TINASHE DESHE
versus
ERIC BULINDA

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 1 November 2016, 27 September, 2017

Civil Appeal

C. Kwaramba, for the appellant
K. Nduyangwa for the respondent

NDEWERE J: On 1 February, 2010, the respondent purchased Plot number 236 which was 300 square metres through Nandi Properties who are cited as Estate Agents in the Agreement of Sale. The Agreement of Sale said the plot number was temporary and for identification purposes only and that the "Department of Physical Planning" was still working on allocating the stand numbers.

On 7 January, 2012, the appellant was offered stand number 13102 by Law Comfort Housing Cooperative. The appellant moved onto the stand soon thereafter.

Both parties were paying for their allocated stands through their respective allocating authorities.

In April, 2015, the respondent issued eviction summons against the appellant and all those occupying stand 13109 Hatcliffe under case number 8022/15 at the Harare Magistrates' Court. The summons were served upon the appellant through his wife, but the appellant did not enter appearance to defend the case. As a result, the respondent obtained Default Judgment against the appellant on 31 July, 2015.

The appellant applied for rescission of the default judgment on 23 March, 2016, but the application was not dealt with on the merits after the court ruled that the application was not properly before it. The appellant filed another application for rescission on 6 May, 2016. That application was dismissed on 3 June, 2016.

On 23 June, 2016, the appellant noted an appeal against the dismissal of his application for rescission. His grounds of appeal were as follows:

(1) the court *a quo* erred in refusing to grant rescission of judgment where an acceptable explanation had been proffered for the failure to defend that matter. It so erred in that it failed to consider that, illiterate and indigent, the appellant would not have known or appreciated the consequences of non-compliance with the rules and as such his default could not possibly have been wilful.

(2) At any rate the court a quo erred in coming to the conclusion that the appellant had agreed that he did not own the property when the record bore no such agreement. Such mistake of fact was so grossly unreasonable that it amounts to a mistake of law.

(3) The court *a quo* further erred in concluding that the appellant had no defence to offer when the facts were so disputed that that question could not be resolved on the papers without going to trial.

The appellant's prayer was that the judgment of the court *a quo* dismissing the application for rescission be overturned and substituted with one granting the application for rescission, with costs.

The first ground of appeal in summary is saying the appellant's default was not wilful. On the background facts, the appellant admitted being duly served with the summons but he raised two explanations for not entering appearance to defend. Firstly he said he did not know what to do in order to defend the matter and secondly, he did not have the money to engage lawyers. He said later, he was referred to the Legal Aid Directorate and they took up his case. Indeed, the Legal Aid Directorate is the one that has been representing him ever since.

In his answering affidavit in the application for rescission, in para 53, the applicant also states that he approached the developer after he was served with the summons asking him why he was being evicted from his property. He said the developer told him that there was an administrative error and suggested that the eviction claim would be withdrawn. In that paragraph, he also denied entering into any agreement with the respondent to vacate his property.

The learned magistrate, in his reasons for ruling, correctly indicated the approach to rescission applications in the Magistrates' Court.

Section 39 of the Magistrates' Court Act, [*Chapter 7:10*] as read with Order 30 of the Magistrates' Court Civil Rules provides as follows:

Order 30 r 1:

"1. Application for rescission or variation of default judgment

(1) Any party against whom a default judgment is given may, not later than one month after he has knowledge thereof, apply to the court to rescind or vary such judgment.

(2) Any application in terms of subrule (1) shall be on affidavit stating shortly -

(a) the reasons why the applicant did not appear or file his plea; and
(b) the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment.

2. Orders which court may make

(1) the court may on the hearing of any application in terms of r 1, unless it is proved that the applicant was in wilful default –

(a) rescind or vary the judgment in question; and
(b) give such directions and extensions of time as necessary for the further conduct of the action or application."

The inclusion of the phrase "unless it is proved that the applicant was in wilful default" means that once wilful default is proved, that is the end of the matter. No rescission can be granted. So the determining factor in the matter is whether, in the given circumstances the appellant was in wilful default as concluded by the court *a quo*.

In *Fletcher* v *Three Edmunds (Pvt) Ltd*; *Vishram* v *Four Edmunds (Pvt) Ltd*, 1998 (1) ZLR 257.

GUBBAY C.J. said:

"The failure on the part of the appellants to enter an appearance to defend within the prescribed period did not, *per se* signify wilfulness."

This means that in the present case, the fact that appellant, having been served with the summons, did not enter appearance to defend, does not mean wilful default.

"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," continued GUBBAY C.J. in the case cited above. In the present case, where appellant said he was illiterate; did not know what to do and had no money to engage lawyers, can we say the "inevitable inference" is "deliberate acquiescence not to defend the action"? In my view, there is no inevitable inference of deliberate acquiescence not to defend the action. The fact that after getting information about a government Department which assisted the poor to defend their actions, the appellant went

to that department, got them to defend his case and that they have continued to defend it up to now shows that there was never a deliberate acquiescence by the appellant 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." Further continued GUBBAY C.J. in the *Fletcher case supra*.

In the appellant's circumstances, we cannot conclude that he "freely made" a decision to refrain from appearing with full knowledge of the service of summons and the risks attendant upon default.

In *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400 MC NALLY JA stated the following;

> "…….. The wilfulness of 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."

In my view, the appellant was not so grossly negligent as to conclude that his default was wilful. The learned magistrate's observations in his ruling that the applicant, at the very least, should have approached the Magistrate's Court, the source of his summons, to inquire on what to do, may indicate an element of negligence on his part, but in my view, appellant cannot be accused of gross negligence. It is not as if he just sat and did nothing. He eventually enquired from neighbours who referred him to the Legal Aid Directorate.

In view of the above analysis, I have come to the conclusion that the appellant was not in wilful default. Ground 1 of appeal therefore has merit.

Ground 2 of appeal attacks the magistrate's conclusion that the appellant had agreed that he did not own the property. The basis of the magistrate's decision seems to be a document whose copy is on p 34 of the record. The heading deleted the other party to the agreement. The agreement was not witnessed and it was not dated. It is not clear whether the date given in the body of the document is the date of completion or of signing. The document is also not commissioned. This means the document on p 34 is not reliable. But more importantly, the appellant disputed any agreement with the respondent in his answering affidavit in para 5, p 36. Given the appellant's denial, it is not clear on what basis the magistrate then accepted that document as a valid agreement. No further evidence was produced about the document to prove

its authenticity given the appellant's denial. This was a clear misdirection by the learned magistrate. Ground of appeal 2 therefore has merit.

Ground 3 attacks the magistrate's conclusion that the applicant has no defence to offer.

From the facts of this matter, we have two people who were allocated two different stand numbers by two different allocating authorities. One of them immediately occupied the stand and erected some structures. That is the appellant. Then the other person issued summons for the eviction of the one who took occupation of the stand allocated to him, but citing a 3rd stand number 13109, which is different from the stand number allocated to him on his own agreement, and different from the stand number allocated to the occupier he is seeking to evict. Surely such facts call for clarification from the co-operative, the Estate Agent and the owner of the land. No supporting affidavits were attached from the co-operative, Developer, Estate Agent or the owner of the land to explain how Plot Number 236 allocated to respondent ends up becoming stand 13109 and how stand 13102 allocated to the appellant, becomes stand 13109, leading to his being evicted.

The fact that appellant was allocated stand 13102 and occupied it and that someone who was allocated Plot 236 is now evicting him, but citing stand number 13109 is sufficient defence for the appellant. That confusion over the stand numbers needs to be clarified and it can only be clarified if the matter proceeds to trial and viva voce evidence is led from all involved parties.

Consequently, the appeal must succeed. The decision of the court *a quo* is therefore set aside and substituted with the following:

1. The appeal succeeds, with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:
   "The application for rescission of judgment be and is hereby granted with costs."
3. The appellant is ordered to file his plea within ten days from the date of this judgment. Thereafter, the case should proceed in terms of the rules.

CHITAKUNYE J: I concur …….

Legal Aid Directorate, applicant's legal practitioners
Muyangwa Legal Practitioners, respondent's legal practitioners