WINNIE MUZUVA
versus
RENIA MUSARA

HIGH COURT OF ZIMBABWE
MAVANGIRA AND TSANGA JJ
HARARE 6, February and 7 May 2014

Civil appeal

Appellant, in person
S Chako, for the respondent

MAVANGIRA J: The respondent in *casu* was the plaintiff in proceedings in the magistrate's court where she issued summons in which she claims that the defendant who is the appellant in *casu* engaged in an adulterous relationship with her husband thereby causing the plaintiff suffering as she has "been deprived of conjugal rights, comfort and the usual husband and wife support." She also claims that she has "suffered loss of comfort and contumelia from her husband." For purposes of consistency, in this judgment the defendant in the lower court will be referred to as the appellant and the plaintiff as the respondent.

The appellant entered appearance to defend the action instituted against her in the magistrates court and subsequently also filed a plea. The matter was set down for a pre-trial conference on 15 March 2013. The record of those proceedings shows that on 28 March 2013 which was the trial date, a lady alleging to be the "defendant's" sister attended and said that the defendant was admitted in hospital and she was seeking to hand over a medical record book and this was ruled impermissible by the court. The appellant was therefore found to be in default and a default judgment was granted in favour of the plaintiff. On 7 May 2013 a warrant of Execution against property was issued against the appellant. On 14 May 2013 the appellant filed an "Urgent Application for Stay of Execution and Rescission of Judgment" and on the same day the learned magistrate issued a rule *nisi* staying execution pending the finalisation of the appellant's application for rescission of judgment. The rule nisi was

returnable on 21 May 2013. On the return day there was a hearing before a magistrate at which both parties were in attendance. The respondent opposed the appellant's application. The court ruled that the appellant had been in wilful default and dismissed her application.

The appellant has now appealed to this court against the decision on the following grounds:

> "1. The Honourable Trial Magistrate misdirected herself by failing to find that appellant was not in wilful default as she was physically incapable of attending court and had taken reasonable steps to make the court aware of this fact.
>
> 2. The Honourable Trial Magistrate misdirected herself by failing to consider that appellant was misled by Cleophas Musara into believing that he was unmarried, which fact was augmented by his contracting a customary marriage with appellant.
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> 3. The Learned Trial Magistrate misdirected herself by awarding Respondent 'unquantified' damages."

The appellant's prayer is for the setting aside of the magistrate's decision and the substitution thereof with the following:

"(a) Respondent's claim for damages be and is hereby dismissed.

(b) That respondent be and is hereby ordered to pay appellant's costs of suit."

In her heads of argument she prays that the trial court's judgment be set aside and that the matter be referred (remitted) for a full trial. The respondent opposes the appeal.

The full text of the judgment appealed against reads:

> "**RULING**
>
> The Applicant made an urgent application for rescission of judgment and Stay of Execution. In order for her application to be successful the court will look at:
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> i. Whether the applicant was in wilful default.
> ii. Does she have a bona fide defence to the claim.
>
> i. Whether Applicant was in wilful default
>
> The Applicant avers that on the day in question when the default judgment was entered she was in hospital and her sister had come to advise the court of her predicament. Indeed the record of proceedings reflect that on the day in question a lady purporting to be the now Applicant's sister stood up in court

> and on notifying the court of the situation was advised that a medical book had to be tendered before the court to prove that indeed the now Applicant was not feeling well. This proof was not averred before this court. Even after numerous explanations by the court that the Applicant had to show that she was not in wilful default she failed to do so. In her application the Applicant stated that she was informed that she was to appear in court after 30 days, if this was the case the Applicant was to have appeared in court sometime in April 2013 and not May as she is alleging. More so Order 30 (1) states that a party may not apply to have a judgment rescinded after 30 days of having knowledge of the judgment which is what the Applicant did.
>
> It is thus my finding that you were in wilful default thus your application is dismissed with no order as to costs." (sic) (the underlining is added).

In *Mdokwani* v *Shonhiwa* 1992 (1) ZLR 269 the appellant appealed against a decision of the magistrate following the dismissal of his application for rescission of a judgment granted against him. At 270B – 271A EBRAHIM JA stated:

> "The factors to be taken into account by a court in an application for rescission of judgment were stated as follows by DAVIES JA in *G D Haulage (Pvt) Ltd* v *Mumurgwi Bus Services (Pvt) Ltd* 1979 RLR 447 (A) at 455B-G:
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> > 'In *du Preez* v *Hughes NO* 1957 R&N 706 (SR), according to the headnote of that case, it was decided that there are no precise rules limiting or regulating what matters the court may take into account in deciding whether a defendant who seeks to set aside a default judgment has shown the existence for such relief of 'good and sufficient' cause in terms of Rule 63, the court will normally take into account (a) the applicant's explanation of his default, (b) the *bona fides* of the application to rescind the judgment, and (c) the *bona fides* of the applicant's defence on the merits of the case, and the court will normally consider these matters in conjunction with each other and cumulatively. The headnote is misleading since it appears from the body of the judgment of BEADLE J, as he then was, that careful consideration was also given to the prospects of success.
> >
> > The matter was also dealt with by this court in the case of *Arab* v *Arab* 1976 (2) RLR 166 (A). That was an appeal against a refusal of the General Division to grant rescission of a default judgment, and the effect of the court's decision is adequately set out in the headnote in the following terms:
> >
> > 'There is no "rule of thumb" to be applied where an applicant seeks rescission of a judgment in terms of Rule 63 of the High Court (General Division) Rules, 1971. All that can be said is that the applicant must show something which entitles him to ask for the indulgence of the court (*dicta* per COTTON LJ in In re *Manchester Economic Society*, 24 ChD at p 498 applied). Such indulgence will, however, not be granted where the default of the applicant may be classified as wilful (*Du Preez* v *Hughes NO* 1957 R & N, followed).

> It is a fundamental principle, dictated by public policy, that, as far as possible, there should be finality in litigation. That is one of the reasons why, in terms of Rule 63, rescission will not be granted unless the applicant shows 'good and sufficient' cause, the *onus* being on him.'

Clearly it was incumbent upon the appellant at the hearing before the magistrate to satisfy the court that he was not in wilful default. He had to show that there was an acceptable reason for the late filing of the appearance to defend and that he has a *bona fide* defence to the respondent's action."

The meaning of "wilful default" was aptly put by MURRAY CJ in the case of *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) at 173A-D, where he stated the principle as follows:

> "The true test, to my mind, is whether the default is a deliberate one – i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing."

In the respondent's heads of argument prepared by counsel, the *Mdokwani* case is cited and the following submitted:

> "51. Using the reasonable test, Appellant should have at least made sure that her sister furnishes the court with medical books were it true that she was sick. That her sister, even after several requests, failed to produce any medical books substantiating her conditions means that she took a calculated risk.
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> 52. There is no way the court would have accepted the reason for the default in the absence of medical books. The trial court therefore did not fell (sic) into error in finding that Appellant was in wilful default.
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> 53. It is trite that if it turns out that the default was wilful or was due to gross negligence, the Court normally does not come to the Applicant's assistance.
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> 54. See *Registrar General* v *Tsvangirai* 2003 (2) ZLR 114
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> 55. Having ruled that the default was wilful, the court therefore was correct in not coming to the Appellant's assistance."

A perusal of the proceedings of 28 March 2013 does not confirm what is stated by the learned magistrate in the underlined portion of her judgment. On the contrary, such perusal shows that the lady who stood up in court claiming to be the appellant's sister sought to hand over a medical record book to the court and the court ruled this to be impermissible. The original record in which the handwritten notes of the two magistrates who dealt with this matter on 28 March and on 21 May 2013 are available is very clear on what transpired in court. The court on 28 March 2013 declined to accept what was being proffered and was

meant to be proof of the appellant's admission in hospital by reason of which she was unable to attend court. There is no record of the court giving numerous explanations as stated in the judgment quoted above.

It is stated further in the above quoted judgment that the appellant said that she had been informed that she was to appear in court after 30 days and that if this was so, then she was to have appeared in court sometime in April 2013 and not in May as she alleged. In her affidavit the appellant said that she was informed that she was to appear in court after 30 working days. That would have meant that she would have had to attend court on 9 May 2013 and not around 15 may as she claims. She apparently took no action until 14 May 2013 when she became aware of the warrant of execution. It is tempting to view her obviously wrong calculation which takes her to 15 May 2013 as being a convenient excuse on her part to explain her inaction. Yet the fact is that she is a self-actor. It is also a fact that she did take action by ensuring that someone attended court on 28 March 2013 for the purpose of advising the court of her admission in hospital and her consequent inability to attend in person. The documentary proof that was brought for exhibition to the court was ruled impermissible by the court. She did not, as said in the lower court's judgment, fail to show that she was not in wilful default. Had the court examined the medical book and after perusing it come to the conclusion that the appellant was in wilful default it might have been possible for a different view to be taken of the court's finding on 28 March 2013 that the appellant was in wilful default. In the circumstances the appellant could not be said to have been in wilful default. To this extent, the appellant's right to a fair hearing was infringed. The infringement is in my view of such seriousness as to warrant or justify this court coming to the assistance of the appellant as the decision of the lower court was based on an unjustified earlier finding that the appellant was in wilful default when a perusal of the record does not support such a finding. By the same token, the respondent's counsel's submissions quoted above are not based on any facts borne out by the record. That which the appellant is accused of failing to do is exactly what she sought to do but was prevented from doing so by the court.

In addition to the above, the nature of the appellant's defence to the respondent's claim against her is to the effect that she was misled by Cleophas Musara and his relatives that he was a divorcee and so she was unaware that he was married to the respondent. Furthermore, the action by Cleophas Musara in marrying her customarily by paying lobola, made her believe him. Two children were born of their union. She thus denies being

responsible for the respondent's suffering which she says should be attributed to Cleophas Musara. Without going into the finer details of her plea, the appellant's defence is of such a nature that would require full ventilation by a trial court. The appellant also raised in her heads of argument the aspect that there was no proper quantification of the damages awarded to the respondent by way of the default judgment. All these factors taken in conjunction with each other and cumulatively, point to the justification for this court to grant the appellant relief.

It is for these reasons that the appeal will succeed. There appears to be no justification for the respondent to be penalised with costs in this matter. This is so because the failure to rescind the judgment was largely due to the magistrate's erroneous interpretation of the record of proceedings. It is therefore ordered as follows:

IT IS ORDERED THAT:

1. The appeal is allowed with costs.
2. The judgment of the lower court is set aside and substituted with the following:
   (a) The application for the rescission of judgment is granted.
   (b) The matter be and is hereby remitted to the court *a quo* for a full trial.
   (c) Each party shall pay their own costs.

TSANGA J agrees _____

Mushangwe & Company, respondent's legal practitioners.