REPORTABLE (89)

(1) INEBRIANT CACHE (2) RONALD MUSONZA
v
FRENCH SMITH t/a **CUSTOMS SERVICES**

SUPREME COURT OF ZIMBABWE
HARARE: 27 JUNE & 25 SEPTEMBER 2024

L. Madhuku, for the applicants

Ms *A. S. Ndlovu* with *B. Machekano*, for the respondent

IN CHAMBERS

MAVANGIRA JA:

1. This is an opposed application for condonation for non-compliance with r 38 (1) (a) of the Supreme Court Rules, 2018 and extension of time within which to file an appeal. The applicants are aggrieved by and desirous of appealing against a judgment of the High Court, Commercial Division, handed down on 30 June 2023 in HCHC554/23 under judgment number HH 603/23.

2. The applicants seek an order in the following terms:

> "IT IS ORDERED THAT
> 1. The application for condonation of non-compliance with r 38 (1)(a) of the Supreme Court Rules, 2018 be and is hereby granted.
>
> 2. The application for extension of time within which to file and serve a notice of appeal in terms of the Rules be and is hereby granted.
>
> 3. The notice of appeal which is 'Annexure 7' to this application shall be deemed to have been filed on the date of this order
>
> 4. There shall be no order as to costs."

FACTUAL BACKGROUND

3. The first applicant is a company registered in terms of the laws of Zimbabwe. The second applicant is a natural person, a director/representative of the first applicant who is also acting in his personal capacity. The respondent is also a company registered in terms of the laws of Zimbabwe.

4. The respondent instituted action proceedings in the court *a quo* against the applicants, claiming the following:

> "a. Payment in the sum of US$1 726.11 (one thousand seven hundred and twenty six dollars and eleven cents united states dollars) (sic) being the plaintiff's service charge for the importation of defendant's (sic) goods, with interest calculated at the rate of 5 % per annum, calculated from the date of issuing summons to the date of payment in full.
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> b. Payment in the sum of US$118 831.77 (*one hundred and eighteen thousand, eight hundred and thirty one united states dollars and seventy cents*) (sic) and ZWL 3 242 650.23 (*three million two hundred and forty two thousand, six hundred and fifty Zimbabwean dollars and twenty three cents*) (sic) being the customs duty to be paid to the Zimbabwe Revenue Authority (ZIMRA) for the first defendants consignment of goods; (sic)
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> c. Payment in the sum of US$118 831.77 (*one hundred and eighteen thousand, eight hundred and thirty one united states dollars and seventy seven cents*) (sic) and ZWL 3 242 650.23 (*three million two hundred and forty two thousand, six hundred and fifty Zimbabwean dollars and twenty three cents*) (sic) being the statutory penalty applied for having failed to pay customs duty to the Zimbabwe Revenue Authority (ZIMRA) for the first defendant's consignment of goods;
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> d. Payment in the sum of US$58 227.57 (*fifty eight thousand, two hundred and twenty seven united states dollars and fifty seven cents)* and ZWL2 157 287.39 *(two million, one hundred and fifty seven thousand, two hundred and eighty seven Zimbabwean dollars and thirty nine cents*) being interest charged by the Zimbabwean (sic) Revenue Authority (ZIMRA) on the duty payable for the first defendant's goods;
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> e. That the second defendant, and all other directors of the first defendant, in terms of s 68(3) of the Companies and Other Business Entities Act [*Chapter 24:31*] is held jointly and severally liable for the above sums in his personal capacity.
>
> f. Costs of suit on a legal practitioner and client scale."

5. The applicants herein were the first and second defendants respectively, in the court *a quo*, whilst the respondent was the plaintiff. The parties will appear as such, to wit, "plaintiff" or "defendants", only in quotes that appear hereunder from the judgment of the court *a quo*. However, they will be referred to in this judgment in accordance with their statuses in this application, namely respondent and applicants.

6. According to the summons, the claim against the applicants was alleged to have arisen from a verbal agreement concluded with the first applicant, as defendant in terms of which the respondent (plaintiff) was mandated to clear a consignment of goods on behalf of the former from South Africa to Zambia. It was alleged that during the negotiations the first applicant fraudulently misrepresented to the respondent that the goods were going to Zambia, this being done to induce the respondent into entering a "removal in transit" entry to the Zimbabwe Revenue Authority system and for the first applicant to avoid the payment of the correct service fee, the import duty and taxes on the consignment.

7. It was further alleged that, acting on the misrepresentation by the first applicant, the respondent cleared the consignment as a "removal in transit." Further, that the second applicant then wrongfully and unlawfully diverted the consignment and caused the goods to be delivered in Zimbabwe for the first applicant's consumption.

8. In addition, it was alleged, in the respondent's Declaration that upon ZIMRA discovering that the goods did not exit Zimbabwe, it proceeded to levy duty against the respondent as well as taxes in the amounts of US$118 831.77 and ZWL$3 242 650.23 representing the principal duty that the applicants were supposed to pay if the liquor had been destined for Zimbabwe. ZIMRA also imposed a penalty of double the principal duty and taxes in

additional amounts of US$118 831.77 and ZWL$3 242 650.23. In addition, ZIMRA also levied US$58 227.57 and ZWL$2 157 287.39 by way of interest.

9. As a result, the respondent claimed these amounts from the applicants on the basis of misrepresentation and the subsequent loss that it suffered as a consequence of the actions by ZIMRA. In addition, the respondent claimed US$1 726.11 being a service charge calculated at the rate of 2.5% of the value of the goods to be cleared.

10. It was also alleged that the respondent made a report to the police alleging that the applicants had committed fraud. The second applicant was charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It was alleged that the second applicant as director, had carried on the business of the first applicant with the intent to defraud the respondent and the Zimbabwe Revenue Authority. He was duly convicted and sentenced to pay a fine of ZWL$60 000.00. In addition, twelve months' imprisonment was wholly suspended on given conditions.

11. To the civil claim before the court *a quo*, the applicants filed a joint notice of appearance to defend and a joint plea. In their plea, the applicants denied liability. They denied having engaged the respondent or given it any mandate. Regarding the second applicant's conviction and sentence, the plea was that it was a wrong conviction coupled with the averment that the second applicant did not appeal against the conviction and sentence for the sake of his "mental well-being." Further, that he was charged in his personal capacity and not in his representative capacity. No criminal charges were laid against the first applicant.

12. The respondent filed a Summary of Evidence which indicated that it would be calling two witnesses to testify on its behalf. The summaries of their intended evidence were set out therein. The summary also listed numerous documents that the respondent was going to rely on. It simultaneously filed its Bundle of Documents to which copies of the numerous documents intended to be relied on were attached. Amongst these documents were invoices, bills of entry, bill payments, correspondence with the police and with ZIMRA as well as the record of proceedings of the trial of the second applicant, jointly with one Daniel Gahadza. The said Daniel Gahadza is described in the "Outline of the State Case" as "a male adult … self employed as a Clearing Agent at Beitbridge Border Post." According to the said record he is reflected as having been found not guilty and acquitted while the second applicant was convicted and sentenced to a fine and a wholly suspended term of imprisonment. The magistrate's reasons for judgment and sentence were also attached. Notably, the first applicant was not charged.

13. The applicants also filed a Summary of Evidence in which the second applicant was named as the only witness and a summary of his evidence set out. The Summary of Evidence also listed three documents that the applicants intended to rely on, these being also listed in their Bundle of Documents filed simultaneously.

14. The filing of the bundle of documents and the summary of evidence accords with r 12 (2) of the High Court (Commercial Division) Rules, 2020 (the rules of the court *a quo*), which reads:

> "(2) The plea, exception, special plea or other answer shall be supported by a paginated and indexed bundle of all relevant and material documentary and a summary of the evidence that the defendant relies on which shall be in Form No. CC 2."

15. On 13 October 2023, the respondent's legal practitioners filed with the registrar of the court *a quo* a "Notice of Set-Down for Pre-Trial Conference" with blank spaces for the date, presumably meant to prod the registrar of the court *a quo* to allocate a pre-trial conference date.

16. Thereafter, the judge in the court *a quo* caused a notice to be dispatched to the parties in terms of r 18 (1) of the rules of the court *a quo*) notifying the parties that a case management meeting was to be held on 30 October, 2023. Presumably, pleadings had been closed for the learned judge to do so. I make this presumption on the basis of the provision in r 16 (1) which states that:

> "(1) The registrar shall, unless the circumstances do not permit, within a maximum of 3 (three) days after the closure of pleadings, cause a case to be manually or electronically allocated to a specific judge for the purpose of case management and case mapping."

The exact wording of the notice sent to the parties is not part of the record before this Court. However, as the judge *a quo* states in the judgment that this was done in terms of r 18 (1) of the rules of the court *a quo*, the presumption can safely be made that the purpose was as stated in r 18 (1) to be "*for the purposes of case management, in order that he or she may* ***make such order or give such directions in relation to any case management as well as any interim application which the parties may have filed or intend to file as the judge deems fit,*** *in order to achieve the just, expeditious and economical disposal of the dispute.*" (The emphasis is added)

17. On 30 October, 2023, the respondent's representatives attended the meeting as required. The first and second applicants' legal practitioner was in attendance. The Operations Manager for the first applicant was also in attendance in a representative capacity. The

second applicant was not in attendance and was noted to be and recorded as being in default.

18. At the conclusion of the case management meeting, the judge gave judgment for the respondent, against both applicants, jointly and severally, the one paying the other to be absolved, and ordered them to pay the respondent US$297 616.22 together with interest at the prescribed rate calculated from the date of summons to the date of payment in full and a further sum of ZWL$8 642 587.85 together with interest at the prescribed rate calculated from the date of summons to the date of payment in full. The applicants were also ordered to pay, jointly and severally, costs of suit on the legal practitioner and client scale. The order given by the judge is dated 30 October 2023 and is headed "CASE MANAGEMENT ORDER."

19. Requested for reasons thereafter, the judge *a quo*, in setting out the reasons for judgment, determined the merits of the matter. In her judgment, the learned judge also stated that she "*gave judgment through a case management order for the plaintiff …*" A reading of the judgment, which was availed on 8 November 2023, shows that the determination of the matter was done on the basis of the pleadings filed by the parties and the averments made therein, the contents of the summaries of evidence, the documents intended to be relied on by the parties as reflected in their Summaries of Evidence and Bundles of Documents and the exchanges between the judge and counsel during the case management meeting itself. Such interaction included the issue of the implications of s 31 of the Civil Evidence Act, [*Chapter 8:01*], which issue the judge indicated that she brought to the attention of the applicants' legal practitioner during the meeting. This was in relation to the criminal conviction of the second applicant by the magistrates' court on the charge of fraud. A perusal of the judgment shows that there was an exchange or debate that followed, during

which the applicant's legal practitioner submitted, *inter alia*, that the second applicant's conviction was wrong and that the first applicant had, in any event, not been prosecuted and/or convicted. After the engagement, the learned judge stated the following:

> "This finding has not been challenged by way of an appeal. Therefore it remains extant. It is therefore improper for the second defendant to distance himself from the first defendant. The findings in the Magistrate Court (*sic*) as well as the conviction equally apply to the first defendant. In my view, the first and second defendants cannot run away from liability.
>
> The next consideration is what then does a Judge do under those circumstances? The answer lies in r 18 (1) (2) (3) and (4) which reads as follows:-
> ….."

20. After quoting the content of r 18 of the rules of the court *a quo*, the learned judge pronounced as follows:

> "The second defendant failed to attend the case management meeting virtually and was in default. The provisions of r 18 (4) become relevant. In terms of r 18 (2), a judge may, (a) dismiss the suit, (b) strike out the defence or counterclaim (c) **or (d) make such other order on the papers filed of record as she considers just.** In my view, a matter can be disposed of at the case management stage depending on the circumstances.
>
> In my exercise of the powers vested in me in accordance with r 18 (2), I considered the matter having heard from Mr *Tembani*. I also considered the fact that the second defendant was in default. I added all the sums claimed by the plaintiff and gave judgment under a globular figure separately for claims in United States and Zimbabwe dollars." (The emphasis is added)

21. A perusal of the judgment of the court *a quo* also reveals that the determination of the merits was purportedly justified by the learned judge on what can only be said to be allegations or averments by the respective parties as at the case management meeting stage. No evidence was led or adduced. The learned judge appears to have elevated the submissions and engagements with counsel as well as the documents, to the same level as evidence that had been properly adduced and placed before the court.

22. The learned judge *a quo* further found that the criminal conviction had not been denied and that no appeal was pending in the criminal courts. She also made a finding that the conviction and sentence had been proved by the criminal record book extract and that therefore the presumption in s 31 (3) (a) of the Civil Evidence Act therefore applied. The section reads:

> "(3) Where it is **proved in any civil proceedings that a person has been convicted of a criminal offence**, it shall be presumed unless the contrary is shown-
>
> (a) that he did all acts necessary to constitute the offence;" (The emphasis is added)

23. The learned judge noted that the applicants' counsel sought to distinguish between the first and the second applicants. On this issue, she commented that "*as rightly pointed out by the trial magistrate ... the first defendant in terms of s 277 (3) of the Criminal Law (Codification and Reform) Act* [*Chapter 9:23*]*, is liable as the corporate body due to the conduct of the first defendant.*" The said s 277 (3) provides as follows:

> "(3) Where there has been any conduct which constitutes a crime for which a corporate body is or was liable to prosecution, that conduct shall be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body, and if the conduct was accompanied by any intention on the part of the person responsible for it, that intention shall be deemed to have been the intention of every other person who at the time was a director or employee of the corporate body."

24. The judge *a quo* proceeded thereafter to make the pronouncement that appears at the end of para 19 above, the contents of which I do not find it necessary to repeat in this paragraph.

25. Regarding costs, the learned judge, exercising the powers set out in r 18 (3), granted an order of costs in favour of the respondent on the legal practitioner and client scale. The judge proceeded to opine that the applicants ought to have engaged the respondent with a view to settling the amounts claimed rather than to enter appearance to defend. She further

opined that the applicants were also insincere in attacking the criminal conviction in the court *a quo* instead of appealing.

THIS APPLICATION

26. At the commencement of proceedings, the respondent raised preliminary points to this application. Firstly, that the applicants did not seek leave to appeal whereas this was necessary as the intended appeal was against a case management order. It contended that in terms of the rules of the court *a quo*, no appeal lies against a case management order. It based its contention on r 44 (3) of the said rules which provides that:

> "(3) Subject to the provisions of the High Court Act, [*Chapter 7:06*], **no appeal** shall lie from an order or directive issued at a case management meeting and interlocutory orders." (The emphasis is added)

27. The second preliminary point raised was that the second applicant intends to appeal against a default judgment instead of applying for its rescission in terms of the rules of the court a *quo*. Reliance was placed on r 18 (4) which provides as appears below where I quote r 18 in its fullness for completeness:

> "**18 Power to make and give directions for disposal of suits**
>
> (1) A judge shall, within ten working days after receipt of the record, on his or her own motion direct the registrar to cause the parties to the proceedings to appear before him or her, for the purpose of case management, in order that he or she may make such order or give such directions in relation to any case management as well as any interim application which the parties may have filed or intend to file as the judge deems fit, in order to achieve the just, expeditious and economical disposal of the dispute.
>
> (2) Where any party fails to comply with any order made or direction given by the judge under subrule (1), the judge may dismiss the suit, strike out the defence or counterclaim or make such other order on the papers filed of record as he or she considers just.
>
> (3) The judge may, in exercising his or her powers under subrule (2), make such order as to costs on the papers filed of record as he or she considers just.

(4) Any order or direction given or made against **any party who does not appear before the judge** when directed to do so under subrule (1), shall be deemed a default judgment and may only be set aside or varied by the judge on good and sufficient cause shown upon application made within 10 (ten) days of the order being made or direction being given and on such terms as the judge considers just.

(5) Rule 15 shall *mutatis mutandis* apply in respect of the setting aside of a default judgment" (The emphasis is added)

28. The applicants, on the other hand, contend that these preliminary points are of no moment as the judgment of the court *a quo* went to the merits of the dispute between the parties and there is no longer any dispute between them that is pending before it. There was therefore no requirement for the first applicant which was not in default, to seek and obtain leave before it could lodge an appeal with this Court.

29. The second applicant also contended that he ought not have been held to be in default as his legal practitioner, who was representing both him and the first applicant, was in attendance at the case management meeting.

30. The second applicant did not attend the case management meeting. The judgment against him by the court *a quo* was given in his absence. He therefore was, and remains in default. The court *a quo* correctly noted that as he had not been excused by the court from attending, he was in default, despite the attendance of his legal practitioner. This is so because the rules define a party in these terms: "*'Party' means any person who is a party to any proceedings before the court*." It seems to me that the judge *a quo*'s finding that the second applicant was in default cannot be faulted. Consequently, the second applicant's remedy could not properly be the appeal that he desires to pursue. It is trite that there can be no appeal against a default judgment. A party aggrieved by a default judgment given

against it may only apply for its rescission. The second applicant's application is therefore misconceived. It is a doomed application.

31. After the learned judge *a quo* "caused a notice to be dispatched to the parties in terms of r 18 (1)" of the rules of the court *a quo*, the first applicant, not being a natural person, was in attendance through its representative. There is no indication that the first applicant consented to judgment thereat. The granting of judgment against it effectively means that, without expressly stating so, the court *a quo* must have struck out its defence. Presumably, this was on the basis of the pleadings and documents filed by the parties as well as the judge's exchanges with counsel.

32. It is trite that unless a defendant consents to judgment, the plaintiff must prove its case on a balance of probabilities. Such probabilities can only be assessed on evidence adduced before the court. No evidence was adduced before the court *a quo*. It is also trite that pleadings are not evidence. The discovered documents that the court might have taken into consideration had not yet been placed before the court by any witness, properly sworn. The granting of judgment against the first applicant was thus irregular. Furthermore, in the absence of evidence, this was tantamount to relief being granted for the mere asking. It was not predicated on any provision enabling such an order. In the process the basic tenet *audi alteram partem* would seem to have been trumped and relegated to the sidelines. The first applicant duly complied with the notice or directions given by the judge under subrule (1) by attending the case management meeting. If the first applicant complied with any order or direction, it would follow that the striking out of its defence and the granting of judgment against it would be unprocedural.

33. No settlement having been reached, in other words, the first applicant not having consented to judgment, the judge ought to have escalated the matter to the next step contemplated by the rules.

34. *In casu*, it seems that the matter should have properly been referred to trial. The order that the judge *a quo* made at the end of the case management meeting on 30 October, 2023, against the first applicant, would have been properly made at the end of a trial properly conducted if the evidence adduced thereat would have justified such result. In my view, the reference in the rules to "*such other order on the papers filed of record as he or she considers just*" or other similar phrases does not override the trite position that a plaintiff must prove his or her or its case. The judge's expressed view, at p 7 of her judgment, that the applicants ought to have settled the matter and not entered appearance to defend, remains a view that cannot birth an order or judgment in the absence of evidence being led before the court.

35. With regard to the first applicant, the judge *a quo* made a definitive and dispositive determination of the dispute between the parties but did so without hearing any evidence and without its consent. It did not make a case management order within the contemplation of r 18, such as would have required the second applicant to seek the leave of the court *a quo* to appeal against it. This is so despite the learned judge *a quo*'s pronouncement that she "*gave judgment through a case management order.*" The judgment definitively and effectively disposed of the dispute between the parties and cannot be referred to as interim or interlocutory. To the extent that the merits of the dispute were purportedly determined, the respondent's preliminary point that leave to appeal ought to have first been sought and obtained does not seem to find favour with general principles of law which do not require an aggrieved party to first seek and obtain leave before appealing against such a judgment.

36. A perusal of the intended grounds of appeal, as reflected in Annexure 7 to this application, confirms that the applicants' grievance was with the manner in which the respondent's action was handled by the court *a quo* as opposed to the merits of the dispute. They read:

GROUNDS OF APPEAL

"1. The court *a quo* erred in law and misdirected itself in disposing of the matter on the merits at a case management meeting in circumstances where a judge presiding over a case management meeting has no power whatsoever under r 18 of the High Court (Commercial Division) Rules, 2020 [SI 123/2020] to dispose of a matter on the merits.

2. As an alternative to 1 above, the court *a quo* erred in law and misdirected itself in giving judgment in favour of the respondent at a case management meeting in circumstances where r 18 (2) of the High Court (Commercial Division) Rules, 2020 [SI 123/2020] did not apply by reason of the fact that the appellants had not failed to comply with any order or direction given under subrule 1 of r 18.
3. Given that the second Appellant was represented at the case management meeting by his legal practitioner of record, the court *a quo* erred in law and misdirected itself in treating the second Appellant as being in default in circumstances where r 18 of the High Court (Commercial Division) Rules, 2020 [SI 123/2020] does not require a party represented by a legal practitioner to be also present in person.
4. The court *a quo* misdirected itself in law by committing a gross irregularity in misconstruing the provisions of s 31 of the Civil Evidence Act [*Chapter 8:01*] (*sic*) by holding that the said provision did not permit the second Appellant to challenge the facts underlying the conviction.

5. The court *a quo* misdirected itself in law by committing a gross irregularity in misconstruing the provisions of s 277 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (*sic*) by holding that the conviction of the second appellant necessarily meant that the first appellant was also criminally liable."

37. On a view of the above grounds of appeal, it appears that, were this application to succeed, what would be before the appeal court would, to all intents and purposes, be a review as opposed to an appeal.

38. During the course of the virtual hearing of the application, I raised with counsel the question whether this was not a proper case for the invocation of s 25 of the Supreme Court Act. Mr *Madhuku* agreed that s 25 could properly be invoked on the facts of this case. Ms *Ndlovu* did not make any specific submission on this point. Instead, she was at pains to point out that both applicants were faced with a default judgment granted in accordance with the rules of the court *a quo*, including r 21 (1). She referred the court to para 48 of her written submissions in which she stated:

> "48. It is clear from the ordinary meaning of this provision that the absence of only one party can invoke the powers of the court to enter judgment, as was done in the court *a quo*.
>
> 49. In such circumstances, the rules are clear on the procedure to be used to set aside a judgment entered in the absence of one party. It envisages that any party affected by such judgment (first and second applicant), can apply for the judgment to be set aside on good cause shown.
>
> > 'Rule 21 (2) An order made by the judge in terms of this rule may be set aside on the application of the party affected thereby on good and sufficient cause shown within ten (10) days from the date of the order, and on such terms as the judge considers fit and just and the provisions of r 15 shall apply to the extent possible.'
>
> 50. It is accordingly wholly inappropriate for such judgment to be brought on appeal.

51. The respondent accordingly prays that the appeal (sic) be struck off the roll with costs on a punitive scale."

39. The provision referred to by counsel in para 48 of her heads of argument is r 21 (1) of the rules of the court *a quo* and it reads:

> "(1) Where at the appointed time for the pre-trial case management conference, one or more of the parties or witnesses, fails to attend, the judge may-
> (a) dismiss the suit or proceedings'
> (b) strike out the defence or counterclaim;
> (c) enter judgment;
> (d) make such other order as he or she considers fit on the papers filed of record.
>
> (2) An order made by the judge in terms of this rule may be set aside on the application of the party affected thereby on good and sufficient cause shown within ten days from the date of the order, and on such term as the judge considers fit and just and the provisions of r 15 shall apply to the extent possible.
>
> (3) Subsequent to the first adjournment, if all parties fail to attend the pre-trial conference, the court or judge shall remove the suit from the roll, with such order as to costs as it or he or she deems fit and just."

40. Rule 15 referred to in r 21 (2), relates to the setting aside of default judgments. I do not think it necessary to dwell on it in this matter. Suffice it to say that the judgment is clear that the learned judge acted in terms of r 18 in causing the parties to appear before her. She made her decision on the basis of the powers that she perceived r 18 conferred on her. The argument about r 21 being applicable in this matter, seems to me to be unnecessary, immaterial and misguided particularly when one has regard to subrule (5) of r 18 which also specifically provides for the application of r 15 in respect of the setting aside of a default judgment. In addition, the learned judge *a quo* did not have any regard to, seek guidance from or purport to act in terms of r 21. The argument does not alter the status of the judgment of the court *a quo* in relation to the first applicant. The requirement at law for a plaintiff to prove its case is so trite that any judgment given contrary to its dictates is likely, if not absolutely, to be tainted or invalidated by gross irregularity, as is the position in this matter. In addition, r 4 (3) is pertinent. It reads:

"(3) The court shall in administering these rules, have due regard to the set of values set out in the Second Schedule to these rules and the need to achieve substantial justice inter parties in any particular case **without derogating from the principles of natural justice or established law** and resolving the dispute timeously." (The emphasis is added)

It is established law that a plaintiff must prove its case. That did not happen *in casu*.

41. For completeness, the Second Schedule to the rules of the court *a quo* provides as follows:

"**SECOND SCHEDULE**

VALUES

"**(R 2)**

The adjudication of disputes and operation of the Commercial Division of the High Court of Zimbabwe (hereafter referred to as "the Commercial Court") shall be guided by the set of values listed below which however, are not part of the Rules of Court.

(1) The establishment of the Commercial Court in Zimbabwe is designed to improve the ease of doing business in line with the criteria set by the World Bank and contribute towards the national effort in attracting local and foreign direct investment.

(2) The core function of the Commercial Court is the expeditious resolution of commercial disputes according to international best practices to enhance efficient justice delivery'

(3) The core attributes of the Commercial Court are:
   (a) reduction and simplification of processes;
   (b) curtailment and minimisation of costs and time;
   (c) full integration of electronic case management systems;
   (d) complete digitalisation of records;
   (e) across the board training;
   (f) enhanced professionalism and increased efficiency;
   (g) new rules of procedure;
   (h) adaptability."

The Second Schedule does not, in my view, displace, detract from or do away with the command not to derogate from established law. The command to the court *a quo* to have due regard to the set of values set out in the Second Schedule, does not detract from the established position of the law that he who alleges must prove. *In casu*, the respondent

alleged but was not afforded the platform to prove. Neither was the first applicant heard before judgment was issued.

42. The manner in which the court *a quo* dealt with the matter before it, pertaining to the respondent's action proceedings instituted against the applicants, has already been discussed earlier and need not be revisited. The inevitable fate of the second applicant has also already been pronounced upon earlier. In respect of the first applicant, there is no doubt that a **gross irregularity** was committed by the court *a quo* in determining the merits of the matter and giving judgment against the first applicant without the benefit of evidence, adduced and tested, before it.

43. The gross irregularity is further exacerbated by the following observations. Firstly, the judgment of the court *a quo* was based, *inter alia*, on the consideration of documents, as evidence, that had not (yet) been procedurally placed before the learned judge in accordance with law. Secondly, the judgment also shows that in respect of the first applicant, there was no finding that it was in default. Neither was the first applicant's defence struck out. In terms of r 18 (2), under which the judge caused the parties to appear before her, it is only where a party fails to comply with any order or direction given by the judge under subrule (1) that the judge may "dismiss the suit, **strike out the defence** or counterclaim or make **such other order** on the papers filed of record as he or she considers just." *In casu*, there is no indication or proof that the first applicant failed to comply with the direction or order of the learned judge for the parties to appear before her for a case management meeting on 30 October 2023. In fact, the first applicant duly complied and attended as required. These factors further expose the grossly irregular nature of the proceedings and judgment of 30 October 2023.

44. Such gross irregularity having come to my attention, the law, to wit s 25 of the Supreme Court Act, [*Chapter 7:13*], empowers me to review the proceedings of the court *a quo* with regard to the first applicant.

45. Section 25 of the Supreme Court Act provides as follows:

> "(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings of inferior courts of justice, tribunals and administrative authorities.
>
> (2) The power, jurisdiction and authority conferred by subs (1) may be exercised **whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision** notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
>
> (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination." (the emphasis is added)

46. The pertinent provisions relating to the High Court and judges of the High Court are found in the High Court Act, [*Chapter 7:06*], particularly ss 26, 27 and 28 which provide as follows"

> "**26 Power to review proceedings and decisions**
> Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
>
> **27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) **gross irregularity in the proceedings or decision**.

(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.

28 Powers on review of civil proceedings and decisions
On a review of any proceedings or decision other than criminal proceedings, the High Court **may**, subject to any other law, **set aside or correct the proceedings or decision.**" (The emphasis is added)

DISPOSITION

47. It is the gross irregularity pertaining to the first applicant, as enunciated in paras 41 and 42 above, that enables and empowers me as a judge of the Supreme Court to exercise the powers conferred in terms of s 25 of the Supreme Court Act as read with the pertinent provisions of the High Court Act specified and quoted above. The proceedings of and the decision made at the case management meeting regarding the first applicant cannot stand, for the reason that they are tainted by gross irregularity.

48. The first applicant was not in default. The preliminary point raised against it was therefore not properly taken. It was ill-conceived and irregular. The second applicant's position is different as discussed earlier herein. His application is misconceived, thereby justifying the respondent's second preliminary point as having merit.

49. With regard to the first applicant, it has had to approach this Court and expend resources in seeking relief. The judgment by the court *a quo*, despite being labelled as such, was not a case management order because it determined the merits of the dispute between the parties. In my view, subrule (4) of r 18 thereby became inapplicable. It provides as follows:

"(4) Any order or direction given or made against any party **who does not appear** before the judge when directed to do so under subrule (1), **shall be deemed a default judgment** and **may only be set aside or varied by the judge** on good and sufficient cause shown upon application made within ten days of the order being made or direction being given and on such terms as the judge considers just."

Subrule (4) became inapplicable for the following reasons. Firstly, the first applicant appeared before the judge. Secondly, the judge unprocedurally gave an order against the first applicant when there was no basis for it to do so. Thirdly, she determined the merits of the matter against the first applicant without the benefit of evidence properly adduced, tested and placed before her. The merits of the matter having been decided in such circumstances, the first applicant cannot be blamed or penalized for seeking relief from this Court. In addition, the respondent has persisted in defending the judgment. For these reasons, I see no reason for departing from the general principle that costs follow the cause.

50. For the reasons discussed above, it is ordered as follows:

    1. In the exercise of the powers of review of the Supreme Court or a judge of the Supreme Court as provided in s 25 of the Supreme Court Act [*Chapter 7:13*], the judgment of the Commercial Court given in case number HCHC554/23 under judgment No. HH603 /23 be and is hereby set aside in its entirety.

    2. The matter is remitted to the court *a quo* for a proper determination before a different judge.

    3. For the avoidance of doubt the declaration of the second applicant being in default stands.

    4. The respondent shall pay the first applicant's costs.

Tembani Gomo Law Practice, applicants' legal practitioners.

AB & David, respondent's legal practitioners