SHARON NESTER CHIKWAKA
versus
STANLEY SHUPIKAI MUTSONZIWA

HIGH COURT OF ZIMBABWE
MUCHAWA & DEME JJ
HARARE 18 May & 23 June 2023

Civil Appeal

Mr *M C Mukome*, for the appellant
Mr *R Mzyece*, for the respondent

MUCHAWA J: This is an appeal in which we heard the matter on 18 May 2023. We found that the respondent was barred and proceeded to hear the appellant and upheld the appeal. We granted the following order:

1. "The appeal be and is hereby granted with costs.
2. The judgment of the court *a quo* be and is hereby set aside in its entirety and it be substituted as follows:
    i. The application for rescission of judgment in case C-CG 2351/22 be granted.
    ii. Applicant is to file her plea or any other response to the respondent's summons within seven days of the granting of this order.
    iii. The order for stay of execution be confirmed.
    iv. Costs be in the cause."

The respondent has requested full reasons for our ruling. The brief background to this matter is that on 22 August 2022, a default judgment was entered against the appellant in the Magistrates' Court after she had failed to enter an appearance to defend the summons that had been issued against her by the respondent. In the summons, the respondent sought the ejectment of the appellant from stand 3758 Subdivision C Portion of Haydon Farm, Westgate, Harare. She then applied for rescission of judgment and the application was opposed by the now respondent. The application for rescission of judgment was dismissed and resultantly the interim order for stay of execution was discharged with now appellant paying costs on an ordinary scale.

That is the judgment appealed against before us. The grounds of appeal are given as follows:

1. "The court *a quo* erred at law by holding that appellant was in wilful default, yet summons was served on a person unknown to her, one Valerie Njanji. The court held that the Messenger of Court could not imagine such a name forgetful that an error could have occurred considering that various summons was served at the same time at the disputed farm.
2. Notwithstanding the above, although the lower court correctly made a finding that even if a party is in wilful default, a court has to consider prospects of success of the application. The lower court then misdirected itself at law in holding that appellant had no prospects of success despite appellant proffering a bona fide defence with prospects of success that:
   2.1 It was an error that the affidavit stated that she purchased the stand from Nobert Jinjika when annexure "D" was self -explanatory that she purchased same from Trigow Investments (Pvt) Ltd, the land developer, which was embroiled in litigation with respondent pending the High Court, Harare under case number HC 90/22 over the stands the latter had allocated to the former. The land developer in turn had rightfully sold the stands to innocent third parties against whom respondent sued without jointly joining them as parties to the High Court proceedings.
   2.2 The court *a quo* failed at law to realise that respondent could not enforce whatever rights it had in the land against third parties without joining the to the proceedings which was fatally defective to the respondent's claim. Respondent should be estopped from enforcing any rights he claims to have under quasi mutual assent doctrine as he was fully aware of the agreement between the appellant and the land developer.
   2.3 Additionally, an order for the eviction of appellant could not be granted by the lower court until the High Court makes a pronouncement on the rights of title between the land developer and respondent in the stands in question. Should the land developer succeed in the High Court, innocent third purchasers like appellant will suffer irreparable harm by losing their stands.
3. The lower court misdirected itself at law in failing to follow precedence by deviating from the judgment it gave in case number C-CG 2349/22 whose circumstances are within all the four corners with the case in *casu*. The lower court granted the application for rescission of judgment on the basis that the applicant had prospects of success because of the dispute between the respondent and the land developer, which dispute had to be resolved first.
4. The court *a quo* erred at law in failing to grant the application for rescission of judgment as appellant laid out an arguable case, thus shutting her out from accessing justice."

The relief sought is as per the relief spelt out as granted, above.

At the hearing, Mr *Mukome* took the point that the respondent is barred as there are no heads of argument properly filed for the respondent. The heads of argument which were filed for the respondent on 30 December 2022 were said to have been only served on the appellant on 15 May 2023. It was argued that the respondent was barred on two bases. The first is that respondent 's heads of argument were filed out of time, having received the appellant's heads of argument on 12 December 2022 and only filing his on 30 December. This was said to be on the eleventh day instead of the tenth day as prescribed by the Rules. The second is that the heads of argument should have been served immediately on the appellant but were only served some four and half months later.

It was contended that the Rules allow for a party to file heads of argument 4 to 5 days prior to set down. In this case, the notice of set down was served in January. It was pointed out that the respondent did not try to get the bar uplifted nor even to seek the appellant's opinion. In the circumstances, the respondent was said to be improperly before the court.

Mr *Mzyece* submitted that the heads of argument were filed within the prescribed period as there were public holidays in between particularly the 22nd and 23rd of December 2022. Whilst conceding that the heads of argument were served on the appellant out of time, Mr *Mzyece* sought condonation and explained that this could have been because of an administrative hitch at their offices. His prayer was that the appellant be given time to go through the heads of argument and the matter be stood down to the end of the roll to consider the point *in limine* they raise in the heads of argument.

Mr *Mukome* would have none of that and pointed out that the respondent's counsel had conceded that they are barred and should have requested their indulgence to deal with the bar and they had not made a proper application to have the matter stood down. The respondent was said to be barred in terms of r 95 (19).

Rule 95 (19) provides as follows:

> "(19) Where the respondent is represented by a legal practitioner, that legal practitioner shall, within ten days after receiving the heads of argument in terms of subrule (18), file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the appellant or applicant as the case may be:
>
> Provided that, where the appeal is set down for hearing less than fifteen days after the respondent receives the appellant's or applicant's heads of argument, the respondent shall file his or her heads of argument as soon as possible and in any event not later than four days before the hearing of the appeal or review".

The following points emerge from this rule:

i. A respondent represented by a legal practitioner shall, within ten days after receiving the appellant's heads of argument, file his own heads of argument with the court.
ii. A respondent shall immediately thereafter serve his heads of argument upon the appellant.
iii. In the case of the appeal being set down for hearing less than fifteen days after the respondent receives the appellant's heads of argument, then the respondent shall file his or her heads of argument as soon as possible and not later than four days before the hearing.

In *casu* the appellant's heads of argument were issued out on 12 December 2022 and these are said to have been served on even date on the respondent's legal practitioners. This means that the respondent had ten days in which to file and serve his own heads of argument on the appellant.

In computing the days recourse is had to r 95 (5) which provides that:

> "(5) Where anything is required by this Rule to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of that period."

Considering the weekends and public holidays in December 2022 and noting that the 23rd of December was not a public holiday, the ten days lapsed on 29 December 2022. The filing of the respondent's heads of argument on 30 December 2022 was out of time by a day. The situation was compounded by failure to immediately serve the appellant with the respondent's heads of argument which were then served some four and half months later, on 15 May 2023.

The respondent's situation cannot be saved by the proviso to r 95 (19) in that set down for hearing was not less than fifteen days after the respondent received the appellant's heads of argument. The notices of set down were served on 13 January 2023 for hearing on 18 May 2023, after the heads of argument of the appellant were received on 12 December.

In the case of *Vera* v *Imperial Asset Management Company* HH 50/06, Honourable MAKARAU J (as she then was) had occasion to deal with an almost similar rule. This was what she said:

"Rule 238 (2a) of the High Court Rules 1971, provides that

> "Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subrule (1):

Provided that-

(i) no period during which the court is on vacation shall be counted as part of the ten day period;
(ii) the respondent's heads of argument shall be filed at least five days before the hearing."

The correct interpretation to be placed on the rule appears to have elude the respondent's legal practitioner, resulting in its heads of argument being filed out of time and without an accompanying or preceding application for condonation.

The applicant filed and served his heads of argument on 8 December 2005, 6 days after the High Court rose on vacation. The High Court resumed sitting on 9 January 2006 and the 10 day period within which the respondent had to file its heads in terms of rule 238 (2a) (ii) expired on 20 January 2006. No heads were filed on or before this date on behalf of the respondent.

On 14 December 2006, the applicant applied for a set down date and the matter was set down before me on 22 March 2006. On 14 March, five days before the set down date, the respondent filed its heads without an accompanying or preceding application for condonation explaining the delay.

At the hearing of the matter, the issue of whether or not the respondent was barred was raised and Miss *Zvarevashe* for the respondent maintained that the respondent was not barred as its heads were filed five days before the set down date. It then became necessary for me to render my interpretation of the rule. This it is.

The operative part of the rule is not to be found in the proviso. It is in the main provision and is to the effect that the respondent is to file his or her heads of argument within 10 days of being served with the respondent's heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant's heads close to the set down date, he or she shall not have the benefit of the full 10-day period within which to file and serve heads stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule."

The above rule which was under consideration mirrors the current r 59 (20) as read with subrule (21). Whereas in computing the days regard is to be had to the time when the court is on vacation, the same is not extended to r 95 wherein only weekends and public holidays are excluded. The findings on the interpretation of the rule in *Vera supra* apply equally in this case. R 95 (19) makes it clear that a respondent must file his heads of argument within ten days of

being served with the appellant's heads. That is the immutable rule. The respondent failed to comply with the immutable rule. He failed to file his heads with an accompanying or preceding application for condonation explaining the delay.

The respondent may very well say that an oral application for upliftment of the bar was made. In the case of *GMB* v *Muchero* 2008 (1) ZLR 216 (S) such an approach was considered appropriate.

In *casu* the sum of the respondent's oral application went like this:

> "The heads of argument were filed within the prescribed period. There was a public holiday, 22 and 23 December were holidays. So, we are not barred.
> Indeed, heads of argument were not served on the appellant on 15 May 2023. The respondent is seeking condonation in not having served appellant earlier than 15 May. This might have been an administrative hitch at respondent's legal practitioner's office. If the appellant may be given time to respond to the point in *limine* we raise."

When asked to clarify on the time, Mr *Mzyece* requested that the matter be stood down to the end of the roll. He did not apply for postponement to a later date to enable a written application to be made. It was not accepted that the respondent had filed heads of argument out of time. There was no explanation for the filing of heads out of time. The only half-hearted explanation was that there was a possible administrative hitch at the office. It was incumbent upon the respondent to explain both the late filing of heads of argument and then the long delay in serving them upon the appellant. This is because in such a case the applicant must explain the reason for the delay. There was absolutely no attempt thereafter to convince the court that he has a *bona fide* defence on the merits. There was no request for a postponement to enable the filing of a written application for condonation. Mr *Mzyece* seemed to think that condonation was his for the asking.

It was our finding therefore that the respondent was barred in terms of r 95 (19) as submitted for the appellant.

The approach taken in *Vera supra* is interesting. This is what was said:

> "It is my further view that as the bar against a respondent in such circumstances is automatic and brings about a technical default, a review of the merits of either case at this stage of the proceedings, though provided for in the rules, will unnecessarily fetter the discretion of a future court that may be seized with an application to rescind the default judgment that the applicant is entitled to at this stage. In view of the above, I have used the discretion vested in me by rule 4(c) in the interests of justice and instead of directing that the matter be set down on the unopposed roll for the granting of a default judgment, I will save the incurring of further costs and delays in the matter and grant a default judgment in favour of the applicant."

In our case we proceeded to hear Mr *Mukome* on the merits as he motivated for the granting of the appeal. He made a persuasive case that the appellant had not been in wilful default as the summons were served on a person unknown to her. It was argued that the messenger of court's return of service is prima facie evidence but once challenged, it can be set aside. Further, it was averred that the stand in issue is a vacant stand, and she does not know upon whom service was effected.

Order 7 r 5 (2) (a) of the Magistrates' Court Rules was relied upon to argue that service must be personal delivery upon the person or his duly authorised agent. The said Valerie Njanji was alleged not to be an authorised person as she is unknown to the appellant. Further, the return of service was said to be lacking in that it does not describe the relationship of Valerie Njanji to the appellant, nor provide her identity particulars.

On prospects of success, Mr *Mukome* pointed to an error in the founding affidavit in the application for rescission wherein it was stated that the property was bought from Norbert Njanika yet the agreement of sale cures this by showing that the seller was Trigow Investments and Norbert Njanika was just a witness. Paragraph 12 to 19 of the founding affidavit on p 74 of the record were also referred to. They show averments particularly in para 18 that the stand was purchased from Trigow Investments (Pvt) Ltd.

It was argued that the balance of convenience favours the granting of the appeal as there is an ownership wrangle pending at the High Court and appellant and other third parties should not be evicted until that is finalised.

It was also stated that there Trigow Investments should have been joined to the eviction proceedings, therefore.

We proceeded to uphold the appeal as we were of the firm view that the appellant was not in wilful default and has reasonable prospects of success. Noteworthy however, based on the *Vera supra* case, is that this is essentially a default judgment.

MUCHAWA J----------

DEME J, I AGREE----------

M C Mukome, appellant's legal practitioners
G H Muzondo & Partners, respondent's legal practitioners