ALICE MQUNU

Versus

NKOSIYAZI NKOSI

IN THE HIGH COURT OF ZIMBABWE
DUBE JP & DUBE-BANDA J
BULAWAYO 26 January 2024 & 25 April 2024

Civil appeal

Ms. V. Chagonda, for the appellant

DUBE-BANDA J:

[1] This is an appeal against the decision of the Magistrates Court sitting at Bulawayo handed down on 28 September 2022. In terms of the said decision, a default judgment granted against the respondent (defendant in the main action), in favour of the appellant (plaintiff in the main action) on 24 July 2020 was rescinded and the appellant was ordered to pay the costs on a legal practitioner and client scale.

[2] For ease of reference the parties shall be referred to as the "appellant" or "plaintiff" and "respondent" or "defendant" as the context would permit.

Factual background

[3] The appellant sued out a summons against two defendants, one being the respondent in this matter and the other who is not part of these proceedings. The appellant pleaded that the parties entered into a loan agreement in terms of which the defendants advanced to her a loan in the sum of USD$500.00. As security for the loan, the appellant pledged her motor vehicle being a Honda CVR 1996 Model Reg. No. ABA 8352. The defendants took possession of the vehicle as security for the loan. The plaintiff repaid the loan by delivering to the defendants 20 grammes of gold, and not withstanding such delivery the defendants proceeded to sell the vehicle. The plaintiff prayed for the replacement value of the vehicle as at the date of judgement with costs of suit.

[4] The respondent, (second defendant in the main claim) did not enter appearance to defend, prompting the plaintiff to apply and obtain default judgment. In answer to the default judgment and writ of execution, the respondent filed an application for rescission of judgment. In the application he contended that he was not in wilful default and that he had prospects of success in the main action. The application was opposed. After a contested hearing, the court *a quo* granted the application for rescission of judgment. The court *a quo* found that the respondent was indeed in wilful default. It said that:

> "I therefore find that service of the summons was done through applicant's wife and applicant in his wisdom or lack thereof chose ignore (*sic*) the summons well knowing the legal consequences thereof. He was in wilful default."

Notwithstanding such a finding it felt inclined to grant the application for rescission on the basis that the default judgment was either granted in error or was fraudulently obtained.

This appeal

[5] Aggrieved by the decision of the court *a quo,* the appellants noted this appeal on the following grounds:

i. The court a quo erred in fact and in law in that having found that the respondent was in wilful default it could not competently grant rescission of judgment.
ii. The court a quo misdirected itself on a point of law in failing to dismiss the application for rescission of judgment in that the order sought and granted was fatally defective for want of compliance with Order 30 r 2 (1)(c) and (d) of the Magistrates Court (Civil) Rules, 2019.
iii. The court a quo grossly misdirected itself on a point of law in finding that the respondent had prospects of success on the merits in that the respondent failed to sustain his alleged defence as set out in the founding affidavit.
iv. The court a quo erred on a point of law in that having found that the application for rescission of judgment was based on falsehoods, it ought to have refused to relate to the application and dismissed it with costs.
v. The court a quo grossly misdirected itself in the exercise of its discretion regarding the issue of costs that no court faced with the same facts would have arrived at the same decision in that it did not apply its mind when it awarded costs against the appellant at an attorney and client scale.

[6] At the hearing of the appeal, the respondent was in default. However, according to the record before court, he was aware of the date and time of set down of this appeal hearing. Notwithstanding the respondent's default the court proceeded to hear submissions on the merits of the appeal from Ms. *Chagonda* counsel for the appellant. This was so because an appeal cannot be allowed or succeed in default, and also because a judgment of a court of law may not be set aside because of the default of a litigant.

[7] In essence this is an appeal against the decision of the court *a quo* granting a rescission of judgment. It was on this basis that at the commencement of the hearing the court requested Ms. *Chagonda* to address the issue whether at law a decision granting rescission of judgment is appealable. Counsel submitted that it is trite that as a general rule a decision rescinding a default judgment is not appealable. However, counsel submitted further that in this matter the decision of the court *a quo* is final and definitive and thus appealable.

The application of the law to the facts

[8] This analysis must start with a consideration of s 40(2) of the Magistrates Court Act [Chapter 7:10], which says:

> "Subject to subsection (1), an appeal to the High Court shall lie against—
> (a) any judgment of the nature described in section eighteen or thirty-nine;
> (b) any rule or order made in a suit or proceeding referred to in section eighteen or thirty-nine and having the effect of a final and definitive judgment, including any order as to costs."

[9] It is trite in our law that in general an order rescinding a default judgment is not appealable. In *Nyamuswa v Mukanya* 1987(2) ZLR 186 (SC) the court said an order rescinding a default judgment is not a final and definitive judgment. At 189 of the judgment the court said:

> "Such an order does not have the effect of a final and definitive judgment. It leaves the rights of the plaintiff, in this case the appellant, unaffected and the issues in the main action undisturbed. Those issues are not disposed of by the order of rescission. The appellant will still pursue her claim for arrears of rent at the trial. She is still in court.
>
> An order setting aside a default judgment is appealable where the default judgment is invalid or is obtained by fraud or mistake. Under one or other of these circumstances the default judgment is final. In other words, it terminates litigation. The plaintiff cannot go to court and continue with his claim unless he appeals and succeeds." (My emphasis). See *Mushuma v Mushonga* HH 45/13.

[10] The court *a quo* allowed the application for rescission of judgment on the basis that the default judgment was granted in error or was fraudulently obtained. On the authority of *Nyamuswa v Mukanya* (*supra*) in this case the order rescinding the default judgment is final and appealable. It is so because it has terminated the litigation between the parties, and the appellant cannot prosecute her claim further unless she has appealed and succeeded. This explains the reason the court *a quo* did not comply with Order 30 rule 1 (d) of the Magistrates Court (Civil) Rules, 2018, which provides that in rescinding a default judgment the court may give such directions and extensions of time as necessary for the further conduct of the action. In the circumstances, the order granted on 15 November 2022 rescinding the default judgment is final and appealable.

[11] The first ground of appeal attacks the order rescinding the default of judgment on the premise that once the court *a quo* had found that the respondent was in wilful default it could not competently have granted rescission of judgment. In the event this court finds that at the Magistrates Court a finding that a litigant was in wilful default disposes of the application for recission of judgment, and therefore the court *a quo* misdirected itself granting rescission, such will be dispositive of the appeal.

[12] Order 30 r 2 of the Magistrates Court (Civil) Rules, 2019 provides thus:

> (1) On hearing an application in terms of rule 1 and being satisfied that -
> (a) the applicant was not in wilful default; and
> (b) there is a good prospect that the proffered grounds
> of defence or the proffered objection may succeed in
> reversing the judgment;
> the court may—
> (c) rescind or vary the judgment in question; and
> (d) give such directions and extensions of time as necessary
> for the further conduct of the action or application.

[13] The rule on which this issue turns is clear. A litigant seeking rescission of judgment at the Magistrates Court must meet two requirements, i.e., first that it was not in wilful default and second that it has prospects of success in the main action. The rule uses the word ‘and’ meaning the two requirements must be met conjunctively. A litigant seeking recission must first meet the wilful default requirement. See *Gundani v Kanyemba* 1988 (1) ZLR 226 (SC). On failure

to overcome the wilful default huddle the enquiry must end, and there would be no useful purpose to enquire whether there are prospects of success in the main matter. It is only after the wilful default inquiry has been overcome, that the enquiry progresses to the prospects of success requirement. In *casu* the court *a quo* found on the evidence that the respondent was in wilful default. That finding must have signalled the end of the enquiry. The court *a quo* fell into error when it continued to determine the prospects of success requirement when it had found that the respondent was in wilful default. It is on this basis that this court is of the view that the appeal is meritorious and must succeed. This resolves the appeal, and renders the remaining grounds of appeal redundant and no useful purpose would be served by determining them.

[14] As for the costs of this appeal, there is no reason why they should not follow the result. They are for the account of the respondent.

In the result, the following order is made:

i. The appeal be and is hereby allowed with costs.

ii. The judgment of the court *a quo* is set aside and substituted with the following:

"The application for rescission of judgment is dismissed with costs."

DUBE JP ……. I agree

Calderwood, Bryce Hendrie & Partners, appellants legal practitioners
Makiya & Partners, respondent's legal practitioners