

TANDIWE KODZWA
versus
YAMBUKAI HOLDING T/A YAMBUKAI FINANCE
and
MOLLEN KUVIMBA
and
MEANS KODZWA

HIGH COURT OF ZIMBABWE
MAKONI & MWAYER JJ
HARARE, 17 November 2015 and 29 June 2016

Civil Appeal

T Muchineripi, for the appellant
T Chiguvare, for the respondents

MAKONI J: The appellant appeals against the decision of the magistrate court whereby it dismissed the appellants' application for rescission of judgment.

The background to the matter is that the first respondent is a duly registered money lender in terms of the Money Lending and Rates of Interest Act [*Chapter 14:14*]. It lent and advanced a sum of \$10 000-00 to the second respondent. The second respondent signed an acknowledgement of debt whereby she consented to the jurisdiction of the Magistrates Court in the event of legal action being taken by the first respondent. She also agreed to pay costs on a higher scale and collection commission. The second respondent failed to repay the loan within the stipulated time. The parties then agreed that the second respondent signs another acknowledgment of debt for the sum of \$20 300-00 with the same conditions as the first one. The first respondent further requested for security to secure the debt and the appellant and her husband, the third respondent bound themselves as sureties and co-principal debtors to the second respondent. The appellant the third respondent went further and pledged as security, their immovable property in Budiro known as stand No. 6640 Budiro.

The second respondent, again, failed to pay the debt and the first respondent issued summons against the appellant, the second and third respondents. A default judgment was issued. The appellant and the third respondent were advised by letter dated 14 July 2014 that judgment had been obtained against them. Caveat XN 336/2010 dated 21 July 2010 was placed on the property on the instructions of the appellant. The first respondent executed against the second respondent's property but the debt was not extinguished. It sought to execute against the appellant's and the third respondent's movable property and a *nulla bona* return was rendered. It then advised the messenger of court to execute against their immovable property. As a result of the attachment, the appellant then made an application for rescission of the default judgment. The application was dismissed. She then filed the present appeal.

The appellant's grounds of appeal are as follows:

“IN LIMINE

1. The *court aquo* misdirected itself both on facts and the law in making a finding that the appellant's application was out of time and destined to be dismissed notwithstanding:
 - (a) the fact that she could not have gotten knowledge of the same in July 2010 as the default judgment was only granted on the 7th of March 2011 (as will more fully appear from annexure “B” to the appellant's application for rescission of judgment on record) which would mean that her explanation to have gotten wind of same on the 7th of April 2014 was wrongly dismissed and on that note her application for rescission had been filed on time on the 11th of April 2014 within 30 days of knowledge of same; and
 - (b) The provisions of order 33 rule 1 Subrule (1) of the rules and the fact that there is no specific rule in the rules expressly directing the dismissal of an application for rescission for non – compliance with the rules in the manner the *court aquo* did.
2. As an alternative to ground of appeal No. 1, (and assuming it is not upheld) then it will be argued that the *court aquo* misdirected itself in fact and in law by failing to grant the appellant's alternative application for condonation *in limine* which had been pursuant to the provisions of order 33 Rule 1 Subrule (2) as read with Rule 2 (1) (b) of the aforesaid rules which was before it on record (in the event that it had made findings that the application for rescission had been filed out of time) but subject to exercising its discretion to allow the 1st to 3rd respondents to file further affidavits in response to the appellant's said alternative application for condonation *in limine* before handing down its judgment on the merits which was open to it in terms of order 22 Rule 3 Subrule (2) of the rules aforesaid which gives it a discretion to allow the filing of further affidavits after the replying or answering affidavit and to do justice to the matter and the parties herein given the importance of the matter to all the parties involved, and that none of the respondents opposed the said application for condonation, which was made *in limine* but the court wrongly held that **“the applicant had not addressed the court as regards**

when it became aware of the judgment, it has not rebutted submissions made by the respondent in addressing that point. Instead the applicant just tactfully addressed the issue. In the absence of condonation therefore the application is improperly before the court and will be dismissed, when appellant had the application for condonation as will more fully appear on record”

- 2.1. Consequently the *court aquo* misdirected itself at law as:
- (a) It ought to have postponed making any decision on the merits pending the determination of application for condonation which was already on record,
 - (b) Once there was a failure to deal with the application for condonation which was on record and requiring it to make a determination in limine, but it did not and proceeded on the wrong basis that there was no application before the court and thus its decision on the merits was incompetent and cannot be allowed to stand at law.

Merits

3. The *court aquo* misdirected itself both on the facts and law by ruling that the appellant was in willful default as she failed to rebut submissions made by the respondent in dealing with that point (that she got knowledge of the default judgment back in July 2010):
- (a) In so doing improperly relying on hearsay evidence in relation to:
 - (i) The contents of annexure ‘C’ to the 1st respondent’s opposing affidavit to the appellant’s application for rescission of a default judgment;
 - (ii) The contents of annexure ‘B’ to the 1st respondent’s opposing affidavit to the appellant’s application for rescission and the alleged service of the letter which is not admissible and ought to have been disregarded;
 - (b) In so doing wrongly making that finding though it is contradicted by the evidence on record to the effect that the default judgment was granted on the 7th of March 2011, as will more fully appear from annexure ‘B’ to the appellant’s application for a default judgment;
 - (c) In accepting annexure ‘F’ to the 1st respondent’s opposing affidavit to the appellant’s application for rescission as evidence at face value notwithstanding the fact that the appellant had rebutted the rebuttable presumption (of anything appearing on the Messenger of Court’s return of service as *prima facie* truth) by producing annexure ‘B’ to her answering affidavit to her application for rescission of a default judgment which clearly showed that the appellant could not have been served with any letter on the 22nd February 2014 by the Messenger of Court at 11:30am as she was clearly at work.
- (cc) At any rate the said annexure ‘F’ does not state which letter was alleged to have been served let alone the date of the letter allegedly served to the extent that it did not advance the 1st respondent’s case.

- (d) when in actual fact the appellant had given a reasonable explanation for her failure to timeously defend the action against her and the 2nd and the 3rd respondents, as required at law.
- (4) As an alternative to ground of appeal No. 3 above, (and assuming it is not upheld) then it will be argued that the *court aquo* had made a finding that the applicant was negligent or that her explanation for her default was inadequate as she was acting in good faith in seeking the protection of the law and her interests as she had *prima facie* or *bona fide* defences to the 1st respondent's action in that:
- (a) She had never consented to the immovable property being hypothecated as security on the basis of annexure 'F' to the 1st Respondent's opposing affidavit as she disputed appending her signature thereon, as even a cursory comparative analysis of the appellant's alleged signature thereon would have shown differences between her alleged signature and her real signature on the affidavits on record, which would have been a real defence if proved at the trial as it would have left the 1st respondent with no cause of action against the appellant;
- (b) The 3rd respondent's purported hypothecation of a jointly owned immovable property behind the appellant's back and in the absence of appellant (a co-owner)'s consent was a legal nullity from which the 1st respondent could not possibly derive any legal benefit, which if proved at the trial would have left the 1st respondent with no cause of action against the appellant and the 3rd respondent in relation to the landed property (stand 6640 of Budiriro Township of Gleneagles Farm held under Deed of transfer No. 5445/08);
- (c) Annexure 'A' to the appellant's answering affidavit to her application for rescission (an acknowledgment of debts signed by the 2nd respondent on the 7th of July 2009) clearly showed that US\$10 000-00 was the initial capital debt advanced to the 2nd respondent and therefore the maximum amount the 2nd respondent ought to have lawfully repaid was \$20 000-00 factoring in the duplum rule which clearly rendered and exposed the default judgment of US\$30 171-54, usurious, incompetent at law and a legal nullity from which no one (1st respondent included) could lawfully derive any legal benefit there from, and destined for nothing short of rescission as to allow it to stand amounted to perpetuating a serious miscarriage of justice.
- 4.1. Consequently, the *court aquo* erred and misdirected itself in holding that the appellant had failed to prove on a balance of probabilities that she had a *bona fide* defence on the merits.

Wherefore the appellant prays for an order:

- (1) that the appellant's appeal succeeds with costs;
- (2) that the *court aquo*'s judgment of the 20th of May 2014 (dismissing the appellant's application for rescission of a default judgment) be and is hereby set aside and an order in its place and stead is hereby granted to the effect that:

“the applicant (appellant herein)'s 2 applications for condonation and rescission of a default judgment be and are hereby respectively granted with costs being in

the cause and the same is ordered to file its pleas to the 1st respondent's action within 7 days of receipt of this order".

At the hearing of the matter, I asked the appellant's legal practitioner whether the notice of appeal complied with order 31 r 2 (4). Mr *Muchineripi* vigorously defended the notice of appeal. He stated that the grounds of appeal are clearly set out in the notice of appeal.

Rule 2 (4) provides;

- "(4) A notice of appeal or cross – appeal shall state –
(a)
(b) the grounds of appeal, specifying, the findings of fact or rulings of law appealed against" (my own emphasis)

The word 'specify' was defined in the Oxford English Dictionary as 'to state explicitly'. In other words the appellant is expected to clearly define and outline his or her grounds of appeal.

The above issue was dealt with in *S v McNab* 1986 (2) ZLR 280 (SC) at 282 B – E where Dumbuthena CJ (as he then was) stated the following:

"A better understanding of what is required can be gleaned from Rule 51 (7) of the Magistrates Court' Act 32 of 1944 (South Africa). See *Kilian v Messenger of the Court, Uitenhage* 1980 (1) SA 808 (AD). The extract from the judgment of Rabie JA (as he then was) is taken from the official translation at 234 (p 815 of the Report). It reads:

"Rule 51 (7) provides, in so far as it is relevant, that:

'A notice of appeal or cross – appeal shall state –

- (a)
(b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.'

Such a notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the Court may know on which points a decision is required. See eg *Himunchol v Moharom* 1947 94) SA 778 (N) at 780; *Harvey v Brown* 1964 (3) SA 381 (E) at 383. The magistrate must also be properly informed of the grounds on which the appeal is based, so that he can comply with the duties imposed on him by rule 51 (8). Para 1 of the notice of appeal merely contains an allegation that the magistrate erred in making the order in question, without stating in what respect he erred, and it cannot be said that it contains a ground of appeal as required by Rule 51 (7)."

The above decision was followed in *S v Jack* 1990 (2) ZLR 166 (SC) where it was held that r 22 contained in SZ 504 of 1979, requires a notice "setting out clearly and specifically the

grounds of appeal” Although this was a criminal matter, the same can be said of a notice of appeal in civil matters. See also *S v Sibanda* 2001 (2) ZLR 514 (H).

In *casu*, the appellants’ grounds of appeal are far from being concise and specific. The notice of appeal is four typed pages in a simple matter of rescission of judgment. They are long, winding and rumbling. From a mere reading of the grounds of appeal, it is difficult to decipher what the appellant is attacking in the judgment of the *court aquo*. The court is left in a situation where it has to attempt to make out the grounds of appeal. This, the court cannot do, as it amounts to drafting grounds of appeal on behalf of the appellant.

If one examines the appellant Heads of Argument, there is not much difference between them and the notice of appeal. All this does is to confuse the court and a respondent who must understand the grounds of appeal and be able to respond in a manner that will assist the court.

From the above, it is clear that the notice of appeal does not comply with rules.

The issue is settled regarding a notice of appeal which does not comply with the rules. In *Bindura Municipality v Pairson Chikeya Mugogo* SC 32/15, the court on p 3 of the cyclostyled judgment quoted with approval the leading case on this point of *Jensen v Avacalos* 1993 (1) ZLR 216 at 220 B (S) where Korsah H stated as follows:

“..... a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, it must be struck off the roll.”

In *casu* no such application for condonation was made. Instead Mr *Muchineripi* vigorously defended the notice of appeal. In view of the above findings, I have no choice but to have the matter struck off the roll.

In the result, I make the following order:

- i) The matter is struck off the roll with costs.

MWAYERA J: Agrees:.....

Muchineripi and Associates, applicant’s legal practitioners
Muvirimi and Associates, respondent’s legal practitioners