HB 67/18
HCA 40/17

SIYADUMISA NDLOVU

Versus

E. MARIMA INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
BERE & TAKUVA JJ
BULAWAYO, 12 & 15 MARCH 2018

Civil appeal

Appellant in person
N. Mlala, for the respondent

BERE J: This is an appeal against the decision of the lower court declining an application for rescission of judgment by the appellant who is a self actor.

The grounds of appeal by the appellant are given as follows:

1. That the court *a quo* grossly misdirected itself when it refused to accept that the date of November 2015 was a genuine typographical error which was meant to be November 2016.
2. That the court *a quo* erred in concluding as it did that the discrepancy in the two dates given by the applicant was deliberate and calculated to mislead the court after the appellant realised that the date of November 2015 was consistent with the respondent's application for default judgment.

In opposing the appellant's appeal the respondent argued that the appellant had not made an error in stating and elaborating in his affidavit that he had been at his homestead in December 2015 as this lent credence to the respondent's argument that at the time the court process was served on the appellant the appellant was at the address of service.

The respondent further argued that the appellant's attempt to shift dates was deliberately calculated to mislead the court into believing that the appellant did not receive the court process.

The background

On 14 October 2015 the respondent issued out summons in the court *a quo* seeking to recover arrear rentals over stand number 612 Mahatshula, Bulawayo.

Upon being served with court process, the appellant did not respondent leading to the respondent seeking and obtaining default judgment.

The appellant then sought to apply for rescission of the default judgment arguing that he had not received the court process. But unfortunately the appellant's founding affidavit betrayed him as it was clear that the court process was served at a time when he was at the address of service.

Realising the fallacy of his argument, the appellant then sought to orally change his founding affidavit by alleging that reference he had made in his founding affidavit to the critical and decisive date of November 2015 was in fact meant to be November 2016, an argument which did not find favour with the court *a quo*. In dismissing the appellant's application for rescission of judgment the learned magistrate reasoned as follows:

> "if one is to go by the applicant's explanation that he returned at the property in question in November 2015 it would be difficult for the applicant to escape the presumption that he had knowledge of the summons when the messenger of court effected service in December 2015 as at that time he had already returned at the property in issue. This would render the applicant's explanation on the affidavit to be unreasonable and not convincing at all. I am alive to the fact that the applicant later on during the hearing in his response to the submissions by *Mr Mlala* indicated that he had made a typographical error on the dates.

> I was of the view that if the applicant had made a genuine error on the dates, he could have corrected that by filing an answering affidavit. Further, I also fully appreciate that the applicant had pursued this case as an unrepresented litigant such that he may not be aware of his right to file an answering affidavit. However, if indeed the applicant's error had been genuine, I was of the view that that was the first thing the applicant ought to have raised the first time I gave him the opportunity to address the court. The applicant's later indication that he had made a mistake, appeared to me with respect, to be more of an afterthought when he realised the insufficiency of his explanation for the default. With all respect, it becomes difficult for the court to believe his explanation or even to indulge him as a self-actor."[1]

It is difficult to fault the sound reasoning of the court *a quo*.

It is the settled position of our law that an appellate court must be slow in disregarding specific findings of fact made by a lower court. In this regard SANDURA JA (as he then was) in the case of *Beckford* v *Beckford* had this to say:

> "It is quite clear that the learned judge made specific findings of fact with regard to the credibility of the parties and their witnesses. As has been stated in a number of cases, an appellate court would not readily interfere with such findings. That is so because the advantage enjoyed by demeanour of witnesses is very great. See *Arter* v *Burt* 1922 AD 303 at 306; *National Employers Mutual General Insurance Association* v *Gany* 1931 AD 187 at 199 and Germani v *Herf & Anor* 1975 (4) SA 887 (A) at 903 AD."[2]

We have not been sufficiently persuaded to disregard or interfere with the court *a quo's* findings in this regard. In our view that decision was reasonably arrived at after the court had had the benefit of seeing the appellant testify as is clear from the trial court's analysis as illustrated in the extract of the judgment *(supra).*

It is imperative to note that in terms of Order 30 Rule 2 (1)[3] once the court makes a finding that the applicant was in willful default, rescission of judgment cannot be granted.

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[1] Pages 72-73 of the record of the court a quo

[2]

[3] Magistrates' Court (Civil) Rules

GUBBAY CJ succinctly puts this position of our law in the case of *Fletcher* v *Three Edmund (Pvt) Ltd*[4] as follows:

> "Order 30 Rule 2 (1) of the Magistrates' Court (Civil) Rules expressly provides that a Magistrate's Court has no power to rescind where the default was willful. The enquiry terminates with that finding. Indulgence must be withheld. See *Newman (Pvt) Ltd* v *Marks* 1960 R & N 166 (SR) at p 168B-C; *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) at 228F; *Karimazondo* v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S) at 407E-F."

The appellant's position in this case was further compounded by the fact that he sought to disown the contents of his founding affidavit by alleging a typographical error when he realised that it made his argument unconvincing.

I do not believe that in all the probabilities of this case, the court *a quo* could be said to have erred or misdirected itself in declining to grant rescission of judgment.

The appeal is accordingly dismissed with costs.

Takuva J …… I agree

Messrs Sansole & Senda, respondent's legal practitioners

[4] 1998 (1) ZLR 257 (S) at p 260B-C