MOSES CHARARIZA
versus
SPENCER FARAYI MATIPANO

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 16 June & 4 August 2022

Civil Appeal

Mr *M Mutagwi*, for the appellant
Respondent in person

MUCHAWA J: This is an appeal against an order which was granted by the Magistrates Court. The appellant, then applicant, approached the court *a quo* with an *ex parte* application for stay of sale of a motor vehicle pending rescission of default judgment wherein the following interim relief was granted:-

> "That pending the finalization of the Application for rescission of judgment filed of record, the respondent be and is hereby ordered not to sell the motor vehicle repossessed from applicant."

The appellant, also filed an application for rescission of default judgment seeking the following relief:-

> "1. The default judgment entered against the applicant in case 1474/21 be and is hereby rescinded.
> 2. The applicant is ordered to file his plea within 7 days from the date of this order.
> 3. Respondent to pay costs."

The court *a quo* made the following order:-

> "IT IS ORDERED THAT:
> i) Court application for rescission of default judgment is dismissed.
> ii) Interim relief staying the sale of a motor vehicle be and is hereby discharged.
> iii) Each party to bear its own costs."

In the main matter before the court *a quo*, the respondent approached the court with a claim in which he alleged that he had entered into a sale agreement for a Hino truck registration number AEF 9183 with the appellant. He alleged that prior to the sale he had been generating an income of US$7 000 per month. The appellant was alleged to have agreed to the offer and promised to pay

in three weeks but had neglected, failed or refused to pay. This was despite the fact that the appellant was said to have taken delivery of the vehicle and was using it. The respondent was praying for the following relief:-

"a) Loss of business in the sum of US$7 000 or amount equivalent at prevailing RBZ auction rate or alternatively repossess the motor vehicle.
b) General damages in the sum of US$2 000 or amount equivalent at a prevailing RBZ auction rate.
c) Interest at the prescribed rate to be paid in full from day of service of summons to day of final settlement.
d) Defendant to pay costs."

Though the appellant entered an appearance to defend the claim, he did not file a plea after a notice to plead was served on him. The respondent proceeded to request for default judgment which was granted as already stated above. The appellant filed an application for rescission of judgment which was unsuccessful hence this present appeal. The following are the grounds of appeal before us:-

"1. The court *a quo* erred and misdirected itself at law on resolving the matter on the papers despite the existence of genuine and material disputes of facts particularly on the purchase price which the appellant paid totaling US$10 200 leaving a balance of only US$2 800.
2. The learned magistrate placed herself in error by making a finding that the appellant's wife received the notice to plead at her place of residence in the absence of her signature when at the time she was at her shop.
3. The court *a quo* erred placed itself in error by failing to consider that
    i. The breach was occasioned by the respondent's refusal to accept payment in local currency at his preferred rate thereby offering the court's assistance to an illegal transaction.
    ii. The messenger of court in connivance with the respondent only executed the alternative judgment without affording the appellant an opportunity to clear his debt.
    iii. Payment of US$7 000 from a debt of US$2 800 is at a usurious rate of interest considering that the agreement is silent about hiring fees, the court thereby ending up making the agreement for the parties.
    iv. The damages of US$7 000 are not quantified."

The relief sought is as follows:

"1. That the instant appeal succeeds with costs.
2. That the judgment of the court a quo is set aside and substituted with the following order;
    a) The defendant is hereby ordered not to dispose or deal in any way with the Hino Super F Reg No AEF 9183 truck until finalization of the matter under MC 1474/2021
    b) The application for rescission of default judgment be and is hereby granted.
    c) The defendant be and is hereby allowed to file his plea within seven days from the date of the granting of this order."

I deal with the grounds of appeal in turn below.

Ground 1: Whether there were material disputes of fact needing to be resolved through the adducing of further evidence

Mr *Mutagwi* submitted that the court *a quo* misdirected itself by determining the matter on the papers yet there were some material disputes of fact crying out for proper ventilation through the leading of evidence. In particular, reference was made to the issue of the purchase price whereupon the appellant claimed the purchase price was US$12 00 and he had paid US$10 200. It was also averred that payment was to be by way of instalments and there was need to lead evidence to be able to decide whether the appellant was in breach. Reference was made to the case of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) in support of this contention.

The respondent, who was a self-actor simply averred that the appellant failed to honour the agreement of sale by defaulting on his payments so there was no error by the court a quo in proceeding as it did. The court is alleged to have correctly granted the relief sought as this was backed by the agreements of sale which included the remedy to repossess the truck and dispose of it without reference to the appellant.

The appellant seems to be confused about what he had placed before the court *a quo*. It was him who had approached the court with an ex parte application for stay of execution which was before the court for either confirmation or discharge. He had also filed an application for rescission of judgment which was brought in terms of order 30 r 2 which provides as follows:

1. **Application for rescission or variation of default judgment**

(1) Any party against whom a default judgment is given may, not later than one month after he or she has knowledge thereof, apply to the court to rescind or vary such judgment.

(2) **Any application in terms of subrule (1) shall be on affidavit stating shortly—**

(a) the reasons why the applicant did not appear or file his or her plea; and

(b) the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment."

Both applications are necessarily brought by way of an application supported by an affidavit**.** That is what the appellant did**.** The court *a quo* correctly identified the law which was applicable to the application for rescission. The first requirement is to give a reasonable explanation for his default and the second is the *bona fides* of the application to rescind and lastly

whether the defence offered is *bona fide* and carries some prospects of success. See *Stockil* v *Griffiths* 1992 (1) ZLR 172.

The agreement of sale on p 26 of the record as read with that on p 25 dispels the notion that there was a dispute of fact as to whether the purchase price was US$12 000 and only US10 200 had been paid. In fact in its ground 3 (iii) of appeal, the appellant does confirm that the remaining debt was US$2 800. There do not seem to be any disputes of fact regarding the terms of the agreement and the breach by appellant in defaulting in payments. The court was therefore in a position to correctly assess whether the defence proffered by the appellant enjoyed prospects of success on the papers before it. There can be no merit in ground 1 of appeal.

Ground 2: Whether the court *a quo* erred by making a finding that the appellant's wife had been served with the notice to plead

Another issue was said to be whether the notice to plead had indeed been served on the appellant's wife or not as she had disputed this fact and said that she was in fact unavailable at the time of the alleged service. This issue was said to be key in the determination of whether or not there was wilful default.

The court *a quo* relied on the certificate of service on p 23 of the record which is an affidavit by the respondent stating that service was effected on him as a hard copy and was received by his wife at his place of residence on 19 October 2021. It did not take into account, the respondent's further evidence that the respondent had also delivered an electronic copy of the notice to plead on the same date to appellant's WhatsApp at 10.53 a.m. which he had viewed a minute later. This was said to have been an additional measure as the appellant was said to be in the habit of refuting having been served if service is not effected by the messenger of court. The court *a quo* found that service of process electronically in this manner is not acceptable.

On his part, applicant questioned that the respondent was saying he had served him but also said it was service on the wife and argued that service had not been effected. The wife filed a supporting affidavit in which she stated that she operates a business and starts work at 7.00 a.m. and finishes at 7.00 p.m. every week day, so she could not have been personally served on 19 October as she was unavailable.

Order 7 r 3 (2) provides that service of any process, other than a summons, warrant or order of court, may be effected by the messenger or **by the party concerned** or his or her legal

practitioner or agent. The manner of acceptable service is set out in Order 7 r 5 (2) (a) to include service through electronic mail and in Order 5 (2) (b) through service on a responsible person at the address of service. Electronic mail is generally defined to mean e-mail and WhatsApp is said not to be email. The court *a quo* was correct to say service through WhatsApp is not acceptable service.

The appellant's wife could not have been correct in saying that she was unavailable simply because she operates a business. There was proof on p 89 of record that she had previously been served with summons by the Messenger of Court on 8 October 2021 at the 5938 Southlea Park, the chosen address of service. It was a Friday and she was not at her alleged business address at 95 Southlea Park.

The respondent's affidavit of service on p 23 of record is simply saying that the appellant was properly served through service on his wife, a responsible person at the given address of service and this complies with Order 7 r 10 (c). There need not be a signature of the person served for the affidavit of service to be acceptable as proof of service.

The court *a quo* cannot be impugned for finding that the appellant had been properly served but elected not to file his plea and was therefore in wilful default.

Ground 3: Whether the appellant had prospects of success in his defence to the claim by the respondent

In his four sub grounds of appeal, the appellant is averring that he had good prospects of success in the main matter and the court a quo should have rescinded the default judgment and allowed him an opportunity to file his plea and have his day in court.

Mr *Mutagwi* submitted that the court should have noted that the breach was occasioned by the respondent's refusal to accept payment in local currency. By refusing to take the appellant's position on this, the court *a quo* is alleged to have brought and sanctioned a dirty transaction into the clean halls of justice as per *Dube* v *Khumalo* 1982 (2) ZLR 103 (SC).

On execution by the messenger of Court, Mr *Mutagwi* submitted there was connivance and that it was an error for the execution to have been in terms of alternative relief instead of the main relief as the respondent's prayer had been couched as follows:

> "Loss of business in the sum of US$7 000 or amount equivalent at prevailing RBZ auction rate OR alternatively repossess the motor vehicle."

It was contended that the order obtained by the respondent for damages sounded in money in the sum of US$9 000. It was pointed out that the alternative relief of repossession was not provided for in the agreement of sale. Mr *Mutagwi* argued that the appellant should have been afforded an opportunity to pay the judgment debt instead of the relief granted. It was furthermore, argued that the court went on a frolic of its own in granting the relief as it did.

The court *a quo* was impugned for upholding the claim of US$7 000 as this was said to be tantamount to making an agreement for the parties as there was nothing in the agreement about hiring fees and there was no evidence placed before the court to justify this claim. It was contended that at law a claim for damages ought to be pleaded and quantified sufficiently and this was not done by the respondent.

The respondent submitted that the agreement between the parties was based on a purchase price sounding in United States dollars and in his prayer he had prayed for payment in United States Dollars or an equivalent amount at the prevailing RBZ auction rate so there was nothing 'dirty' about the transaction. The appellant who argued that the respondent should have come up with his own preferred rate of exchange is said to be the one missing the mark.

In the allegations of connivance between the respondent and the Messenger of Court, the appellant is said to be making damaging claims without any supporting evidence which is alleged to be defamatory.

The amount of US$7 000 was explained to be made up on the basis of the average hiring fees for the truck which was US$1 500 per month. The appellant is said to have been aware that the truck he bought was being taken off a contract for hire and his failure to clear the balance within 30 days led to financial losses greater than US$7 000 from preexisting hiring contracts. The respondent also says that he suffered lack of adequate funds to meet business ventures for which he had sold the truck.

The court *a quo*'s key finding was that the appellant had no *bona fide* defence in the main matter as he breached the agreement of sale. That seems to be established from the papers on record that indeed there was an outstanding balance. The order granted in default was as follows:

> "1. Defendant is ordered to pay plaintiff for loss of business in the sum of US$7 000 or amount equivalent at prevailing RBZ auction rate or alternatively repossess the motor vehicle as agreed in contract since defendant breached the contract.
> 2. Interest at the prescribed rate to be paid in full from day of service of summons to day of final settlement

3. Defendant to pay costs of suit."

The material terms of the agreement of sale of the motor vehicle executed on 10 April 2021 as appears on p 25 of the record were that the purchase price was US$12 000 and a deposit of US$8 700 was payable and the balance was to be paid in a month, that is on or before 10 May 2021. The vehicle was sold as seen.

On 17 May 2021, there was a further agreement between the parties which was clearly a consequence of appellant's breach of the first agreement as the balance remained un-cleared to the tune of US$2 800 which was to be cleared through instalments of US$500 and the last payment would be US$300. The first payment was due on 24 May 2021. A new term was that in the event of any late payment, the respondent would have a legal right to recover his vehicle from the appellant.

What was important for the court *a quo* was to establish the breach, as it did, based on the papers on record being, inter alia the agreements of sale. The court cannot by any stretch of imagination be said to have assisted any illegal transaction as the respondent claimed the money in the equivalent at prevailing RBZ rate. The court *a quo* cannot be said to have made up an agreement for the parties as they are the ones who had agreed on a purchase price sounding in United States Dollars.

The appellant cannot be excused from the clear terms of the contract he voluntarily entered into. The court *a quo* simply enforced the agreed terms after finding there was a breach. The parties had agreed to repossession. In *Magodora & Ors* v *Care International Zimbabwe* SC 24/14, it was held that:

> "In principle, **it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive**. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H."

The respondent placed before the court a quo, an affidavit of evidence which appears on p 29 of record. Therein it is set out that there was breach of contract by the appellant. A transportation service agreement between the respondent and one Faith Wadzanayi Rupende was

attached to support the averment that the vehicle in question had been on a hire contract for the period 1 March 2021 to 31 October 2021 and would give plaintiff (now respondent) US$1 000 per month plus. There is a note on p 32 of the record wherein the respondent communicated with Rupende that he would no longer be able to provide the vehicle in terms of the contract but would assist in sourcing another transport service provider. A further note records that the respondent had to give back US$ 1000 which had been paid as security deposit.

The case of *Wynina (Pvt) Ltd V MBCA Bank Limited* SC 27/14 clearly sets out what is expected of a party claiming damages for breach of contract. See below:

> "A plaintiff who sues for damages is required to prove his damages. A court will not presume damages in the absence of proof of such damages by a plaintiff. **However, the principle that a plaintiff must prove his damages is not a strict rule, what is required of a plaintiff is to place before the court all the evidence that is reasonably available to him.** Before this principle can come into effect it must be established that the plaintiff has suffered some damages and that all that has to be established is the quantum of those damages." My emphasis.

The respondent appears to me to have laid out before the court that he expected a hire contract for the relevant period for which he expected to make US$1 000 per month but due to the appellant's failure to pay off the purchase price yet retaining the motor vehicle for 8 months, he had lost US$7 000. He was able to place before the court all the evidence reasonably available to him.

In any event, the respondent did not execute on the damages award. He got the motor vehicle repossessed thereby executing on the alternative relief. The appellant cannot be correct in averring that the alternative relief was not provided for in the parties' agreement of sale. The agreement of 17 May 2021 which appears on p 26 of record clearly states as follows:

> "In the event a payment is late, I Spencer Matipano has legal right to recover the vehicle from Mr Moses Chareriza."

The appellant has not disowned this agreement at all. He cannot argue therefore that the alternative relief was outside the terms of the contract of sale. The court *a quo* cannot be impugned for having gone on a frolic of its own and determining issues not pleaded in granting the alternative relief. In the summons before the court *a quo*, the respondent specifically prayed for repossession of the motor vehicle as alternative relief.

The court order on p 77 of the record was clear that the respondent had a judgment in his favour awarding him either the sum of US$7 000 or the amount equivalent at the RBZ auction rate

OR repossession of the motor vehicle. It cannot be termed connivance that the respondent elected to enforce the alternative relief. The order did not say that the appellant should be give an option to first clear the arrears.

In the circumstances, the appellant had no *bona fide* defence or prospects of success in the main matter.

Accordingly, there being no reasonable explanation for the default, and no *bona fides* of the application to rescind and lastly the defence offered not being *bona fide* and as it does not carry some prospects of success, there is no merit in this appeal which is dismissed with costs.

MUCHAWA J:……..……

WAMAMBO J: Agrees…….

Madotsa & Partners, appellant's legal practitioners