EVELINA MURAMBIWA N.O
versus
EDMUND MAIGURIRA
and
MAGISTRATE NYATSANZA N.O
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 27, 28, 29 January & 20 February 2020.

**OPPOSED MATTER**

*J Koto,* for the applicant
*N Chinhanu,* for the respondent
No appearance for the 2nd and 3rd respondents

CHIRAWU-MUGOMBA J: A lack of appreciation of the relevant legal principles pertaining to review applications for unterminated civil proceedings ended up clouding the real issues in this matter. Despite the clarion call on legal practitioners to exercise due diligence, this seems to be going unheeded.

In *casu,* the applicant seeks the review of two decisions by the magistrate court sitting at Harare in granting an *ex parte* application for stay of execution and another for rescission of judgment. The salient facts are as follows. On the 9th of July 2015, the applicant issued summons against the 1st respondent for his eviction from what she termed her late husband's house being stand number 2006, Glen Norah B, Harare. The applicant is the executrix of her late husband's estate. The matter proceeded to trial and reached a stage were the applicant was still being cross examined by the 1st respondent's legal practitioner. The matter was postponed several times until it was postponed to the 14th of July 2016. The 1st respondent and her legal practitioner did not turn up on that day resulting in a default judgment being granted. The 1st respondent filed an *ex parte* application for stay of execution upon the applicant instructing the messenger of court to effect a warrant of ejectment in pursuance of the default judgment. This application was granted by the 2nd respondent on the 5th of October 2016 according to the record cover though the date stamp on the actual order is the 6th of October 2016. The 1st respondent also made an application for rescission of

judgment that was granted in the court a *quo* presided over by the 2nd respondent on the 31st of October 2016. Irked by these decisions, the applicant filed the present application for review based on the following grounds:-

I. The 2nd respondent's decision to grant an application which was invalid for failure to comply with the rules was grossly irregular and must be set aside.

II. The 2nd respondent granted 1st respondent's a final order without hearing the other part (*sic)* on an application for stay of execution which was grossly irregular.

III. The decision to grant the stay of execution shows 2nd respondent's bias in that the founding affidavit was just scant and incompetent that no order for stay could be based thereon.

IV. The 2nd respondent's decision to grant relief to a litigant who had violated all applicable rules of the court also shows bias in favour of the said litigant and the decision must be set aside.

V. The 2nd respondent ought to have recused himself given his previous dealings with the parties and an earlier attack on his competence by the 1st respondent making it reasonably possible that he would be biased in the decision he was to make.

The applicant seeks the following relief:-

1. Application for review be and is hereby granted.
2. The decisions by the 2nd respondent made on 6 October 2016 staying execution of judgment and the decision of 31st October rescinding the judgment under case number 21426/15 be and are hereby set aside.
3. Any future proceedings in the dispute between the parties shall be heard before a different magistrate.
4. Any respondent who shall oppose this application to pay costs on an attorney and client scale.

The heads of argument filed by both the applicant and the 1st respondent's legal practitioners were not helpful as they did not address the pertinent legal issues raised by the proceedings in the court a *quo*. Mr *Koto* looked bemused when the court pointed out to him some of the leading cases relating to reviews for unterminated civil matters. He made the following submissions on behalf of the applicant. The 2nd respondent conducted his own

research and came up with non-existent facts. The application for rescission was made on the 3rd of October 2016 and yet the 2nd respondent stated that it was filed on the 16th of August 2016. His aim was to manufacture facts to suit his own ends. The 2nd respondent dealt with a matter that was not properly before him in view of the fact that the 1st respondent had not complied with the requirement to pay costs before a matter could be heard. The applicant raised a point in *limine* that the 2nd respondent agreed with which could have disposed of the application but surprisingly went on to decide the merits of the application. The bias of the 2nd respondent was cumulative regard being had to the facts placed before him. The 2nd respondent never made a finding on wilful default. Mr *Koto* conceded that the ground of the 2nd respondent refusing to recuse himself was not valid.

For the 1st respondent, Mr *Chinhanu,* made the following submissions. The 2nd respondent dealt adequately with the points in *limine* raised in the court *a quo.* The bias against the 2nd respondent is a mere allegation with no proof. Even if the 2nd respondent erred, it does not mean that he was biased. The applicant did not cry foul when the 2nd respondent granted a default judgment in an on-going trial. Based on the legal requirements, the 2nd respondent made the correct decision in finding that the 1st respondent was not in wilful default. Any allegation of bias is unsustainable.

From the grounds of review filed, grounds one and two are similar. Grounds three and four are similar. As already indicated, the applicant's legal practitioner correctly abandoned ground five on recusal since the record shows that the 2nd respondent invited the applicant and the 1st respondent's legal practitioners to make submissions on his recusal but no argument was led from both of them.

The pertinent legal issues raised *in casu* are as follows:-

a. Was the granting of the *ex parte* application for stay of execution and rescission of judgment in the court a *quo* grossly irregular?

b. Was there any bias shown by the 2nd respondent in granting both applications enunciated above?

c. In the event of the court finding gross irregularity and bias, what is the appropriate relief?

The starting point in *casu* is that of review of unterminated civil proceedings. In *Mashonganyika* v *Lena N.O and anor,* 2001(2) ZLR 103, CHINHENGO J aptly stated that the High Court will not review an interlocutory decision in civil or criminal proceedings, unless

the irregularity complained of is gross and the decision will seriously prejudice the litigants' rights, or if the irregularity is such that justice might not be served by any other means.

In *Charumbira* v *Commissioner of taxes and ors,* 1998 (1) ZLR 584 (S), it was held that the only ground for review the High Court can rely on was gross irregularity in the ***decision***, in the absence of allegations of irregularity in the ***proceedings***. Further that a gross irregularity might be found if the decision is so outrageous, irrational or absurd, but where as in that matter the only allegation was that the Magistrates who held the inquiry came to a wrong conclusion on the evidence, no ground for review was shown.

In *Bridge and Hulme (Pvt) Ltd* v *Magistrate, Bulawayo and anor,* 1996(1) ZLR 542, MALABA J (as he then was) pronounced eloquently the law on review of unterminated proceedings as follows:- a mistake of law is not necessarily an irregularity, entitling the proceedings to be reviewed. It is not unknown for a court to misread a statutory provision or overlook one not brought to its notice. But such a mistake could amount to an irregularity:-

a. Where a wrong question of law is asked, so that the lower court misunderstands the nature of the enquiry and misdirects its mind to wrong matters.

b. Where an error of law causes the lower court to fail to appreciate the nature of the discretionary powers vested in it.

c. Where the misconstruction of the provisions of the enactment causes the lower court a misconception for example declining to hear a case which it should properly hear.

d. Where the decision was dependant on the error of law or was substantially or manifestly influenced by it.

I will proceed to deal with the allegation of gross irregularity in granting the *ex parte* stay of execution and rescission of judgment. The record reveals that the *ex parte* application for stay of execution was filed on the 5th of October 2016 by the 1st respondent. The application was granted on the 6th of October 2016 as follows, '*The application for stay of execution issued under case number 21426/16 is hereby granted pending application for rescission of default judgment'.* From the onset it is important to note that despite the draft order being in the form of a *rule nisi,* the cover of the application states, *"Take notice that an application for rescission of judgment will be heard before this honourable court…".* This was despite paragraph 5 of the founding affidavit stating unequivocally that, *"This is an application for stay of execution against the respondents' notice of removal served on the*

*applicant on 29 September 2016'.* Neither the applicant's legal practitioner nor the 2nd respondent picked this anomaly. The main record does not contain the notice of opposition and the opposing affidavit to the *ex parte* application. This notice and affidavit appear as annexure 'G' to the founding affidavit in *casu.* The date stamp is not clear but it is dated the 14th of October 2016 on the cover. The date of commissioning of the affidavit is blank. It seems however that this notice and the opposing affidavit were filed well after the stay of execution had been granted.

At the relevant time, *ex parte* orders were governed by O23 R3 (2) of the Magistrates Court (Civil) Rules, 1980 that read as follows:-

> "(2) An order made ex parte, other than an order –
>
> a) for the arrest of any person; or
>
> b) referred to in section 38 of the Act; or
>
> c) of attachment of for rent under section 34 of the Act
>
> shall call upon the respondent to show cause against it at a time stated in the order, which shall not be a shorter time after service than the time allowed by these rules for appearance to a summons, unless the court gives leave for shorter notice."

The show cause order is commonly referred to as a *rule nisi.*

Herbstein and Van Winsen in the *Civil Practice of the High Courts of South Africa,* 5th ed @page 455, state as follows,

> It has already been pointed out that where an application is brought *ex parte* but the rights of other persons may be affected by the order, the court will not make an outright order but will grant a rule *nisi,* i.e. an order directed to a particular person or persons calling upon him or them to appear in court on a certain date to show cause why the rule should not be made absolute; or in other words, why the court should not grant a final order……The rules of court do not provide for the granting of a rule *nisi* by the court. Nevertheless, the practice in certain circumstances of doing so is firmly embedded in the South African law of procedure. This is recognised by implication in the rules.

In my view, O23 R (2) makes provision by implication for a rule *nisi.* In *casu,* what the court a *quo* granted was a final order. There was no 'return date' as the 2nd respondent erroneously stated in the reasons for ruling. There was nothing to 'return' to since a final order had been granted. While a court can grant an **order** (my emphasis), *ex parte,* such should be subject to the requirement that the affected party or parties be given an opportunity to be heard in opposing the granting of final relief. In *casu,* what is apparent is that the court a *quo* granted a final order without affording the applicant the opportunity to be heard. To that extent, the concerns of the applicant and the submissions made by Mr *Koto* are valid. This in my view points to an error of law on the part of the 2nd respondent. The pertinent question then becomes this- is that an irregularity entitling the proceedings to be reviewed? In my

view, the error does not meet the threshold of the exceptions stated in the *Bridges and Hulmes* case. I am fortified in my view based on the fact that even though the applicant was affected by the order, she had a remedy in terms of O23 R4 (3) which reads as follows, *"An order made ex parte may be discharged or varied by the court on cause shown by any person affected thereby, and on such terms as to costs as it thinks fit.* All that the applicant needed to do was to approach the court seeking variation of the *ex parte* order. For the avoidance of doubt, the order granting the application for stay of execution in the court a *quo* remains extant.

I now turn to the application for rescission of judgment. The record shows that the application was filed on the 5th of October 2016. The applicant's complaint regarding that application are five.

a. That it is only a party against whom judgment is granted who/that should apply on affidavit for the rescission. In this matter, the founding affidavit was deposed to by the 1st respondent's legal practitioner.

b. In the application, the defaulting party must explain their reasons for the default. In this matter, the explanation was given not by the 1st respondent but by his legal practitioner.

c. That the application must give grounds of defence to the action or proceedings in which judgment was given or of objection to the judgment.

d. The applicant must pay costs awarded against him before setting down the application for rescission. In this matter no such costs were paid. In addition, the application was filed out of time.

e. The applicant must pay security of costs first before set down. In this matter no such costs were paid.

The first three grounds are fallacious for the following reasons. In terms of O30 R1 (1), any party against whom a default judgment is given may apply. The application is in the sense of filing an application in the name of the person against whom default judgment was given. Such application shall be on affidavit stating the grounds of defence to the action or proceedings in which judgment was given or of objection to the judgment- see O30 R (2) (a) (b). There is no requirement that the affidavit must be that of the litigant. It can be by any person who has personal knowledge of the issues. To that extent, I agree with the

submissions by Mr *Chinhanu* to that effect. The applicant's legal practitioner was clearly misguided in their assertion that the application for rescission was defective simply because the founding affidavit was deposed to by the 1st respondent's legal practitioner.

With regard to the other two grounds of objection, the court was guided by the reasons for judgment in the court a *quo.* The 2nd respondent regarding security for costs stated as follows: - *"Secondly before an application for rescission can be set down for hearing, the applicant must first pay into court US$100 security costs together with the costs awarded by the court in the default judgment. This is mandatory and where the Clerk of Court has overlooked this, the court must still refuse to entertain a matter that is brought without such payment. .....Such proof of payment must be attached to the rescission application.* In support, he cited the case of *Mushuma* v *Mushonga*, HH-45-13. In terms of O30 R(3)(a) and (b), payment of costs is mandatory before an application for rescission can be heard. It is unlike an appeal from the Magistrate to the High court wherein the appellant can simply undertake to pay the costs for the record and for the appeal. Despite clear evidence that the 1st respondent had not paid the costs, the 2nd respondent whilst making correct observations on the law, did not reach nor record the legal conclusion on the non-payment and he proceeded to grant the application. This was a serious error of law on the part of the court a *quo.*

The time frame for filling an application for rescission of judgment in the court a *quo* is trite –see O30, R(4). The 2nd respondent correctly discussed the relevant legal provisions on this aspect. He concluded that, *"The application for rescission of judgment was then filed on the 16th of August 2016, well within the month".* The record shows that the default judgment was granted on the 14th of July 2016. This was a gross error on the part of the 2nd respondent. It meant that his calculation of the days was based on the wrong date. I agree with Mr *Koto* that the 2nd respondent seemed to have invented dates.

In the Magistrate court, it is trite that the first hurdle that a litigant who applies for rescission of judgment has to overcome is that they were not in wilful default – see O30 R(2)(1). Once they are found to have been in wilful default regardless of the merits, the matter ends there. In the court a *quo,* the law on wilful default was correctly identified. The 2nd respondent correctly stated that, *'Where there is evidence of wilful default, the court must not condone such by granting rescission.* In respect of the matter that was before him, no conclusion was reached on whether or not applying the law to the facts, the 1st respondent

could be said to have been in wilful default, a key finding before going into the merits in such matters. To that extent, there was a serious error of law.

The question to consider is whether or not the errors of law constitute a gross irregularity entitling the proceedings to be reviewed? In my view, the clear mistakes went to the root of the decision to grant the application for rescission of judgment. The court a *quo* clearly outlined the legal principles relating to security for costs; time frame within which to make an application for rescission and the question of wilful default. The court went on to deal with the merits despite no security costs having been paid; incorrectly stating the dates on which the application for rescission was filed thus falling into error in calculating the time frame and not concluding whether or not the 1st respondent was in wilful default despite this being the first rung of inquiry. The decision was therefore dependant on these errors and to that extent is reviewable and cannot be allowed to stand. The court is fortified in its view because the applicant does not have any other remedy. She could not appeal against the granting of the application for rescission since the order is not final and definitive.

The last valid ground for review relates to bias. Most applications on bias revolve around the recusal of the presiding officer. As already stated, the 2nd respondent invited the legal practitioners to apply for his recusal. The onus rests on the party alleging bias to establish this on review. In *casu*, Mr *Koto's* submission was that looking cumulatively at the circumstances in this matter, there was actual bias on the part of the 2nd respondent. In my view, the question of bias is intimately linked to that of recusal. There was no application made in the court a *quo* which would have enabled the legal practitioners to advance argument and make submissions on the alleged bias. What the applicant now seeks to rely on is actual bias which is a tall order. The bias is linked to an alleged letter authored by the applicant's legal practitioners and addressed to the 2nd respondent. The letter questioned his competence in the handling of the matter. Without any submissions having been made on bias and recusal in the court a *quo*, this court finds itself in a position of not being able to make a determination on this issue.

At the hearing, the court engaged with Mr *Koto* regarding the relief sought. In my view, it was not well thought out. The implications of setting aside the decisions to grant the application for stay of execution and rescission of judgment will mean that the default judgment will stand. It is similar to a situation envisaged in O30 R 2(3) were if an application for rescission is dismissed, the default judgement becomes a final one. There will therefore be no need for any future proceedings in the dispute unless the matter is remitted to

the court a *quo* to be heard before a different presiding officer. On costs, I have stated in many judgments that the carrot and stick approach of 'enticing' a respondent not to oppose an application lest they are made to pay costs on a higher scale has no legal basis in the law of Zimbabwe. It is clearly misguided because every person natural or juristic has a right to be heard. Ironically the applicant's contention in the *ex parte* application for stay of execution is that she was denied the right to be heard.

The application for review succeeds on the basis of the mistakes of law on non-payment of security for costs, reliance on wrong dates to calculate the time frame within which to file an application for rescission and non-conclusion of whether or not the 1st respondent was in wilful default. These constitute a gross irregularity. Although the applicant has succeeded in having the granting of the rescission of judgment set aside, she has not been 100% successful since the order for stay of execution will remain extant. Therefore each party will bear its own costs.

**Disposition**

It is ordered as follows:-

a. The decision of the court a *quo* of the 31st of October 2016 in case number 21426/15 granting an application for rescission of judgment be and is hereby set aside.

b. The application for rescission of judgment in case number 21426/15 in its present form shall be set down and heard before a different Magistrate within a period of 30 days from the date of this order.

c. The 1st respondent shall apply for a set down date for the application referred to in paragraph (b) above and the Clerk of Court of the Magistrates Court (Civil) Harare shall ensure that the matter is set down and heard within the stipulated time frame.

d. Each party shall bear its own costs.

*Koto and Company*, applicant's legal practitioners
*Scanlen and Holderness,* 1st respondent's legal practitioners