

CITY PARKING (PRIVATE) LIMITED
versus
ANGELA MABUYAWA

HIGH COURT OF ZIMBABWE
TAKUVA & WAMAMBO JJ
HARARE ;31 October 2023 & 26 February 2025

Civil Appeal

G Sithole, for the appellant
G Madzoka with J Mandeverere, for the respondent

WAMAMBO J: This is an appeal against the judgment of the Magistrates Court.

Before the court *a quo* respondent obtained a default judgment. The default order in essence directed appellant to return respondents motor vehicle, a mercedes benz with registration numbers AFM 4421 to the respondent.

Appellant filed an application for they rescission of the earlier default judgment. The court *a quo* after due consideration rendered an order dismissing the application for rescission. Appellant dissatisfied with the judgment has noted an appeal which appeal is now before us.

The appellant raises three grounds of appeal which are couched as follows:

- “1. The court *a quo* erred and misdirected itself in fact and erred in law in finding that the appellant was in wilful default when there was no basis for such finding.
2. The court *a quo* grossly erred and misdirected itself in law in finding that the appellant acted lawfully and there could not be an interdict against lawful conduct.
3. The court *a quo* misdirected itself on the facts and erred in law in finding that the dispute between the parties had been overtaken by the release of the respondent’s vehicle when such release was only done in compliance with a binding court order and did not amount to acquiescence with the default judgment”

Respondent raised two points *in limine* as follows:

“3. The respondent will motivate two preliminary points against the appeal and will move the court to dismiss it without going into the merits.

- (i) Applicant acquiesced to the court *a quo* order and lost the right to challenge it.
- (ii) The appeal is now moot and has been over taken by events.

The circumstances of this case on this point are that upon the rendering of the default judgment appellant released, the motor vehicle to the respondent. The first point *in limine* finds support in the cited case of

Mining Commissioner Masvingo N.O Mining Affairs Board, Minister of Mines and Mining Development Finer Diamond (Private Limited SC 38/22 where BHUNU JA at p 4 had this to say:

“[16] On that score the respondent has now placed reliance on the dictum in the case of *Dhliwayo v Warman Zimbabwe (Private) Limited HB 12-12* where the court *a quo* said: According to the common law doctrine of preemption, a party who acquiesces to a judgment cannot subsequently seek to challenge a judgment in which he has acquiesced.

[17] Undoubtedly the applicant by complying with the order he now seeks to appeal against acquiesced in the judgment of the court. He cannot now be heard seeking to appeal against the judgment he has complied with. He cannot a probate and reprobate as it were See *S v Marutsi* 1990(2) ZLR 370 (SC)”.

By parity of reasoning I find that appellant acquiesced with an order of the court and cannot now challenge the same order I find that respondent is on firm ground and were up hold this point *in limine* is intricately connected to the first point *in limine*. The second point *in limine*.

It speaks to the appeal being moot and being overtaken by events.

The appellant returned respondent’s motor vehicle in response to the default order. The default order reads as follows:

- a) “The application for an interdict be and is hereby granted.
- b) The respondents be and is hereby ordered to return and deliver the applicant’s motor vehicle mercedes Benz, Registrar Number AFM 4421 to the applicant
- c) The respondent shall bear costs of suit on ordinary scale”

After the return of the motor vehicle at the centre of the dispute the issue became moot. The horse has indeed bolted and the need to close the stables becomes unnecessary I also find that the second point *in limine* has merit and I uphold it.

See *Chetty v Law Society Cransvaal* 1985(2) SA 756.

Appellant was served through Genрге Mpoperi who in a supporting affidavit confirms receipt of respondent ‘s urgent application. He confirms to reporting directly to Mr Mudzonga the company secretary. In spite of that very strategic position he avers that he did not see that the matter was set down for 7 March 2023.

It becomes unclear how he did not see the date for hearing. The question then arises as to what he read if he did not realise the endorsement of the date of hearing.

The court a quo correctly found that appellant was in wilful default and failed to meet the requirements of Order 30 of the Magistrate Court Rules.

Clearly the grounds of appeal in particular grounds, one and two are enmeshed with the points *in limine* raised. The resolution is that the appeal is devoid of merit. In the circumstances the appeal stands to be dismissed.

Costs on a higher scale have been motivated on the basis that appellant persisted with the appeal in circumstances wherein it was effectively a hopeless appeal. It is averred that the appeal is motivated by vindictiveness and a desire to punish respondent,

In the circumstances however the appeal appears out of place. The submissions made with regard to possible accrual of fines incurred by respondent seems to suggest a misplaced pursuance of respondent using the wrong fora. If there is an issue of fines it can be pursued separately

In the circumstances the appeal appears *mala fide* and attracts higher costs. It is ordered as follows:

The appeal be and is hereby dismissed with costs on a legal practitioner and client scale.

TAKUVA J agrees

Kantor & Imverman, applicant's legal practitioner
Kadzere Hungwe & Mandevere, respondents' legal practitioner