MOLLINA MATARUSE
versus
JOHN EMMANUEL PAPAYIANNIS

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 26 October 2017 & 29 November 2017

Civil Appeal

Appellant, in person
Mr *S Zingano,* for the respondent

MWAYERA J: The appellant approached this court on appeal irked by the dismissal of its application for rescission of judgment in terms of s 39 of the Magistrate Court Act [*Chapter 7:10*].

The brief history of the matter has to be put into perspective. In February 2016, the respondent issued summons for eviction of the appellant from House Number 265/8 Mbizo Kwekwe. The appellant filed an appearance to defend. The respondent then made an application for summary judgment. Both parties entered a consent judgment on 21 March 2017. The import of the consent order was that the appellant would vacate the premises in question on 30 June 2016. It must also be highlighted as way of background that the appellant's late husband Phoni Fani Muchochonyi was allocated accommodation by his employer Plaza Bakery thus explaining the occupation of the appellant. The respondent at the time of issuance of the summons had title to the premises which he purchased from the local authority, the Municipality of Kwekwe. The certificate of occupation tendered as Exhibit before the court affirmed the tenancy of the late Phoni Muchochonyi through E & J Plaza Bakery his employer. Upon the death of her husband the appellant, signed an acknowledgement of receipt of terminal benefits for her husband and she also

acknowledged receipt of notice of 3 months vacation notice with rent free occupancy of the house in question 265/8 Mbizo, Kwekwe. Page 19 of the record refers. This occurred in July 2014.

On 9 July 2015 a Deed of Transfer in favour of the respondent John Emmanuel Papayiannis was passed by the City of Kwekwe. The same property which was leased to the late husband of the appellant through his employer Plaza Bakery was transferred to the respondent by the local authority after the death of the appellant's husband.

It is against this background that the appellant's counsel of record Mkushi Foroma and Maupa upon receipt of summary judgment advised client, the appellant, of the difficulty that they had in pursuing a defence given that the respondent had title to the property, see letter to client page 30. It was after this letter dated 13 March 2016 that the parties entered into a consent order on 21 March 2016. The consent is what forms the subject of this appeal. Given that background and that there is no renunciation filed of record the court *a quo* declined to rescind a well informed consent order by the parties.

The grounds of appeal against the dismissal of rescission of the consent order as discerned from the notice of appeal can be summarised as follows

1. The learned magistrate misdirected herself in finding that they are limited prospects of success.
2. The learned magistrate misdirected herself by dismissing the appellant's application for rescission of judgment on the basis that the application was out of time and no condonation was applied for
3. The learned magistrate *a quo* misdirected herself in finding that relevant costs were not paid

The three grounds as evidenced by our summarization were punctuated with evidence explanations and narrations which made them lack clarity and precision. We condoned the state of the "grounds" of appeal given the appellant although legally represented in the court *a quo* noted the appeal as a self-actor. The third ground of appeal raised by the appellant appears to have been a misconception of the finding by the court that "no order as to cost."

There is nothing which arises from the order of the court *a quo* on costs which would amount to a misdirection. Turning to the second ground on prospects of success in the main matter the appellant's argument was that the consent order was filed on 21 March 2016 by the legal

practitioner without her consent. In her founding affidavit she argued that she could not have consented given the property in question was purchased by her husband on a rent to buy facility through the employer from one Mr Ndoro. The agreement was attached to the record page 43. The second ground of dismissal of application on the basis that the application was filed out of time cannot be sustained. The application for rescission in this case was based on the fact that the order was issued in error. It is the appellant's argument that there was no instruction on the appellant's part to the legal practitioner to consent to judgment. The application is based on s 39 of the Magistrate Court Act [Chapter 7:10] which reads:-

> "Section 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 aborigine or was obtained by fraud or 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. ……."

The application has to be brought with reasonable time. The order sought to be rescinded was issued on 22 March 2016 and the application for rescission was on 16 May 2016. That certainly cannot be termed unreasonable time in the circumstances. The court *a quo* in its judgment page 5 second paragraph alludes to the appellant giving history or background to the application and dismissed such as not assisting in showing the nature of the application. On the contrary it is clear and apparent from the appellant's founding affidavit that she raised disquiet about the consent order which was issued without her consent as she was in occupation by virtue of her late husband having bought the house. The application for rescission of judgment was based on the order having been issued in error and as such the issue of condonation did not arise.

I am alive to the fact that generally a consent order is unappealable. This is for the obvious reason that the court which grants a consent order merely records the agreement between the parties. The court does not make any findings of facts proved. If there are no findings of fact or ruling on law then there would be no basis for appealing because there will be nothing in the notice of appeal specifying the finding of fact and law on which the court erred. See *Chivero and others* v *Mudzimuunoyera Apostolic Church* 1994 (2) ZLR 371 (5). GUBBAY CJ with the concurrence of KORSAN JA and MUCHECHETERE JA struck off the appeal from the roll and held that in sum, where

a defendant has consented to judgment, the order granted by the magistrate court is in essence, merely a record of the agreement between the parties. It is not a judgment against which a party may appeal.

It is settled that a judgment by consent is not a decision against which any appeal may be made. However, a judgment by consent may be rescinded and set aside. It is apparent *in casu* what is before us is not an appeal against a judgment by consent but an appeal against refusal of setting aside or rescinding a consent judgment allegedly issued by mistake for want of consent on the part of the appellant. The court *a quo* faced with an application for rescission of consent order was to consider whether or not to grant the application. The law with regards to the criteria to be taken into account when considering an application to set aside a judgment given the consent of the parties was ably stated by MAKARAU J as she then was in the case of *Masulani* v *Masulani and others* 2003 (1) ZRL 491H. She quoted with approval the finding of GUBBAY CJ in *Georgian and Anor* v *Standard Chartered Finance Zimbabwe Limited* 1998 (2) ZLR 488. It was stated that whether the consent order was granted in terms of rules or common law was immaterial when it came to consideration as to whether to rescind or not the consent judgment. The court has to have regard to the following factors

1. The reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered.
2. The bona fides of the application for rescission.
3. The bona fides of the defence on merits of the case which prima facie carries some prospects of success on balance of probability need not be established.

The learned Chief Justice in the *Georgion* case *supra* observed that just as the situation in an application for setting aside of a default judgment too much emphasis should not be placed on any of the factors for consideration. It was stated that the factors must be viewed in conjunction with each other and with the application as a whole.

Clearly the onus in the application for rescission is on the applicant as a judgment will not be set aside by mere asking. See *Washaya* v *Washaya* 1989 (2) ZLR 195.

In *Masulani* v *Masulani and Ors* MAKARAU J as she then was stated that the applicant bears the onus of proving that he or she is entitled to the indulgence sought. There has <u>to be good and sufficient cause warranting the indulgence.</u> (Underling my emphasis)

A close look at the record of proceeding shows that the court *a quo* proceeded on the wrong premises for an application for rescission of default judgment, hence it went on as part of its ratio for dismissal, to rule that the application was out of time as there was no application for condonation. The application before the court was for rescission of a consent judgment on the basis that the legal practitioner erroneously or unprocedurally consented to judgment without any mandate from the appellant. The court *a quo* also made a finding that the appellant in her application did not mention having bought the property from a third party and that she did not comment on an Acknowledgement signed in 2014. A close look at the applicant, now appellant's, founding affidavit to the application for rescission of judgment shows otherwise.

The appellant clearly spelt out how she and her husband bought the property in question. Paragraph 3-5 of the appellant's founding affidavit is instructive

> "3. I am a widow who lost her husband on 11th of June 2014
> 4. I had been married to Phoney Muchochonyi since December 1978 and have three children. We moved to Kwekwe from Gweru in 1988 after Phoney had been employed by Eonas Plaza as a driver, a position held until his death in 2014.
> 5. Sometime in 1992, Phoney negotiated with Ndoro whose house we were renting for the purchase of the house. After an agreement, Phoney approached his employer Eonas Plaza for some financial assistance which he got on condition that he would transfer the house to Eonas Plaza as security until he fully repaid the borrowed amount to his employer. Thus we have stayed in the matrimonial money since then in the comfort of the house belonging to us.
> 6. Phone had the amount deducted as payment from the house on his payslip. Eonas Plaza tasked Phoney for all the transactions and he signed on Home Ownership Scheme as security. After the death of Phoney I approached Burzil the Manager at Plaza for Phoney's benefits and he said that he would call me when the benefits were ready."

Upon considering the applicant's founding affidavit and the consent which is lumped up for terminal benefits and notice to vacate the appellant's version that she signed acknowledging receipt of money cannot be said to be in genuine. In any event the acknowledgement is headed "Acknowledgement of receipt". The story of signing for money received is more probable. The appellant stated in her founding affidavit that the lawyer signed a consent order without the mandate. Given the letter from the legal practitioner dated 13 March on record which in part reads:

> "We refer to you above matter in which an application for summary judgment is set down for hearing on 14 March, 2016. We advise that it is difficult to pursue your defence in view of the fact that the plaintiff has title to the property. This was unknown to us at the time he received instructions from you.

> The issue of the deeds coupled with the acknowledgment was signed in July, 2014 weakens your defence hence we will not pursue it. The issue of the acknowledgement was brought to your attention on the date you instructed us but we were hoping to warm our way on the issue of rent to buy, uncover that the property has already been transferred to a third party (plaintiff)"

As observed from the letter, there is no indication that the lawyers were working on consent order. The letter is merely advisory it also further confirms the appellant's version that she was in a rent to buy scheme through the late husband. The version of the appellant as placed before the court a quo when viewed with the totality of the circumstances of the matter reveals a genuine cause worth exploration on merits. There was good and sufficient cause placed before the court warranting the setting aside of the consent order. The court *a quo* also seemed to have dismissed the application for rescission of the consent order on the basis that the applicant did not state the basis and nature of application for rescission. On the contrary the record reveals the applicant was seeking rescission on the basis that the consent order was not with her knowledge and appreciation and she had not instructed the legal practitioner to consent. The last correspondence as seen above was informative and advisory and if anything, refers to the applicant's defence of rent to buy and that the legal practitioner on realising that the respondent already had title felt the appellant's defence was weak. Such communication does not presuppose consent to judgment. Given the sale agreement attached by the appellant, the acknowledgement receipt and letter from the legal practitioners and the assertions by the appellant in the founding affidavit the appellant discharged the required onus entitling her to indulgence sought for the matter to be heard on merit. The respondent's heads of argument in seeking dismissal of the appeal focused on the fact that the appeal has been overtaken by events. This is more so given that the appellant has already been evicted and that the respondent already has title to the property in issue. It is common cause that the respondent now holds title to the property in question. It is also common cause the respondent successfully sought to evict the appellant pending appeal and evicted the appellant. It is settled courts are there to settle concrete and live disputes or controversies see *Chidawu and Ors* v *Stanced and Ors* SC 12/13 and *Chipendo* v *Nyamu Panda and Anor* SC 7/07.

In the Chipendo case the appellant had already been lawfully evicted from the premises and that removed any prospects of success on appeal.

The facts of present case are distinguishable from the *Chidawu* and *Chipendo* cases *supra*. This is more so when one considers the controversies surrounding the acquisition of title by the respondent and the subsequent eviction. The controversies surrounding the consent order from which emanated the subsequent eviction, when viewed with the history of how the appellant and the late husband occupied and resumed a rent to buy scheme from Mr Ndoro and with no evidence of how the property changed hands from the local authority to the respondent, raises a lot of questions which beg of answers. In such a situation where there is no ready answer to title which occasions the subsequent eviction of a person *in situ* with perceived rights then there are live disputes and controversies warranting proper and further ventilation of the matter.

It has further been observed that there is an interested party, the deceased estate, which was not cited in proceedings in the court *a quo*. That further brings about a gap in the resolution of the matter. This means the relief sought is still available and there are live disputes or controversies for the court to settle.

From the foregoing it is apparent that the application for rescission of consent order on the basis of judgment being issued by mistake was properly placed before the court within a reasonable time. The appellant offered reasonable explanation and showed good cause why the application ought to be granted. The genuiness of the defence is fortified by the lack of evidence of the legal practitioner having been mandated to consent by the appellant. The court *a quo* erred in not granting the indulgence of setting aside the judgment in circumstances where good and sufficient cause for granting the relief had been shown.

Accordingly the appeal has merit and it ought to succeed.

It is ordered that

1. The appeal be and is hereby up held with costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:

   The applicant's application for rescission of consent order be and is hereby granted with costs.

MUNANGATI-MANONGWA J agrees

Wilmot & Bennet, respondent's legal practitioners