SYRUS MASTARA
and
GLORIA MASTARA
versus
TENDAI KUFA
and
JOCKSTAR INVESTMENTS

HIGH COURT OF ZIMBABWE
WAMAMBO AND MUCHAWA JJ
HARARE, 24 February & 25 March 2022

Civil Appeal

M Musimbe, for the appellants
A Mufari, for the 1st respondent
F T Chingoma, for the 2nd respondent

MUCHAWA J: After hearing the parties on the 24 February, 2022, we upheld the first respondent's point *in limine* and struck off the appeal with costs after delivering an *ex tempore* judgment. The appellants have since requested reasons for our judgment. These are they.

The judgment of the court *a quo* appealed against before us is one in which the now first respondent had filed an application for rescission of a default judgment granted against him on 19 July 2021. The court found as a fact that the first respondent had not been informed of the court date as the application served on him, did not, on the face of it, show a court date and did not have an interim order. It concluded that he was not in wilful default as he had not been made aware of the date of the hearing. It was also found that there were reasonable prospects of success and the application for rescission of judgment was granted with a direction that the matter be set down for hearing.

The grounds of appeal before us were as follows;

"The court *a quo* erred in law:-

1. By failing to reconsider and relate its ruling to the point *in limine* raised concerning the dirty hands principle.

2. By failing to uphold the point *in limine* raised by the appellants that the respondents had approached the court with dirty hands and withholding its jurisdiction as a result.

It was prayed that the appeal should succeed with costs with the judgment of the court *a quo* being set aside and to be substituted as follows;

> "The point *in limine* concerning the dirty hands principle in relation to the appellant be and is hereby upheld. The court accordingly withholds its jurisdiction."

Mr *Mufari* raised the point *in limine* that the appeal is improperly before the court as it is an appeal against an interlocutory ruling which has been appealed against without the leave of the court. The court was referred to decisions such as *Gold Reef Mining (Pvt) Ltd &Anor v Mnjiya Consulting Engineers (Pty) Ltd & Anor* HH 631/15 and *Nyamuswa* v *Mukanya* 1987 (2) ZLR 186 (S) and *Mushuma* v *Mushonga* HH 45/13 which have distinguished between purely interlocutory orders which are not appealable because they do not have a final and definitive effect on the main action and those whose effect would be a final determination on the issues between the parties. See *Blue Rangers Estates (Pvt) Ltd* v *Muduvuri & Anor* 2009 (1) ZLR 368 (S) it was prayed that the appeal be struck off with costs.

Ms *Musimbe* conceded that the decision appealed against is indeed an interlocutory one but argued that the position in the Magistrates' court is different due to the provisions in sections 39 and 40 of the Magistrates Court Act. She particularly argued that because of section 40 (2) (a), the High Court has power to entertain appeals on rescission rulings. She further argued that the cases relied on by the first respondent are all Supreme Court cases and would be inapplicable.

Mr *Chingoma* made no submissions as he registered that the second respondent has no interest in the matter which is really between the appellants and first respondent.

A good starting point is to consider what the Magistrates Court Act provides in the sections referred to by Ms *Musimbe.* Section 39 generally provides for when rescission and alteration of judgments can be done as quoted below.

> **"39 Rescission and alteration of judgment**
> (1) In civil cases the court may—
> (*a*) rescind or vary any judgment which was 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 or by mistake common to the parties;
> (*c*) correct patent errors in any judgment in respect of which no appeal is pending.

(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 powers shall be subject to appeal.
(3) Where an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the application and the direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the application."

Ms *Musimbe* then selectively referred the court to section 40 (2) (a) which provides that an appeal to the High Court shall lie against any judgment of the nature described in section eighteen and thirty nine. She conveniently left out what is provided as a qualification in section 40 (2) (b) that appeals shall lie against any rule or order referred to in section eighteen or thirty nine and having the effect of a final and definitive judgment.

"40 Appeals
(1) No appeal shall lie from the decision of a court if, before the hearing is commenced, the parties lodge with the court an agreement in writing that the decision of the court shall be final.
(2) 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;
(*c*) any decision overruling an exception when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case or when it includes an order as to costs."

She further ignored that in *Mushuma* v *Mushonga supra*, it was not a Supreme Court matter but a High Court matter in which the court zeroed onto the significance of section 40 (2) (b) in dealing with a matter wherein rescission of judgment had been granted.

In *Nyamuswa* v *Mukanya supra*, though it is a Supreme Court decision, it also dealt with the provisions of section 40 (2) (a) and compared them with section 40 (2) (b) of the Magistrates Court Act, and it was held that an order rescinding a default judgment is not a final order and would therefore not be appealable unless it has the effect of a final or definitive judgment or has been obtained on grounds which make the default order invalid or it has been obtained by fraud or a mistake. It was not argued for the appellants that the order is final or definitive, nor that it is a nullity or was obtained by fraud or a mistake. The argument was simply that in terms of section 39 as read with section 40 (2) (a) it is appealable. That argument has already been discarded by case law.

The law is settled and in *casu* as it is conceded that the magistrates' court decision is interlocutory, no appeal can lie against such decision. The appeal being improperly before us, it was struck off with costs.

WAMAMBO J AGREES ----------

M.S Musimbe. Appellants' legal practitioners
Marian F & Company, first respondent's legal practitioners
Jiti Law Chambers, second respondent's legal practitioners