CITY OF MUTARE
and
DIRECTOR OF HOUSING AND COMMUNITY SERVICES DEPARTMENT
CITY OF MUTARE
versus
ROSEMARY MAKOMBE
and
JOSEPH MUSUNGANI

HIGH COURT OF ZIMBABWE
UCHENA AND MWAYERA JJ
HARARE, 17 July and 2 October 2014

Civil Appeal

D. Tandiri, for the appellant
First respondent in person

UCHENA J: This is an appeal against the dismissal of the appellant's application for rescission of a default judgment granted by Mutare Magistrate's Court. The appellant had applied for the postponement of a Pre-Trial Conference to a date it specified in its application. The application was heard and granted in its absence but to a date earlier than the one it had specified.

The appellant did not attend court on the day to which the case had been postponed. It was held to be in wilful default and a default judgment was granted against it. It applied for its rescission. The application for rescission was dismissed the court *a quo* holding that the appellant had been in wilful default.

The appellant's explanation for its default on the day to which the case had been postponed was that there was a week end between the date of its application being granted and the hearing date. It had not yet followed up its application for postponement when the default judgment was granted. This is not in dispute. It is therefore not clear how the Magistrate came to the conclusion that the appellant was in wilful default.

The determination of this appeal depends on what is a wilful default. In the case of *Fletcher* v *Three Edmunds (Pvt) Ltd*; *Vishram* v *Four Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (SC) at pp 259 G-H and 260 A-C GUBBAY CJ commented on wilful default as follows;

> "First, it was submitted that the rationale for the finding that the defaults were wilful was wholly misconceived. I have no hesitation in agreeing with counsel. The failure on the part of the appellants to enter an appearance to defend within the prescribed period did not, per se, signify wilfulness. What should have been considered, but was not, was whether the explanation advanced for such failure was of unacceptable cogency, in the sense that the inevitable inference it gave rise to **was deliberate acquiescence not to defend the action. Put differently, but to the same effect, whether with full knowledge of the service of the summons and of the risks attendant upon default, a decision to refrain from appearing was freely made.**
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> Order 30 Rule 2(1) of the Magistrates Court (Civil) Rules expressly provides that a magistrate has no power to rescind where the default was wilful. The enquiry terminates with that finding. Indulgence must be withheld. See Neuman (Pvt) Ltd v Marks 1960 R&N 166 (SR) at 168B-C; Gundani v Kanyemba 1988 (1) ZLR 226 (S) at 228F; Karimazando v Standard Chartered Bank Zimbabwe 1995 (2) ZLR 404 (S) at 407E-F.
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> **In these matters, the appellants plainly laboured under the belief that the Harare magistrate's court was not operating due to the collective job action taken by Public Service employees. Absent that mistaken perception, the probability was that appearances to defend would have been entered on or before 27 August 1996."** (emphasis added)

This case proves that failure to attend court, due to a mistake as to what date the case has been postponed to, is not a wilful default. It also points out that the court should in determining whether or not there is wilful default, asses whether the explanation advanced for such failure was of unacceptable cogency, in the sense that the inevitable inference it gave rise to was deliberate acquiescence not to defend the action. In this case the applicant had applied for a postponement to a date when it was going to defend itself against the respondent's claim. It is common cause that the Pre-Trial Conference was postponed in its absence and to a date earlier than the one the appellant had applied for. It cannot therefore, be said that it deliberately chose not to defend the respondent's claim.

In the case of *Zimbabwe Banking Corp Ltd* v *Masendeke* 1995 (2) ZLR 400 (SC) at pages 402 C-H and 403 A-B, McNALLY JA commending on wilful default said;

> "It seemed to us, with respect, that the learned judge erred, both as to the concept of wilful default, and as to the fact that no explanation had been proffered.
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> **Wilful default occurs when a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing: Neuman (Pvt) Ltd v Marks 1960 R & N 166 (SR) at 169; 1960 (2) SA 170 (SR) at 173; Simbi v Simbi S-164-90 at p 6; Mdokwani v Shoniwa 1992 (1) ZLR 269 (S) at 271.**
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> **Here there was a mistake. It was clearly a mistake. Zimbank had no possible reason to allow the claim against it (which was for $50 000) to go by default.** No-one, and in that term I include Mr Moyo of Chikumbirike and Associates who acted for Mr Masendeke, could reasonably have thought otherwise.
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> The mistake was, like many mistakes where documents go astray in the filing system of an organisation, inexplicable. And one wonders how the court would benefit if a minute and detailed investigation were to reveal how the summons came to be filed without coming to the attention of the General Manager. The important explanation is that it was filed, and it did not come to his attention.
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> It is a credible explanation precisely because of the point I made earlier the extreme improbability that Zimbank, through its General Manager, would intentionally abstain from defending this claim.
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> So the explanation that the summons was filed in error is an explanation. The learned judge was wrong to say there was no explanation. How it happened may be inexplicable, but that it happened is undeniable. **The wilfulness of a default is seldom, if ever, clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the negligence and the merits of the defence. See Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S); Stockil v Griffiths 1992 (1) ZLR 172 (S); and Mdokwani v Shoniwa supra."** (emphasis added.)

This case is important for establishing that a default due to a mistake is not wilful and its explanation of when wilful default can be deduced from the defaulter's gross negligence. The case establishes that only gross negligence can establish wilful default subject to its being weighed against the merits of the defence.

In the case of *Neuman (Pvt) Ltd* v *Marks* 1960 (2) SA 170 (SR) at p 173 A-C MURRAY CJ dealing with what is wilful default said;

> "A defendant may be most unwilling to suffer a judgment to be entered against him and the consequences of such a judgment are such that he cannot in fact be indifferent to them, particularly if (as in the present case) he has placed a plea and counterclaim on record. **The true test, to my mind, is whether the default is a deliberate one - i.e. when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing. I can do no better than quote the following passage from the judgment of BOWEN, L.J., in the case of In re Young and Harston's Contract, L.R. 31 Ch. Division at pp. 174, 175, a passage approved by GARDINER, J.P., in Hendriks v Allen, 1928 CPD 519,**
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> **'The other word which it is sought to define is 'wilful'. That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. Now, if that is all you can get out of the analysis of these words, it becomes plain that to endeavour to classify every conceivable contingency with a view of defining what will be and what will not be wilful default, would be idle. You cannot define the words 'wilful default' more than I have defined them. And I only use the definition for the purpose of shewing that the term is a simple one and not technical at all."** (emphasis added)

This means the words "wilful default" must be given their ordinary grammatical meaning, and should not be stretched to establish none existent wilfulness as was done in this case. The appellant was not aware of the date to which the case had been postponed. It had asked the court to postpone the case to a specific date. The court had unbeknown to the appellant postponed the case to another date which was earlier than the date it had applied for. It cannot therefore be said that the appellant was in wilful default. It cannot also be said that its failure to attend court was due to gross negligence. The appellant's intention to defend is apparent from the record. The court *a quo* erred when it dismissed the appellant's application for rescission.

The appellant's appeal is up held.

The order of the court *a quo* is set aside and is substituted by the following;

(a) The application for rescission of default judgment be and is hereby granted.

(b) Costs be in the cause.

MWAYERA J concurs----------

Messers Tandari Law Chambers, Appellant's Legal Practitioners
Respondent In Person