JOSPHAT MASAITI
and
CHARLEEN MAONANJI PHIRI
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MANGOTA, MWAYERA JJ
HARARE, 28 February, 2014

Civil Appeal

E. Chimombe, for the appellant
Defendant In Person

MANGOTA J: This is an appeal against the decision of the trial magistrate who ruled in favour of the first respondent in a rescission judgment application.

The appellant's legal practitioners set out in a clear and lucid manner, the background of this case in their introductory remarks to the appellant's Heads of Arguments. We see no reason which persuades us to depart from that well-structured background the contents of which, in part, read as follows:-

(1) the first respondent issued a summons out of Chipinge Magistrate's Court on 11 September 2012 claiming against the appellant the sum of $2 339 and costs,

(2) on 13 December, 2012 the summons was served at the appellant's business premises through the appellant's clerk, one Daniel Murima. No appearance to defend was entered and, as a result, judgment by default was granted on 28 December, 2012,

(3) on 9 January, 2013 an application for rescission of judgment was filed. It was opposed by the first respondent and was subsequently dismissed by the trial magistrate. It is against the trial magistrate's decision that this appeal now lies.

In his grounds of appeal, the appellant raised two matters which, more often than not, guide courts when they deal with applications for rescission of judgment. He, in short, said

(a) he was not in wilful default - and

(b) he has a *bona fide* defence to the first respondent's claim.

In so far as the first matter is concerned the respondent submitted that he was not at his place of work when the second respondent served the summons on his clerk, Daniel Murima. He said he had gone to his farm. He stated, further, that his clerk did not deliver the summons to him on his return to his business premises. Daniel Murima handed the summons to him on 7 January, 2013 and when the second respondent had made his second visit to his premises, according to him. He said, on this second visit, the second respondent had brought with him a writ of execution against his property.

Daniel Murima deposed to an affidavit the contents of which were substantially on all fours with the testimony of the appellant on this matter. He confirmed that he received from the second respondent a document which he did not understand. The appellant was not at his place of work when he received the document, he said. He stated that he forgot to deliver the document to the appellant on the latter's return to work and that he only did so when the second respondent had, once more, called at his place of work with a warrant of execution against the appellant's property. He said he gave the summons to the appellant on 7 January, 2013.

It is on the basis of the foregoing submissions that the appellant insisted that he was not in wilful default. He argued that, if the existence of the summons had been drawn to his attention, he would most certainly have entered appearance as it was his intention to contest the first respondent's claim. Counsel for the appellant referred the court to case law authority which, it was considered, supported the position of the appellant. The case which the appellant relied upon on this matter is that of *Zimbabwe Banking Corp.* v *Masendeke*, 1995(2) ZLR 400,402 wherein McNALLY JA (as he then was) clarified the issue at hand in the following words:-

> "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".

The appellant said he did not take the decision to refrain from appearing. He said he had no knowledge of the fact that service of summons which the first respondent had caused to be issued against him had been made at his business premises and on his clerk.

The first respondent stated, in her Heads of Argument, that the appellant approached the second respondent after the latter had served the summons on Mr Murima. She said he approached the second respondent with an offer of an out of court settlement. She submitted that the appellant proposed a monthly payment plan of $200 which she considered as having

been an unreasonable offer which she did not accept. The respondent did not, however, request the second respondent to depose to an affidavit which supported what she was saying on the matter. Her testimony on that point is, unfortunately for her, premised on hearsay evidence which is inadmissible.

The question which the court must answer is whether, or not, the appellant's story can possibly be reasonably true. If it is, then he was not in wilful default in the context of the cited *Zimbabwe Banking Corp.* v *Masendeke* case otherwise he was, or is, in wilful default.

An examination of the evidence which the appellant gave will, in the court's view, unravel the veracity, or otherwise, of the story which he told. The court mentions in passing that the trial court dismissed the appellant's application for the wrong reason. It based its decision on the finding which it made that service of summons on the appellant's clerk was proper service. The issue, with respect, was not whether, or not, service of the summons on the appellant's employee was proper service. The issue which should have exercised the court's mind under the circumstances of this matter was whether, or not, the appellant was in wilful default in the context of the case of *Zimbabwe Banking Corp* v *Masendeke*.

The court now proceeds to examine the appellant's first matter in the context of the cited case. The appellant described his employee, Daniel Murima, as having occupied the position of a clerk at his place of work. It requires little, if any, effort to observe that Mr Murima was literate enough not to confuse such important court process as a summons with an ordinary piece of paper. The summons which the second respondent left with him did have, on its face, the words "Summons Commencing Action …, Clerk of Court … Magistrates' Court for the Province of Manicaland …. held at Chipinge" in addition to the names and addresses of the appellant and the first respondent as well as the claimed sum of $2 339 and the stated particulars of claim all of which was in hand-written form. He certainly would not have the court believe that he did not understand the contents of the summons in his position as a clerk. He, if anything, understood everything which was written on the face of the summons and he chose to depose to an affidavit in which he told falsehood with a view to supporting the claim of the appellant who was, or is, his employer. His assertion which is to the effect that the second respondent gave him documents which he did not understand is totally unacceptable when his level of education, though unknown presently, is taken into account. No business person would, in the court's view, employ a totally iliterate person in the position of a clerk. That is so as it is the work of a clerk in any organisation to handle practically all papers, including correspondence which comes into, or goes out of, the

organisation for which the clerk works. Mr Murima's claim would have held if his position at the appellant's business premises was described as having been that of a general hand as opposed to that of a clerk.

Further, the summons did not reach him by ordinary post. The second respondent hand-delivered it to him. The second respondent, in the court's view, did not just leave the summons with him. He must, at the time that he hand-delivered it, have explained to Mr Murima the meaning and importance of the summons in addition to him reading what was on the face of the summons. It is for the mentioned reasons, if for no other, that the court dismissed Mr Murima's assertion that he did not understand the meaning and/or import of the document which the second respondent left with him.

It is common cause that the second respondent served the summons on Mr Murima on 13 December, 2012. It is also common cause that Daniel Murima handed the summons to the appellant on 7 January, 2013 and when the second respondent had, once again, called at the appellant's business premises with a writ of execution. The second respondent's second visit to the appellant's business premises was made by him on 4 January, 2013.

Daniel Murima said he kept the summons with him from 13 December, 2012 to 7 January, 2013 which is the day that he handed the summons to the appellant. He kept the summons with him for a stretch of some twenty-five (25) days running. He claimed that he forgot to hand over the summons to the appellant. He said he only remembered about the summons when the second respondent called at his place of work with the warrant of execution on 4 January, 2013. The court will accept, for argument's sake, that Mr Murima forgot to hand the summons to the appellant for a period of twenty-five days. The second respondent's second visit to Mr Murima's place of work was even more serious than his first visit to the same. That visit was serious in that the second respondent brought with him a warrant of execution against the appellant's property. With this grave matter in his mind Daniel Murima did not profer any explanation as regards the fact of why he chose to keep the summons with him for a further two or three days. The second respondent visited him on 4 January, and he only handed the summons to the appellant on 7 January, 2013 according to him. He, as of 4 January, 2013 was very much aware that the summons which the second respondent left with him on 13 December, 2012 did have grave implications on the appellant who was, or is, his employer. He, as of that date, became conscious of the fact that his own employment might be on the line if the appellant's goods were attached and removed from the appellant's business premises as well as sold in execution of the judgment. With his

appreciation of the grave consequences which were about to befall his employer, Mr Murima would not have allowed the matter which related to the existence of the summons, let alone the warrant, to remain undisclosed to the appellant for even one minute. He would, in all probability, have done all he could to draw the appellant's attention to the existence of the summons and the warrant with immediate effect. He would have done so with a view to affording the appellant an opportunity to deal with that court process without any further day. Mr Murima offered no reason at all for his statement which was to the effect that he handed the summons to the appellant on 7 January, when the second respondent served the writ upon him on 4 January, 2013. It is not only improbable but is also impossible that Mr Murima kept the summons and the warrant to himself and did not disclose their existence to the appellant for some two or three days. As a conscientious clerk, which the court believes he was, he would have taken advantage of all technological advances which are available in the country and would have phoned the appellant to advise him of what was coming the latter's way if the appellant was not at work when the second respondent served the writ of execution upon him. His assertion on this point does not, therefore, hold. It is, in the court's view, a story which the appellant and his clerk concocted with a view to supporting the appellant's claim that he was not in wilful default.

Neither the appellant nor Daniel Murima were able to tell the court where the appellant was when the second respondent made his second visit to the appellant's business premises. That matter was left unmentioned by both of them. They could not mention it as they had no explanation for it.

The appellant filed his application for rescission of judgment on 9 January, 2013. He did so after Mr Murima had drawn his attention to the existence of the summons on 7 January, 2013. His inaction for the whole of 8 January, 2013 as regards such a grave matter as had been disclosed to him remains inexplicably untenable. The seriousness of the matter which was confronting him as disclosed to him on 7 January, 2013 according to him, would not have allowed him to wait for even an hour without having attended to it.

All the above-analysed matters go to show nothing except that the appellant was being economic with the truth when he asserted, as he did, that he was not in wilful default. What came out of his affidavit and that of his clerk was, in the court's view, rehearsed pieces of evidence which were aimed at convincing the court that the appellant was not in wilful default. His claim on that matter is a made up one which, unfortunately for him, could not, and did not, hold.

The matter which relates to the present appeal was grounded on an acknowledgement which the first respondent attached to the summons commencing action. The first respondent marked the agreement annexure A. The annexure was signed, witnessed and dated 4 October, 2011. It, in part, reads:

> "TO BE PAID…..
>
> On this day it has been resolved that Finewood owes Mangena $11m^3$ valued at $2 932 which amount payable as soon as possible".

It was the appellant's submission that the annexure formed the basis of his defence to the first respondent's claim. He stated that the agreement was not between the first respondent and him. The agreement, he said, was between the first respondent and a company called Finewood. He argued that the first respondent sued the wrong party. She should have sued Finewood and not him, he insisted. He argued and stated that it was on the basis of the above mentioned assertion that he maintained the position that he has a *bona fide* defence to the first respondent's claim.

The first respondent insisted that she dealt with no one else but the appellant in all the transactions which pertained to the present case. She said it was the appellant who reduced his indebtedness to her by paying all the sums of money which are reflected under the signatures of the parties on the annexure. The sums in question are $400 which was paid on 6 October 2011, $120 which was paid on 26 November, 2011 and $80 the date of payment of which was not recorded. The balance which remained outstanding was recorded as having been $2 332 which is just about the sum that the first respondent is claiming from the appellant.

In his Heads of Argument, the appellant made reference to the annexure and said:-

> "The appellant has a *bona fide* defence on the merits of the case. The defence carries prospects of success. Annexure A relied upon by the court *a quo* clearly shows that it is not the appellant who owed the respondent in his personal capacity. The debtor according to Annexure A is a company called Finewood (Pvt) Ltd. A company is a distinct legal person from members comprising it. The appellant is merely one of the directors. Annexure A filed of record is an agreement which shows acknowledgment that the <u>company</u> owes now respondent the said amount. Hence the respondent sued the appellant wrongly. Thus the appellant has a genuine defence on the merits of the case".

A reading of the court *a quo*'s reasoning on this point shows that the trial magistrate did not appreciate the argument which the appellant was advancing on the matter at hand. He, because of that, dealt with that matter in a cursory fashion which was difficult to

comprehend. His position on the same became even more difficult to comprehend than otherwise in the statement which he made in response to the appellant's grounds of appeal. He stated, in his response, that:

> "… they filed an acknowledgment of debt Annexure A shows that the appellant had no defence to the claim since an acknowledgment of debt is considered a liquid document sounding in money".

With respect to the trial magistrate's abovementioned reasoning, the issue which the trial court was called upon to decide was not whether, or not, the appellant acknowledged the debt which forms the basis of the first respondent's claim against him. The issue was whether, or not, it was the appellant or his company, Finewood, who or which owed the money to the first respondent. The hurried manner in which the trial court appeared to have dealt with the case does, in the court's view, account for the confused state in which the decision was arrived at. The trial magistrate, in the circumstances, opened herself to criticism which, unfortunately for her, falls entirely on her work as a judicial officer. It is very important for a judicial functionary before whom a matter lies for decision to always make an effort to appreciate the issues which are before him and then proceed to deal with them in an as judicious a manner as his judicial mind allows him to in order for him to escape or avoid such criticisms as were levelled against the trial magistrate in this case.

An examination of the annexure shows that the word Finewood was not suffixed with the words "*private"* "*limited*" to indicate to the world at large, the first respondent included, that Finewood is a legal entity which stands on its own and is separate as well as distinct from its directors and shareholders, if such did exist. The annexure shows, further, that the persons who appended their signatures to the annexure did not make any effort to indicate to the world, or to the first respondent, that they were signing the document not in their personal capacity but for, and on behalf of, their company, or companies. The person who signed for, and on behalf of, Finewood gave a clear impression that he, or she, was signing the annexure in his, or her, individual capacity. It is when such matters as have been observed are taken into account that the first respondent's assertions remain difficult to dismiss as being without substance.

On the basis of the foregoing, therefore, the court is convinced that the first respondent contracted with no one else but the appellant. He in the words of the first respondent, reduced the debt which he owed to her by the sum of $600 *in toto*. He left a balance of $2 332 which the first respondent is lawfully claiming from him. The appellant's

story which is to the effect that the first respondent should have sued Finewood and not him does not hold at all. Finewood is, in the court's view, the appellant's *alter ego* whom he calls to come into play when he is faced with such a situation as the present one.

The court has considered all the circumstances of this case. It is satisfied that the appellant was in wilful default and that he does not have a *bona fide* defence to the claim of the first respondent.

The appeal is, accordingly, dismissed with costs.

MWAYERA J: agrees …….

Magwaliba & Kwirira, appellant's legal practitioners