

LLOYD NECHIBVUTE  
versus  
ISAAC KAPENI  
and  
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE  
MWAYERA AND MUZENDA JJ  
MUTARE, 24 March and 1 April 2021

### **Civil Appeal**

*A Nyamukondiwa* for the Appellant  
Respondent in person

MUZENDA J: This is an appeal against the whole judgment of the Magistrate's Court sitting at Mutare on 9 September 2020 where the Magistrate dismissed an application filed by the Appellant for Rescission of a default judgment.

The appeal is opposed.

### **FACTS**

On 27 January 2020 the Respondent instituted summons against Appellant claiming \$200 000-00 adultery damages. On 16 June 2020 Respondent applied for default judgment which was granted by the Provincial Magistrate. Appellant had been served through his wife on 18 February 2020. On 7 July 2020 a warrant of execution was issued in favour of the Respondent.

On 29 July 2020 Appellant filed an *ex parte* application for stay of execution and also simultaneously filed an application for rescission of judgment granted in default. The affidavits for the dual application contain identical averments as to why Appellant could not enter appearance to defend the summons. He contended that the summons were not served on him, but on his wife, and the wife never handed them to him. He works at Macheke. He denied being in love with the Respondent's wife at all as such the claim for adultery had no basis. The Appellant also attached his wife's affidavit in support of the application for rescission and stay of execution. She stated that after receiving the summons she left for her rural home and did not come back early due to lockdown.

Both applications filed by the Appellant were opposed by the Respondent. The Respondent stated that the Appellant ignored the summons and only acted when served with the warrant of execution against property. He added further that although Appellant works at Macheke he comes to his house 6490 Phase 3, Chikanga, Mutare almost every weekend. Respondent's house is close to Appellant's. After the summons were served on the Appellant, Appellant's wife approached Respondent's wife suggesting to the latter to have the matter withdrawn. As such it will not be correct for the Appellant to state that he only became aware of the summons when his property was attached in execution. Respondent insisted that Appellant had committed adultery with his wife.

On 9 September 2020 the court *a quo* dismissed both the application for stay of execution and rescission of judgment. The court *a quo* concluded that the Appellant was in wilful default and the service of summons commencing action upon the Appellant was properly done for it was served on a responsible person. He dismissed Appellant's grounds and further concluded that the Appellant failed to rebut averments raised by the Respondent in his answering affidavit. He also rejected the supporting affidavit of Appellant's wife and came to a conclusion that Appellant deliberately chose not to respond to the summons *albeit* after being properly served. In fact the court *a quo* came to a further finding that Appellant ignored a court process and chose not to confide in the court.

On the aspect of whether Appellant had a valid defence to the claim, the Learned Provincial Magistrate concluded that the conduct of the Appellant undoubtedly amounted to admission. Appellant was adjudged by the court *a quo* to have no defence to offer.

#### GROUPS OF APPEAL

- 1. The Learned Magistrate erred at law by dismissing Appellant's application for rescission of default judgment basing such finding on the papers filed of record without holding an enquiry to ascertain the correctness or otherwise of the concessions made by the unrepresented parties on paper.***
- 2. The court a quo misdirected itself on the facts and at law by making a finding that the Appellant was approaching the court with dirty hands when in actual fact he was practising his right to be heard.***

3. ***The Learned Magistrate erred at law by dismissing the Appellant's application for rescission of default judgment when the justice of the case demanded the matter to be dealt with on merits.***
4. ***The Learned Magistrate thus grossly erred at law by making a finding that the Appellant was in wilful default when the common cause evidence is to the contrary.***

## THE LAW

Order 30 r 2 (1) of the Magistrates Court (Civil) Rules, 2019 provides as follows:

“Orders which court may make’

- 2(1) On hearing an application in terms of r 1 and being satisfied that-
  - (a) the applicant was not in wilful default; and
  - (b) there is a good prospect that the proffered grounds of defence or the proffered objection may succeed in reversing the judgment.

the court may-

  - (c) rescind or vary the judgment in question; and
  - (d) give such directions and extensions of time as necessary for the further conduct of the action or application
- (2).....
- (3) If an application in terms of r 1 is dismissed the default judgment shall become a final judgment.

“The test for rescission of judgment whether under r 63 of the High Court Rules, 1971, or Order 30 of the Magistrates’ Court (Civil) Rules, 1980 is but one: the applicant has to establish good and sufficient cause for the relief he seeks. Under Order 30 of the magistrates court (Civil) Rules, rescission cannot be granted if the applicant was in wilful default, but absence of wilful default does not necessarily mean that rescission must be granted: the applicant must still establish good and sufficient cause for rescission. Under r 63 of the High Court Rules, which applies to the rescission of judgment under common law and under any enactment other than the Magistrates Court Act [*Chapter 7:10*], wilful default is only one of the factors, including *bona fides* and a *prima facie* case, to be considered in deciding whether the applicant has established good and sufficient rescission”.<sup>1</sup>

Wilful default occurs when a party with the full knowledge of the service or set down of the matter, and the risk attendant upon default takes a decision to refrain from appearing.<sup>2</sup> As regards whether applicant has a *bona fide* defence to the default judgment, the applicant or defendant is to set out in his affidavit sufficient facts which, if approved at the trial, will constitute an answer to the plaintiff’s claim.<sup>3</sup> In granting rescission the court normally

<sup>1</sup> V Saith & Company (Pvt) Ltd v Fenlake (Pvt) Ltd, 2002 (1) ZLR 378, at 378 E-F per CHINHENGO J

<sup>2</sup> Per MC NALLY JA in Zimbabwe Banking Corporation Ltd v Masendeke 1995 (2) ZLR 400 (SC).

<sup>3</sup> Gamestone Enterprises (Pvt) Ltd and Another v Mbambo and Another HB 225/18

considers (a) the applicant's explanation for his default; (b) the applicant's good faith, and (c) the *bona fides* of his defence on the merits as well as the prospects of success.<sup>4</sup>

#### ISSUES FOR DETERMINATION

There are four grounds of appeal but only two crisply call for determination.

- (1) Whether the court *a quo* misdirected itself in dealing with the matter on paper relying on the affidavits filed by the parties?
- (2) Whether the court *a quo* erred and misdirected itself in dismissing both applications for stay and rescission of judgment.

*Whether the lower court misdirected itself in resolving the application relying on the pleadings filed by the parties?*

In his papers and oral arguments the Appellant contends that the court *a quo* ought to have held an enquiry to ascertain the correctness or otherwise of the concessions made by the parties. Order 30 of the Magistrates Court (Civil) Rules, *supra* does not provide for that at all. No such application for an enquiry was made by the Appellant and the Appellant had chosen an application procedure and filed affidavits in support of the application. He also attached supporting affidavits to bolster up his documentary evidence. Generally applications for rescission of default judgments from time immemorial have been brought to courts by way of an application. In terms of Order 30 r (2) the court is given options open to it after hearing parties and in *casu* the lower court dismissed the application based on the papers filed of record. I definitely discern no misdirection on the part of the Learned Provincial Magistrate, that ground of appeal has no merit and it is dismissed.

*Whether the court a quo misdirected itself in dismissing the application for rescission of judgment?*

The court *a quo* from p 6 of the record of proceedings dealt with the fact whether Appellant was in wilful default. He concluded on the facts that Appellant and Respondent reside in the same area, he also found it as a fact that Appellant instructed his wife to engage Respondent's wife, with a view, that the summons commencing action be withdrawn from the Civil Courts, and this averment by the Respondent had stood unchallenged by the Appellant in his answering affidavit. The court *a quo* then deducted and concluded that what is not denied in affidavits is taken as an admission. The court *a quo* also disbelieved the

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<sup>4</sup> Beitbridge District council v Russel Construction (Pvt) Ltd 1998 (2) ZLR 190 (5) at p 190F

Appellant's wife's version that having received the summons for adultery damages she chose to go to the rural area without alerting the Appellant. That did not show logic in the circumstances and the lower court dismissed the explanation by the Appellant as impractical and false. It found that Appellant was in wilful default. The court *a quo* went on to give case law authorities in support of its observations and conclusions. The lower court went on to impugn the conduct of Appellant in trying to pretend as if he did not receive the summons and stated that Appellant was approaching the court with dirty hands. From the facts outlined before the court *a quo* I hasten to comment that I see no basis how and why the Appellant was adjudged to have dirty hands but nevertheless that aside the court *a quo* found the conduct of the Appellant pretensions *vis-à-vis* the service of summons. In any case I did not hear Appellant's counsel arguing that there was something amiss about the mode of service of summons. The service of process was done on a responsible person the wife of the Appellant.

On the aspect of whether from the affidavits the Appellant had placed sufficient facts constituting a defence to the default judgment, the lower court concluded that the Appellant had no defence and on p 8 of the record, concluded thus-

"The conduct of the Appellant undoubtedly amounted to admission by conduct".

Further the court *a quo* added that Appellant "knew that he had no defence to offer to the claim".

A court dealing with an application for rescission of default judgment has a discretion to grant such an application or dismiss it. Having looked at the well-reasoned judgment of the court *a quo* I see no misdirection nor do I perceive any ground to impugn the use of the court's discretion in how it dismissed the applications. The prospects of success of the Appellant's defence on trial were found to be non-existent hence there was no need for the court *a quo* to grant application for rescission and refer the matter to be heard on merits as argued by the Appellant.

The second issue for determination for purpose of appeal also fails and the following order is given.

The appeal is dismissed with costs.

MWAYERA J agrees.

*Messrs Tanaya Law Firm*, appellant's legal practitioners.