

CHARLES BANDERA
versus
MAXMILLAN TAPIWA KONDOWE

HIGH COURT OF ZIMBABWE
CHIKOWERO & DEME JJ
HARARE, 8 June & 19 October 2023

Civil Appeal

Ms *L Chiperesa*, for the appellant
Mr *C Bare*, for the respondent

DEME J: The appellant approached this court challenging the whole judgment of the Harare Magistrates Court based on four grounds of appeal which are as follows:

- “1. The court *a quo* misdirected itself at law when it ruled that the court *a quo* has jurisdiction to hear the respondent’s claim in the main matter.
2. The court *a quo* also erred in that it failed to find as a fact that the appellant’s explanation for the default when he failed to enter an appearance to defend is reasonable and that the *bona fides* of his defence on the merits of the case carry some weight which when considered in conjunction with one another and the application as a whole would tilt in favour of the granting of the rescission of the judgment prayed for by the appellant.
3. The court of first instance misdirected itself when it acted as the trial court for the respondent’s claim and relied on the facts in the respondent’s Opposing Affidavit to dismiss the Application for Rescission of Judgment instead of relying on the respondent’s Summons and Particulars of Claim.
4. The court *a quo* also misdirected itself by discharging the interim Stay of Execution Order thereby making a judgment granted by a court which has no jurisdiction executable.”

The appellant prayed for the following relief:

- “1. That the appellant’s appeal succeeds.
2. That the court *a quo*’s judgment / ruling of the 21st October 2022 be and is hereby set aside.
3. The appellant’s Application for Rescission of Judgment be and is hereby granted as prayed for.
4. That the respondent be and is hereby ordered to pay the costs of this appeal on the legal practitioner and client scale.”

It is common cause that the respondent married the appellant’s daughter namely Shumirai Bandera and proceeded to pay the bride price in this respect in the sum of US\$2 720 sometime in March 2021 at the appellant’s place of residence in Karoi. After this

ceremony, the respondent alleged that he was not allowed by the appellant to immediately start living with his wife. According to the respondent, the appellant advised him that the two of them could only start living together as husband and wife after the wedding.

The respondent further alleged that sometime in May 2021, he discovered through some phone messages that his wife was now committing some adulterous acts. According to the respondent, he confronted his wife who admitted having committed such acts. This forced the respondent to institute an action against the appellant and his wife at the court *a quo* for the recovery of the money paid as bride price. The respondent also alleged that before instituting an action at the court *a quo*, he conducted some customary divorce procedures.

The appellant was served with the copy of the summons and failed to enter appearance to defend. The respondent, at the court *a quo*, successfully applied for default judgment against the appellant.

The appellant, consequently, upon discovering that the Messenger of Court wanted to execute the default judgment proceeded to apply for the rescission of the same. The appellant also successfully applied for an interim order for the stay of execution of the default judgment.

The application for rescission of default judgment was dismissed by the court *a quo*. Consequently, the interim order for the stay of execution of default judgment was discharged. Aggrieved by the decision of the court *a quo*, the appellant approached this court appealing against the decision of the court *a quo* based on the grounds specified above.

The issues that arise for determination are:

- A. Whether the appellant offered a reasonable explanation for the default.
- B. Whether the appellant has a *bona fide prima facie* defence to the claim.

The court *a quo* found that the appellant's default was wilful. According to the appellant, his legal practitioners prepared a notice of appearance to defend but the messenger of the legal practitioners failed to file the same with the court *a quo*. The appellant's counsel deposed to the supporting affidavit explaining this position. The counsel for the appellant further alleged that the messenger was relieved of his duties for the misconduct.

According to the court *a quo*, no substantive evidence was produced by the appellant's counsel substantiating the explanation for the default. The court *a quo* further observed that there was nothing on the record that demonstrated that the appellant had instructed the legal practitioners to represent him at the material time. Further, the court *a quo*

opined that there was nothing on the record that suggested that the messenger concerned was instructed to file the pleading concerned. The court *a quo* further commented that the appellant's legal practitioners failed to tender evidence that their messenger was fired from employment as a result of the alleged misconduct. According to the court *a quo*, the appellant's legal practitioners solely relied on their word of mouth which made the appellant's explanation meritless. It was the court *a quo*'s view that the appellant had demonstrated great negligence in the handling of the matter. The court *a quo* thus found that the appellant's explanation for the default was not plausible and consequently the appellant was in wilful default.

The concept of wilful default has been explained in a number of authorities in our jurisdiction. In *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp Ltd*¹, the court made the following observations:

“While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause. I favour the definition of wilful default offered by KING J in *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803 H-I:

‘More specifically, in the context of a default judgment, ‘wilful’ connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be.’”

In *Zimbabwe Banking Corp. Ltd v Masendeke*² the court opined as follows:

“Wilful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter.”

The court asked counsel for the respondent, Mr *Bare*, whether the conduct of the appellant may be described as a mistake, negligence or deliberateness and the counsel replied that the appellant's behaviour exhibited deliberateness. Counsel for the appellant, Ms *Chiperesa*, argued that the appellant's acts can be best described as a mistake. We do not agree with the views of both counsel. We concur with the court *a quo*'s view that the appellant's attitude displayed negligence. However, according to the *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* (supra) the appellant's conduct does not connote deliberateness. We do not think that the appellant freely and consciously made a

¹ 1998 (1) ZLR 368(S) at 369 E – H; 370A.

² 1995 (2) ZLR 400 (S).

decision of refraining from defending the matter before the court *a quo*. Thus, we are of the view that the court *a quo* erred in this respect by holding that the appellant was in wilful default as negligence does not meet the requisite threshold of deliberateness. In our view, there was no evidence of deliberateness that was placed before the court *a quo* and hence there was no wilful default. Accordingly, the first part of the second ground of appeal is upheld.

With respect to the merits of the appellant's defence, the court *a quo* held that the appellant's defence is meritless. According to the court *a quo*, the facts in this matter are common cause. The court *a quo* observed that the payment of bride price by the respondent is not being debated. Further, the court *a quo* commented that the fact that the respondent and the appellant's daughter never lived together as husband and wife is not being contested as the respondent was advised that he would only start living together with the appellant's daughter after the church wedding.

The appellant argued *a quo* that the court did not have jurisdiction to hear the matter as the cause of action, being the payment of bride price, arose in Karoi where the ceremony happened. This argument was dismissed by the court *a quo* on the basis that the list of the bride price was sent to the respondent who, at the material time, lived in Harare. Further, the learned magistrate observed that the appellant's daughter, who was one of the defendants *a quo*, made confessions of adultery in Harare. Based on these two grounds, the court *a quo* came to the conclusion that it had jurisdiction to hear the matter.

We are of the view that whether the court *a quo* has jurisdiction to hear the matter presents a reasonably arguable case given that the bride price was paid in Karoi. The basis upon which the court *a quo* assumed its jurisdiction was not pleaded in the summons as required. In his relevant paragraphs of the Particulars of Claim, the respondent averred as follows:

- “4. The 2nd Defendant is the father of the 1st Defendant.
5. On 27 March 2021, the Plaintiff paid bride price (lobola/roora) to the 2nd Defendant for the 1st Defendant.
6. The Plaintiff paid a total of US\$ 2 720.00.
7. The Plaintiff was not given permission to take or stay with his wife 1st Defendant as it was agreed that Plaintiff would only take his wife 1st Defendant after wedding.
8. The Plaintiff discovered that the 1st Defendant (wife) was cheating on Plaintiff and was having an affair with another man a situation which the Plaintiff considered it (sic) incompatible with the continuation of the marriage and the Plaintiff dissolves (sic) the customary union on the 27th January 2022 without having stayed with the wife.”

It is thus apparent, that the jurisdiction basis of the court *a quo* was not pleaded in the summons. We appreciate that the respondent was a self-actor at the time of filing summons but this does not exempt him from complying with the legal requirements. Thus, the issue of jurisdiction raised in the first and last grounds of appeal demonstrates the existence of a bona fide defence which prima facie carries some prospect of success.

Instead of relying on the appellant's case as pleaded in the summons in resolving the question of whether or not the jurisdictional facts were pleaded, the court *a quo* depended on allegations raised in the opposing affidavit when the appellant was responding to the application for rescission of default judgment. By so doing, the court *a quo* erred. The opposing affidavit was not before the court which granted default judgement. It was not yet part of the record. In determining the application for rescission of judgement, the court should have approached the issue of jurisdiction from the stand-point of the contents of the summons and particulars of claim. The third ground of appeal has merit. This necessarily means that the appellant has a reasonably arguable defence. The court *a quo* was in error in finding otherwise. The second ground of appeal is likewise upheld.

An application for rescission of default judgment before the court *a quo* is regulated by Order 30 of the Magistrates Court (Civil) Rules, 2019. Order 30 Rule 1(1) and (2), which are relevant for purposes of setting out requirements for the application for rescission of default judgment, provide as follows:

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

In casu, the appellant, in the founding affidavit filed *a quo*, set out the reasons for his failure to defend the matter. In other words, he met the requirements of Order 30 Rule 1(2) (a) of the Magistrates Court (Civil) Rules, 2019. Further, the appellant also affirmed in the founding affidavit the grounds for his defence, which, in our view, also satisfied the provisions of Order 30 Rule 1(2)(b) of the Magistrates Court (Civil) Rules, 2019.

In the circumstances, the appeal is allowed with costs. Costs ordinarily follow the outcome. No sound reasons were tendered for us to depart from this general rule.

Accordingly, it is ordered as follows:

- (1) The appeal be and is allowed.
- (2) The court *a quo*'s judgment / ruling of the 21st October 2022 be and is set aside and substituted with the following:
 - “(a) The default judgement granted on 2 August 2022 be and is hereby rescinded.
 - (b) The respondent shall pay the applicant's costs of suit.”
- (3) The respondent shall pay the appellant's costs of the appeal.

DEME J:.....

CHIKOWERO J:I agree

Mkuhlani Chiperesa Legal Practitioners, appellant's legal practitioners
Murambasvina Legal Practice, respondent's legal practitioners