MUBEENA EBRAHIM PRIMARY SCHOOL
versus
JEREMIAH KAZUWA
and
MUTSA MACHIMBIDZOFA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 30 June & 22 September 2022

Civil Appeal

I Mandongwe, for the appellant
E Matsanura, for the respondent

MAXWELL J: This is an appeal against the judgment of the Magistrate Court for the Province of Mashonaland sitting at Harare handed down on 18 January, 2022.

BACKGROUND

On 18 December 2020, appellant issued out summons against the respondents seeking payment of USD1100.00, or the Zimbabwe dollar equivalent thereof, for outstanding fees, plus USD700, or the Zimbabwe dollar equivalent thereof, being one term's fees in lieu of a notice of withdrawal from the school and interest at the prescribed rate together with costs on a higher scale. On 19 May 2021 respondents entered a plea coupled with a counter claim. The matter was referred to trial. After postponement of the matter on several occasions due to lockdown restrictions and the resultant Practice Directions, the matter was set down for 9 September, 2021. Respondents and their legal practitioners did not attend and the matter was postponed to 16 September, 2021. Appellant alleged that on 10 September, 2021, its legal practitioners addressed a letter to respondents' legal practitioners advising them of the postponement. Despite the notice they defaulted and a default judgment was granted.

On 10 December, 2021, the respondents filed a court application seeking rescission of the order granted in default. Respondents also filed an application for stay of execution. Both applications were opposed but the lower court granted both of them.

JUDGMENT OF THE LOWER COURT

The lower court stated that there was no evidence to prove that the respondents were aware of the default judgment. It was of the view that respondents' erstwhile lawyers might have been negligent and ignored the letters attached as annexures by the appellants. It decided that respondents cannot be punished for the negligence of their previous lawyers when it is apparent that they are willing to defend the action. It found the explanation proffered probable and believable and was of the view that it pointed to the possibility that the default was not willful. On the merits, the lower court was of the view that it is just and proper that the matter be resolved by way of a full trial as there were disputes of facts on amounts claimed. As it had found in favour of the respondents on the application for rescission, it granted interim relief for the stay of execution.

GROUNDS OF APPEAL

Appellant was aggrieved and noted an appeal on the following grounds.

1. The Honourable Magistrate misdirected herself by failing to find that the respondents knew of the existence of the Default Judgment against them at all material times and that they were barred for failing to seek rescission of the Default Judgment within the stipulated time-frame.
2. The Honourable Magistrate misdirected herself by finding that the respondents were not in willful default despite ample evidence that the respondents were informed of the court proceedings.
3. The Honourable Magistrate misdirected herself by holding that the respondents' previous legal practitioners were to blame for the default of the respondents yet there was no supporting and confirmatory evidence from the said legal practitioners.
4. The Honourable Magistrate misdirected herself by failing to find that the respondents were bound by the consequences of the conduct of their chosen legal practitioners.

5. The Honourable Magistrate misdirected herself by finding that the respondents enjoy good prospects of success on the merits despite ample evidence that there was flagrant breach of court rules.

Appellant prayed for the setting aside of the judgment of the lower court and its substitution with a dismissal of the application for rescission of default judgment with costs.

SUBMISSIONS BY THE PARTIES

Appellant submitted that the respondents were barred for failing to seek rescission of the Default Judgment within a period of one month after they had knowledge of it. It further submitted that the respondents were in willful default as they failed to attend court for commencement of trial on different occasions despite due notice and communication. Appellant also submitted that it was a misdirection for the lower court to hold that the respondents' previous legal practitioners were to blame for the default by the respondents as there was no supporting and confirmatory evidence from the said legal practitioners before her. Further, that the lower court ought to have found that the respondents were bound by the consequences of the conduct of their previous legal practitioners as they were their chosen agents at all material times. Appellant expressed the view that the lower court should not have considered whether or not respondents enjoyed good prospects of success on the merits as there was flagrant breach of court rules. Mr *Matsanura* argued that where there is willful default the merits of the matter should not be considered. He referred to the case of *Shepherd Singadi* v *Tasariravona Tasisio Mandaba & Another***,** HMA 15/21 for the position that for a rescission application to succeed, the applicant has to satisfy the requirements that the default was not willful and that there is a good prospect of success as the requirements are conjunctive.

Appellant's heads of argument were served on the respondents on 26/4/22. In terms of r 95 (19) respondents were obliged to file their heads of argument within ten days thereafter. Their heads of arguments were filed on 29 June, 2022. Respondents' heads of argument were therefore filed out of time. Resultantly respondents were barred.

ANALYSIS

Appellant argued that the respondents failed to rebut the presumption that they had knowledge of the default judgment within two days of its issue for two reasons. Firstly, that the respondents' erstwhile legal practitioners were advised on 10 September 2021 that the trial of the matter would commence on 16 September 2021. The lower court was of the view that it is probable and believable that the respondents' erstwhile legal practitioners might have been negligent and ignored the letter therefore respondents cannot be punished for the negligence of their previous lawyers when it is apparent that they are willing to defend the action. Secondly, that as per the letter on p 92 of the record, at a conference held on 15 October 2021 between the respondents' erstwhile legal practitioners and appellant's legal practitioners, the respondents' erstwhile legal practitioners acknowledged that both themselves and the respondents were well aware of the default judgment that had been granted on 16 September 2021. The letter on p 92 was written by appellant's legal practitioners. It refers to a conference in which one Mr Mutemwa was involved. On pp 4 to 5 of its ruling, the lower court stated; -

> "Applicants argued that their lawyer was Mr Nevile Farai Kambarami not Mr Mutemwa from LT Muringani Law Practice. Applicants denied attending pre-trial conference allegedly held on 15 October 2021."

The lower court further stated on page 5 of its ruling; -

> "Court assessing the explanation for the default it noted that it is apparent that no evidence has been shown to prove that Applicants Jeremiah Kazuwa and Mutsa Machimbidzofa knew of this default judgment."

Can the lower court's conclusion that the default was not willful be impugned? The circumstances of this case show that it cannot. Willful default was defined in the case of *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400 (S) by MCNALLY JA (as he then was) in the following terms; -

> "Willful default occurs when a party, with the full knowledge of the service of the service or set down of the matter, and risks attendant upon default, freely takes a decision to refrain from appearing." (Underlining for emphasis)

Also in the case of *Maujean t/a Audio Video Agencies* v *Standard Bank of South Africa Limited* 1994 (3) SA 801 King J stated that; -

> "More specifically, in the context of a default judgment, 'willful' connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e., its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be,"

Nothing on record shows deliberateness on the part of the respondents. Appellants did not show that Mr Kambarami had knowledge of the set down date. Neither did they tender confirmation from Mr Mutemwa that he attended the said conference on behalf of the Respondents. Such confirmation could have been in the form of the minutes of the conference. For the above reasons the first and second grounds of appeal are without merit.

Appellant argued that there was no confirmation from the respondents' erstwhile legal practitioners that they were to blame for the default. Appellant made reference to *Paul Gary Friendship* v *Jeffrey Dick* HH 128/13 and *Masuku* v *Masuku* HB 106/16. None of these cases dealt with an appeal. They are decisions in opposed matters and on that basis distinguishable. The lower court observed that the said legal practitioners had renounced agency. It then proceeded to decide the issue on probabilities that they ignored the letters. It is trite that the standard of proof in civil matters is on a balance of probabilities. SELKE, J., in *Govan* v *Skidmore***,** 1952 (1) SA 732 (N) at p 734, said; -

> ". . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence*, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one"

The lower court found it more likely that the Respondents' erstwhile legal practitioners did not notify them of the set down date.

Appellant also criticizes the lower court for failing to find that the respondents were bound by the consequences of the conduct of their chosen legal practitioners. When the lower court decided that respondents cannot be punished for the negligence of their previous lawyers, it was exercising its discretion. For an appellate court to interfere with the exercise of discretion by a lower court, it must be shown that the discretion was exercised injudiciously. See *Barros & Another* v *Chimpondah* 1999 (1) ZLR 59 (S) in which it was held that it is not for an appellate court to assume the position that if it had been in the place of the lower court it would have reached a different decision. There must be a demonstration that the lower court erred in its assessment of the facts or its application of the law to the facts. No basis has been laid for this Court to interfere

with the discretion of the lower court. Accordingly, the third and fourth grounds of appeal also fail.

In the last ground of appeal, appellant argues that it is neither here nor there whether the respondents have good prospects of success on the merits as they were not entitled to rescission due to flagrant and wanton disregard of the rules. Such a submission ignored the fact that the lower court had made a decision that the respondents ought not to be punished for the negligence of their legal practitioners. While the general rule is that a litigant cannot escape the consequences of the conduct of his legal practitioner, it is not a rule cast in stone. It is trite that each case is decided on its own merits. *In casu*, the lower court found reason to depart from the general rule. It exercised its discretion and there is no basis to interfere with it.

DISPOSITION

The appeal lacks merit. The following order is made.

The appeal be and is hereby dismissed with no order as to costs.

TSANGA J:……Agrees

Chitewe Law Practice, appellant's legal practitioners
P Makora Commercial Law Chambers, respondent's legal practitioners