LINCOLN TAFADZWA USHAMBA
versus
DAMSON ZUVA
and
THE PRESIDING MAGISTRATE (S NDHLOVU)
BULAWAYO MAGISTRATE COURT

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI and DEME JJ
HARARE, 17 June 2020 & 5 July 2022

Application for Review

N Mugiya, for the applicant
The first respondent in person
No appearance for the second respondent

BACHI-MZAWAZI J: In this contested application for Review applicant seeks an order setting aside the decision of the second respondent, sitting at the Magistrate court, Bulawayo on 6 July 2020 in case MG120 and ancillary relief. At the hearing of the matter we handed down an *ex tempore* judgment which provides as follows:

IT IS ORDERED THAT:

1. The current valid order in the Maintenance dispute between the applicant and the first respondent is the order dated 23rd June 2020 by magistrate N. Ncube sitting at Bulawayo Magistrate Court under Case Number M9/20.
2. The order of Magistrate S. Ndhlovu dated 6th July 2020 under Case Number M9/20 sitting at Bulawayo magistrate Court be and is hereby set aside in toto.
3. The applicant is ordered and directed to set down the maintenance matter for enquiry in the next seven days from the date of this order.
4. The 1st respondent is ordered to set down the matter in the manner subscribed in paragraph 2 of the order by Magistrate N. Ncube sitting at Bulawayo under Case Number M9/20 dated 23rd of June 2020 in the event that the applicant fails to comply with paragraph 3 of this order.

5. Parties to exchange their current addresses and all the necessary information for the effective service of process in relation to the maintenance enquiry in paragraphs 3 and 4 hereto.
6. Interim maintenance for the minor in the sum of $15 000 ZWL to be paid by the applicant from the date of this order until the finalization of the maintenance enquiry in case M9/12.
7. No order as to costs.

The first respondent has requested for reasons for judgment.

Briefly, the applicant and the first respondent had a love relationship which did not last but resulted in the birth of a minor child, Khloe Damson born in May 2009. Thereafter the first respondent obtained an order and subsequent variation for the maintenance of the child in Harare in 2010 and 2011 respectively. In May 2014 the first respondent obtained yet another order for an upward variation after several counter lawsuits with the applicant. The order of May 2014, which is part of the record was for the payment of school fees and maintenance in the sum of $500 for the minor child. On 23 January 2020 in Bulawayo in case M9/20 before Provincial Magistrate T. Tasnaya the respondent was granted an order for upward variation of the order of May 2014 in default.

Applicant subsequently made an application for the rescission of the default judgement of 23 January. On 29 June 2020, Magistrate Ncube after having sat on 17 June 2020, issued out two orders which are part of the record. The first one only rescinds the contentous default judgement, but the second bearing the same date captures an additional feature that the first respondent ensures that the main matter is set down for hearing within seven days of the order.

Following that, the first respondent obtained a default judgement on 6 July 2020 in M9/20 before Magistrate Ndhlovu, rescinding the rescission of judgement made in June 2020. Aggrieved by the turn of events applicant approached this court seeking a review of the last decision by Ndhlovu Magistrate who is the second respondent herein. Apparently, both parties are very litigious. Overally there are numerous accusations on how the matter has been handled by either party.

The applicant in their grounds for review submit that there was gross irregularity when the second respondent rescinded a rescission of the default judgement. They further argued that not only did she err in that regard, but she also misdirected herself by ordering the

reinstatement of the order of 23 January 2020, of which rescission has been sought and obtained by Magistrate Ncube, on 29 June 2020.

First respondent raised a preliminary point that, the application for review has been filed out of time and that there was no application for condonation before the court therefore the applicant was automatically barred. The applicant raised a defence that he filed his papers in time given the fact that they were filed during the Covid 19 regulations that barred filing of any other papers other than those deemed urgent. We disregarded the preliminary point on the following reasons.

It is on record that since the launching of this review the payment of maintenance for the minor child has been suspended pending the outcome of this review. It was also brought to the attention of the court that, there are several lawsuits pending before different courts on issues revolving around the minor child. Further, we were informed that counsel for the respondent had gotten away with close to fifty-four postponements on all of the pending maintenance cases.

In view of these factors, we assumed a position that, whatever decision we make, as the Upper Guardian of all minor children, was not going to further prejudice the interests of the child. In that light, s 81(3) of the Constitution, Amendment Act No 20, says that children are entitled to adequate protection by the courts, in particular by the High Court as their Upper Guardian. Moreso, where, s 81(2) of the Constitution, the Supreme law of the land, instructively states that:

> "A child's best interests are paramount in every matter concerning the child."

Just like in the adage, "When elephants fight the grass suffers". Likewise, it is the offspring of feuding parents who suffer when the parents are egocentrically fighting their battles without considering the short and long term, socio-psychological impact on their children. In that regard, erring on the side of caution, even if the Covid 19 practice direction did not adequately accommodate the applicant's situation, we condoned the infraction of the rules in terms of r 7 of the 2021 High Court Rules. This rule empowers the court or a judge in relation to any particular case before it or him, as the case may be to condone a departure from any provision of the rules when it is in the interest of justice. As it where, r 62(4) of the 2021, High Court rules states that, any proceeding by way of review shall be institutes within eight

weeks of the termination of the suit, action or proceedings in which the irregularity or illegally complained of is alleged to have occurred. As such, we as a court, felt obligated not only by the interests of justice but the best interests of the child and condoned the non-observance of r 62(4) if any.

Turning to the merits of the application, the issues for consideration are, whether or not the second respondent's decision was grossly irregular and/or whether or not there was a misdirection on her part?

On the first issue, what is on attack is the default judgement of 6 July 2020 by the second respondent. This decision, also given in default reversed the rescission of judgement of another order that had been obtained in default. Following, that the first respondent obtained an upward variation in default, which the applicant had rescinded. A term of that rescission order clearly gave the parties room to reset the matter of 23 January 2020 so as to allow the canvassing of the issues at hand therein. This meant that both parties would have been allowed the opportunity to provide supporting evidence in support of their averments. The first respondent did not take this route which would have ensured finality to this dispute and to litigation. It is the policy of the law that there should be finality to litigation without doing injustice to the parties. *See – Wangai* v *Mudukuti* HB 155/*17 Mahomed* v *Dhudia* & *Anor* HH140/18 and *Dzvairo* v *Kango Products* (SC 35 of 2017). In other words, courts want to see the real source of dispute addressed and finalized to avoid a multiplicity of lawsuits.

It is common cause that a judgement given in default is not a judgment on the merits. It does not effectively resolve the source of dispute. The defaulting party on good cause or reason is permitted to have that decision rescinded. The essence behind the granting of a rescission to a judgement given in default being to allow the parties a chance to argue on merits and not to penalize unintentional defaults. It is well known that a judgement given in that manner does not address the facts of that cause. *See – Shoultz* v *Masasa Service Centre* HH 18 /18 SC 228/13. *See* also *Lesley Faye Margh Private Limited t/a Premier Diamonds* and 7 *Ors* v *African Banking Corporation of Zimbabwe Private Limited and Anor* SC 4/119.

Instead of ensuring that the matter is heard or the merits as directed by the order of 29 June 2020, the first respondent obtained an order reversing it to that of 23 January 2020. This in our view lies the gross irregularity. As already stated the order of 7 July had a provision that allowed the parties to set down the matter so as to ventilate their arguments on the merits.

The second respondent overturned a ruling by the same court which had condoned the non- appearance of the applicant therein in the case of 23 January 2020.
It indeed did review the decision of the court which had granted the rescission of judgment. She rescinded a rescission of judgment. In our view that was a gross irregularity in her proceedings. In the case of *Mafu* v *Ncube & Anor* HB 04-2016 the learned judge posed a question:

> "Why would a party approach the court for a rescission of a rescission of judgment order unless proceeding with the main cause is so calamitous that it cannot be contemplated."

Notably, the learned judge in this case had dealt with the same scenario in another case but had left it open. In the case of *Kwaramba* v *Winshop Enterprise (Pvt) Ltd & Ors* HH 788/15, the question was, whether an order granting the rescission of judgement is interlocutory in nature? In *Mafu* above it was definitively concluded that, rescission is undesirable as the court will lean in favour of the disposition of a dispute on its merits. It was held further that, an order granting rescission of judgement is interlocutory in nature as it does not dispose of the rights of the parties or have the effects of disposing of the whole or the portion of the relief claimed by the parties.

In casu we associate ourselves with the decision in *Mafu* v *Ncube*. The second respondent erred in rescinding a rescission of a default judgement. There was no need for the second respondent to make the second pronouncements as the granting of default judgment of 6 July 2020, automatically, by operation of law restored the decision of 23 January 2020 thereby negating that of 29 June 2020. The judgment of 29 June 2020 as indicated earlier allowed the parties to go back to the drawing board and canvass all pertinent issues on the welfare of the minor child.

For these reasons we allowed the matter to succeed and judgment was given in terms of the draft order. In addition, we gave an interim order reviewing the sum of maintenance from ZWL$5 000 to ZWL$15 000 so as to cushion the interests of the minor child pending the hearing of the maintenance main matter.

Accordingly, application succeeds.

BACHI-MZAWAZI J:……

DEME J: Agrees:……

Mugiya & Muvhami Law Chambers, applicant's legal practitioners