement was duly completed. This must have been a copy which they had kept

for themselves, and not the one filed with the Registrar of the High Court in terms of Rule 81.

As far as the service of the notice on the appellants was concerned, the instructing legal practitioners had this to say in their letter to the Registrar of this Court:-

> "Service was effected by one John Mupereri, a messenger in the employ of Sawyer and Mkushi, and not by the Deputy Sheriff. No certificate of Service was filed at Court."

Thus, the endorsement on the copy of the notice of intention to bar filed with the Registrar of the High Court in terms of Rule 81 was not duly completed, and no certificate of service was filed with the Registrar as required by Rule 81. The provisions of Rule 81 were not, therefore, complied with.

In the circumstances, the Chamber application for a default judgment was not in order because the respondent did not comply with the barring procedure set out in Rule 81. The appellants were, therefore, not barred, and the learned JUDGE PRESIDENT should not have granted the default judgment.

That being the case, the provisions of Rule 63 of the High Court Rules, 1971, do not apply. The Rule reads as follows:-

> "63 (1). A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

I say that this rule does not apply to the rescission of the default judgment granted in this case because the rule only applies to a default judgment

granted “under these rules or under any other law.”

I am satisfied, for the reasons already given, that the default judgment granted in this case should not have been granted. It cannot, therefore, be described as a default judgment granted “under these rules or under any other law”. It is, in fact, a nullity.

In the circumstances, the appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted:-

“1. The default judgment granted against the applicants on 11 September 1998 is set aside.

2. The respondent shall pay the costs of this application.”

CHEDA JA: I agree

ZIYAMBI JA: I agree

Sawyer & Mkushi, respondent's legal practitioners