DISTRIBUTABLE (10)

ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY
v
IGNATIUS RUVINGA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWEJA & OMERJEE AJA
HARARE, NOVEMBER 12, 2012 & JUNE 3, 2013

T Mpofu, for the appellant
The respondent in person

ZIYAMBI JA: In the court *a quo* the respondent was the plaintiff whilst the appellant was the defendant. The respondent issued summons against the appellant in the High Court for the following:

> "Payment of:
>
> (i) US$9 800-00 being the costs of replacing the motor;
>
> (ii) Payment of US$208 849-00 in respect of damages suffered as a result of the loss of the plaintiff's crop;
>
> (iii) Payment of US$200 000-00 being damages in respect of mental anguish, anxiety and depression;
>
> (iv) Costs of suit."

The appellant filed its plea and the pleadings followed their natural course to a Pre-trial conference which was set down for 23 September 2010. At this hearing the learned

Judge was of the view that the parties assisted by their legal practitioners should attempt to reach a settlement failing which she would refer the matter to trial. She accordingly directed that the parties and their legal practitioners should convene a round table conference on their own for that purpose on 18 October 2010. For this reason the learned Judge then, with the concurrence of the legal practitioners of the parties, postponed the matter to 21 October 2010 for a second Pre-trial conference. The appellant was then represented by Mr *Vote Muza*.

On 21 October 2010, neither the appellant nor its legal practitioner Mr *Muza* attended at the pre-trial conference and the appellant's defence was struck off with costs. The learned Judge's note reads, in relevant part, as follows:

> "For PLAINTIFF: K Ncube with plaintiff
>
> For DEFENDANT: S A Tawona without client
>
> 1. RESULT: The defendant is not in attendance. Its legal practitioner was unable to proffer a reasonable excuse for the failure by the defendant to send a representative to attend the PTC.
>
> 2. Mr *Ncube* submitted that this was the second occasion on which the defendant failed to attend the PTC without a reasonable explanation. The parties were supposed to have met yesterday to discuss settlement and plaintiff and his legal practitioner waited for them for 30 minutes. A call then came from *Muza* to say that his client could not come because [of] a course in Kadoma.
>
> 3. The defendant has been dilatory in dealing with this PTC and having no explanation for its non-attendance on 2 occasions. I find that it is in default. The plaintiff has opposed the postponement sought and has applied for the defence to be struck off.
>
> IT IS ORDERED
>
> 1) That the defence and plea by the defendant be and is hereby struck out.
>
> 2) That the matter is referred to the unopposed roll for proof of damages by the plaintiff."

The appellant filed an application in the High Court for the reinstatement of the plea. BERE J dismissed the application. This is an appeal against that dismissal.

The grounds of appeal raised 5 issues. They are:-

1. That the court *a quo* erred in failing to determine the issue before it which was that the plea had been struck out in error;

2. That the court *a quo* erred in concluding that the plea could properly be struck off notwithstanding that the appellant's legal practitioner was present and sought a postponement on account of the unavailability of the appellant's representatives;

3. That the court erred in failing to conclude that the presence of the legal practitioner as well as the defence on the merits constituted good and sufficient cause entitling it to grant reinstatement;

4. That the court erred in concluding that the affidavit of Judith Tsamba attached to the answering affidavit could not be taken into account without leave of the court

5. That the court misdirected itself in not subjecting the huge claim made by the respondent, which claim raises new issues of law to a full trial in properly contested adversarial proceedings.

THE APPLICATION

The founding affidavit was attested to by the appellant's legal practitioner *Vote Muza*. He averred that the matter was initially set down for a pre-trial conference by GOWORA J on 23 September 2010 but was postponed at the appellant's instance. The parties were to meet on 18 October 2010 for a round table conference after which they would attend the pre-trial conference which was scheduled for 21 October 2010. However, on a date not given the engineer, one Steven Mbavavira, indicated that he was to sit for professional exams during the week beginning 25 October 2010 and would not be available for the meeting on 18 October 2010 as he had to study. He was anxious to have the meeting held so he telephoned the appellant's secretary and requested the attendance of another engineer. He then agreed with Mr *Ncube,* the respondent's legal practitioner, that the meeting would be held on 20 October at 3pm.

On the morning of 20 October he telephoned Mr Mbavavira intending to discuss certain issues in preparation for the meeting. During this telephone conversation it became clear to him that it would not be possible for any other person to attend the meeting. He then took the decision that Mr Mbavavira's attendance was necessary if the meeting was to be meaningful and decided to ask Mr *Ncube* to defer the meeting to a date after Mbavavira's examinations.

He called Mr *Ncube* after 2pm (the meeting was scheduled for 3pm) but *Ncube* was out of office and he spoke to his male secretary (name not given). He explained to him that he sought to have both the meeting and the pre-trial conference postponed in view of the developments surrounding the matter. He also indicated to him that his firm would attend to the postponement of the pre-trial conference. The secretary seemed to appreciate his position. The meeting was accordingly not held and no complaints having been made by Mr *Ncube,* he felt that "everything was in place".

It is to be noted that he did not enquire as to whether Mr *Ncube* had received his message and he did not attend the meeting scheduled for 3pm. One would have thought that he would have done so if only to see Mr *Ncube* and speak with him personally about the dilemma in which he found himself.

The next day he asked his assistant Mr Tawona (he did not go himself and gives no reason for his non- attendance) to attend upon MRS JUSTICE GOWORA and move a postponement. He explained to Tawona that the plaintiff would not be in attendance (of

this he had no confirmation) as he had already called Mr *Ncube's* office and undertaken to postpone the matter in his absence.

I quote from para 15 of the founding affidavit:

> "15 Mr Tawona was however surprised, to find that Mr Ncube was in attendance. Mr Ncube's position as communicated to the judge was that it was only the meeting which had been deferred but as far as he was aware the pre-trial conference would not be postponed. The only reasonable inference that I can draw from what he told the judge is that my message had not been properly communicated to him. Indeed I would be loath to make riling accusations against a person of Mr Ncube's standing and experience. The fact of the matter however, is that what he communicated to the court is not what I had communicated to his office and is a position that I do not share.
>
> The judge was persuaded by Mr Ncube's explanation and rejected that of Mr Tawona, who by the way did not expect to be arguing the issue. The judge then found that applicant was in default, although its legal practitioner was in attendance. I verily believe that in matters before the High Court, corporates appear represented by their legal practitioners. I assert that the court made its determination not on the correct version of the facts. I will not rejoice in locating and apportioning wrong and blame. I would rather locate the error. *The error was that the message that I communicated to Mr Ncube's office is not the one transmitted to the judge and in all probability to Mr Ncube as well*. I however, state this as fact and state it on my oath of office. My communication was to the effect that the applicant wanted both the meeting and the conference postponed. That was my communication and I stand by it.
>
> It is therefore clear that the order made by the court was made in error. Vital information was not placed before it. On the basis set out above, I would urge the court to find that reinstatement ought to be decreed as a matter of course." (Emphasis added).

The application was opposed by the respondent. He questioned the *bona fides* of the application. The appellant, he alleged, had defaulted at two meetings and two pre-trial conferences that were set to resolve the matter. The appellant had failed to show good and proper cause for the rescission of the order of GOWORA J. In particular, no affidavit had been filed by Stephen Mbavarira to confirm the averments made by Vote *Muza*. There was no evidence that he was sitting for professional exams and even if he was so sitting there had to be someone from the institution who could have attended at the pre-trial conferences and

meetings. The persistent defaults by the appellant and its legal practitioner are an indication that they were not interested in having the matter resolved expeditiously.

THE GROUNDS OF APPEAL

Dealing with the first and second grounds, two submissions were made. The first is that the legal representative of the appellant was present and it was open to the court to express its displeasure by different means other than striking out of the plea.

It may be noted here that the purpose of the pre-trial conference is to attempt to reach settlement between the parties and, where this is not possible, to identify issues for trial with a view to curtailing the proceedings. This is the reason why the presence of both the parties and their legal practitioners are required thereat. Where a legal practitioner attends a pre-trial conference set by a Judge without his client he must have his client's instructions to take decisions on its behalf. The pre-trial conference is not a formality. It is an essential part of the proceedings and the Judge will have put aside other work and studied the pleadings, in order to prepare for the conference. It is therefore disrespectful in the extreme to wait until the time scheduled for the conference to advise the court that the parties are unable to attend. In *casu* the legal practitioner who appeared on behalf of the appellant had no knowledge of the appellant's case, was not prepared to argue it and was there only to seek a postponement. In such circumstances it cannot be said that the appellant was represented at the pre-trial conference.

The second contention under this head was that the court which struck out the plea acted on wrong information. It was submitted that the court's judgment rested on the

"uninformed" views of Tawona who had not checked the position and that the details of *Muza's* conversation with Mr *Ncube's* secretary were not placed before the court.

The first thought that comes to mind is that if, as was submitted on behalf of the appellant, *Tawona* was its representative, why was he uninformed? Why did he not have proper instructions? And if *Muza* was the one possessed of the necessary information and seized with the conduct of the case, why did he not attend the pre-trial conference and take decisions on behalf of his client if the latter was for good reason unable to attend? The founding affidavit is silent on why *Muza* did not himself attend to the postponement.

In any event, can it be said that had the Judge been informed of *Muza's* conversation with *Ncube's* secretary she would not have given the judgment that she did? I think not. Any legal practitioner worthy of his calling will know that he cannot rely on a conversation with a secretary, without more, to excuse him from attendance at a pre-trial conference in defiance of a Judge's directive. The fact that *Muza* made no effort to ascertain that *Ncube* had received his message and the additional fact that he refrained from attending the pre-trial conference would seem to suggest a considered decision by both the appellant and *Muza* to play for time by getting the pre-trial conference postponed.

Rule 449 of the High Court Rules permits the High Court to rescind, vary or correct a decision erroneously given. While the learned Judge made no specific reference to the issue of error on the part of the GOWORA J, I am inclined to agree with the respondent that this application was not based solely on an alleged error by the learned Judge. The allegations made therein, while including the allegation of error, were also of a general nature explaining the appellant's absence at the pre-trial conference and stating the prospects

of success as well as the reasons why the matter should go to a full trial. This is not a case where there existed a valid cause for the absence of the appellant and Mr *Muza* which cause was unknown to the Judge at the time the order striking out the plea was made. Indeed no valid reason was advanced before the court *a quo* which would persuade it that the judgment was erroneously given. Further, the explanation given to GOWORA JA conflicted with that given by *Vote Muza* in the founding affidavit.

In any event, for such an application to succeed the error would have to be obvious on the papers. If for instance, both the appellant and its legal practitioner had been involved in a serious accident on their way to the pre-trial conference unknown to the Judge and the respondent's legal practitioner, it would have been quite obvious to the court that its judgment was granted in error. It follows that I do not agree with the submission by Mr *Mpofu* that the plea was "clearly" struck out in error.

What is apparent from the judgment of the court *a quo* is that the court considered the totality of the circumstances in which the plea had been struck out and came to the conclusion that the appellant had shown no good cause for the rescission of the judgment and the reinstatement of the plea.

With regard to the third ground of appeal, the finding that the appellant was in effect unrepresented, leaves only one question to be considered and that is whether the court ought to have granted reinstatement in view of the defence on the merits. The learned Judge reasoned as follows:

> "In the instant case and in a desperate effort to lay the foundation of the applicant's *bona fides* in its defence, the deponent has completely denied liability on the part of the applicant. Unfortunately the filed pleadings do not quite support him. It will be

noted that on 16 January 2010, the applicant wrote to the applicant complaining about the burnt electric motors which had been caused by low voltage leading to disruption of the supply of electricity at the respondent's plot, which disruption is the cause of his action in the main matter. In its response the applicant, through its secretary one J Tsamba partially accepted blame through its letter of 27 January which was to the following:

> "We acknowledge receipt of your letter dated 6 January 2010 whose contents have been noted.
>
> Please be advised that it was established that a 100 KVA transformer which was available by then was installed in 2002 at Exwick Plots and could cater for the load. Due to the increase in the load over the years, the transformer capacity could not match the load.
>
> To ensure adequate supplies an increase in transformer capacity will be made from 100 KVA to 315 KVA. The LT line will be uprated from 50mm^2 HAD to 100mm^2 HAD by 15 February 2010.
>
> We hope this addresses your concerns." (my emphasis)

Compare this conciliatory gesture which in my view is a partial admission of liability with the fully fledged denial of liability that runs through Vote Muza's founding affidavit filed for and on behalf of the applicant. This conflicting approach in dealing with this matter neither edifies the applicant's defence nor portrays Vote Muza in good light. If anything it casts reasonable doubt on the *bone fides* of the application filed.

In para 11 of his notice of opposition to the application the respondent had challenged the applicant why its entire institution had failed to nominate a representative to represent it at the pre-trial conference of 21 October 2010. In response, and in his answering affidavit, Vote Muza then grudgingly referred to the affidavit of Judith Tsamba "filed herewith."

Since the appellant's case must stand or fall on its founding affidavit, the affidavit of Judith Tsamba was correctly rejected having been appended to the answering affidavit without leave of the court.

I agree with the observations of the court *a quo,* that through its conduct and *via* its chosen counsel, the appellant deprived itself of the opportunity to clearly ventilate the issues in fully contested adversarial proceedings. It has only itself to blame if the result is

not to its satisfaction. The conclusion reached herein also disposes of the fourth ground of appeal.

With regard to ground 5, the issue of the magnitude of the claim is a matter for determination by the court before which the matter is placed on the unopposed roll. It cannot on its own constitute good and sufficient cause for setting aside the judgment entered in default.

In the result no good grounds have been established for interference by this Court with the judgment of the court *a quo*.

Accordingly the appeal is dismissed with costs.

GARWE JA: **I agree**

OMERJEE AJA: **I agree**

Muza & Nyapadi, appellant's legal practitioners