

WONDER DUBE
versus
KEITH MATSEKA

IN THE HIGH COURT OF ZIMBABWE
BERE J
HARARE, 20 NOVEMBER 2014 & 28 FEBRUARY 2018

Opposed Application

K. Gama, for the applicant
J. Dondo, for the respondent

BERE J: At the conclusion of this case after hearing argument, I granted the following order in favour of the applicant:

“It is ordered:

- (i) That the appeal instituted by the applicant in this court on 14 October 2011 in case number HC CIV ‘A’ 522/11 and dismissed on 16 July 2013 be and is hereby reinstated.
- (ii) That there shall be no order as to costs.”

Upon pronouncing my order, *Mr Dondo* who was representing the respondent sprung to his feet and made an application for leave to appeal against my decision and at the same time demanded full reasons for my judgment. I reserved my reasons for the application for leave to appeal. I provide hereunder my full reasons for my decision as well as my position on the application for leave to appeal as requested by counsel.

The background

The applicant and the respondent were allocated two plots adjacent to each other. The applicant's plot was referred to as stand number 2 in Ward 20, Central Estates, Mvuma, whilst the respondent's plot was referred to as stand number 1 in Ward 12 Central Estates, Mvuma.

Since these two plots are adjacent to each other the respondent and the applicant had a boundary dispute which spilled over to the Magistrates' Court for determination. The magistrate who presided over the dispute gave judgment in favour of the respondent. The applicant was aggrieved by the determination and reacted by lodging an appeal to the High Court. The matter was set down for the appeal hearing on 16 July 2013. The appellant was in default at the appeal hearing as a result of which *Mr Dondo* who was appearing for the respondent applied for and obtained the dismissal of the applicant's appeal.

The application before me was by the applicant to have his dismissed appeal reinstated,

The applicant's case

The applicant's case was that on the date his appeal was dismissed he arrived at court late and that he lost valuable time being referred from one office to the other as he was not familiar with the High Court set up.

The applicant said he attempted to phone his legal practitioner of record but could not get hold of him with the result that by the time he eventually got hold of him, his appeal had already been dismissed in his absence.

In seeking to have the appeal reinstated the applicant argued that he had a good case on merits as the Magistrates' Court had no jurisdiction to determine the boundaries of the two plots.

The applicant also argued that even if the magistrate had such jurisdiction, the evidence led from the lands officer did not support the decision arrived at by the learned magistrate.

In support of his application for the reinstatement of his dismissed appeal, the applicant referred to and attached the affidavit of his then legal practitioner Charles Mutsahuni Chikore who took the applicant's case on appeal.

The legal practitioner confirmed that the applicant had phoned him on the date of the appeal with a view to attending the hearing.

The applicant's legal practitioner also stated in his supporting affidavit that owing to unforeseen legal challenges he found himself unable to argue the appeal and was forced to renounce agency before he could argue the appeal leading to default judgment being granted against the applicant.

Applicant's counsel emphasised that the appeal was not heard on merits but was merely dismissed due to the applicant's default.

The applicant stated that on 30 July 2013, he filed a chamber application in this court for reinstatement of his case but was subsequently advised by his erstwhile legal practitioner to withdraw the application.

The respondent's case

In opposing the applicant's application the respondent attacked what he described as the inordinate or lengthy and unreasonable delay by the applicant in bringing the application for reinstatement of the dismissed appeal.

The respondent stated that the delay on its own showed that the applicant was acting *mala fide* and that even on merits the applicant had no prospects of success on the appeal itself.

The respondent also attacked the story told by the applicant that he could not find the court where the appeal was being heard and urged the court to dismiss the applicant's application.

The respondent did however acknowledge that it was not in dispute that the applicant was coming to court to represent himself as his legal practitioner had withdrawn from his case on the eleventh hour. The respondent conceded in his opposing affidavit that the applicant's erstwhile legal practitioner did in fact tell the court that he had advised the applicant to appear in the Appeal Court in person on the date of the appeal (16th July 2013) in order to protect his interests.

I now wish to focus on the applicable law on the issue before me. There is a common thread that runs between an application for reinstatement of an appeal and an application for rescission of judgment. They are both determined by the explanation given for the default and the strength of the applicant's case on merits. In the much celebrated case of *Zimbabwe Banking Corp vs Masendeke*¹ the point is made clear that "willful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter. Where there is negligence in relation to the default, the court will examine whether the negligence is so gross as to amount to willfulness. In coming to its conclusion, there is a certain weighing of the balance between the extent of negligence and the merits of the defence."

There is confirmation that indeed the applicant filed an application for reinstatement but there was no explanation by his legal practitioner why that application was withdrawn and the fresh, instant application filed on 30 April 2014 almost five months after default judgment had been granted.

Both the applicant's legal practitioner and the applicant did not proffer any reasonable explanation for what seems to be an inordinate delay in bringing the subsequent application for the sought reinstatement. If this case was entirely dependent on failure to give an explanation for the delay perhaps the applicant's case would have ended here.

I accept that the applicant has not been able to explain the reasons for failing to file his application in time but I think it would be stretching the whole concept too far for one to use this

¹ 1995 (2) ZLR 400 (S) (F-G)

as the exclusive and decisive consideration in this case. This could very well have been caused by poor draftsmanship on the part of the applicant's legal practitioner and in this particular case it would in my view be improper to take the usual approach of punishing the litigant for the faults of his legal practitioner. I believe that where it is clear that an applicant has a good case on merits, the court must consider leaning backwards and try to accommodate the applicant. It is not cast in stone or rule of thumb that the court must always punish a litigant because of the shortcomings of his legal practitioner. In adopting this line of thinking I am persuaded by the position taken by the late Chief Justice CHIDYAUSIKU in the case of *Lovemore Sango vs Chairman of the Public Service Commission and Another*. The Chief Justice having noted that the applicant had failed to proffer a reasonable explanation for the delay remarked as follows:

“Perhaps if the applicant had a strong case on the merits one could overlook the above and condone the delay in bringing this application. However, the applicant's case on the merits is poor.”²

In a later case of *Susan Chipo Vera v Mitsui and Company Limited*, the same late Chief Justice, despite acknowledging that the applicant who was applying for reinstatement of his appeal had poor prospects of success on the merits, leaned backwards and allowed reinstatement of the appeal. The learned Chief Justice put it this way:

“While I agree with Mr Callow that the applicant's prospects of success on the merits are poor it really is for the appeal court to have a final say on the issue. My view on the prospects of success is, of necessity, prima facie. If the explanation for the default were not plausible I probably would have come to a different conclusion. The applicant deserves her day in court regardless of the merits of the case. This is particularly so taking into account that she is appealing against summary judgment, which, in effect deprives her the chance to defend herself in the court *a quo*.”³

I take a cue from these decided cases and conclude that the reasons proffered by the applicant for his default on 16 July 2013 were indeed reasonable despite his failure to explain his

² HH-28-96 at page 2

³ Judgment No. SC-32-04 at p 3

delay in filing the application for reinstatement in time. I am persuaded to take this approach because of what I consider to be an almost water tight case on merits.

In his fairly detailed founding affidavit the applicant went out of his way to explain the difficulties he encountered in trying to locate the Appeal Court and that by the time he eventually found the court default judgment had been entered against him.

It could not be controverted by the respondent that the applicant was not familiar with the set up at the High Court building itself and that because of this the applicant took time to locate the correct court room and that by the time he pitched up after he had unsuccessfully tried to connect with his erstwhile legal practitioner via cellphone and having taken the trouble of rushing to his legal practitioner's office to connect with him, he found default judgment having been granted against him.

It occurs to me that the cumulative effect of the efforts made by the applicant cannot be said to project a man who deliberately abstained from attending court to justify the granting of a default judgment.

I now move to consider the merits of the applicant's case in the main case in the court *a quo*. The applicant's case centered on a dispute over the boundary of his own plot and that of the respondent. It is clear that the plots in question share a common boundary. The dispute in the lower court screamed for specific identification of the boundary pegs for the two plots.

The evidence upon which the magistrate determined the legitimacy of the respondent's boundary did not include the evidence of an officer from the Surveyor General's office who is professionally qualified to determine the specific location of boundary pegs in the event of a dispute between farmers or plot holders.

The record of proceedings suggests that only an Acting District Lands Officer was called as a witness to assist in the identification of the boundaries of the two plots in issue. A clear reading of this officer's evidence reveals that the officer was candid with the lower court that he

did not know how the boundary pegs are placed on the ground. In my view, this witness must have been telling the truth because he was not qualified to talk about boundary pegs. That is the preserve of the officers of the Surveyor General's office. It therefore follows, in my view that only an officer from the Surveyor General's office would have been in a position to tell the court where the boundary pegs lay. See the Land Survey Act⁴ and the Land Surveyors Act.⁵

Having carefully looked at the explanation given by the applicant and the merits of his case in the main matter, I was absolutely left in no doubt that reinstatement of the appeal was inevitable hence my decision on 20 November 2014.

As indicated earlier own, after pronouncing my decision *Mr Dondo* sought to be granted leave to appeal against my decision.

I now move to consider the application in question.

The basis of *Mr Dondo*'s application were basically three-fold.

The first point raised by the respondent's counsel in attacking my decision was that I had no jurisdiction to grant the order I granted because what I had done amounted to reviewing the decision of a court of parallel jurisdiction. Counsel then referred the court to the Supreme Court decision in the case of *Unitrack (Pvt) Ltd v Telone (Pvt) Ltd*.⁶ Further, by seeking to lean on the case of *Mutare City Council v Mawoyo*⁷, counsel also argued that the default judgment against the applicant was a final judgment and therefore could not be reinstated. The third point raised by the

⁴ Chapter No. 20:12

⁵ Chapter No. 27:06

⁶ SC-185-14

⁷ 1995 (1) ZLR 258 (H)

respondent's counsel was that the applicant's case on merits was weak and therefore there was no need to grant reinstatement of the appeal.

I have already dealt with the issue of the applicant's case on merits.

My position highlighted in the main judgment is exhaustive on this issue and I have no wish to push it further. Suffice it to say that the point has been made in the main judgment that the court *a quo* made a genuine error by determining the issue of plot boundary pegs without seeking guidance from the Surveyor General's office. That approach was patently wrong. I agree with the position eloquently spelt out by *Mr Gama* in both his written and oral submissions on this point.

On the issue of jurisdiction, *Mr Dondo* argued that the default judgment granted by the appeal court on 16 July 2013 amounted to a final judgment which could not be reinstated by a court of parallel jurisdiction.

As indicated, *Mr Dondo* sought to rely on the decision in *Unitrack (Pvt) Ltd v Telone (Pvt) Ltd (supra)*. This case is, with respect, not authority for the proposition that a case which has not been decided on merits cannot be reinstated for the matter to be dealt with on merits.

With due deference, the argument by *Mr Dondo* did not impress me. It struck me as quite strange that a default judgment made without a court dealing with the matter on merits would be viewed as a final judgment ousting the jurisdiction of a court of parallel jurisdiction from granting an order for its reinstatement.

It does seem to me that the case of *Mutare City Council v Mawoyo (supra)* which *Mr Dondo* sought to rely on is quite distinguishable from the instant case. In the *Mutare City Council* case, the court was being asked to fundamentally change a decision which had been made by the court after hearing the case on merits. In the instant case, the decision was a default judgment where the case was never heard on merits.

In any event, in the case of *Chitsaka & Ors v Public Service Association*⁸ the Supreme Court took the position which seems to be consistent with the position advocated by *Mr Gama*. In granting an order for reinstatement the court made the following pronouncement:

“It may well be, although I leave the point open, that an order dismissing an application by a judge in chambers is final when such order is made after an appearance and argument by both sides. But the essence of the order in this case is that it was an order made in default of appearance. It was an order made, not after a consideration of the merits, which would have involved a weighing of the undoubted failure to pay and the excuse, if any, for such failure, against the possible chances of success of the appeal, but on the basis solely of the unexplained default.

In general principle, any judgment given on the grounds of default may be reinstated on good cause shown”. ... See *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 764.”
(my own emphasis)

I have already concluded in this case that the applicant has shown good cause warranting reinstatement of his appeal.

Finally, I consider *Mr Dondo* not to be on firm ground in seeking leave to appeal against the decision I made and I accordingly dismiss his application with costs.

Messrs Gama & Partners, applicant’s legal practitioners
Messrs Dondo & Partners, respondent’s legal practitioners

⁸ 1993 (2) ZLR 345 (S) at pp 352-353