

TANYARADZWA OLINDA MATAMBO
versus
ONE FOUR NINE FINANCIAL SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU AND MUCHAWA JJ
HARARE, 21 September, 2021

Civil Appeal

Appellant, in person
B Masamvu, for the respondent

TAGU J: We heard the appeal and summarily dismissed it. The following are our full reasons.

This is an appeal against the entire judgment of the Magistrates Court handed down on the 25th of March 2021 at Harare under case number COM “A”181/20 wherein the court dismissed the appellant’s application for rescission of default judgment granted against her with costs. The interim order for stay of execution was also discharged.

The appellant a self –actor, in her grounds of appeal took issue with the fact that the court *a quo* firstly, erred in fact and in law in finding that the appellant was in willful default despite the fact that the appellant was not served with the Court Application. Her second ground of appeal was that the court *a quo* erred in law and in fact by finding out that the appellant does not have *bona fide* defence without taking into consideration that the appellant is disputing the sum claimed hence there was need for the matter to be determined on the merits so that the respondent could prove how the sum claimed had been arrived at. She sought the following relief:

1. That the instant appeal succeeds with costs.
2. That the judgment of the court *a quo* be overturned to read as follows:

“The Application for Rescission of Default Judgment be and is hereby granted with costs.”

THE FACTUAL BACKGROUND

The appellant had borrowed some money from the respondent to the tune of US\$2 400.00 and she signed an acknowledgment of debt on the 21st July 2020 as per Annexure B wherein she said:

“I, the undersigned, TANYARADZWA O. MATAMBO, holder of National ID number 63-1433615N32, residing at 7700 Lemon Drive ZIMRE PARK, reachable at mobile number 0779082509/0771452009, and doing business at 7700 Lemon Drive ZIMRE PARK acknowledge that I owe One Four Nine Financial Services the sum of US\$2, 400.00 as of this date. I understand that interest will accrue on this amount at the rate of 22.5 % per month until full payment. I promise to pay the full amount by the 30th day of September 2020, as follows:”

Having failed to fulfil her promise she was served with the summons on the 16th of October 2020 at her given address. When she defaulted court a default judgment was granted against her. She then applied for rescission of the default judgment before the court *a quo*. Her application for rescission of judgment was dismissed hence the present appeal. In dismissing her application for rescission of default judgment the court *a quo* found among other things that she was in willful default and that she had no *bona fide* defence since she had signed an acknowledgment of debt.

THE SUBMISSIONS

In her submissions both orally and in her heads of argument the appellant denied that she was in willful default as she was never served with the court papers. Her explanation being that sometime last year a representative from the respondent asked her to sign a document on behalf of her husband. She was asked to sign a blank document. Later, she was visited by the Messenger of Court to attach property. She denied being served with any court papers. Before us she submitted that she did not have the blank document that she signed. As to the amount claimed she disputed that it was a personal loan advanced to her but was an order finance loan advanced to appellant's husband Morven Joel Tapiwa Matanda to the tune of ZW\$93 286.33 which was paid in full. As to the document titled “acknowledge of debt” which the respondent used in suing her she said it is null and void and is a forged document due to the fact that the document had no figures written on it and respondent made her believe that she was signing on behalf of her husband but respondent went on to write figures which they never agreed between respondent and appellant's husband.

She said the forgery case is being investigated at CCD, RRB 4798213. She denied refusing to be served by a female messenger hence said has a *bona fide* defence and was not in willful default.

Mr *Masamvu* for the respondent submitted that in the previous occasions the appellant said three male persons visited her residence. On the last incident he said it was a female person who came to serve her and she refused to accept service. He referred to an account on p 31 of the record which shows how the figure was arrived at. He denied that there was a forged document. Relying on his heads of argument he maintained that the appellant was in willful default and had no *bona fide* defence hence there was no basis in faulting the court *a quo*'s findings. He prayed that the appeal has no merit and must be dismissed.

Before us the appellant made some telling concessions which are worthy mentioning. She admitted that she resides at number 7700 Lemon Drive, ZIMRE Park, Ruwa. That at her residence is a black gate. That she usually wears a black dress and in court she was putting on a black dress. She admitted that she wears spectacles which she was putting on in court. She further confirms possessing a cell phone. In addition she admitted before us that there is a letter box at her residence and that the house has a white dura wall. To cap it off she submitted that there is a big tree besides the gate but denied having seen a female person who came to serve her and denied having refused to sign the return of service.

In dismissing her application for rescission of default judgment the court *a quo* properly analyzed the law applicable to an application of this nature. The court *a quo* commented on the affidavit of service compiled by one Rebecca Masiya as well as the acknowledgment of debt. We had sight of the affidavit of service as well as the acknowledgement of debt that I quoted above. It is worthy to quote what the affidavit of service says, a document used to grant the application for default judgment in the first place. It reads as follows:

"I, the undersigned REBECCA MASIYA do hereby make oath and state as follows:

1. I am employed by the applicant.
2. On the 16th of October 2020, in the morning we went to serve the papers with Tamuka Bvuma to the respondent's address at number 7700 Lemon Drive, ZIMRE Park, Ruwa.
3. Upon arrival I hooted at the gate and the children came to open the gate, I asked if their mum or dad was around and they indicated the mum was around and I asked them to call her.
4. She came to the gate and I introduced myself and informed her that I was there on behalf of the applicant and the lawyers and she confirmed that she was indeed Tanyaradzwa Olinda Matambo. She was wearing a black dress and also wears spectacles. I asked her to sign (write her full name and ID, the date and sign) the one document and that she could retain the other one.

5. She briefly flipped through the pages and indicated she needed to make a call.
6. She went inside the gate and when she came out after a few seconds she asked for the pen. As she was about to sign, she received a call and when she was done with the call she indicated that she was not in a position to sign the documents and that I should leave both copies and call her to confirm whether the responsible person had signed.
7. I then informed her I couldn't leave both documents and then she requested I take her number and the copies and find out if the responsible person is available so that I return with the documents so that they will be signed. I left the house and updated Tamuka Bvuma on what transpired, before we left the area, Tamuka then called the lawyer explaining the details. We were advised to drop off the document in a letter box.
8. When we returned, the letter box was blocked with bricks so I placed the document by the gate opening. The house has a white dura wall, a black gate and a big tree just beside the gate....”

The above affidavit of service coupled with the appellant's concessions I stated above make it abundantly clear that the appellant was served with the court papers but chose not to respond to it. The court *a quo* cannot be faulted when it found that Rebecca Masiya deposed to an Affidavit of Service indicating how they had gone to serve the court process and what transpired. The court *a quo* found that it is clear in the explanation that Rebecca Masiya was at the appellant's residence hence the appellant was in willful default. We also do not fault the court *a quo*'s finding that the appellant had signed an acknowledgement of debt showing that amount she owed.

THE LAW

The requirements for rescission of judgment are well settled in our law. Set out in Order 30 r (2) of the Magistrates Court (Civil) Rules, 2018, S.I. 11 of 2019:

- “(2) Any application in terms of subrule (1) shall be on affidavit stating shortly –
- (a) the reasons why the applicant did not appear or file his plea; and
 - (b) the grounds of defence to the action or proceedings in which the judgment was given or objection to the judgment.”

The two requirements have to be met. The meaning of willful default was aptly put by MURRAY CJ in the case of *Newman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) at 173 A-D where he stated the principle as follows:

“The true test, to my mind, is whether the default is a deliberate one i.e. when a defendant with full knowledge of the summons or set down and of the risks attendant on his default freely takes a decision to refrain from responding or appearing.”

In the case of *Deweras Farm (Private) Limited & Others v Zimbank Corporation* 1997 (2) ZLR 47 (H) at 56 E-F GILLESPIE J illustrated the above point as follows:

“On a proper approach to the concept of willful default....it should be seen that the expression refers to that extreme of circumstance where the explanation for default reveals that the applicant for rescission knowingly and deliberately refrained from opposing the relief sought. He acquiesced in the judgment being taken against him.”

In casu, we found that the appellant was there at the premises and was duly served with the Court Application on the 16th of October 2020 and the same refused service. The court *a quo* was spot on when it found that the appellant was in willful default.

Coming to the second requirement of *bona fide* defence, the appellant should prove that she had a *bona fide* defence against the respondent’s claim. CHITAKUNYE J (as he then was) in *Old Mutual Property Investment (Private) Limited v Mogola Enterprises (Private) Limited* HH-24-17 had this to say on this issue:

“The last leg of the inquiry pertains to the prospects of success in the main matter...a *bona fide* defence which *prima facie* carries some prospects of success.”

The meaning of a *bona fide* defence was dealt with in *Registrar-General of Elections v Tsvangirayi* HH-142-2003 when it was stated that:

“The second requirement for the rescission of an order or judgment granted in default is that the application for rescissions must be *bona fide*, that is to say, it must not be intended to delay the claim by the other party.”

In casu the appellant signed an acknowledgement of debt which she does not deny is a liquid claim. There is also a clear statement of account which clearly shows how the money claimed was arrived at. The court *a quo* was alive to these authorities and applying the law found that the appellant does not have a *bona fide* defence. Even if the rescission had been granted and matter referred to trial the appellant was not going to succeed but merely wanted to delay the inevitable. For these reasons we found that the court *a quo*’s reasoning was not flawed. As a result we found that the appellant’s appeal has no merit and we dismissed it.

We therefore ordered as follows:

IT IS ORDERED THAT:

1. Appeal be and is hereby dismissed with costs.

MUCHAWA J, agrees:.....