

GLICKMATE ENTERPRISES (PVT) LTD
versus
ALOUVINE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND CHIRAWU-MUGOMBA JJ
HARARE, 10 October 2019 and 7 February 2020

CIVIL APPEAL

R. C. Muchenje for the appellant
M. Zvirahwa for the respondent

CHITAKUNYE J: On the 10th October 2019 after hearing submissions on the appeal we dismissed the appeal with costs. The appellant later asked for written reasons for the dismissal despite the fact that we had made clear the rationale for our decision. The reasons for our decision were as follows:

On the 5th April 2015 the respondent, ALOUVINE (Pvt) Ltd, sued the appellant in the magistrate court for eviction from stand 1691D SPCA Prospect, Waterfalls, Harare. In that suit respondent alleged that it owned that stand.

The appellant opposed the suit for eviction hence it filed its plea. The matter proceeded to trial.

After the respondent's witness had given her evidence and had closed its case the appellant's legal practitioner indicated that he would file an application for absolution from the instance on the following day which was the 9th March 2017. The respondent's legal practitioner was to thereafter file his response on the 13th March 2017. The appellant's legal practitioner failed to file the application by the given date and instead filed it on the 13th March 2017.

The application for absolution from the instance was subsequently dismissed. The matter was thereafter set down for continuation of trial on the 30th March 2017. On that day the appellant and its legal practitioner were not in court. The respondent duly applied for a default judgment which was granted.

On the 3rd April 2017, the appellant applied for rescission of that default judgment alleging that it was not in wilful default and it had prospects of success in the main matter.

The respondent opposed the application. On the 26th April 2017 after hearing arguments the magistrate dismissed the application for rescission. In dismissing the application the trial magistrate made a finding that appellant was in wilful default.

The appellant was aggrieved by the dismissal of its application hence this appeal. The appellant advanced three grounds of appeal couched as follows:

1. The court *a quo* erred at law in dismissing the application for rescission of default judgment when all the requirements for rescission had been met by the appellant;
2. The court *a quo* grossly misdirected itself and erred at law in making a finding that the default was wilful contrary to the facts and reasonable explanation tendered for the default by the appellant.
3. The court *a quo* erred at law in failing to consider the prospects of success which had been demonstrated by the appellant as a determinant on whether or not to grant rescission. In so doing the court *a quo* ignored a relevant consideration in the sort of application that was before it.

The respondent opposed the appeal and contended that the court *a quo*'s decision was proper as appellant was in wilful default.

It is trite to note that the rescission of a default judgment in the magistrate court was governed by Order 30 of the Magistrates Court (Civil) Rules, 1980. Rule 1 thereof provided for the manner of applying for the rescission and requirements thereof. These included, *inter alia*, that the application shall be on affidavit stating shortly the reasons for the default and the grounds for the defence to the main matter.

Rule 2(1) thereof then provided that:

- “(1) the court may on the hearing of any application in terms of rule 1, unless it is proved the applicant was in wilful default—
- (a) rescind or vary the judgment in question; and
 - (b) give such directions and extensions of time as necessary for the further conduct of the action or application.”

It is apparent that the first hurdle an applicant has to overcome at a hearing is the aspect of wilful default where such is contended by the respondent. In terms of r 2(1) where an applicant is shown to have been in wilful default that is the end of the inquiry. The court is not required to consider the second rung of merits of the defence once an applicant is found to have been in wilful default. The situation is thus different from the High Court wherein even after a finding of wilful default a default judgment may still be rescinded if the court upon

consideration of the defence deems it that the applicant has established good and sufficient cause for the indulgence to be granted in its favour.

In the Magistrates court the issue of the defence only arose when applicant was shown not to have been in wilful default. In *Karimazondo v Standard Chartered Bank Zimbabwe* 1995(2) ZLR 404(S) at 407E the Supreme Court made this position clear and any legal practitioner seeking rescission under that rule ought to have been alive to this.

It is when an applicant is found not to have been in wilful default that court will proceed to consider the aspect of defence. In *V Saitis & Company (Pvt) Ltd v Fenlake (Pvt) Ltd* 2002(1) ZLR 378 (H) at 384B- E CHINHENGO J aptly put the position as follows:

“In *Gundani’s case supra*, the court indeed accepted that if there was wilful default then in terms of r 2(1) of Order 30 of the Magistrates Court (Civil) Rules a rescission could be refused without further ado. Order 30 r 1(2) of the magistrates court civil rules requires the applicant to establish two things if he is to succeed in an application for rescission—the reason for the default and the grounds of defence or of objection to the judgment. Rule 2(1)(a) of that Order states that, on the hearing of any application for rescission the court may rescind the judgment unless it is proved that the applicant was in wilful default. I do not however read Order 30 of the Magistrates Court (Civil) Rules as laying that once an applicant for rescission has established that he was not in wilful default then rescission will automatically be granted. Not at all. The applicant must still show that there is good and sufficient cause for rescission. The applicant is required by r 1(2) (b), as I have shown, to state shortly the grounds of his defence or of objection to the judgment. This is an allusion to ‘good and sufficient cause’. Why else would an applicant, besides giving his explanation for the default, be required to state his grounds of defence or objection?....”

It is thus clear that where wilful default is found that is the end. Where the applicant is found not to have been in wilful default then the second rung is considered; that of the bona fides of the application and prima facie defence to the main matter.

Wilful default has been defined to include, inter alia, a scenario whereby a litigant being aware of the set down date and time deliberately absents himself or herself from attending. See *Zimbank v Masendeke* 1995(2) ZLR 400(S) at 402D.

It is in this regard that an applicant’s explanation for the default must be reasonable and acceptable. It must not be an affront to the intelligence of court.

In casu, the magistrate’s finding was that applicant was in wilful default and he dismissed the application. The issue is thus whether the magistrate erred and misdirected himself in making such a finding.

It is common cause that appellant and its legal practitioner were aware of the date and time the matter was set down to resume, which was the 30th March at 8:30 am. The appellant’s

representative, a Dr Mangwiro, was equally aware of this date and time. Despite this knowledge they were not in court at the time trial was to resume.

The appellant's explanation for the default, as contained in the founding affidavit by Mr Bamu and the supporting affidavit by Dr Mangwiro, was to the effect that on the date in question they both arrived on time albeit separately. Mr Bamu was, however, double booked as he had to attend to another case in court 1. He alleges that he spoke to respondent's representative, Rudo Mapfumo, and she consented for him to attend to the case in court 1.

In his analysis of the explanation presented to him, the trial magistrate noted a number of inconsistencies in the explanation by Mr Bamu and Dr Mangwiro. For instance, whilst both claimed to have arrived at court in time, they seemed not to have seen each other before Mr Bamu went into court 1.

In his founding affidavit Mr Bamu indicated that he attended court in time but he was double-booked as he had another matter in court 1. He then approached Mrs Rudo Mapfumo for the respondent and advised her that he intended to proceed to the next court to seek a postponement of another matter. According to him, Mrs Mapfumo agreed to this as he had said he would come back. Unfortunately for him the matter in court 1 took longer than he had anticipated though it was not opposed. This assertion by Mr Bamu is contradicted by his next statement to the effect that in court 1 there was another matter in which evidence was being led on a special plea. He thus sat through that hearing aware that he had another matter in court 2 for which he had not advised court of his whereabouts. He said he left court 1 at 9:25am after obtaining the postponement. It is then that as he was on his way to court 2, with his client, he learnt that a default judgment had been entered.

Mr Bamu also indicated that as he was still in court 1 and before his matter was heard he saw his client's representative Dr Mangwiro in that court and informed him their case was to continue in court 2, he was in court 1 to simply postpone his other case. For some reason Dr Mangwiro did not see the need to go and wait for the legal practitioner in the appropriate court hence after the postponement in court 1 Mr Bamu and client alleged they then trudged to court 2 only to learn of the default judgment.

In his supporting affidavit Dr Mangwiro stated that on getting to court he saw Mr Bamu in court 1 and he wrongly assumed that the case was proceeding in that court. When Mr Bamu saw him, he advised him that the case was in court 2 and that he had made arrangements with Mrs Mapfumo to have the matter stood down. Dr Mangwiro remained in that wrong court till Mr Bamu had finished his business in court 1.

Dr Mangwiro's assumption was not easy to appreciate as the Magistrate presiding over the case was presiding in court 2 and the respondent's representative was in court 2 as well. These are persons Dr Mangwiro could have seen had he gone into court 2 where his matter was being tried. For some reason he did not do this.

Mrs Mapfumo for the respondent denied that Mr Bamu had made arrangements with her to stand down the matter till he returned from court 1. As far as she was concerned appellant and its legal practitioner were not in attendance on the day in question.

The trial magistrate in analysing the submissions observed that the appellant's version was not cogent and had certain gaps. He noted a number of options appellant and its legal practitioner could have taken if indeed they were at court and Mr Bamu was double booked, none of which was taken. The version that Mr Bamu had another case in court 1 was not backed by any other evidence such as a notice of set down for that other case. It was simply Mr Bamu's word that he had another case. The citing of that case was not followed up with proof that indeed that case was to be heard on the same day in court 1. Mr Bamu sought to be believed simply because he is a legal practitioner, oblivious of the dent done to his expected conduct as a legal practitioner by his previous conduct.

It may also be noted that in his affidavit Mr Bamu did not explain when he knew that he was double booked and what steps he took to advise court. This was especially important in that this trial had been on-going and appellant was due to give its defence case. A case of being double booked does not normally suddenly arise on the date of hearing. A diligent legal practitioner would know in advance the cases on his roll and would ordinarily take appropriate steps to avoid double booking. Where such occurs appropriate steps are taken to inform the courts involved. *In casu*, Mr Bamu ought to have known that he was double booked before 30th March and as such ought to have taken appropriate steps to seek court's indulgence. He seemed content with the explanation that he was double booked as if such is a good explanation on its own. This explanation was considered by the trial magistrate and he found it not reasonable at all. The trial magistrate was also alive to Mr Bamu's previous conduct in this same matter which bordered on trying to drag the matter at the slightest of excuses.

For instance, the record of proceedings shows that on the 8th February 2017 the matter was set down for trial at 8:30am. A Ms Nyagura appeared on behalf of Mr Bamu and asked for the matter to be stood down till 11:15am as Mr Bamu was said to be attending to a bail application at the High Court and would only come at that time. The application was opposed and the trial magistrate ruled that the trial had to commence forthwith. When the respondent's

representative took the witness' stand and took the oath to testify, suddenly Mr Bamu appeared in court. His sudden appearance was not explained despite the fact that court had been told that he would only be available at 11:15am.

On the 17th February when the matter was to resume with the cross examination of Mrs Mapfumo, Mr Bamu was again not available. When the defendant's representative expressed ignorance about the reason for the absence of its legal practitioner, the court resolved to proceed. The magistrate duly explained the purposes of cross examination to the appellant's representative so that he could continue with the cross examination and as the representative was about to take on that task, Mr Bamu entered the court room and took over the cross examination. As with his previous late appearance, no explanation is on record as to why he had been late.

After the respondent had closed its case on 8th March, Mr Bamu sought the court's indulgence to file his application for absolution from the instance on the 9th March. Such indulgence was granted and respondent was to respond thereto by 13th March. Mr Bamu did not comply with the directive to file his application on the 9th March; he instead filed his application on the 13th March. The record has no cogent explanation for the delay.

The application for absolution was subsequently dismissed because of that delay and the matter was to continue on 30th March 2017. It was on that day that the appellant defaulted leading to this application.

Given such a history of apparent delays and failure by Mr Bamu, the trial magistrate may not be faulted for not believing his story that on 30th March he was double booked and was in court 1 in the absence of cogent proof to that effect. In any case, double booking is an act of misconduct especially where no explanation is given as to how the legal practitioner found himself in such a situation. If indeed Mr Bamu was double booked, he ought to have explained how that came about. In the absence of such an explanation the trial magistrate was justified in not believing him.

Equally the same fate befell the explanation in the supporting affidavit by Dr Mangwiro. His explanation for not being in the court 2 was clearly without merit. This is a trial that had been on-going and he knew the respondent's representative and the magistrate dealing with the matter. He ought to have been in the appropriate court. He does not even explain why he remained in court 1 even after his legal practitioner had told him that the matter was to continue in court 2. The probability is that he was not at court or if he came, he was very late.

It is trite that an appellate court will not interfere with the exercise of judicial discretion by a lower court just at the asking. In *Baross & Another v Chimponda* 1999(1) ZLR 58(S) at 62G- 63A GUBBAY C J underscored this point when he stated that:-

“It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing.”

In *casu*, the trial magistrate considered the appropriate rule governing applications for rescission of default judgments in the magistrate’s court after which he ruled that the appellant had not passed the first hurdle of wilful default. He was not required to consider the aspect of the defence put forth by the appellant once he found that appellant was in wilful default and that was as it should be. The finding that appellant was in wilful default was carefully considered and arrived at. It cannot be said that in arriving at such a determination the trial magistrate applied wrong principles or took into account irrelevant considerations or factors.

In the circumstances we were of the view that the decision of the court *a quo* cannot be faulted. The appellant’s legal practitioner was grossly negligent in the manner he conducted himself. He was fully aware of the likely consequences of failure to appear in court and so was the appellant’s representative. Despite this knowledge both of them failed to turn up in court 2 where the matter was to resume.

The other grounds of appeal premised on the alleged failure to consider the defence to the main matter were clearly ill conceived and of no consequence to the real bone of contention. It is the finding of wilful default that was the determining factor.

Accordingly we dismissed the appeal with costs.

CHIRAWU- MUGOMBA J. I concur

Mbidzo, Muchadehama & Makoni, appellant’s legal practitioners
Laita & Partners, respondent’s legal practitioners