ALICK NDOLWANE SIBINDI
versus
MUNICIPALITY OF VICTORIA FALLS

HIGH COURT OF ZIMBABWE
BERE AND MATHONSI JJ
BULAWAYO 21 MARCH 2017 AND 30 MARCH 2017

Civil Appeal

M Petkar for the appellant
K Ngwenya for the respondent

MATHONSI J: There is a limit beyond which a litigant cannot escape the repercussions of his or her legal practitioner's dilatoriness or lack of diligence. To hold otherwise would render nugatory the need for a court of law to function through rules of procedure which are provided for in advance in order to guide litigants on how to approach the court and what to do upon court process being served upon them. The situation that the appellant finds himself in, that of trying to reverse the grant of default judgment entered against him was self-inflicted ably assisted by his legal practitioners of his own choice. After all it is his constitutional right to be represented by a legal practitioner of his choice and having made such a choice he cannot escape the consequences of it.

This is an appeal against the judgment of the magistrates court sitting at Victoria Falls dismissing an application for rescission of judgment entered against the appellant in default on 20 July 2016. Prior to that the appellant had defaulted at a pretrial conference set down before a magistrate on 14 July 2016. The appellant appeals on the grounds *inter alia*, that the court *a quo* erred in holding that the appellant was in willful default at the pretrial conference when his legal practitioner was not aware of the court date, the notice of set down did not state what was being set down and therefore not in compliance with the magistrates court rules and the court *a quo* overlooked the fact that the appellant has a valid defence against the respondent's claim.

The respondent sued the appellant in the court *a quo* by summons action seeking an order for his eviction from house number 1492 Chinotimba Township Victoria Falls and holding over damages. It averred that the house in question had been issued to the appellant to occupy as part

of his conditions of employment at a time when he was employed by the respondent as Assistant Director of Housing. The appellant retired from employment in 2007 and having done so, should have vacated the premises so that it could be availed to other employees of the respondent but he held onto it demanding that it be given to him *gratis* as a retirement package.

Represented by Messrs James Moyo-Majwabu & Nyoni legal practitioners of Bulawayo who were acting through Paul Connolly of Victoria Falls as correspondent, the appellant contested the action. After entering appearance to defend he requested further particulars. When those were provided he requested further and better particulars. When those were provided he still did not plead until a plea was forced out of him by use of a notice to plea filed on 22 February 2016. The appellant eventually pleaded asserting that the respondent had resolved at a full council meeting that the house be awarded to him as part of his retirement package. For that reason he was entitled to resist eviction. After the closure of pleadings the clerk of court set the matter down for pretrial conference on 14 July 2016 at 0800 hours. The notice of set down was served on Paul Connolly, the correspondent of the appellant's legal practitioners on 16 June 2016. That was proper service because the appellant's legal practitioners had given that address for service.

The record reflects that after receipt of the notice of set down, the plaintiff's pre-trial conference memorandum, plaintiff's summary of evidence and application for a pre-trial conference date on 16 June 2016, Paul Connolly telephoned the offices of James Moyo-Majwabu & Nyoni and informed them that he had received such documents. He says he also demanded payment of his fees in terms of a fee note he had rendered to them four months earlier on 24 February 2016 making it clear he would only forward the court process to them upon settlement of his fees. Although he was assured that the appellant would visit his office to settle the bill, that did not happen. He then withheld the documents.

Whatever the case, the appellant and his legal practitioner did not attend court on 14 July 2016 notwithstanding the almost one month's notice of that hearing and that Richard Moyo-Majwabu, his legal practitioner had been notified that court documents had been served at his post box in Victoria Falls. Moyo-Majwabu says that he spent all the time frantically trying to contact the appellant who was in rural Tsholotsho without success. He goes on to say that on 20 July 2016 he received another telephone call from his correspondent this time with the news that

the correspondent had been served with a letter from the respondent's legal practitioners reporting that they had applied for and had been granted default judgment. It is only then that Moyo-Majwabu says he started "realizing the seriousness of the matter."

Although the appellant became aware that default judgment had been entered on 20 July 2016, it was not until 29 August 2016, outside the one month period provided in Order 30 rule 1 for the filing of an application for rescission of judgment, that the application was filed. Order 30 rule 1 (1) and (2) of the Magistrates Court (Civil) Rules, 1980 provide:

> "(1) Any party against whom a default judgment is given may, not later than one month after he has knowledge thereof, apply to the court to rescind or vary such judgment.
> (2) Any application in terms of subrule (1) shall be on affidavit stating shortly—
> (a) the reasons why the applicant did not appear or file his plea; and
> (b) the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment."

It is apparent that the application was filed without regard to the foregoing provision. No application for condonation was sought or granted. It is surprising that the respondent did not take up that issue and the court *a quo* did not raise it *mero motu* as it was entitled to do. The application may have been improperly before the court.

Be that as it may, Moyo-Majwabu says he requested a copy of the court order from the respondent's legal practitioners because he needed it to prepare the application for rescission of judgment. More than two weeks later they had not sent him the court order. Only then did he send someone to uplift a copy from the clerk of court which was only done on 19 August 2016. One would have thought that the approach to the clerk of court should have been done on 20 July 2016 when he learnt of the judgment and not a month later.

On the issue of willful default, Moyo-Majwabu states at paragraph 13 of his founding affidavit;

> "As stated above, applicant was not in willful default when he and I failed to attend court on the 14th of July 2016. Our failure to attend was due to the fact that the notice of set down that gave notice of the date of hearing had not been passed on to me by my agent of record because of reasons I have stated above. I annex hereto the affidavit of Mr. Paul Connolly, my agent of record, confirming the fact that he did not forward the notice of set down, and the other documents to me. In the circumstances, it is clear that the applicant was not in willful default, because he was unaware of the date of hearing."

Regarding the nature of the appellant's defence, Moyo-Majwabu states that stand 1492 Chinotimba Township, Victoria Falls which the appellant occupied by virtue of his employment contract before he retired was negotiated by the parties to be part of his retirement package. Considering that council had passed a resolution to that effect the appellant had "a reasonable expectation that the house would be transferred to him." The retirement package "is a contract between the parties" and as such it could not be unilaterally changed by the respondent.

That argument was relied upon despite the fact that the only resolution filed in the record is that contained in the Victoria Falls Municipality Ordinary Full Council Meeting No.7 of 2007 minutes. The meeting took place on 31 July 2007 and the resolution on that issue appears at p28 of the appeal record as:

> "Retirement from Council Employment and Request by Mr A. N Sibindi for Council to award him House number 1492.
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> Members expressed support to the request but observed that the house in question was built in the 1940s; therefore the book value was likely to (be) zero. Council to charge the land value and give out the house at no costs. One councilor noted that the size of the stand was too big, there was a need for council to subdivide the stand. After deliberations it was resolved that:
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> (i) The item be referred to the Finance and Development Committee for finalization of the offer.
> (ii) Treasury should source for a valuator.
> (iii)The offer be referred to the Local Government Board for approval."

Clearly the offer was subject to three suspensive conditions and certainly did not result in a contract as alleged by the appellant. The respondent has stated that the Minister of Local Government rejected their request to offer the house to the appellant as a result of which no agreement was reached. The record does not show if the other two conditions of the offer were fulfilled namely the referral of the matter to the Finance and Development Committee for finalization of the offer and its referral to treasury for the engagement of a valuer. The appellant did not even attempt to show that those conditions were met content to insist that a contract was created by a resolution, a resolution he does not even appear to have accepted and laden with conditions.

The court *a quo* was not satisfied that the appellant established a case for the rescission of the default judgment. It stated at pp5 -6 of the record;

> "In our case can it be said that the applicant was not in willful default? The answer is 'NO'. It cannot be said that applicant did not default willfully. This was an example of willful default where both applicant and his legal practitioner of record adopted a relaxed, carefree and casual attitude towards court process. Applicant is said to have been in rural Tsholotsho where mobile network is bad, he knew that he had a pending civil case and surely it was incumbent upon him to make a follow up if this case was serious to him as his legal practitioner emphasizes in his founding affidavit but he did not bother to a point when a default judgment was applied for and granted. The same applied to his legal practitioner who only decided to take issues seriously when the default judgment had been communicated to him, he stated himself that this is the juncture when he undertook to personally pay the agent's dues and this is the time he thought of contacting respondent's legal practitioners as well. His agent had communicated to him that he had received among others a set down date for pretrial conference but states that Mr. Paul Connolly said he was reluctant to release the papers, be that as it may, the bottom line is he was aware that a pretrial conference had been set. It was his duty to endeavour to find out the date this he could have done through the clerk of court, he could have liased with respondent's legal practitioners but he relaxed, did nothing up until a default judgment had been applied for and granted, that is when he purports to take matters seriously." (The underlining is mine)

The court *a quo* concluded that counsel for the appellant had been grossly remiss in dealing with the matter electing to only take it seriously after judgment had been entered. It was of the firm view that even the failure to settle the correspondent's fees was an act of carelessness on the part of both the appellant and his legal practitioner. Having arrived at the conclusion that the appellant was in willful default, the court *a quo* refrained from even considering the *bona fides* of the appellant's defence.

That reasoning is very sound and I am unable to discern any misdirection whatsoever. The appellant would have us believe that Moyo-Majwabu was unaware of the date of set down. One has to be naive in the extreme to accept that assertion. The only reason why Conolly telephoned Moyo-Majwabu on 16 June 2016 was because he had received court process including the notice of set down. Therefore he communicated to Moyo-Majwabu the set down date. It matters not that the process was retained by Conolly. What is important is that the contents of the notice of set down were communicated and the existence of kindred court documents relating to a pretrial conference was also communicated. The court *a quo* was therefore correct to find that, aware of the set down Moyo-Majwabu elected not to attend court and to do nothing about the matter.

It is not enough that he could not contact the appellant in Tsholotsho even if one were to believe that, a contact which suddenly became possible after Moyo-Majwabu started "realizing the seriousness" of the matter. It is also cold comfort that the notice of set down did not state that it was in respect of a pretrial conference. A matter pending before the court where the pleadings had been closed had been set down, the notice of set down came together with an application for pretrial conference and other pretrial conference documents. Any legal practitioner would have known that the matter was set down for pretrial conference in those circumstances.

In any event, a legal practitioner is not at liberty to ignore notification of set down merely because the notice does not state what has been set down. By the same token he or she is not at liberty to stay away from court if he forms an opinion that the notice is defective. It is his duty to attend court and raise whatever objections he may have against the set down or the process served upon him. Equally so, it is not within the discretion of a legal practitioner who has not settled the bill of a correspondent resulting in process being withheld as lien, to simply sit back and do nothing expecting to approach the court later with a rescission of judgment application on such grounds.

I can only state that the negligence of the appellant's legal practitioners relied upon by the appellant in his application for rescission of judgment cannot be accepted as a reasonable explanation for the default. See the remarks of MALABA DCJ in *Musemburi and Another* v *Tshuma* 2013 (1) ZLR 526 (S) 529 E-H; *Mubongo* v *Undenge* HH 110-06 (unreported).

In *Kodzwa* v *Secretary For Health and Another* 1999 (1) ZLR 313 (S) 317E SANDURA JA cited with approval the pronouncement made by STEYN CJ in *Saloojee and another* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E that:

> "I should point out however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Consideration *ad misericordiam* should not be allowed to become an invitation for laxity. In fact, this court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney after all is the agent whom the litigant has chosen for

> himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship."

Those remarks have equal application to the circumstances of this matter where the appellant's legal practitioner stayed away from court after being notified of the court date. The grant of an order for rescission of judgment after all involves the exercise of a discretion where the applicant would have defaulted.

In the magistrates court, unlike the High Court where the application is governed by rule 63 which requires "good and sufficient cause" to be shown for the rescission of the judgment granted in default, Order 30 rule 2 provides for a two rung inquiry in considering such an application. In other words the applicant must give reasons why he or she defaulted and the grounds of defence. Both requirements must be satisfied in the application. . In the absence of a reasonable explanation for the default, the application may be dismissed even where there are good grounds of defence.

In any event, in the present matter the appellant did not show any good defence. I have already stated that he seeks to rely on a resolution of the council which does not show that a valid contract was concluded between the parties. The parties were never at *ad idem*. The Municipality of Victoria Falls manages public property and cannot willy nilly alienate such property to an individual without the requisite approval from the parent ministry. Where such approval has been refused, the party seeking to benefit from such transaction cannot enforce it because, to the extent that it is subject to approval, that is a suspensive condition, no valid contract comes into existence without the condition being satisfied.

Mr *Petkar* for the appellant in the main relied on new submissions not made before the court *a quo* and not even contained in the grounds of appeal. It is trite that the appeal is decided on the four corners of the appeal record. An appellant cannot rely on grounds not contained in the notice and cannot seek to import new arguments not considered by the court of first instance.

In any event, the submissions made by Mr *Petkar* that it was incompetent for the respondent to seek a set down for pretrial conference without first holding a pretrial conference between the parties, does not hold water. While Order 19 rule 1 (1) requires a party who wishes the action to be brought to trial to request the other party to attend a pretrial conference at a

mutually convenient time and place. That provision does not invalidate the set down of a matter for pretrial conference before a magistrate. This is because subrules (4) and (5) are permissive. They provide:

> "(4) The clerk of court acting on the instructions of a magistrate, may at anytime on reasonable notice, notify the parties to the action to appear before a magistrate in chambers on a date and at a time specified in the notice, for a pretrial conference with the object of reaching agreement on or settling the matters referred to in subrule (2), and the magistrate may at the same time give directions as to the persons who shall attend and the documents to be furnished or exchanged at such conference.
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> (5) Where the clerk of court has given notice in terms of subrule (4) to the parties who have not yet held a pre-trial conference, it shall not be necessary for them to hold such a conference in terms of subrule (1)." (The underlining is mine)

In other words, the clerk of court is empowered to give notice of a pre-trial conference before a magistrate even where the parties have not held one in terms of subrule (1). Where that happens it is not necessary to hold a subrule (1) conference. In the present matter the clerk of court gave notice in terms of subrule (4). It was no longer necessary for the parties to convene a conference of their own but to attend the one before a magistrate where the appellant defaulted.

Mr *Petkar* would have wanted the appellant to be given notice of the application for default judgment in terms of Order 22 rule (1) of the Magistrates Court Rules. That argument was not made in the founding affidavit of Moyo-Majwabu. Apart from that, it is a trifle. A person who was in default would want to be given notice that default judgment is being applied for. Surely nothing more need is to be said about that.

The appeal is clearly without merit. It is accordingly dismissed with costs.

Bere J agrees……

Messrs Moyo-Majwabu and Nyoni, appellant's legal practitioners
Dube and Company, respondent's legal practitioners