

DISTRIBUTABLE (31)

ROGERIO BARBOSA DE SA
v
HERLANDER BARBOSA DE SA

SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA & GUVAVA JA
HARARE, OCTOBER 30, 2014 & JULY 21, 2016

T Magwaliba, for the appellant

E W W Morris, for the respondent

GUVAVA JA: This is an appeal against the judgment of the High Court dated 28 May 2014. The background to this matter may be summarised as follows.

The appellant and the respondent are siblings. The appellant, through his company Carnerstown SA based in Geneva, had a 100% shareholding in Zincar (Private) Limited, a company duly incorporated in Zimbabwe. On 29 May 1995, the appellant sold to the respondent 15% of the shares in Carnerstown SA. In terms of their agreement the respondent was entitled to 50% of the net profit in Zincar at the end of each financial year. In March 2007, Carnerstown sold its shareholding in Zincar to a South African company for US\$1 500 000, at which point the appellant allegedly undertook to pay to the respondent the sum of US\$191 250.00, which sum represented the 15% share of the proceeds of the sale of Zincar after deducting expenses.

The US\$191 250.00 was to be paid by way of instalments which were to be staggered as follows:

- US\$16 000.00 initial instalment, and
- Instalments of US\$15 937.00 every 60 days.

The appellant is alleged to have paid only US\$32 000.00 of the US\$191 250.00. The respondent thereafter caused summons to be issued against the appellant in the court *a quo* claiming an amount of US\$155 000.00. The matter was set down for trial on 18 June 2008. The appellant was in default and judgment was entered against him.

The appellant then filed an application for the rescission of the default judgment. During the hearing in the court *a quo* it was not in dispute that the appellant had not been aware of the trial date as there was a mix up of notices of set down emanating from the Registrar's office. The court *a quo* nevertheless proceeded to dismiss the application on the basis that the appellant had not established "good cause" in terms of r 63(2) of the High Court Rules, 1971, such as would have warranted the rescinding of the judgment. The court stated the following on p 5 of the cyclostyled judgment:

"Should I therefore exercise my discretion in favour of the applicant and grant him the indulgence of rescission? I think not. There is nothing that the applicant can present to the trial court as a meaningful defence. Mr Morris was right in saying that he possesses "no earthly prospect of a defence" to the claim."

Aggrieved by this decision, the appellant approached this Court on the following grounds:

- a) The honourable Court *a quo* erred in law in dismissing the application for rescission of default judgment without affording the appellant an opportunity to be heard at trial.
- b) The Honourable Court *a quo* erred in dismissing the application even though respondent conceded that there was no wilful default on the part of the

appellant and notwithstanding that appellant demonstrated the existence of triable issues which were bona fide in nature and which prima facie carried some prospects of success at trial.

- c) The Honourable court *a quo*, with respect, erred in finding that the respondent's claim against the appellant in his personal capacity, when the transaction involved Carnerstown Corporation S.A of Monrovia, which sold its shares in Zincar (Private) Limited to another entity, which sale proceeds accrued to Carnerstown Corporation S.A and not the appellant, which issue can only be determined and resolved at a trial.
- d) The Honourable Court *a quo* erred at law in its finding that it had jurisdiction to hear the matter notwithstanding that Carnerstown Corporation is domiciled in Switzerland and does not conduct its business in Zimbabwe. The purported cause of action thus arose from the sale of shares in a jurisdiction outside Zimbabwe and should be determined in that jurisdiction.”

Three preliminary points were raised by the respondent in his heads of argument and at the hearing as follows:

1. Appellant filed his heads of argument out of time;
2. Appellant's grounds of appeal were meaningless and did not comply with r 32 of the Supreme Court Rules; and
3. Appellant's notice of appeal was fatally defective.

The first preliminary point raised by Mr *Morris* for the respondent was that the appellant had filed his heads of argument out of time. In terms of r 43(1) of the Supreme Court Rules, 1964 the Registrar is required to call upon the appellant to file heads of argument once he has received the record of proceedings. Correspondence in the record reveals that the Registrar made it clear to the parties that they would be advised to file their heads of argument once he had received the record. This letter was issued by the Registrar on

2 September 2014. A perusal of the record of proceedings shows that the record was only received by the Registrar on 4 September 2014. The appellant filed his heads of argument on 5 September 2014. It therefore becomes unimaginable how the appellant can be said to have failed to file the heads of argument within the stipulated time, when it is evident that no correspondence was issued by the registrar calling upon the parties to file heads of argument and they were filed a day after receipt of the record by the Registrar. As such this preliminary point in my view has no merit and is dismissed.

The second preliminary point raised was that the appellant's grounds of appeal were meaningless and did not comply with r 32 of the Supreme Court Rules. Mr *Morris* submitted that on that basis the appeal ought to be struck off the roll. Mr *Magwaliba*, for the appellant, conceded that the first ground of appeal was meaningless. He however submitted that the other grounds in the notice of appeal could not be impugned. It was the court's view that the concession was properly made and decided to proceed to hear the appeal on the remaining grounds.

The third preliminary point raised by the respondent was that the appellant's notice of appeal was fatally defective. It was submitted that since the decision which was the subject of the appeal was one premised upon the use of discretion by the court *a quo*, the appellant ought to have alleged that there was a gross misdirection by the judge in the exercise of the discretion in the grounds of appeal. The respondent relied on the requirement, as stated in some cases, that the grounds of appeal must allege a gross misdirection in circumstances wherein an appeal is directed towards the failure of a court to apply its discretion properly. In the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1947) 2 All ER 680, (1948) 1 KB 223, upon which the respondent relied,

it was noted that the appellant's grounds of appeal ought to allege that the court exercised its discretion unreasonably.

It seems to me, on an examination of the authorities in our jurisdiction, that this principle is not applied so strictly. This question was comprehensively addressed by this Court in the case of *Jainos Zvokusekwa v Bikita Rural District Council* SC 44/2015 where the court noted that:

“In my view, the remarks made in Granger’s case (supra) need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point of law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner. If it is clear that an appellant is criticising a finding by an inferior court on the basis that such finding was contrary to the evidence led or was not supported by such evidence, such a ground cannot be said to be improper merely because the words “there has been a misdirection on the facts which is so unreasonable that no sensible person would have arrived at such a decision” have not been added thereto. If it is evident that the gravamen is that an inferior court mistook the facts and consequently reached a wrong conclusion, such an attack would clearly raise an issue of law and the failure to include the words referred to above would not render such an appeal defective. After all, there is no magic in the above stated phrase and very often the words are simply regurgitated without any issue of law being raised. See, for example, the case of *Sable Chemical Industries v David Peter Easterbrook* SC 18/10 where it was noted that the words “erred on a question of law” are sometimes included in grounds of appeal but without any question of law actually being raised.” (the underlining is my own)

The above cited case sets out the approach to be taken in this respect. An examination of the appellant's grounds of appeal, when one has regard to the above remarks, leaves one in no doubt that they are concise and reflect the points of law being challenged. I thus find that the point raised has no merit and is hereby dismissed.

Turning to the merits of the appeal, the question was whether the court *a quo* was correct when it examined the defence raised by the appellant and found that he had no *bona fide* defence to the claim. The thrust of the appellant's argument was that once the court had found that the appellant was not in wilful default, it should have rescinded the judgment as it was made in error. The respondent does not dispute that the appellant was not in wilful default as his failure to attend court was as a result of an administrative mishap in the Registrar's office in the court *a quo*.

In this regard, the appellant relied on the case of *Marimo v Mpofu* HB-99-04 in which CHEDA J noted that:

"In conclusion therefore, I hold that service upon Ishmael Dhlamini a clerk in applicant's Bulawayo office was defective ab initio and accordingly there was no wilful default on applicant's part and is therefore entitled to defend respondent's action"

The appellant further submitted that the judge in the court *a quo* ought to have invoked r 449 (1) of the High Court Rules, *mero motu*, upon realising that the founding affidavit and heads of argument filed in the court *a quo* showed that the default judgment was granted in error. I agree with the submission made by Mr *Magwaliba*. A judge has the power to *mero motu* premise his decision on r 449(1)(a) where it is clear from the papers that default judgment was granted in error despite the application having been made in terms of r 63. The circumstances *in casu* are similar to those in *Mukambirwa & Ors v The Gospel of God Church International* 1932 SC 8/14. This Court dealt with this point as follows:

"In considering the application for rescission, it is common cause that the learned judge invoked the provisions of r 449 in rescinding the judgment and thus dealt with the order as one made in error. It is correct, as contended by the appellants, that the Church had not premised its application on the grounds of an alleged error, but rather as an application for rescission of a judgment granted in default, as provided under r 63. The learned judge did not in her judgment make reference to r 63. She referred to r 449. Rule 449 (1) under which the court determined the application for rescission reads:

‘The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order-

- (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby; or
 - (b) ...
 - (c) ...
- (1) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that the parties whose interests may be affected have had notice of the order proposed.’”

The High Court is a superior court with inherent jurisdiction to protect and regulate its own processes and to develop the common law, taking into account the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court designed to expedite and facilitate the conduct of court business of the court. In terms of r 449 (1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue.

The founding affidavit in support of the application for rescission clearly adverted to the grounds that the Church had not been in default, but the heads of argument filed on its behalf took the point that the judgment had been erroneously sought, and further that that the judgment had been granted in error. This was a point of law, and in my view, the learned judge in the court *a quo* was entitled to consider the application based on the submissions in the heads of argument notwithstanding that the premise upon which the application for rescission differed to what was being argued.

Under the rules the judge is empowered to invoke r 449 *mero motu*, or upon application, and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449. In view of the inherent powers of the High Court it is open to the court to correct any of its orders which exhibit patent errors. The inherent power of the High Court was affirmed by LEVY J in *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA 481, at 492 as follows:

“Under the common law the courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond and was not limited to the grounds provided in Rules of Court 31 and 42 (1)...”

Clearly, the High Court has the power to deal with the application for rescission in the manner that it did, and the submissions by the appellants would suggest that the powers of the court are curtailed, when dealing with questions relating to rescission of judgment, are without any foundation. In the absence of an express or clear statement to the contrary, a Court will not assume that its powers are curtailed.” (Emphasis my own)

It is clear from the above authority that the judge in the court *a quo* should have invoked r 449 (1) (a) upon realising that the application for rescission was predicated on the fact that the default judgment was granted in error. In his heads of argument filed in the court *a quo*, the appellant indicated that the mistake by the registrar had resulted in the appellant defaulting and as such, the default judgment was granted in error. I am persuaded by Mr *Magwaliba*'s submissions that despite the fact that the application for rescission was in terms of r 63 of the High Court Rules, the judge should have decided the matter on the premise of r 449 (1) (a), as the default judgment was granted in error.

The question which remains to be determined is whether the considerations for r 63 are similar to the consideration to be made in an application for rescission in terms of r 449 (1) (a). This point was discussed in *Munyimi v Tauro* SC 41/2013 where the court stated that:

“Further it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show “good cause” – *Grantually (Pvt) Ltd & Anor v UDC Ltd* 2001(1) ZLR 361at p 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H), 64 F-H; *Mutebwa v Mutebwa & Anor* 2001 (2) SA, 193, 199 I-J and 200 A-B.” (Emphasis my own)

In terms of r 449 the only requirement which the applicant has to discharge is that the judgment was erroneously granted and the question as to whether the defendant has good cause becomes irrelevant in the circumstances. In *casu*, it has been proved that the default judgment was erroneously granted.

The argument by Mr *Morris* that r 63 calls for the court to consider the requirements for rescission of judgment cumulatively is correct at law but falls away where r

449 (1) (a) has been invoked. Clearly, the appellant's application for rescission of default judgment fulfilled the requirements set out in r 449 (1) (a) of the High Court Rules.

For the above reasons, I am of the firm view that the appeal ought to succeed and I grant the following order.

1. The appeal succeeds with costs.
2. The order of the court *a quo* be and is hereby set aside and substituted with the following:-
 - a. The application for the rescission of the default judgment entered against the appellant on 18 June 2013 in default of appearance in Case No. HC 4135/11 be and is hereby granted.
 - b. The appellant is hereby granted leave to defend the action in Case No. HC 4135/11.
 - c. The costs of the application shall be costs in the cause.

GARWE JA: I agree

HLATSHWAYO JA: I agree

Hussein, Ranchod & Co, appellant's legal practitioners
Coghlan, Welsh & Guest, respondent's legal practitioners