JACOB MATINYARARE
and
PATIENCE CHIRIMUDONDO
versus
WILSON NYOKA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 1 June 2021 & 26 August 2021

Opposed Application

Mr D. Chirima; for both Applicants
Respondent; In person

ZISENGWE J: On the 7th of October 2020, the legal practitioner representing the two applicants failed to appear to argue an appeal set for that day resulting in their appeal being dismissed for want of prosecution. The Applicants through the present application seek to have that default judgment set aside and that appeal reinstated on the roll. The application is premised on the fact that such failure by their counsel to appear was through no fault of theirs nor that of the said legal practitioner. They attribute such non-attendance of counsel to a mix up at the offices of the Masvingo based correspondent legal practitioners, Ruvengo, Maboke and Company legal practitioners (hereinafter abbreviated as *"Ruvengo and Maboke"*).

Evidently, this application should more appropriately have been brought as an application for the rescission of the default judgment granted on 7 October 2020 rather than one for its automatic reinstatement. Reinstatement of the matter can only be sought once the default judgment has been rescinded. Be that as it may, this misnomer notwithstanding, the applicants addressed the factors germane to an application for rescission and thereafter sought to have the appeal matter reinstated on the roll.

The founding affidavit upon which the present application hinges was disposed to by one *Dryson Chirima* of Chirima & Associates legal practitioners of Chiredzi. He attributes his absence at court on the 7th of October 2020 to the failure by *Ruvengo and Maboke* to notify him that the appeal had been set down for that date. He further indicates that by sheer coincidence, on that very day (i.e., the 7th of October 2020) he happened to be at court attending to a completely different matter. Unbeknown to him, the appeal in question had been set down for hearing later that day. He claims he only got wind of the imminence of the hearing when he received a telephone call to that effect from *Mr Chavi*, who at the time was representing the respondent by which time, however, he had already returned to Chiredzi having attended to the matters that had brought him to Masvingo.

He claims that his frantic efforts to arrange for the postponement of the matter via the assistance of correspondent counsel proved futile as the latter was out of town. He states that he was assured that alternative counsel would be secured to attend to the application for postponement but that never came to fruition on account of impossibly short notice at their disposal to so secure the services of.

Mr Joannes Ruvengo and *Ms Sekai Hazangwe*, both *of Ruvengo & Maboke* deposed to supporting affidavits explaining the circumstances leading to the failure of their law form to apprise Mr Dryson Chirima of the date on which the appeal was set down.

Mr Ruvengo, who is a legal practitioner in that law firm, confirms not having informed Mr. Dryson Chirima of the set down date for the simple reason that he never received the notice of set down in the first place. His enquiries with the administrative staff of this law firm (notably the secretary), in the aftermath of the catastrophe of the dismissal of the appeal revealed that the notice of set down had unfortunately been misfiled. He blames this mix up on what he termed "the negligence of the secretary" who received and misplaced the notice of set down. He surmises that the fact that staff members at the law firm only reported for duty on a rotational basis contributed to the confusion.

For her part, *Ms Sekai Hazangwe*, a secretary in that law firm acknowledged having received the notice of set down in question but having inadvertently misfiled it, which error she blames on her "overwhelming typing duties ". She indicates in the affidavit filed in support of the present application that she has no recollection of what became of that notice of set down after she

received it, implying that it must have gotten concealed with other documents clattering her work station.

Although she does not say so in as many words, the import of her explanation is that the consequence of this mishap was an unfortunate domino effect. This is because she then failed to inform *Mr Ruvengo* of notice of set down, who in turn failed to inform *Mr Dryson Chirima* of the same. The consequence therefore was that the latter failed to turn up for the appeal thus leading to the dismissal of the appeal for want of prosecution.

In his founding affidavit *Mr Dryson Chirima* also addresses the prospects of success of the appeal same being germane an application of this nature. It is his contention that the court *a quo* erred in purporting to allow the withdrawal of a civil claim (GL 326/18) after the applicants (then as defendants) had consented to the same.

The claim was for the payment of the sum of $5500 being of moneys paid by the respondent to the applicants for the procurement of a motor vehicle from Durban South Africa on behalf of the respondent which motor vehicle the applicants had failed to deliver. The nub of the claim was that the two applicants had swindled him of that sum of money as they never intended to procure such motor vehicle in the first place.

The claim was initially resisted and the matter proceeded to trial. However, on 18 December 2018, the applicants entered consent to judgement in the sum of $5519 and promptly made payment into court in the stated amount which was denominated in Zimbabwe dollars.

It was then that the respondent withdrew that initial claim and filed another one for the same amount, but this time specifically denominated in United States dollars. This was under case No. GL 28/2019.

During the ensuing trial, the court was called upon to adjudicate *inter alia* on the propriety of the withdrawal of the matter which had been consented to and the institution of a subsequent one with the same cause of action with the only difference (as stated earlier) being the substitution of Zimbabwe dollars by United States Dollars.

Needless to say, the court found for the respondent and proceeded to grant judgement as claimed in United States Dollars.

It was then that the applicants filed the appeal which however appeared to be still-born in the wake the failure of applicants' counsel to appear on the date of hearing.

The application is resisted by the respondent who raise some four preliminary points which according to him are potentially dispositive of the matter and it is to these that I now turn. He enumerates the following in this regard:

1. The improper designation of the applicants as "appellants" instead of Applicants on the face of the application.
2. The failure by the deponent to the founding affidavit to append his signature on the same.
3. The failure by the applicants to depose to affidavits in support of this present application
4. The use of the wrong form of application.

Each of these will be addressed seriatim.

The improper designation of the parties.

In the answering affidavit *Mr Chirima* expresses regret over the erroneous reference to the applicants in the heading of the application as “appellants. He attributes the same to a typing error. I am inclined to accept the explanation proffered in light of the overall contents of the application which admit of no doubt that the matter relates to an application as opposed to an appeal. Although the applicants did not say so on terms, they seek condonation for the improper designation of the parties. I am prepared to condone the patent "slip of the pen" particularly given that to do so would not prejudice the respondent. In this regard I embrace the sentiments of MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Others* HH 446-15 where he warned litigants against over-fastidiousness on form at the expenses of resolution of the real dispute between them. He said the following:

> *"I take the view that the rules of court are there to assist the court in the discharge of its day to day function of disposing justice to litigants. They certainly are not designated to impede the attainment of justice. Where there has been substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B, when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by 4C of the High Court Rules, I condone the omission."*

I respectfully adopt a similar approach and condone, as I hereby do, applicants' erroneous citation of themselves as "appellants" instead of applicants, which error I find innocuous in the circumstances.

Absence of affidavits by the applicants.

The respondent takes issue of the absence of an affidavit by either of the two applicants. In his view this renders the application fatally defective. *Mr Dryson Chirima* holds a different view. He contends that it is perfectly permissible for a legal practitioner to depose to affidavits on behalf of his clients particularly where the information conveyed therein is peculiarly within his knowledge.

I hold the view that the two cases on which *Mr Chirima* relies namely *Metal Sales (Pvt) Ltd v Sakurai Mbanda t/a FAUNORLD Enterprise HH 812/16 and Zimbabwe Banking Corporation Limited v Trust Finance Limited & Another 2000 (2) ZLR 404 (H)* are quite instructive. The facts of the Metal Sales case (*supra*) are similar to the present matter in many material respects. In that case the legal practitioner representing one of the parties in an application for summary judgement had erroneously diarised the time when the matter was scheduled to be heard resulting his failure to attend court and a dismissal of the same. In a subsequent application for the rescission of that default judgment the said legal practitioner deposed to an affidavit explaining the reason for default. When the respondent challenged the propriety of him doing so, the court said the following:

> *"There is a plethora of case authorities which support the proposition that a legal practitioner can, in such cases as the present one, depose to an affidavit for and on behalf of his client. Mandaza v Mzilikazi Investments (Pvt) Ltd 2007 (1) ZLR 77 at 79 is one such case wherein NDOU J remarked.*
>
> > *'If the facts are within the knowledge of the legal practitioner, he may swear an affidavit on behalf of the client.'*
>
> *The facts of the present case, it needless to emphasize, were known to Chapwanya. They were not known to Metal Sales. Chapwanya stated as much during submissions. He, accordingly acted properly when he deposed to the founding affidavit."*

In the same judgement the court also dealt with question of whether or not the legal practitioner in *Mr Chirima's* position would require the authority of the litigant to depose to the affidavit in support of the application and concluded that such authority is superfluous. The following was said in this regard:

"Chapwanya did not require the authority of Metal sales to depose to the affidavit as he did. The authority which metal sales conferred upon him when it engaged him as its legal practitioner of record sufficed. The courts assertions in the mentioned regard is in sync with the remarks of GOWARA J (as she then was) wo in TFS Management Co (Pvt) Ltd v Graspeak (Pvt) Ltd & Another, 2005 (1) ZLR 333 at 338 dealt with the issue where a legal practitioner, a Mr Lloyd, deposed to an affidavit for and on behalf of his client. The learned Judge remarked:

> *'It would be an absurdity for Mr Lloyd to be given the mandate to sue for the claim and not to have the authority to depose to an affidavit in the name of the applicants where such affidavit would be in relation to matters particularly within his knowledge for purposes of the successful performance of that mandate. It cannot be suggested on the part of the respondents that a legal practitioner instructed to resent a litigant is obliged, each time it becomes necessary to issue process pertaining to the matter at hand, to obtain and exhibit, for the information of the put against to that dispute, authority to institute proceedings of an interlocutory nature.*

See also ***Zimbabwe Banking Corporation Limited v Trust Finance Limited & Another*** *2006 (2) ZLR 404.*

That puts paid to the respondent's contention that *Mr Dryson Chirima* lacked the authority to depose to the affidavit in support of the application for the reinstatement of the appeal.

The missing signature on the founding affidavit.

The respondent questions the validity of *Chirima's* founding affidavit given that the copy with which he was served apparently does not bear *Chirima's* signature, a development to which the latter expresses surprise. He explains that the appended his signature on several copies of the affidavit and surmised that service of an unsigned copy thereof on the respondent if ever such was the case, was purely accidental. He offered respondent a duly signed copy of the affidavit by way of rectification of the error.

Unfortunately, the respondent did not attach to his notice of opposition, a copy of the unsigned affidavit nor did he avail the same at any time thereafter. The copy filed of record was duly signed and in the absence of the unsigned copy it would be difficult for this court to accept respondent's position upon his mere *ipse dixit*. In any event, however, the explanation proffered by *Mr Chirima* that, if respondent's copy was indeed unsigned, this was an unfortunate oversight rings true given that the copy filed of record was signed. I therefore dismiss this last point in *limine* and proceed to the merits of the application.

As indicated earlier, in essence this is an application for the rescission of a default judgment coupled with an application for the reinstatement of the appeal on the roll.

In *Stockil v Griffiths* 1992 (1) ZLR 172 (S) GUBBAY CJ had this to say regarding the factors germane to an application for rescission of a default judgment:

> *The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86 (not reported); Roland & Anor v McDonnell 1986 (2) ZLR 216 (S) at 226E-H; Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the bona fides of the application to rescind the judgment; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole.*

The explanation for the non-attendance.

While the remissness in the conduct of personnel in the office of Ruvengo and Maboke is nothing to be proud of and must be censored, I however hold the view that between them the staff from that law firm managed to take the court into their confidence and provided a plausible explanation for their failure to notify *Mr Chirima* of the set down date with the consequences referred earlier. I also find the promptness with which the applicants reacted upon discovering that the appeal had been dismissed in their absence indicative of their intention to prosecute the appeal to its logical conclusion. The appeal was dismissed on the 7th of October 2020 and hardly three days later the current application was launched.

Prospects of success.

The appeal against the decision of the Magistrate court in my view enjoys reasonable prospects of success. It involves an interrogation of the vexed question regarding whether a plaintiff can legitimately withdraw (as the respondent did) a matter after the defendant has entered consent to judgement and has paid into court what he believes is the sum for which he was sued.

Unfortunately, there appears to be a dearth of case law authorities on this particular point. It begs the question whether or not the respondent was not required to, should he have held the belief that the amount so consented to and paid into court (ZWL $ 5500) was less than what he sued you, he should have proceeded with his suit in terms of order 11 rule 1 (4) of the Magistrate court Rules 2018. The said rule reads:

Order 11

Judgement by Consent or Default

Consent to judgement and effect in cost; effect of partial consent and joint consent

1. *.....*
2. *……*
3. *……*
4. *If the defendant's consent is for less than the amount claimed in the summons-*

    a) *…….*

    b) *Notwithstanding a judgement upon such consent, the action may proceed as to such balance and it shall in that event be in all subsequent respects an action for such balance.*

Viewed from a different angle, the question that falls for determination in the appeal is whether or a consent to judgement coupled with a payment into court renders the matter *res judicata* as contended by applicants.

Overall, therefore, the appeal raises important legal questions and cannot be viewed as hopeless for the above reasons, I was inclined to, as I do, exercise my discretion in granting the application for the reinstatement of the appeal.

Costs

Although the general rule is that the substantially successful party (which the applicants have been) is entitled to costs, I am disinclined to so award costs given the slipshod manner in which their legal practitioner's correspondent attorneys handled the question of the set down of the matter which in ultimately necessitated the current application.

Accordingly, the following order is hereby given

Order

It is hereby ordered that:

1. The default judgment granted on 7 October 2020 in case Number CIV "A" 55/2019 is hereby set aside.
2. The application for reinstatement is hereby granted.
3. The appeal filed under case No. CIV 'A' 55/19 be and is hereby reinstated on the roll.

4. There shall be no order as to costs.

ZISENGWE J

Chirima & Associates, applicants' Legal Practitioners