MARSHAL TAKUNDA MBERI
versus
ESQ. RUFARO MANGWIRO N.O.
And
DOREEN SAGANDIRA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 15 and 17 January 2024

Opposed Application for Review

W. Mangwende, for the applicant
E.T. Muhlekiwa, for the 2nd respondent

MUZENDA J: Applicant is seeking review of the Magistrate's judgment and is praying for the following:

"*1. That the judgment under SCC 75/23 given by 1st respondent dated 4 August 2023 be and is hereby set aside.*
2. That each party shall bear its own costs."

The application is opposed.

Background

On 31 December 2019, second respondent left a total of 140 bags of Compound D fertiliser in the custody of the applicant. Second respondent wanted to open a hardware using the acronym "*Million Hardware*." Applicant charged a rental of $500 United States Dollars per month. Second respondent said storage charges were pegged at US$20 per month. When second respondent went to collect the consignment, the store-room was empty. Applicant says it was second respondent who told him to dispose of the fertiliser at a cost of US$20 per bag and part of the consignment was collected by the agents sent by second respondent. The matter was eventually reported to the police and applicant was prosecuted and convicted of theft of trust property. The value of 140 bags of fertiliser was reflected on the state outline as US$4 200. The criminal court made a restitutory order of RTGS$33 600 and according to second respondent that amount represented 14 bags leaving value of 126 bags not catered for. Second respondent then approached the Small Claims Court (SCC) for a claim of 126 bags or their equivalent of US$3 780.

The court *a quo*[1] concluded that applicant was given the 140 bags of fertiliser but applicant disposed of them without second respondent's consent. It also concluded that the restitution paid to second respondent by applicant was for 14 bags only. It emphasised the fundamentals of restitutory orders as being to put complainant in a position she enjoyed before the deprivation of his or her property, court *a quo* granted in favour of second respondent after factoring in RTGS$33 600 and ordered applicant to pay second respondent US$3 780 and costs.

Grounds of Review

Applicant then filed the following grounds of review on 10 August 2023:

1. *The first respondent made a gross procedural irregularity by entertaining the matter a quo whilst it was res judicata.*
2. *The first respondent made a gross procedural irregularity by making an order sounding in United States Dollars when a court of the same jurisdiction made the amount sounding in RTGS.*
3. *The judgment by the first respondent was grossly irrational and highly irregular in that she believed that there was an error in the quantification of damages by a court of the same jurisdiction.*
4. *The decision of the first respondent is highly irregular in that it altered a judgment of a court of the same jurisdiction.*
5. *The decision of the first respondent is grossly irrational and highly irregular in that she passed a judgment without removing the amount agreed to by the second respondent as having been tendered.*
6. *The decision of the first respondent is highly irregular in that she made a funding of United States Dollars without any explanation as to why the RTGS$ value of the claim was not used.*

Applicant's Submissions

Applicant submitted that the trial court erred in varying currency in which restitution was to be paid two years after the Criminal Court order for restitution. In any case, it was further submitted on behalf of applicant, applicant had already made full restitution and the court *a quo* dealt with a matter where there was no cause of action. Applicant emphasized further that assuming there was a mistake on the part of the Criminal Court, second respondent

[1] On page 17 of the record of proceedings

was obliged to go back to the same Criminal Court for correction. The Civil Court could not vary that order. Applicant proceeded to refer to Section 365(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which bars a sentencing court: to alter its own verdict or sentence. Applicant also cited the case of *State v Maxwell Mutetwa*[2] and *Muhammed Akram v Olga Batti*[3] specifically reiterating that when a Criminal Court grants restitution it turns into a special Civil Court jurisdiction and once complainant is fully restituted he or she should not be allowed to get the same remedy twice. It is applicant's further averment that the court *a quo* erred in reopening the same case after having become *functus officio*. According to applicant the court *a quo* grossly erred in allowing second respondent to correct an error on the amount of the restitution. To applicant, second respondent lost her chance to get restitution at the Criminal Court and cannot be allowed to get the difference outstanding from applicant. On that basis applicant prayed for the relief as per draft order filed of record.

Second Respondent's Submissions

Mr *Muhlekiwa* submitted on behalf of second respondent that there is both neither legal nor factual basis to criticize the judgment of first respondent. Second respondent instituted action claiming 126 bags or US$3 780 from applicant and the first respondent granted the prayer. Applicant did not produce the summons commencing action, he did not produce copies of the criminal proceedings nor extracts of the state outline for all to see the nature of the actual order given by the Criminal Court. It was further argued by the second respondent's counsel that the grounds of review outlined by applicant in all characters constitute those of an appeal and not for review. On that basis second respondent submitted in principle that the application should be dismissed with costs on legal practitioner client scale. The conduct of applicant in pursuing the application lacks seriousness given the cases cited by both parties and it should have occurred to applicant long back that his application lacks merit, it was added on behalf of the second respondent.

The Law

In the matter of *Chief Constable of North Wales* v *Evans*[4] LORD BRIGHTMAN stated the following:

[2] HH 374/15
[3] HH 689/17
[4] (1982) 3 All ER 141 (HR) at 155C, cited by second respondent's counsel

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

In the case of *City of Harare* v *Zvobgo*[5] it was held:

"*The main difference between the two remedies is that in an appeal what is in question is the substantive correctness of the original decision whereas on review the High Court is not delving into substantive correctness of the decision, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was ultra vires the powers allocated to the tribunal."* [6]

In the matter of *Muhammed Akram* v *Olga Batti* [7] it was held per MUREMBA J

"Because compensation or restitution orders that are given in terms of s 358 under part XVIII are not civil orders, they are therefore not registrable as civil judgments in terms of s 372 (1) of the Criminal Procedure and Evidence Act. The compensation or restitution order in casu being one such order, it cannot be registered in terms of s 372 (1) of the Criminal Procedure and Evidence Act. The applicant should therefore institute civil proceedings against the respondent in order to get a civil judgment order. As it is, he has no civil order to register".

Applying Law to the Facts

Applicant spelt out six grounds of review basically dealing with the substance of the first respondent's ruling. A perusal of the record of proceedings before the court *a quo*, shows spirited efforts by applicant's counsel to frustrate second respondent's claim. Applicant at first raised a defense of prescription which was dismissed correctly by first respondent. Applicant was allowed to cross-examine second respondent about the whole matter of how the 140 bags of fertilizer were left at applicant's property. Applicant ran away from the claim and at the same time his defense was that he had fully restituted second respondent. The question is why was he asking second respondent questions on merits. He ought to have confined his questions on the fact that he had fully compensated second respondent. During the claim before first respondent, applicant was allowed to be legally represented contrary to the provisions of the small claims court. Applicant was allowed to cross-examine second respondent. He was allowed to present his case and call witnesses whereafter the court gave a ruling. As well espoused in the matter of *Bridges & Hulme (Pvt) Ltd* v *Magistrate, Bulawayo & Another.*[8]

"*The High Court does not have to concern itself with correctness or otherwise of the decision itself. A review of a decision involves going behind it and tracing the route taken by the inferior court leading up to the decision. In the performance of its review powers to see whether the*

[5] SC-04-09 cited by second respondent in her heads.
[6] Supra case cited by both litigants.
[7] See also Bridges & Hulme (Pvt) Ltd v Magistrate, Bulawayo & Another 1996 (1) ZLR 542 (H)
[8] Supra

> *inferior court followed the correct path defined for itself the correct legal issues, adopted the correct interpretation of the provision of the statute and based its decision to exercise jurisdiction on legitimate grounds; the High Court is concerned with establishing the validity of the decision*."

I totally subscribe to the above precedent. I will add that the High Court has also to look at the provisions of the Small Claims Court as well as relevant rules if any and juxtapose such to the procedure adopted by first respondent and see whether first respondent went off he prescribed route. Applicant in his grounds of review repeatedly used the words "gross procedural irregularity" "grossly irrational and highly irregular" to form the pith of his application. The use of such words does not move the court to interfere with the proceedings. An applicant must align the use of such words with extracts from the record or support such with facts derived from the record of proceedings to show that the court *a quo* side stepped the accepted standards expected of it. An examination of the papers of applicant exhibits unsupported allegations of procedural irregularity. I am persuaded by second respondent's submission that what applicant perceives as grounds for review are in actual fact grounds of appeal dealing with the substance of a judgment than the procedure. On that basis alone applicant's application lacks merit and it ought to fail.

There is also need to mention that it is the duty of an applicant who alleges a defence of *res judicata* to place all materials before the court for the latter to make a value judgment. In *casu* applicant ought to have obtained the criminal record of proceedings before the court *a quo* to enable it to decide on that aspect. The ground of *res judicata* was not crisply pleaded and well-presented before the lower court. It was therefore incumbent for the court *a quo* to look and assess facts underlying the restitution ordered as well covered by MUREMBA J in the *Muhammed Akram* v *Batti* (*supra*). Only after critically examining such proceedings would a court make a ruling appropriate in the circumstances. However such a course of action would not have been necessary since the court *a quo* was expected to look at the nature of claim brought by second respondent for the claim of US$3 780 being the balance outstanding.

On the question of costs second respondent citing the case of *Chidza* v *Sawyer*[9] urged the court to dismiss the application with costs on a punitive scale. Second respondent gave reasons for such a request and they appear to me sensible. Applicant knew the number of bags he stole, he knew the value of those 140 bags as well as the amount of local currency RTGS $36 000 he paid. From the start applicant had no defence to second respondent's claim yet he

[9] 1997 (2) ZLR 178(S) per MacNally JA

persisted with the application. He should meet all costs borne by second respondent on legal practitioner-client scale.

Consequently the following order is returned.

1. ***The application for review is dismissed.***
2. ***Applicant to pay 2nd respondent's costs on legal practitioner-client scale.***

Chigadza & Associates, applicant's legal practitioners
Muhlekiwa Legal Practice, 2nd respondent's legal practitioners