ENNOCENT T. MAPOSA
versus
CHRISTOPHER MATABUKA

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND MWAYERA JJ
HARARE, 6 November, 2014 and 21 October 2015

Civil Appeal

Appellant in person
G Saidi, for the respondent

CHITAKUNYE J. Sometime in February 2012 the appellant entered into an agreement of sale of a motor vehicle with respondent. The purchase price was agreed at USD 6500-00. The appellant paid USD 4800- 00 and took delivery of the motor vehicle. The appellant defaulted in the payment of the balance of the purchase price as a result of which respondent issued summons out of the Magistrates Court in the same year.

In response to the summons appellant gave consent to judgment as claimed in the summons on 10 August 2012. The appellant undertook to liquidate the debt at a rate of $ 400-00 per month. As fate would have it, appellant failed to meet the payment terms. As a consequence respondent issued a writ of execution in respect of the judgment debt on 23 October 2012.

On 26 October 2012 appellant made an *ex parte* application for stay of execution of the judgment. He at the same time filed an *ex parte* application for rescission of judgment. The rule *nisi* in respect of the two *ex parte* applications were apparently granted with a return date of 7 November 2012.

The record of proceedings shows that the appellant made another *ex parte* application for rescission of judgment and stay of execution on 3 May 2013 with a return date of 20 May 2013.

It is common cause that upon obtaining a rule *nisi* on 3 May 2013, appellant did not serve it on the respondent until 17 May 2013 when he effected service. Upon such service the

respondent promptly responded on the same date raising some points *in limine* and opposing the confirmation of the rule nisi.

Upon hearing the parties on the return date the presiding magistrate concluded that the application was not well founded and thus discharged the rule nisi with costs on a higher scale.

The appellant, being dissatisfied with the magistrate's decision appealed to this court. The grounds of appeal were couched as follows:-

1. The honourable court erred in fact and at law by dismissing appellant's application for Rescission of judgment and stay of execution without even analyzing the merits of the matter, and denying appellant the opportunity of filing an answering affidavit as this would have assisted the court a quo in arriving at a guided decision.
2. By not affording the appellant opportunity to tender his answering affidavit the court *a quo* erred and the learned Magistrate misdirected himself and all avenues of impartiality were closed to the appellant, rendering the whole judgment unmeritable and void.

3. The learned Magistrate erred in dismissing appellant's application for rescission and allowing a judgment with an order of US$ 2 700-00 to stand despite appellant tendering evidence that the amount was US$1 700-00 and from that a total ofUS$1 400-00 had been paid leaving a balance of US$300.00 meaning that if the judgment is allowed to be executed, appellant will suffer unwarranted prejudice for a debt which has long since been settled.

4. The learned Magistrate erred in failing to take into account the fact that appellant had vowed never to have entered a consent order of the said email and such order was a fraudulent one, and even if such consent had existed, it was never registered as an order of the court.

The respondent attacked the grounds of appeal as not proper. Counsel for the respondent contended that the supposed grounds of appeal pertained to procedural matters and such should have been brought as a review if appellant felt the presiding magistrate had not conducted himself properly.

In the first two grounds the appellant alleges that he was denied the opportunity to file an answering affidavit and so he was denied the right to reply. In the third ground it is really a question of disputing the sum owed and lastly ground 4 pertains to his denial of ever entering into a consent order referred to in an email.

In considering the above points *in limine* raised by respondent on the validity of the grounds of appeal this court is of the view that whilst there is merit in the submissions, the circumstances of this case dictated that we hear the parties. Appellant being a self actor seemed not to understand the import of the points *in limine* raised. We thus decided to indulge appellant and deal with the grounds of appeal raised.

Grounds 1 and 2

In these grounds the appellant alleged that the presiding magistrate erred by not allowing him to file an answering affidavit. A careful perusal of the record of proceedings shows that appellant was given the requisite hearing. He is the one who had brought the application on an urgent basis and was duly given a return date. He then did not serve the papers on the other party till the 17th May 2013 for a matter to be heard on 20 May 2013.

The points that decided the fate of the case were points *in limine* of which he was given the opportunity to respond to. The circumstances of the points *in limine* were such that there was no need to analyze the merits of the case. There had to be a proper application before the magistrate for him to consider the merits.

Ground 3

Under this ground appellant is virtually disputing the balance of the debt and not the indebtness itself. This on its own would not be a ground to rescind a judgment by consent. The appellant ought to provide a good explanation of the circumstances that led to him consenting to judgment in the sum as per summons when he did not owe that much.

The application appellant brought before the magistrate had to be in terms of the Magistrates' Court Act and the relevant Rules. In this regard s 39 of the Magistrates' Act; [*Chapter 7:10*] makes provisions for applications for rescission of judgment.

Section 39 (1) (a) to (c) of the Magistrates Court Act, [*Chapter 7:10*] states that:-

"(1) In civil cases the court may-

(a) Rescind or vary any judgment granted by it in the absence of the party against whom it was granted;

(b) Rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud of by mistake common to the parties;

(c) Correct patent errors in any judgment in respect of which no appeal is pending."

Subsection (2) thereof states that:

"(2) the powers given in subsection (1) may only be exercised after notice by the applicant to the other party and any exercise of such power shall be subject to appeal."

A perusal of the *ex parte* application for rescission made before the magistrates court shows that it fell foul of the above provisions. Not only was it made without notice to the other party but it was also made without averring to any of the grounds stated in subsection (a) to (c) above.

In the founding affidavit appellant clearly acknowledged that he had consented to the judgment and so the judgment was not in default. In this regard para 2 of the founding affidavit wherein he stated that he entered consent to judgment is very clear.

In para 5 of the same affidavit appellant leaves no doubt that as at the time of the application for rescission the issue between respondent and the owner of the motor vehicle had been resolved and appellant was to pay to respondent when he states that:

"The 1st respondent filed a Notice of Set down and before the matter went for Pre-trial an agreement was reached between the parties to solve the matter out of court as the respondent had solved his issues with actual owner of the vehicle and it was agreed that the applicant will pay the respondent and get the registration book of the vehicle, which was to be handed over to the respondent's legal practitioners and that the applicant will liquidate the debt in monthly instalment of USD 400-00 until cleared inclusive of agreed legal costs."

The applicant does not state that the judgment was void *ab origine* or was obtained by fraud or by mistake common to the parties and so subrule (b) above in not the one relied upon.

In *Georgias & Another* v *Standard Chartered Finance Zimbabwe Limited* 1998 (2) ZLR 488 (S) court held that:-

"When considering an application for rescission of a judgment entered by consent, the court should have regard to:

(1) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgement was entered;

(2) the *bona fides* of the application;

(3) the *bona fides* of the defence on the merits of the case which prima facie carries some prospect of success. A balance of probability need not be established.

> Too much emphasis should not be placed on any of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits. In general terms, what an applicant must show is something which entitles him to ask for the indulgence of the court."

In *casu*, in one breath appellant admits giving consent to judgment and in another breath denies consenting to judgment. The appellant could not explain away the consent to judgment he signed and his own admission as contained in paras 2 and 5 of his founding affidavit. Clearly appellant is not being truthful.

The lack of a cogent explanation as to why the consent judgment should be rescinded show a lack of *bona fides* in the application.

The appellant could also not proffer a plausible defence. It is apparent that the real issue is a dispute on the outstanding balance. It may also be noted that Consent to Judgment signed by both parties and filed at Marondera Magistrates Court on 6 March 2013 shows the total debt of USD 2 700-00. That debt comprised $1 700-00 as capital debt and $1000-00 for legal costs as at that date. That consent to judgement states that:

> "1 The defendant is liable to Plaintiff in the capital amount of US$ 1 700.00
> 2. The defendant is liable for Plaintiff's costs of suit to date amounting to US$1 000.00
> 3. The parties agree that judgment be entered accordingly.
> 4. The Defendant hereby undertakes to settle the capital amount and legal costs amounting to US$2 700.00 by monthly instalments of US$500.00 with effect from the 5th April 2013 and thereafter on the 5th day of each and every subsequent month until the debt is paid in full."

On 6 March 2013 the above was granted by the court.

In fulfilment of his obligation as outlined above on 23 April 2013, appellant deposited a sum of US$400.00 into respondent's bank account. On 24 April he filed with court a notice stating that:

> "Be pleased to take notice that the Defendant hereby files attached receipt as proof of April 2013 payment of US$400.00 made into Plaintiff's account as per consent order entered between the parties."

The above scenario puts paid to the above ground of appeal.

I am thus of the view that the appeal has no merit at all.

Ground 4

The fourth ground of appeal is not supported by the record of proceedings. There is no email in the record or even referred to by the magistrate in his ruling. There is thus no merit in this ground as well.

The respondent asked for costs on a higher scale. No justification was however proffered for seeking costs at a punitive scale. It is my view that it was respondent's duty to proffer reasons for seeking costs at the higher scale and not for this court to wade through the case to find justification for such costs.

Accordingly the appeal is hereby dismissed with costs on the general scale.

Messrs Sakala & Company, respondent's legal practitioners