NITWICK ENTERPRISES (PVT) LTD
versus
ZIMBABWE POSTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKONI & MWAYERA JJ
HARARE, 22 October and 16 December 2015

Appeal

R Nyapadi, for the appellant
C Kwaramba, for the respondent

MAKONI J: This is an appeal against the decision of the Magistrate Court in which it granted an application for rescission of judgment in favour of the respondent.

The background to the matter is that the respondent instituted proceedings against the appellant in the Magistrate Court under case no M/C 1939. On the date scheduled for the trial to commence, the respondent's legal practitioner was late for court and a default judgment was entered against it. The respondent made an application for rescission of the judgment and it was granted. It is this decision which is the subject of appeal in these proceedings.

The appellant raised four grounds of appeal: *viz*

(i) The Honourable Court *a quo* erred on a point of law and fact when it accepted the Respondent's explanation for default and resultantly, ruled that the failure by Respondent and his Legal Practitioner to attend court on the set date mainly due to the fact that he opted to attend to other court proceedings at the Mbare Magistrate Court without making timeous alternative plans to ensure that his client was represented in the civil Magistrates Court in Harare and or without giving due notification to neither Appellant nor the Court of his intentions was not willful on the part of Respondent.

(ii) The court *a quo* failed to note that, the Respondent was at least negligent in his default and therefore the default was indeed wilful.

(iii) The court *a quo* misdirected itself when it failed to appreciate the fact that Appellant had counterclaimed in the High Court against the Respondent's claim in convention, as such Respondent should have counterclaimed in the High Court to enable the matter to be disposed therein, instead of pursing the matter in the Court *a quo*

(vi) The court *a quo* erred when it failed to recognize that Respondent has no prospects of success on the merits, in that Respondent alleges to have bought the Appellant company as per agreement with Appellant company, meaning that Appellant company, is a part of Respondent, as such Respondent cannot institute proceedings against its self.

In my view, the sole issue for determination is whether the court *a quo* erred when it made a finding that the respondent satisfied the requirements of a default judgment.

I must, at the outset, point out that the requirement for rescission of a default judgment in the High Court Rules 1979 are different from those of the Magistrate Court Rules. In reading the Heads of Argument in this matter particularly the appellant's Heads of Arguments, one might be excused for thinking that he or she is dealing with an application made in terms of r 63 of the High Court Rules.

Rule 63 (2) provides:

"(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just".

Good and sufficient cause has, over the years, been defined as:

(i) The applicant's explanation for the default.

(ii) The *bone fides* of the application

(iii) The *bona fides* of his defence on the merits as well as the prospects of success.

See *Beitbridge Rural District Council* v *Russell Contraction Company (Pvt) Ltd* 1998 (2) ZLR 190 (SC) at *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S) at 369.

Whereas in terms of order 30 r 2 (1) all that the court considers is whether the applicant was in wilful default. Order 30 r 2 (1) provides as follows:

"(1) The court may on the hearing of any application in terms of rule 1, unless it is proved that the applicant was in wilful default:

(a) rescind or vary the judgment in question; and
(b) give such directions and extensions of time as necessary for the further conduct of the action or application".

In other words if the applicant was not in wilful default, then the court rescinds or varies the judgment in question and gives directions as to how the matter proceeds from there.

Wilful default

The concept of wilful default was explained in *Zimbank* v *Masendeke* 1995 (2) ZLR 400 (S) as follows:

> "Wilful default occurs where a pay with the full knowledge of the service or set down of the matter and of the risks attendant upon default freely takes a decision to refrain from appearing"

In *casu,* the applicant's explanation for its default was that the lawyer ceased with the matter was due to appear in another court. He believed he would be able to conclude the matter at Mbare Magistrate Court in time to attend to this matter at Harare Civil Court. When he realised that he could not make it in time, he instructed another legal practitioner to attend on his behalf who arrived just after the matter had been dealt with. It is not in dispute that this other legal practitioner met the appellant's legal practitioner on his way out of the court premises.

It is not in dispute that the lawyer for the respondent got himself entangled in more than one matter on the day in question. He then realised his mistake and arranged for another lawyer to attend to the matter in question. The lawyer did not make it in time and arrived moments after the default judgment had been made. Can it be said that the respondent's lawyer with the full knowledge of the set down of the matter, and the risks attendant upon default, freely took a decision not to appear in court. The answer is in the negative. He was very conscious of the risks attendant upon a default and he made efforts to aver the risks. He was in our view not in wilful default. In view of the provisions of r 30 (2) (1) this is the end of the enquiry. The court does not have to consider the *bona fides* of the application and the *bona fides* of the defence on the merits.

The general test for interference with a lower tribunal's decision was set in *Barros & Anor* v *Chimpondoh* 1999 (1) ZLR 58 (S) at 62G-63A where Gubbay CJ (as he then was) said:

> "These grounds are firmly entrenched. It is not enough that the Appellate Court considers that if it had been in the position of the Primary Court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the Primary Court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration then, its determination should be reviewed and the Appellate Court may exercise its own discretion in substitution provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the Trial Court".

The appellant has failed to establish that the court *a quo* misdirected itself. It applied the correct principles of law and upon a proper consideration of the facts made a decision that the respondent was not in wilful default.

In the result, the appeal has no merit and we make the following order.

1. The appeal is dismissed.
2. The appellant to pay the respondent's costs.

MWAYERA J:……

Muza & Nyapadi, appellant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners