

DISTRIBUTABLE (23)

Judgment No. S.C. 31/2002

Civil Appeal No. 245/00

(1) RAYMOND GONDO (2) DZIDZAI SITHOLE
v ROSEMARY GONDO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
BULAWAYO, MARCH 25 & MAY 21, 2002

S Ndlovu, for the appellants

M J Mellin, for the respondent

CHIDYAUSIKU CJ: The appellants were the defendants in a law suit brought against them by the respondent in the High Court. The appellants did not enter appearance to defend and the respondent obtained a default judgment against them. The appellants applied for a rescission of the default judgment. The application for rescission was dismissed and they now appeal against that judgment.

The grounds of appeal, as set out in the notice of appeal, can be summarised as follows –

1. The court *a quo* misdirected itself in concluding that the appellants had not given a reasonable and acceptable explanation for their default;
2. The court *a quo* misdirected itself in concluding that the appellants had no good and *bona fide* defence on the merits; and
3. The court *a quo* misdirected itself when it allowed its prior dealing

with the matter to influence its recent judgment.

Dealing with the first ground of appeal. The facts are that two copies of the summons in this case, one for the first appellant and the other for the second appellant, were handed to the second appellant at the appellants' matrimonial home on 2 April 1997. The appellants are husband and wife. The respondent is a former wife of the first appellant.

There is no doubt that the summons was properly served on both the appellants in terms of Rule 39 of the High Court Rules. While this was contested in the court *a quo* the appellants now concede that service of the summons was proper. Despite the summons having been properly served, neither the first appellant nor the second appellant entered an appearance to defend.

The first appellant explained his failure to enter an appearance to defend on the basis that he was not aware of the issuance of the summons and the existence of a default judgment until after the service of the writ of execution. In this regard the following averments are made in his founding affidavit:

- "4. On the 7th May 1999 a warrant of execution was served at my place of residence. I was away in Shangani on work commitments at that time. I came on Saturday the 8th of May 1999 only to be handed the writ of execution by my wife. I could not do anything as it was during the weekend.
5. On the 10th of May 1999 I approached my legal practitioners of record who went to the Registrar's office to peruse the record of proceedings.
6. I am informed that the writ of execution which is attached hereto as Annexure 'A' was pursuant to a Default Judgment which was obtained against me and the second applicant on the 6th of November 1998. I am desirous to have that Default Judgment rescinded.

7. I have been informed that an Application for Rescission of Judgment should be made within one month of the Judgment being granted. Further I have been told that in terms of the Rules of this Honourable Court one is deemed to know about a judgment against him two days after it has been granted.

8. It is my humble submission that until I saw the writ of execution I was not aware that there was an action pending against me. I have been told that the summons for both me and the second applicant was served upon the second applicant on the 2nd of April 1997. The second applicant did not hand over the summons to me. I have since enquired from her as to what happened to the summons and she had indicated to me that she misplaced it.”

The second appellant, in her founding affidavit, explained her default on the following basis:

“3. Further I admit that the summons was served upon me at the time when the first applicant was away from home on duty. I waited for the first applicant to come because I thought it was a matter involving him and his former wife.

4. However, the first applicant was away from home for a long time. By the time he came back home I had misplaced the summons and I did not remember about them. It was only after we were served with a writ of execution on the 7th of May 1999 that I remembered about the summons. I looked for them but in vain.”

It is now trite that in an application for the rescission of a default judgment the applicant, in order to succeed, must establish – (a) the existence of a reasonable explanation for the default; (b) that the application is *bona fide*; and (c) that there are prospects of success on the merits.

The learned judge in the court *a quo* concluded that the appellants had not established a reasonable explanation for the default. The appellants take issue with this conclusion.

On the facts of this case I respectfully agree with the conclusion of the learned judge in the court *a quo* that no reasonable explanation for the default was given. The summons in this case, as previously stated, were served on the second appellant. Thus there was personal service on the second appellant and service on a responsible person at the place of residence in respect of the first appellant. Not only was there personal service on the second appellant, the return of service also indicates that the exigencies of both the summons and the declaration attached to the summons were explained to her.

The amount claimed in the summons was in excess of \$100 000.00, an amount which was substantial and would have impressed on the second appellant the seriousness of the matter. The summons explicitly enjoins the appellants to enter appearance to defend within six days of the service of the summons. Apart from this, the summons had been preceded by two letters of demand to each of the appellants. These letters must have forewarned both appellants that litigation was imminent. The second appellant's contention that upon receipt of the summons she decided to do nothing about the matter until the first appellant returned home and that by the time the first appellant returned home she had misplaced the summons and forgotten about the matter is simply not worthy of belief.

I do not accept that the second appellant would treat the matter as casually as she would want the court to believe. I also do not accept that the second appellant only advised the first appellant of the service of the summons about a year later upon receipt of the warrant of execution. The probabilities are that the

appellants simply decided to ignore the summons until the warrant of execution. This is a classical case of a wilful default and disdain of the Rules.

The appellants have further argued that they have a defence on the merits, firstly on the basis that the appellants never assaulted the respondent, and secondly on the basis that the respondent failed to prove her damages. The appellants have no prospects of success on the question of liability. Both appellants were convicted of assaulting the respondent and paid fines.

The appellants have also argued that the *quantum* of damages was not proved. In my view, at best this issue is arguable but, given the fact that the appellants' default was wilful, this is insufficient to provide a basis for rescission of the default judgment.

There is no substance in the further ground that the learned judge who dismissed the application had been improperly influenced by the fact that he had previously granted the default judgment. No authority was cited for this proposition and I do not think any exists.

In the result, the appeal is dismissed with costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Sibusiso Ndlovu, appellants' legal practitioners

Ben Baron & Partners, respondent's legal practitioners