

DISTRIBUTABLE: (123)

OK ZIMBABWE LIMITED
v
BENJAMIN TAZVIVINGA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, HLATSHWAYO JA & BERE JA
HARARE: 8 MARCH 2019 & 22 OCTOBER 2021

T Mpfu, for the appellant

T Mutonhori, for the respondent

Judgment No. SC 134/21
Civil Appeal No. SC 3/18

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HLATSHWAYO JA

[1] This is an appeal against the default judgment granted by the Labour Court on 2 November 2016.

BACKGROUND FACTS

[2] The respondent was employed by the appellant as a till operator. On 30 June 2015 there was a scuffle between the respondent and a customer over an issue of change. A spot check was conducted and a shortfall of \$45 was discovered in the respondent's till. The respondent was asked to write a report of the incident and the shortfall. In the report, he stated that the shortfall was caused by \$50 which he had given to a fellow till operator

Nancy Chawanza who had forgotten to return the money. The respondent also stated in the report that he had served a customer and given him \$180 cash back instead of \$130. He averred that the customer later returned the \$50 after realising the error and he replaced the money in his till without notifying his supervisors.

[3] The respondent was subsequently charged with the offence of deliberately giving untrue or incorrect information and for unsatisfactory work performance. A disciplinary hearing was conducted, and he was found guilty, and was subsequently dismissed. He appealed against the decision to the Local Joint Committee which upheld the determination and the dismissal. Aggrieved, the respondent appealed to the National Employment Council for the Commercial Sections (NEC) which upheld the determination and dismissed the appeal. As a result, the respondent noted an appeal with the Labour Court on 1 June 2016.

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[4] The appellant failed to file a notice of response at the Labour Court within the stipulated time, only to attempt to do so some 4 months later on 18 October 2016 together with heads of argument. This was so despite the appellant having been favoured with a letter from the registrar of the Labour Court calling on it to file a response.

At the hearing of the matter the court *a quo* proceeded in terms of r 22 (b)(1) of the Labour Court Rules, 2006 (SI 59 of 2006), heinafter referred to as “the rules”, and entered default judgment against the appellant.

[5] Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court on the following grounds.

- a. The court *a quo* erred, on a question of law, by proceeding to enter default judgment against the appellant in circumstances in which the appellant had filed a notice of response, albeit belatedly, as well as heads of argument which would have enabled the court to determine the matter on the merits.
- b. The court *a quo* erred, on a question of law, by failing to find that the explanation which was given by the appellant for the delay in filing the Notice of Response constituted good cause for the delay.
- c. The court *a quo* made an error, on a question of law, by not taking into account the nature of the case and failing to apply its discretion judiciously, more specially by not considering the evidence on record which demonstrated that the respondent had admitted to the offences with which he was charged, which offences attracted a penalty of dismissal.
- d. The court *a quo* in any event erred, on a question of law, by failing to give reasons for the judgment which is appealed against. A failure to give reasons constitutes a judicial irregularity.

SUBMISSIONS BEFORE THIS COURT

[6] At the hearing of the appeal, counsel for the appellant argued that the court *a quo* erred in not providing reasons for its decision, which was that of the default judgment. *Per contra*, counsel for the respondent submitted that since what was being appealed against was a default judgment, it could only be set aside through an application for rescission

of that judgment. He further submitted that the appellant had not requested the reasons from the Labour Court.

APPLICATION OF THE LAW TO THE FACTS

After hearing submissions, my view is that the sole issue to be determined is whether the default judgment entered by the court *a quo* is appealable.

[7] The respondent filed its notice of appeal to the Labour Court on 1 June 2016. In terms of the Labour Court Rules, 2006, the appellant had 14 days within which it could file its notice of response. Rule 19 (2) provides as follows:

“(2) The registrar shall, within thirty days of receiving a notice of appeal in terms of subrule (1)(d), give notice in Part I of Form LC 2 to the respondent—
(a) to complete in three copies a notice of response to the appeal in Part II of Form LC 2; and
(b) ~~to do the following within fourteen days of the date when the registrar gives notice to the respondent under this subrule—~~ **Judgment No. SC 134/21**
(i) ~~serve one copy of the notice of response on the appellant; and~~ **Civil Appeal No. SC 3/18**
(ii) ~~file with the registrar one of the other copies of the notice of response, together with proof (as required by rule 11) that the notice of response was served on the appellant...~~”

[8] The appellant failed to adhere to the rules of the court, and it later filed its notice of response and heads of argument way out of time, some 4 months after the registrar had given the appellant notice. There is no evidence on record that an application for condonation for late filing of the notice of response and heads of arguments was made. It therefore follows that the court *a quo* granted a default judgment in terms of r 22 (b) (1) which provides as follows:

“22 Where a party fails to file a notice of response

Where notice has been given to a party to file a notice of response within the period specified in rule 14, 15 or 16 and that party fails to comply, the matter

shall nevertheless be set down in terms of rule 21 and if, on the day of hearing, the defaulting party—

(a) ...

(b) does not appear or show good cause why he or she did not file a response, the Court may, according to the nature of the case, or as the justice of the case requires—

(i) enter a default judgement against the defaulting party;”

[9] A reading of the above provisions will show that a respondent who has been served with a notice to respond by the registrar must file its notice of response within 14 days and serve both the appellant and the registrar. Failure to act in terms of the above rules of court results in the offending party being barred and default judgment entered against him at the discretion of the court. *In casu*, the appellant in the court *a quo* was barred from making submissions as it had filed its notice of response out of time which fact the appellant admitted in its heads of argument. It therefore followed that judgment was granted in default. The court in *Katritsis v De Macedo* 1966 (1) SA 613 (A) held that:

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“It is clear from the authorities that the default in regard to a defendant is not confined to his failure to file the necessary documents required by the Rules in opposition to the claim against him, or to appear when the case is called, but comprises also failure to attend Court during the hearing of the matter.”

[10] As the judgment that was given by the court *a quo* was a default judgment in nature. The question that ought to be asked is whether one can appeal on the merits before the bar has been lifted. According to our law, a party cannot appeal against a default judgment. The correct procedure would be for that party to make an application for the judgment to be rescinded first. See *Chintengo v Tredcor & Anor* SC 67/19. This approach was underlined by this Court in *Sibanda and Ors v Nkayi Rural District Council* 1999 (1) ZLR 32 (S) where it held as follows:

“The present appeal is therefore against the order of 23 May 1997 dismissing the application for rescission of the order made on 8 November 1996. That order of 23 May 1997, as I understand it, was effectively a default judgment. The practitioner who appeared for the appellants presented no submissions on the merits. There were no reasons given for judgment. Once the postponement was refused, the appellants were effectively in default. Procedurally, therefore, the appellants should have sought a rescission of the default judgment of 23 May, rather than appeal against it. On this ground alone, the appeal must fail.” (My emphasis).

In *Zvinavashe v Ndlovu* SC 2006 (2) ZLR 372 (S) it was held:

“The defining feature of a judgement granted after a party fails to appear is the default of the absent party... that decision remained a default judgment whose setting aside could only follow a successful application for its rescission.”

[11] This Court again had the occasion to deal with a similar matter in *Guoxing Gong v Mayor Logistics (Pvt) Ltd and Anor* SC 2/17 wherein Bhunu JA held as follows:

“It is trite that, save in special circumstances which do not concern us here, no appeal lies to this Court against a default judgment which is normally reversed by rescission of judgment or a declaration of nullity. It therefore follows that, in the absence of special circumstances, no valid ground of appeal can be laid at the door of this Court concerning the propriety or otherwise of a default judgment. Whether or not there was non-joinder or any other irregularity pertaining to the default judgment, that is a complaint to be laid at the court *a quo*'s door and not this Court.”

[12] The Appellant has invited this Court to deal with the merits of this matter as it is seized with all the material facts it needs to make a decision. He relies on the case of *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust & Ors* SC 71/14 wherein Ziyambi JA held as follows:

“This court is always reluctant to decide matters at first and last instance although it is quite possible that it may do so in exceptional circumstances.”

Unfortunately, this case does not fall into the category of ‘exceptional circumstances’ as referenced above. There is nothing exceptional in the circumstances, but rather what is there is a disregard of proper practice and procedure that a default judgment can only be set aside by its rescission. It follows that as this is not one of the exceptional circumstances, this Court cannot be moved to hearing this matter in the first and last instance. See *Bakari v Total Zimbabwe (Private) Limited* SC 21/19.

DISPOSITION

[13] The appellant having had default judgment entered against it and having not taken steps to have it rescinded, that default judgment remains extant. No appeal can lie against it. The present purported appeal is improperly before this Court, and it is, accordingly, struck off the roll with costs following the outcome. **Judgment No. SC 134/21**
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GWAUNZA DCJ: I agree

BERE JA: No longer in office

Wintertons, appellant’s legal practitioners

Pundu & Company, respondent’s legal practitioners

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