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(1) PARKHAM ENTERPRISES (PRIVATE) LIMITED (2) NYASHA MOTSI
V
1) ADHESIVE PRODUCTS MANUFACTURES (PRIVATE) LIMITED 2) THE MASTER OF THE HIGH COURT N O

SUPREME COURT OF ZIMBABWE
BULAWAYO: 20 JULY 2021

M. Mazibuko, for the applicants

S. Siziba, for the first respondent

IN CHAMBERS

CHITAKUNYE JA: This is an opposed chamber application for reinstatement of an appeal in terms of r 70 (2) of the Supreme Court Rules 2018. The intended appeal is against the whole judgment of the High Court sitting at Bulawayo handed down on 17 December 2020 in case number HC 1314/20 judgment number HB 12-21.

THE FACTS

On 1 March 2016, the first applicant was placed under Provisional Judicial Management. The second applicant was appointed as the Judicial Manager.

On 20 August 2020, the first respondent filed an application for the discharge of the provisional judicial management order. The application was anchored on the argument that 4 years after the provisional management order was granted, no meaningful progress was

made and the first respondent sought the discharge of the order, as it believed the order was a sham designed to shield the first applicant from paying its debts. The applicants did not file any papers in opposition to the first respondent's application, as a consequence thereof the applicants were automatically barred and the matter was placed on the unopposed roll.

On the date of hearing of the application, *Mr Mazibuko* appeared in court as Counsel for the then respondent. He was informed that the first applicant (as respondent) was barred for failing to file opposing papers.

Instead of applying for the upliftment of the bar Counsel contended that he could still be heard. The judgment of the court *a quo* shows that despite advice on the existence of the bar, counsel persisted in addressing the court on other issues not related to the bar.

The court *a quo* proceeded to grant a default judgment. Aggrieved by the decision the applicants noted an appeal to the Supreme Court. Some problems arose administratively leading to their appeal being deemed abandoned for failure to pay costs of preparation of the record. When they indicated that they had in fact paid the costs, they were advised to apply for reinstatement of the appeal in terms of the rules hence this application.

The application is opposed. In its opposition the first respondent raised some points *in limine*. These included firstly, that the intended appeal is incompetent as one cannot appeal against a default judgment. Secondly, that the deponent to the first applicant's founding affidavit had no requisite authority as at the time he was appointed director of the first applicant, the first applicant was under judicial management and so his appointment was

a nullity or tainted with illegality. The same fate befell the person who signed the letter of authority as he was also appointed director when first applicant was under judicial management.

Counsel for the applicants contended that the judgment was not a default judgment but was premised on the fact that he appeared in court and argued his client's case.

ISSUES FOR DETERMINATION

1. Whether or not the judgment of the court *a quo* was a default judgment or was a judgment on the merits.
2. Whether the Deponent to the founding affidavit, Richard Nyatsoka, had authority to represent the first applicant.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the judgment of the court *a quo* was a default judgment or was a judgment on the merits.

It is unfortunate that despite the fact that the submissions by the applicants' counsel were not supported by the judgment which he demanded from the court *a quo* in order to decide on the way forward, he persisted with them.

In their letter, to the Deputy Registrar of the High Court dated 18 December 2020, the applicants' legal practitioners sought clarity on the nature of the order by the court *a quo*. In it they stated, *inter alia,* that;

> "However, in his granting the Application, the Honourable Judge did not indicate whether he was granting on the basis that the 1st respondent was barred or on the basis of the substantive verbal submissions made by both Counsel as to whether the Application should be granted. **The distinction is important as the 1st respondent would like to know the correct step to take hereafter as in the case of the former, an Application for Rescission would have to be filed whilst in the case of the latter, then an Appeal must be filed.** May you therefore as a matter of urgency clarify with his Lordship which of the two is the position. If it's the latter position, we would be pleased if his Lordship were to provide his written reasons."(emphasis is mine)

It was clear that the applicants' legal practitioners were aware of the options available.

Surprisingly, when the judgment was served on them confirming that the judgment was granted as a default judgment, they persisted with seeking to appeal against a default judgment instead of filing an application for rescission as intimated in their letter of 18 December 2020.

Counsel for the applicants conceded that before the court *a quo,* he was advised that the first applicant was barred for not filing opposing papers. He in effect said that despite the extant bar he was, nevertheless, allowed to make submissions on the merits hence his contention that it was not a default judgment

Counsel's submissions in this regard were without merit. The judgment of the court *a quo* at p 1 shows that he was clearly advised of the bar. Instead of applying for the upliftment of the bar, he took an argumentative stance. In this regard the judgment states that upon being so advised, Counsel was undeterred; he attacked the validity of the service of the application and attacked the competence of the application itself. It is his persistence in the face of the bar that Counsel contends made his submissions on the merits acceptable. A bar

is not uplifted by a litigant's persistence in arguing on the merits but by a proper application for the upliftment of the bar in terms of the applicable rules. *In casu*, applicants' counsel chose to ignore the bar to his own peril.

In the latter part of the judgment, the court *a quo* in fact expressed counsel's conduct as unacceptable especially after being advised of the bar. The judge *a quo* indicated in no uncertain terms that the judgment was a default judgment. He said:-

> "*Mr Mazibuko* was not applying for the removal of the bar. He was attacking the application. In fact I found his conduct somehow unacceptable, that after I had pointed out to him that first respondent was barred and that the application was therefore not opposed, he persisted in argument. After considering a number of factors, I refrained from calling him to order. I take the view that such conduct is a deviation from the normal practice, it is inappropriate and unnecessarily belligerent towards the court, and it serves no useful purpose in litigation.
>
> In the result in deciding this application for default judgment, I did not factor into the equation, *Mr Mazibuko's* submissions. I concluded that the respondent has been duly barred in terms of the rules of court, and not having made an application for the upliftment of the bar, the application was unopposed."

I am of the view that the above makes it clear to all and sundry that the judgment sought to be appealed against is a default judgment.

It is trite that one cannot appeal against a default judgment. The procedure to contest a default judgment is to seek its rescission before the appropriate court.

It does not matter that one has issues with the judgment. The fact that a party forced their way into making submissions despite its default or whilst barred does not turn a default judgment into a judgment on the merits.

In *Christopher Zvinavashe* v *Nobuhle Ndlovu* SC-40-06 at p 4, GWAUNZA JA (as she then was) aptly stated that:-

> "Counsel for the respondent contends correctly that a default judgment can only be set aside by a successful application for rescission of the judgment under the rules of the relevant court. The application must be made by the defaulting party himself, as indicated by the expression "purging his default". It follows that *in casu*, the appellants' default remained unpurged even as the learned judge *a quo* considered the merits of the matter and gave reasons for his judgment."

See *Ranvali Trust's Trustees* v *UDC Limited* 1998 (1) ZLR 110 *Sibanda & Others* vs *Nkayi RDC* 1991 (1) ZLR 32 (SC); *Quoxing Gong* v *Mayor Logistics (Pvt) Limited & Another* SC-2-17 and *Read* v *Gardner & Another* SC-70-19.

Mr *Mazibuko* conceded that indeed the law is clear that one cannot appeal against a default judgment.

The first point *in limine* is upheld with the finding that the judgment is a default judgment. The purported appeal is therefore a nullity. This disposes of the matter and I am of the view that it is unnecessary to consider the other point *in limine.*

COSTS

It is clear from the papers filed of record and submissions made that the applicants were alerted of the futility of appealing against a default judgment but for some reason had persisted. The attitude adopted by their counsel in the court *a quo* and in this Court of seeking to deny the clear and indisputable aspect of default is regrettable. Had counsel accepted wise counsel in the form of letters from his colleagues he would have by

now adopted the correct procedure to have the default judgment set aside in a proper application.

The first respondent has been put to great expense purely because of the unyielding attitude of the applicants even in the face of clear evidence that this was a default judgment. It is only proper that costs be awarded on the higher scale as requested by the first respondent.

DISPOSITION

As the purported appeal is a nullity, it follows that there is nothing to reinstate. Consequently this purported application for reinstatement is improper as one cannot seek to reinstate a nullity.

Accordingly, the matter is hereby struck off the roll with costs on the legal practitioner and client scale.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners.

Mathonsi Ncube Law Chambers, 1st respondent's legal practitioners.