

PATIENCE MAFU
versus
FREEMAN BIBA NCUBE
and
THE BULAWAYO CITY COUNCIL

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 31 DECEMBER 2015 AND 14 JANUARY 2016

Urgent Chamber Application

Mr N. Mlala for the applicant
Mr R. Moyo-Majwabu for the 1st respondent
2nd respondent in default

MATHONSI J: I just have to repeat what I have said before in trying to unlock the conundrum posed by this application;

“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? For one thing such party would have obtained a default judgment which would have been rescinded by the court thereby paving the way for the resolution of the main matter once and for all on the merits. To then spend time, energy and money trying to reverse the process and revert to the default judgment *status quo* is, in my view, a trifle. As it is, considering that this matter is being argued exactly a year after the application was filed, means that another year has been lost in trying to hang onto a default judgment when the merits of the matter would have been determined by now. Could it be that the applicant sees something in that default judgment which none of us can see.”

(Kwaramba v Winshop Enterprises (Pvt) Ltd and others HC 788/15).

For the purpose of the present matter I should add that the applicant does not even mention any resort to the original cause which gave rise to the default judgment that was rescinded content to fight for the reinstatement of the rescinded order in order to hang onto it until kingdom come. The other pertinent question which arises is whether an order granting

rescission, allowing as it does, the parties to deal with the merits of the main matter can lawfully be rescinded.

In this urgent application, the applicant seeks the following relief:

“TERMS OF THE FINAL ORDER SOUGHT

That the provisional order granted by this Honourable Court be confirmed in the following manner;

1. The respondents be and are hereby interdicted from transferring stand number 7825 Highmount from the applicant’s name without a court order.
2. The first respondent be and is hereby ordered to pay costs of suit at an attorney-client scale.

INTERIM RELIEF GRANTED

Pending the finalization of this matter the applicant shall be granted the following relief:

1. The first and second respondents be and are hereby interdicted from transferring, disposing, alienating, accessing, using or in any way dealing with stand number 7825 Highmount from the applicant’s name until finalisation of the ownership dispute between the parties.
2. The second respondent be ordered to stay any process to transfer stand number 7825 Highmount from the applicant’s name pending finalization of this matter.
3. Should the second respondent had effected any change of name prior to the granting of this court order, it be and is hereby ordered to reverse the change of name to the applicant pending the finalization of this matter.”

Historically, the applicant and the first respondent were a happily married couple until their matrimony reached turbulent weather resulting in a decree of divorce being granted on 22 January 2009 with the attendant consequences of a division of their matrimonial assets. Stand 7825 Highmount Bulawayo which was registered in the first respondent’s name was to be retained by the first respondent who was however required to pay the applicant R10 000-00 on certain terms as compensation for her share to it failing which the applicant would assume ownership of it.

Whatever transpired thereafter (the applicant says she was not paid anything while the first respondent claims the whole amount was paid to her through the medium of *James Moyo-*

Majwabu & Nyoni legal practitioners, then representing him), the applicant filed a chamber application in HC 150/13 and obtained an order in her favour, which is the source of the parties' current duel. On 12 February 2013 this court, per KAMOCHA J, granted an order directing the first respondent to transfer the stand to the applicant within 10 days failing which the Sheriff was to do the honours on his behalf.

In that application the applicant had alleged that the first respondent had failed to comply with the terms of the divorce order thereby triggering the provisions of the alternative term of it that the stand be transferred to her. The order was granted despite the conspicuous absence of proof of service upon the first respondent. Although the applicant now claims that the chamber application was served upon the first respondent's legal practitioners, she has not produced any proof of such service.

It is common cause that the applicant used that court order to obtain transfer of the stand to her name. Hers however turned out to be a pyrrhic victory because when the first respondent learnt of the order, he successfully launched a court application in HC 1950-14 for the rescission of that default judgment. He alleged in that application that not only was he not served with the original application which was granted in default, but also that it had no merit as he had paid the applicant the R10000-00 due to her in terms of the divorce settlement thereby entitling him to retain ownership of the stand. This court, per MAKONESE J, obliged and granted rescission of judgment.

I must say that the order was granted following proof in the form of the Sheriff's return showing that the application had been served upon the legal practitioners of the applicant on 27 November 2014 who did not file opposition. Now the applicant insists that the legal practitioners in question had no mandate to receive the application, although they are the ones who obtained the impugned default judgment and did not renounce agency at all. More importantly, the applicant has not produced any evidence from that firm, Zimbabwe Women Lawyers Association, that they received the application without authority.

All that the court order of 29 January 2015 does is to rescind the default judgment and no more, dragging the parties back to the situation obtaining when the applicant launched the application in HC 150/13. The applicant has not seen the wisdom of pursuing that application on

the merits. Instead she has launched an application for rescission of the rescission of judgment order in HC 3399/15 effectively seeking reinstatement of the default judgment. Having taken that very strange turn she has come before me on a certificate of urgency seeking an interdict aforesaid. In fact the interim relief that the applicant seeks includes an order directing either that the stand remain in her name or if it has been transferred that such transfer be reversed. Unfortunately there is no legal basis upon which that can be done given the fact that the order upon which transfer was effected to her name, no longer exists. In fact the prevailing situation is that the stand should be in the name of the first respondent as the basis for its removal from that name no longer exists.

To support the claim the applicant has stated a lot of things most of which are not helpful at all. She has challenged the authenticity of the first respondent's signature on the affidavit in support of the application for rescission of judgment without adducing any evidence from a handwriting expert to substantiate that challenge. It is however common cause that it was signed by the first respondent's father by virtue of a power of attorney. She has denied receiving the R10 000-00 allegedly given to her by the first respondent's legal practitioners alleging that her signature was forged on the acknowledgment of receipt. That however is an issue to be dealt with in determining the merits of the matter.

The applicant has also taken issue with service of the application for rescission upon her legal practitioners. With respect that is trifling with the court in the extreme because it is that law firm which set in motion the application whose order was sought to be rescinded. They did not renounce agency. It was therefore proper to serve them with the application for rescission as their office was given as the applicant's address for service. Above all, it is trite that where a party seeks to disown legal representation or to cast the blame for non-action upon its legal practitioner, an affidavit must be obtained from that legal practitioner confirming that position. That has not been done and what remains is applicant's self-serving denial of mandate not supported by facts.

The applicant seeks a temporary interdict and must therefore establish the traditional requirements for such an interdict namely, a *prima facie* right; an injury actually committed or reasonably apprehended; the absence of similar protection afforded by any other ordinary

remedy and a balance of convenience favouring the grant of the interdict. See *Setlogelo v Setlogelo* 1914 AD 221 at page 227. *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 at page 56. *Boadi v Boadi and another* 1992 (2) ZLR 378.

In my view the applicant has failed to pass even the first hurdle, the existence of a *prima facie* right. I have said that she obtained transfer of the stand by virtue of an impugned court order which allowed for the conveyance of the stand from the first respondent to herself. That court order has since been rescinded and for that reason the applicant has no legal basis to retain ownership. The effect of rescission is to return the parties to the *status quo*, that of the first respondent retaining ownership. The applicant has to start afresh to prove an entitlement to the stand on the merits.

The applicant has made an application for rescission of judgment which in my view is ill-conceived and a sheer waste of time. As I have said, instead of proceeding along that route, she should have pursued the main cause. Which then brings me to the question of whether an order granting rescission of judgment can be rescinded when in fact its effect is interlocutory in nature, a question which I left open in *Kwaramba v Winshop Enterprises (Pvt) Ltd and others, supra*.

The term interlocutory refers to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation. See Jones and Buckle, *The Civil Practice of the Magistrates Court in South Africa*, Vol. 1, 8th edition at page 330, quoted with approval in *Gillespies Monumental Works (Pvt) Ltd v Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H) 438 A. Interlocutory matters are pronouncements on matters incidental to the main dispute and ordinarily would not have a final and definitive effect on the main cause. What a rescission of judgment does is to re-start the whole process of litigation by allowing, in the interim, the parties to go back and plough through the dispute on the merits in order to resolve it. It takes away the advantage given to one party in default and places both parties on par, as it were. For that reason, it is interlocutory in nature as it does not decide the rights of the parties or have the effect of disposing of the whole or a portion of the relief claimed by one of them. It is merely a procedural ruling paving the way for a determination of the dispute. See *Jesse v Chioza* 1996 (1) ZLR 341 (S) 344G; *Dobrock Holdings (Pvt) Ltd v Turner and Sons (Pvt) Ltd and another* 2008 (2) ZLR 153 (S).

The foregoing authorities relate to interlocutory orders in respect of appeals making it clear that to the extent that such orders are not definitive and do not decide the rights of the parties, they cannot be appealed against unless if leave to do so is sought and obtained. In my view, that principle should apply to rescission of judgment orders. Rescission of judgment involves the exercise of a discretion, which ordinarily would be difficult to challenge in any event. When that is considered together with the effect of rescission which merely allows the matter to be definitively dealt with on the merits, it becomes clear that it is undesirable for a rescission order to be rescinded.

Whichever way one looks at it, it is wrong to refuse to proceed with the merits in favour of clinging to a default judgment that would have been rescinded by the court in the exercise of a discretion. Even on the basis of public policy, it remains wrong. Courts of law are there to adjudicate disputes on the merits. While matters may be disposed of procedurally, in my view, a definitive determination of the merits should be the first price. Where a court has allowed the merits to be determined, it is in my view the height of turpitude to then approach the same court to abandon the merits for something else. If that were to be allowed there would be no finality in litigation as matters will be argued over and over again *ad infinitum*. I conclude therefore that a rescission of judgment order should not be rescinded, unless if obtained fraudulently or by other unlawful means.

Having come to that conclusion, there is no basis for a *prima facie* right in order to prosecute an ill-conceived application. There is no basis for the applicant to retain transfer obtained on the strength of an order that has been rescinded. She still has to prove a right. In fact none of the requirements of a temporary interdict have been met. For that reason, the applicant must suffer grief.

In the result, the application is hereby dismissed with costs.

Sansole and Senda, applicant's legal practitioners
James Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners

