DISTRIBUTABLE (42)

ROBSON MAKONI
v
CBZ LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & MAKONI JA
HARARE, JANUARY 21, 2019 AND MARCH 13, 2020

T. Zhuwarara, for the appellant

T. Biti, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court sitting at Harare in which the court dismissed an application for rescission of a default judgment entered against the appellant on 23 July 2015.

BACKGROUND FACTS

On 19 March 2015, the respondent issued summons against the appellant in the High Court under Case No. HC 2525/15, wherein it claimed the sum of US$ 521 083.41 being the capital claim of US$ 258 019.29, interest adjusted by the *in duplum* rule in the sum of US$ 258 019.29 and bank charges in the sum of US$ 5044.83. The respondent further claimed interest on the amounts at the rate of 28 percent per annum from the date of demand, being 24 February 2015, to the date of full and final payment.

The summons were served on the appellant on 30 April 2015. He filed a Notice of Appearance to Defend (the notice) on 12 May 2015 through his legal practitioners Messrs

Nyikadzino, Simango & Associates. The notice was duly served on the respondent's legal practitioners on 20 May 2015. The notice, so filed and served, had no reference of the legal practitioner handling the matter on behalf of the appellant.

Pursuant to this notice, the respondent filed a Notice to Plead and Intention to Bar on 27 May 2015. It was served on Messrs Nyikadzino, Simango & Associates on 1 June 2015 with no reference of the legal practitioner handling the matter on behalf of the appellant, as it had not been provided on the notice.

On receipt of the Notice to Plead, the appellant did not file any plea or other response. As a result, a bar was effected on 23 June 2015. A copy of that bar was served on Messrs Nyikadzino, Simango & Associates on 25 June 2015. On 10 July 2015 the respondent filed a chamber application for default judgment. The default judgment was duly granted on 23 July 2015.

On 24 July 2015, a day after judgment had been granted against him, the appellant filed a chamber application for the upliftment of the bar in terms of r 84 of the High Court Rules 1971 (the rules). Subsequently, he filed the application for rescission of the judgment on 12 August 2015.

The appellant's explanation for not responding to the Notice to Plead was that he had filed a request for further particulars on or around 28 May 2015, personally, without the aid of his legal practitioners, as he had a fall out with his legal practitioners. He further averred that, upon receipt of the Notice to Plead the firm handling his matter was unable to identify the legal practitioner seized with the matter as there was no reference on the notice. They only got

to know that it was a Mr Gwizo after he (the appellant) had made a follow up on his case. By then Mr Gwizo had left the employ of the firm. As a result of this lack of reference his legal practitioners were unable to respond to the Notice to Plead.

DETERMINATION OF THE COURT *A QUO*

The court *a quo* dismissed, with costs, the application for rescission of the default judgment. It made the point that the onus lay on an applicant to show good and sufficient cause for the setting aside of a default judgment. It found that the appellant's legal practitioners took a lackadaisical approach to the matter and that the predicament that the appellant found himself in emanated from the legal practitioners of his choice. They failed to include a reference on the notice. They, again failed to act diligently when served with the notice to plead. As if that was not enough, the firm tried to shift blame on to the respondent's legal practitioners for failure to include the reference on the notice to plead. The court *a quo* thus concluded that the explanation proffered by the appellant was not credible and was an attempt to cover up an inexcusable tardiness on the part of his legal practitioners.

On the issue of the appellant having filed a request for further particulars, the court *a quo* found that he was not being candid with the court. It noted that taking into account the cavalier approach displayed by both the appellant and his legal practitioners, it may well be that the request for further particulars was not properly filed or served on the respondents. It also noted that whilst the appellant claimed to have fallen out with his lawyers, the request for further particulars bore the address of his legal practitioners and the appellant still went to that law firm to check on the progress of his matter.

On the *bona fides* of the defence and the prospects of success the court *a quo* found that the appellant had no defence on the merits. He did not explain how he arrived at the figures he admitted owing the respondent. Despite the detailed figures given by the respondent in its opposition, the appellant gave scant details in his answering affidavit. The appellant also challenged the interest rate of 28 per cent *per annum*. He averred that in terms of the agreement the interest rate was 12 per cent *per annum*. When it was pointed out to him, in the notice of opposition, that the interest rate was increased in terms of clause 7.1.2 he had no meaningful response. As such, the court *a quo* found that the appellant had no defence on the merits and therefore no prospects of success at all. It concluded that the application for rescission was a mere fishing expedition on the part of the appellant.

Aggrieved by that decision, the appellant noted the present appeal based on the following grounds:

GROUNDS OF APPEAL

1. "The court *a quo* erred in determination, finding as fact that the amount (*quantum*), claimed by the respondent was correct, when in actual fact it was overcharged by US$59 000.00, plus 28% interest, contrary to the 12% as per agreement.(sic)
2. The court *a quo* grossly misdirected itself in ignoring clear evidence and accepted evidence that the respondent had discharged his duty to apply for default judgment, despite the fact that there was a request for further particulars filed of record, and proceeded to bar appellant unfairly.
3. The court *a quo* also erred in awarding respondent, in excess of the principal amount, thereby violating the *IN DUPLUM RULE."* (*sic*)

SUBMISSIONS ON APPEAL

Counsel for the appellant, *Mr Zhuwarara*, made the following submissions. The court *a quo* erred in dismissing the application for rescission of default judgment. The finding by the court *a quo* made it seem as a fact that the appellant was in wilful default by finding that the sins of his legal practitioners should be visited on him. The court *a quo* used the wrong test in determining whether or not the appellant had established good and sufficient cause for the

setting aside of the default judgment. He argued that the court *a quo* dealt with negligence on the part of the appellant's legal practitioners as opposed to the deliberate and conscious act by the appellant not to file his plea. Negligence and a deliberate act are different concepts. The test for rescission of judgment was enunciated in *Saitis & Anor (Pvt) Ltd v Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 (H), that rescission cannot be granted if the applicant was in wilful default.

Regarding the appellant's defence Mr *Zhuwarara con*tended that the assessment of the defence at the rescission stage is not the actual veracity of the averments but rather whether the appellant has raised a triable issue. There was a dispute pertaining to the figures and the appellant was raising the defence of error in calculation. It ought to be related to at trial. The appellant's defence was raised in para 4 of his founding affidavit and although it was inelegantly drafted it puts across the appellants defence.

In respect of the interest charged, Mr *Zhuwarara* submitted that there was a dispute regarding the interest rate in that the rate that was agreed on was not the one used to calculate the amount claimed. The court *a quo* relied on clause 7.1.2 which requires that notice be issued before the adjustment of the interest rate. No such notice was ever given. A trial ought to have been conducted so that the question of the interest rate could have been resolved.

On the other hand, Mr *Biti* for the respondent contended that the test for an application for rescission of default judgment, as set out in r 63 is whether 'good and sufficient cause' has been shown. He submitted that what was required for the appellant to prove was the explanation for the default and its reasonableness, the *bona fides* of the application and his defence on the merits.

Regarding the reasonable explanation for the default, Mr *Biti* submitted that there was no attack, in the notice of appeal, in respect of the finding made by the court *a quo* on this issue.

Mr *Biti* further submitted that some attempt is made in the second ground of appeal to attack the court *a quo*'s finding that it was doubtful whether the appellant had filed and served the request for further particulars. To his credit, Mr *Zhuwarara* did not utter a word regarding that ground. Clearly there was no basis of attacking the finding of the court *a quo* on this point.

Regarding prospects of success Mr *Biti* submitted that the summons is very detailed and has attachments to it. The appellant's response is found in para 4 of his founding affidavit where he does not explain where the figure of $198 000.00, he admits owing, had come from and why he was disputing the interest rate. He submitted that the bank had the right to alter the rate of interest on notice in terms of s 7.1.2 of the credit facility agreement. The appellant does not mention clause 7.1.2 in his para 4. The issue of not being served with the requisite notice is not part of the appellant's case. There is no averment that the alteration of the interest rate was unilateral. As a result, he was of the view that the appellant had no prospects of success in the main matter.

ISSUES FOR DETERMINATION

1. Whether the court *a quo* applied the correct test for the setting aside of a default judgment.

2. Whether or not the court *a quo* violated the *in duplum* rule in finding that the amount claimed by the respondent and the claim of interest at the rate of 28 percent per annum was correct.

THE LAW

Order 9 r 63 of the High Court Rules, 1971 (hereinafter referred to as the rules) sets out the procedure and the requirements for the rescission of a default judgment as follows,

> "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."

The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving 'good and sufficient cause' are well established. They have been discussed and decided in a number of cases. See *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd* S-16-86 (not reported); *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211 C-F; *Zinondo v CAFCA Limited* SC 64-17.

From these authorities, it is clear that the test for 'good and sufficient cause' involves the establishment of the following factors:

(a) explanation for the default and whether it is reasonable;

(b) the *bona fides* of the application to rescind the judgment;

(c) the *bona fides* of the defence on the merits of the case which carries some prospect of success

APPLICATION OF THE LAW TO THE FACTS

Before dealing with the above requirements it might be pertinent to dispose of the issue of the correct test to be applied in such applications as raised by Mr *Zhuwarara*. It was his argument that the court *a quo* erred by applying the wrong test in determining the application for rescission of default judgment. He argued that the court *a quo* ought not to have used the test of negligence on the part of the appellant's legal practitioners but that of wilful default on the part of the appellant.

This argument advanced by the appellant is confused and confusing. The authority that he relies on of *Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd* (*supra*) does not support his proposition. At p386 B-D the following was stated;

> "The conclusion I have come to is that the test for rescission of judgment whether in the High Court (under r 63) or the Magistrates Court (under Order 30) (unless it is a refusal of rescission because wilful default exists) is but one: the applicant has to establish good and sufficient cause or, simply put, sufficient cause for the relief he seeks. That this is so, and has always been so, is evident from MCNALLY JA's words in *Dewera Farm (Pvt) Ltd & Ors v Zimbank Corp Ltd* 1998 (1) ZLR 368 (S) where at 369F he said:
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> "While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause.""

From my understanding of the above authorities wilful default is but one of the essential elements of good and sufficient cause in the same manner as lack of diligence on the part of one's legal practitioner. The judgment of the court *a quo* is clear that the judge was alive to the correct test to be applied. At the outset he stated that the *onus* was on the appellant to show that there was good and sufficient cause for his default. He then went on to examine the authorities defining good and sufficient cause and later on analysed the facts in relation to the factors constituting good and sufficient cause. He therefore applied the correct test.

I now proceed to deal with the issue of whether the appellant managed to satisfy the requirements for the setting aside of a default judgment as established by the above mentioned authorities.

THE EXPLANATION FOR THE DEFAULT AND WHETHER IT WAS REASONABLE

The explanation proffered by the appellant was that he failed to file a plea as the Notice to Plead and Intention to Bar had no reference of the lawyer seized with the matter at Messrs Nyikadzino, Simango and Associates. The law firm was therefore unable to identify the lawyer seized with the matter. They only found out that it was one Mr Gwizo, who had left the employ of the firm, after the appellant showed up at their offices inquiring on the progress of his case.

The appellant further averred that the respondent ought not to have applied for default judgment as he had filed a Request for Further Particulars on the 28 May 2015 which particulars were never furnished to him. He claimed that he filed the Request for Further Particulars by himself because he had a fall out with his legal practitioners, although the pleading bore the address of his legal practitioners.

As was correctly observed by Mr *Biti* there is no challenge to the findings made by the court *a quo* that there was no reasonable explanation for the delay, in the notice of appeal. An attempt to attack that finding is made in the second ground of appeal. Mr *Zhuwarara*, in his submissions, and to his credit, did not advance any argument on that point. He instead raised the argument regarding whether the court *a quo* applied the correct test which issue I dealt with above. The finding by the court *a quo* therefore cannot be faulted.

PROSPECTS OF SUCCESS

Mr *Zhuwarara* contended that the appellant was not obliged to prove his defence at this stage but to simply outline it.

In as much as there was no obligation to prove the defence, there certainly was an obligation to establish a *prima facie* defence. The bare denial made by the appellant that he did not owe the respondent the sum claimed but a lesser figure was not sufficient. The point was made in *Songore v Olivine Industries* (*supra*) at 213 D-E where the following was stated;

> "Before I go further, I think it is necessary to say something about the kind of allegations one may expect from an applicant for rescission of judgment. The effect of the cases is summed up to p 371 of the third edition of Herbstein and van Winsen *The Civil Practice of the Superior Courts in SA* as follows:
>
> > "The applicant must show that he has a *bona fide* defence to the plaintiff's claim, it being sufficient if he sets out averments which, if established at the trial, would entitle him to the relief asked for; he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour."
>
> It is dangerous to generalise, and each case differs from others, but nonetheless I think it must be said that bald general allegations of fact may not be enough in every case to show *bona fides.* It might be argued that "I do not owe the money" is "an averment which, if established at trial, would entitle him to relief asked for". In most cases, and particularly where there is a suspicion that the defence is not *bona fide*, more specific allegations of fact will be required."

The appellant, in his founding affidavit devoted only two paragraphs out of twelve to the issue of whether he had a *bona fide* defence to the claim. He alleged that he was not indebted to the respondent in the sum of US$258 019.29 but to the sum of US$198 000.00 together with interest at the rate of 12 percent *per annum*. He concluded by saying that;

> "I therefore submit that I have prospects of success in the main matter."

In *Delta vs Murandu* SC 38/15, GWAUNZA JA (as she then was) had this to say

> "I take the time to point out that parties are expected to argue their cases so as to persuade the court to see the merit, if any, in the arguments advanced for them. They are not expected to make bold, unsubstantiated averments and leave it to the court to make of them what it can. In as much as the court is handicapped in terms of being able to properly determine this point, so too is the respondent. He has not been given enough detail to enable him to understand, and properly defend, the case posed against him in this respect. The effect of this, in my opinion, is to visit unfairness on the respondent. The appellant bore the burden to prove its case on this point but lamentably failed to do so."

Although she was dealing with a different issue from the one before me the remarks are apposite where an applicant fails to address prospects of success in its founding affidavit as *in casu*.

Such bald general allegations cannot be deemed to suffice to convince a court that a party has a *bona fide* defence on the merits. PATEL JA in *Maxwell Sibanda vs Gwyne Stevenson* SC556/15 described such failure to address prospects of success as a "grave omission".

The respondent, on the other hand expressed its claim in quite some detail. The respondent specified that the debt arose from a credit facility between the parties. The total sum lent in respect of the facility was a sum of US$257 000.00 including a rollover of US$175 00.00 from a previous agreement and an additional US$82 000.00 for the 2010/1011 summer cropping season. The respondent explained the interest charged and the total debt after taking into account the *in duplum* rule.

The court *a quo* made the finding that the appellant merely made bald assertions in both the founding affidavit and the answering affidavit yet the respondent's explanation of its figures was made in a clear and meticulous manner. The loan agreement signed on 1 December 2010, tallies with the figures presented by the respondent. Having considered all

the above, the finding made by the court *a quo* that the appellant had no defence on the merits cannot be faulted.

The appellant further alleged the violation of the *in duplum* rule in that the respondent charged interest in excess of the capital debt at a rate that was not agreed to by the parties. In terms of clause 7.1.1 interest was to be payable at a rate of 12 percent per annum plus 4 percent facility fee to be charged upon acceptance of facilities offered. Clause 7.1.2 went on to provide,

> "The Bank reserves the right to give notice at any time of any alteration in the rates of interest and, thereafter, the Bank shall be entitled to charge such other rate as it may prescribe. If the Borrower continues to avail of the facilities after receipt of the aforesaid notice by not fully repaying the amount due to the Bank, the Borrower shall be deemed to have agreed to the change in interest rate."

Mr *Zhuwarara* argued, at length, that for the respondent to alter the rate of interest from 12 percent to 28 percent per annum, it ought to have given prior notice to the appellant in terms of clause 7.1.2. As such a unilateral variation in interest could not be permissible. The result would be a violation of the *in duplum* rule, in that the interest charged would be in excess of the principal debt of US198 000.00.

As was correctly pointed out by Mr *Biti* this argument, regarding the unilateral variation of interest, was not pleaded by the appellant in his founding papers. It was not his case before the court *a quo* neither was it raised in the grounds of appeal. It is trite that a new point may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed. AC Cilliers, C Loots and HC Nel in *Herbestein and Van Winsen, The Civil Practice of the High Courts*, (5th ed Juta & Co Ltd, Cape Town, 2009), at pp 1246, explains as follows,

> "A question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party against whom it is directed…A second requirement for the raising of a new point on appeal is that the point must be covered by the pleadings. Where it is not clear that the point has been fully investigated (*ie* that all the evidence which might have been placed before the court if the point had been taken was in fact led), the court will not allow a new point to be raised for the first time on appeal."

In *Donelley v Barclays National Bank Ltd* 1990 (1) SA 375 at 380 H, the court held as follows,

> "Secondly, it is clearly a wholly new line of defence now being taken. It was not mentioned in the summary judgment proceedings nor in the plea. It was never referred to in evidence or argument at the trial. Its mere novelty, of course, is no ground *per se* for rejecting it. However, generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one not raised on the pleadings in the court below."

Applying the above principles to the present matter, this would not be a proper case to allow the appellant to raise, for the first time on appeal, this new point. The point was not raised in the pleadings and was not argued before the court *a quo*.

Accordingly, no basis has been laid out to attack the court *a quo's* finding that the sum claimed by the respondent was not in violation of the *in duplum* rule and consequently that the appellant has no prospects of success in the main matter. This ground of appeal must also fail.

From the foregoing, I find that the appeal lacks merit and must be dismissed.

The respondent had, in its Heads of Argument prayed for costs on a punitive scale. No basis was advanced either in the Heads of Argument or in submissions before the court for an award of costs on the punitive scale. I will therefore award costs on the ordinary scale.

In the result I make the following order:

The appeal is dismissed with costs

GWAUNZA DCJ: I agree

GUVAVA JA: I agree

Tendai Biti Law, respondent's legal practitioners

Messrs Mabundu & Ndlovu Law Chamber, appellant's legal practitioners