ALEXIO MANDISODZA
versus
ANGELINE ZVARAI

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 27 November 2018 and 19 December 2018

Review Judgment

G. Maseko, for the applicants
1st respondent in person
No appearance for the 2nd Respondent

MUZENDA J: On 22 August 2017 Angeline Zvarai (the 1st respondent) issued summons against Alexio Mandisodza (the applicant) claiming $880.00 arising out of two separate loans advanced to the applicant, the first being on 1 March 2015 amounting to $620 payable on 25 March 2017 and the second loan was payable on 5 May 2015 when first respondent lent the applicant $260. The purpose of the money advanced to the applicant was for him to clear rentals in arrear. Numerous promises had been given by the applicant to repay the money but all efforts were futile.

On the 1st of March 2015, the applicant signed an acknowledgement of debt acknowledging owing the first respondent $620.00 and further agreeing to pay it by the 25th of March 2015. The second acknowledgement was identical in words to the first one but the amount acknowledged was $260.00, it was dated 5 May 2015 and the amount due was going to be repaid on the 15th of May 2015. On 30 March 2016 the applicant undertook to liquidate the debt through monthly instalments of $300 commencing on 30 April 2016. According to the first respondent totally no payments were made to her until she decided to issue summons against the applicant

When the applicant got the summons he entered appearance and filed his plea on the 6th of September 2017. In his plea he admitted borrowing $600 in two batches, first one was for $400 and the second one was $200. He also confirmed signing two acknowledgement of debts but qualifies the acknowledgement by adding that the figures he acknowledged included

interest in them. He denies owing the first respondent stating that he paid the capital in full including interest. He does not mention the dates and place for repayment and accuses the first respondent for behaving usurious and urges the court not to facilitate an illegal transaction.

On the 19th of October 2017 the matter proceeded to trial before Serima Esq at North where the two applicants and the first respondent virtually stuck to their pleadings and both gave evidence in chief, the two cross examined each other when either of them testified and on page 16 of this record the applicant's case was closed after his testimony. On the 19th of October 2017 the second respondent Mr Serima found for the first respondent and the central thematic finding of the trial court was that there was no evidence that shows that the applicant paid the money to the plaintiff.

Aggrieved by the outcome of the matter the applicant filed a court application for review in terms of section 27 of the High Court Act seeking the following relief:

IT IS HEREBY ORDERED THAT:

1. The 2nd respondent's decision to order the applicant to pay the 1st respondent $800, with costs be and is hereby set aside, and substituted with the following:
2. The matter in MC 1130/17 be and is hereby referred back to trial *de novo* at Norton Magistrate Court
3. The 2nd Respondent to pay costs on a legal practitioner and client scale

The grounds for review total five and they are drafted as follows:

1. The 2nd respondent misdirected himself in finding the now applicant liable to pay $880 plus costs of suit without according the applicant his right to exhaust all his evidence through his witnesses which were to prove he paid the now respondent. This constitutes a gross irregularity in the proceedings and affects the decision as the applicant's full evidence was not ventilated.

   The decision is shocking and in breach of the principles of Natural Justice
2. The applicant indicates in the plea that he did not have documentary proof to prove that he indeed had paid the amount he borrowed from the respondent but would call witnesses who were present when the payments were made to testify for his plea, thereby compromising the capacity and ability of the applicant to complete his defence
3. The applicant also went on to indicate in his draft issues that he wanted to call two witnesses , he was denied the opportunity to do so, that constitutes a gross irregularity in the proceedings and is unjust

4. The learned Magistrate erred in crushing to the judgement without having accorded the applicant his right to lead evidence from his witnesses.
5. The learned Magistrate erred in convincing himself that only documentary evidence was necessary to convince the court that even if the applicant had led his evidence from his witnesses, the Court would not have been convinced that indeed payment was made thereby arriving at a wrong judgement.

Mr *Maseko* submitted on behalf of the applicant that the judgement of the Magistrate was delivered on the 27th of October 2017 but was handed to the applicant on the 17th of January 2018. It was further contended on his behalf that the Court *a quo* did not accord the applicant his right to exhaust all his evidence to prove that he paid the first respondent. In all his pleadings including pre-trial issues he indicated that he was going to call witnesses who present when the payments were made to the first respondent to testify in line with his plea but subsequently he was not afforded that opportunity. Instead it is alleged that the Magistrate erred in rushing to the judgement without having accorded the applicant his right to call evidence. He was wrong in calling for documentary evidence from the applicant to prove that the applicant paid the first respondent, it submitted on behalf of the applicant. Applicant cited the case of *Olivine Industries Pvt Ltd* v *Gwekwerere*[1]. The applicant goes on further to attack the reasons of the Magistrate and alleges that he did not offer any good reason as to why the applicant should not exhaust all his evidence.

The applicant also impugns the acknowledgements of debt signed by him. His submitted on his behalf that all along and during his pleadings, applicants had

1. ZWSC 63/05

Challenged the authenticity of the written agreement as being deceitful. He further alleges that the 1st respondent deceitfully charged interest on all the transactions and that was not explored by the court *a quo.* Applicant went on to cite the matter of *Munyimi* v *Tauro*[2]. Applicant criticises the Magistrate for failure to make a diligent finding as to the authenticity of the document. Applicant also attacks the trial court in his submission arguing that it never explored the aspect of interest, that the agreement was not usurious and illegal. Hence the decision reached by the Magistrate was based on inadequate evidence and based further on materially flawed documentation. To the applicant that was a misdirection. The majority of cases further cited by the applicant mainly focused on the need to call witnesses in the absence of documentary evidence. Some of the cases cited do

not help the applicant, they were just thrown into the submissions adopted from facts which are distinct from the facts before this court.

The following can be discerned from the perusal of the record of proceedings:

(a) The judgement by the Magistrate was delivered on the 19th of October 2017 but bears a date stamp of 10 November 2017.

2. SC 41/13

(2) The review application was issued by the Registrar of this Court on the 28th of February 2018

(3) The applicant did not challenge the 1st respondent about the question of interest or otherwise

(4) The applicant did not challenge the authenticity of the acknowledgements od debt

(5) No questions were put to the 1st respondent about what the alleged witnesses were going to say

(6) The applicant did not inform the trial court that he wanted to call witnesses

(7) There is no evidence to show that the Magistrate barred the applicant from calling his witnesses

Order 33, Rule 259 of the High Court Rules 1971 provides as follows:

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the said action or proceedings in which the irregularity or illegality complained of is alleged to have occurred
> Provided that the Court may for good cause shown extend the time".

In *Pangeti* v *Grain Marketing Board*[3] 2002 (1) ZLR 454 (H).

MAKARAU J (as she then was) emphasised on p 458 D-F

> "In terms of r259 a party intending to institute review proceedings must do so within 8 weeks from the date of the decision to be reviewed. If he or she does not do so within the prescribed period, he or she must first make an application for the extension of the period.
> In considering an application for the extension of the period within which the review proceedings may be instituted, the court will have record to the period of delay, the explanation for such delay, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgement. The convenience of the Court and the avoidance of unnecessary delay in the administration of justice. This in my view grants the court wide discretion to come up with a value judgement that best serves the interests of justice. The consideration of an applicant for condonation for late filing of a review application is not a hurdle course where the applicant has to pass certain hurdles before their application can be granted. In my view, it is a consideration in which all or some of the factors I have referred to above are taken into account to enable the court to make a determination in the best interests of justice."

In *City of Harare* v *Christopher Magivenzi Zvobgo*[4] on page 7 of the cyclostyled judgment GARWE JA SC 409 clarifies the distinction between an appeal and review as follows:

> "A review differs from an appeal which can only be instituted after conclusion of the proceedings"

As stated by Feltoe in a Guide to *Zimbabwean Administrative Law* 3rd Ed. 1998 at p14:

> "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 decisions but is only determining whether there were any reviewable irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal" (my emphasis).

> "A review can be brought even before the proceedings have been completed, whereas an appeal can only be brought after the original case has been finalised…"

As already outlined in the foregoing, the decision of the second respondent was given on the 19th of October 2018 and the current application was issued on the 28th of February 2018, a period well in excess of the eight weeks prescribed by the rules of this court. The applicant deliberately sought to use the 17th of February 2018 as the starting date and r 259 cited above is very definitive, the 8 weeks is calculated from the date of decision and that provision is peremptory. The applicant did not apply for the extension of time nor did he apply for condonation. The failure to apply for the extension of time by the applicant is fatal to the application and this non-compliance with the rules is a ground for the dismissal of the application.

Alternatively looking on the merits, the applicant did not prove that the learned Magistrate barred him from calling evidence of his witness. The defendant closed his own case without indicating to the Court that he required to call the witness. The Magistrate could not have guessed that the applicant had witnesses to call. Applicant seems to have realised the problem of appealing against the judgement and sought to have the judgement reviewed by this Court. However a closer scrutiny of the grounds outlined by the applicant as those for review are in principle grounds for appeal. The applicant nonchalantly impugns the acknowledgements of debt which he personally signed and the cause of such an acknowledgement is admitted in his own plea. So what is it that the applicant challenges as the cause of his complaint. The first respondent is not claiming interest but a capital debt of $880 which was acknowledged by the applicant and went on to offer methods of periodical payment of $300 per month until the

whole sum of $880 is fully paid. The applicant has failed to prove the grounds for review and there should be finality to litigation. There is no misdirection proved by the applicant regarding the Magistrate and this one matter where the applicant virtually supported the 1st respondent's case through the documents he personally authored. The application will fail on the merits as well.

The following order retained: the application for review is dismissed with costs.

Maseko Law Chambers, applicant's legal practitioners.