MUSIMWA & ASSOCIATES LEGAL PRACTITIONERS

and

KELVIN MUSIMWA

versus

PHOEBE ZILINDA

and

ANGELA MADYAMBUDZI

HIGH COURT OF ZIMBABWE

UCHENA & MWAYERA JJ

HARARE, 18 November and 21 January 2015

**Civil Appeal**

*K. Musimwa*, for the appellants

*R. Dembure*, for the respondents

UCHENA J: The appellants were according to a lease agreement they and the Estate late Givie Chizema signed the respondents’ tenants. The respondents are co- executors of the Estate late Givie Chizema.

The appellant’s were sued by the respondents in the Magistrate’s court. They entered appearance to defend and pleaded against the respondent’s claim leading to the case being set down for a pre-trial conference. The appellants did not attend the pre-trial conference leading to the respondents’ applying for a default judgment which was granted.

The appellants applied to the court *aquo* for the rescission of the default judgment. The court *aquo* dismissed the appellant’s application. The appellants appealed to this court against the dismissal of their application for recession.

The appellants premised their appeal on the following grounds of appeal;

1. The magistrate in the court *aquo* erred by failing to find out that only one of the appellants was part of the lease agreement.
2. The magistrate erred by failing to find out that the matter was *res judicata*.
3. The magistrate erred by failing to find out that the respondents were representing a deceased estate, therefore, they had to furnish the court with properly issued out letters of administration.
4. That the magistrate misdirected himself by failing to find out that the appellants were not in wilful default of court and that the explanation given was reasonable, as the appellants’ representative is a sole legal practitioner and was attending a matter in the High Court.
5. The magistrate misdirected himself by failing to find that the appellants had a bona fide defence to the respondent’s claim.
6. The magistrate also erred by failing to find out that the lease agreement was not properly drawn out and therefore invalid.
7. The magistrate failed to find out that the appellants’ at all material times defended the matter and as such the matter needed to be determined on the merits and not on technicalities.

**One appellant**

The appellant’s allegation that there is only one appellant is not supported by the facts the appellants placed before the court. The lease agreement on pages 13 to 15 of the record indicates that the first appellant was the tenant represented by the second appellant. The first appellant in its founding affidavit for the application for rescission on p 41 of the record para 7 said. “1st respondent is a law firm and has never operated from 51 Kambanji Drive, Glen Lorne, Harare; which is a residential place. The only reason it was joined as a party was that the 2nd respondent who rented the place is a main partner in the 1st respondent”. This is not correct because the lease agreement indicates that the first appellant is the leasee represented by the second appellant. This confusion was created by the appellants who unnecessarily involved a law firm in the second appellant’s lease agreement. Mr *Dembure* for the respondents therefore correctly pointed out that second appellant, “used 1st appellant as a vehicle to create legal complications, yet he negotiated the lease for his own benefit and comfort”. It is apparent from the record that the second appellant is the alter ego of the first appellant. He seems to have used the law firm to drag his weight around and end up bullying the respondents as he seems to be doing. That could only have been unravelled at the trial. As things stand both appellants have been correctly cited as they are indistinguishable parties. The first appellant is the lessee while the second appellant is the occupant. It is therefore clear that the first appellant is involved as the lessee, while the second appellant is the one who stayed at the leased property. There is therefore no merit in this ground of appeal.

**Res Judicata**

The appellants alleged that this case was *res judicata* because case No 27732/12 between the same parties and on the same facts was dismissed by the court *aquo* on 30 January 2013 and that summons issued under case No 24504/12 were withdrawn. It is common cause, that case No 27732/12 was dismissed for want of proper citation of the parties. It was not heard on the merits. It is therefore not *res judicata*. The withdrawal of the summons in case no 24504/12, did not dispose of the matter on the merits. The principle of res judicata only applies, were the case has been determined on the merits between the same parties. There is therefore no merit in this ground of appeal.

**Respondent’s Letters of Administration**

The appellants submitted that the respondents who were representing a deceased estate should have furnished the court with properly issued out letters of administration. The issue of *locus standi* should be raised as a special plea or a preliminary issue which can be determined separately before the hearing or at the hearing of the case at the instance of the aggrieved party. There is no evidence on record that it was raised as a special plea and set down for determination. The appellants should therefore have attended court to raise it as an issue for trial. Their failure to attend the pre-trial conference deprived them of an opportunity to raise it as an issue for trial. The appellants therefore denied themselves an opportunity to raise this issue. It cannot therefore be raised on appeal against the dismissal of their application for recession.

**Wilful Default**

The appellants erroneously appealed against the magistrate’s decision on this aspect. The magistrate had found them to not have been in wilful default. In his reasons for judgment the magistrate said;

“An applicant must satisfy two requirements for the application to succeed. Firstly, that he was not in wilful default and he has a bona-fide defence to the claim. On the first requirement the applicant without more passes.”

The magistrate had clearly found that the appellant was not in wilful default.

It is strange that the appellants appealed against a finding in their favour. This has however brought before the court a point of law which must be corrected. The appellants had in their application for rescission told the court *aquo* that they had not attended court because the second appellant was appearing in the High Court which should be given precedence if a Legal practitioner ‘s attendance is required in both courts. The respondent in responds to this ground of appeal submitted that a litigant cannot choose to go to work instead of going to court and there- after say that he was not in wilful default. It seems the respondent was also of the mistaken view that the magistrate had found in the respondent’s favour on this aspect.

When the court *mero motu*, raised this issue which it was entitled to do, the parties fully ventilated it. It is now trite that a point of law can be raised at any stage even on appeal. See the cases of *Trustees, Leonard Cheshire homes Zimbabwe Central Trust* v *Chite & ors* 2010 (1) ZLR 631, *Muchakata* v *Nertherburn Mine* 1996 (1) ZLR 153 (S) at 157. *Nissan Zimbabwe (Pvt) Ltd* v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S), *Zesa* v *Bopoto* 1997 (1) ZLR 126 (S). The point of law which arises in this case is does the precedence created by the hierarchy of courts apply in cases where a legal practitioner chooses to go to work instead of attending court as a litigant. Put differently can a litigant deliberately choose to go to work instead of attending court, and not, be in wilful default.

The appellants were given notice of the set down of a pre-trial conference. They do not say they were not aware of the set down date. They say their representative one Kelvin Musimwa is the only Legal practitioner in the law firm. He was appearing in the High Court hence did not appear in the Magistrate’s Court where he and his law firm were litigant’s. Mr *Dembure* for the respondent submitted that a legal practitioner who is a litigant in a lower court cannot hide behind the hierarchy of the courts to avoid attending his case at the lower court. I agree. There is a vast difference between a legal practitioner appearing for litigants in the High Court and the Magistrate’s Court, and a legal practitioner who is a litigant in the magistrate’s court and has a case he should be representing in the High Court. In the former case his appearance in the High Court takes precedence. In the later, case his appearing in the magistrate’s court should take precedence. The reason is simple. A litigant cannot come before the court and say “I did not come to court to defend myself against the plaintiff’s case, because I had gone to work”. A legal practitioner goes to the courts to work for his clients. When he is required to go to court as a litigant he is going there to represent himself as a litigant and cannot give priority to his own work. A litigant, who chooses to go to work instead of going to court to prosecute or defend his case, will obviously be in wilful default. This is because attending court takes precedence over going to work. Litigants should excuse themselves from their work so that they can attend court.

In this case the second appellant fully aware of the need to attend court with the 1st appellant as co-litigants chose to go to work to represent clients instead of attending their own case. The 1st appellant also chose not to attrend. The second appellant’s explanation that the case he was representing in the High Court was rolled over to the afternoon is not supported by the purported affidavit of Prince Hurungudo because it was not signed by the deponent, nor commissioned by a Commissioner of oath. There is no supporting affidavit by Prince Hurungudo before the court. Even if it was not defective it would not have been of any assistance to him because it does not state that he asked to be excused on account of the case at the Magistrate’s court. The appellants’ own affidavits do not state that they sought to be excused from the High Court case or sought the postponement of their case in the magistrate’s court. A reasonable litigant seeks a postponement of one of the cases when two cases he is involved in as a legal practitioner and a litigant are set down for hearing at the same time. One cannot, just stay away, in the hope that he will there-after apply for rescission on the ground that he was appearing in a superior court for his client. The appellant’s failure to contact the Magistrate’s Court and the legal practitioner for the respondents or to aver that he asked to be excused from appearing in the High Court or the Magistrate’s Court, are indications that the appellants were in wilful default.

Once a Magistrate finds that a party was in wilful default that should be end of the inquiry. This was clearly spelt out in the case of *Fletcher* v *Three Edmunds (Pvt) Ltd*; *Vishram* v *Four Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (SC) at p 260 B where GUBBAY CJ commented on the effect of wilful default as follows;

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

It therefore follows that nothing turns on the magistrate’s consideration of the merits. He should not, have taken them into consideration.

The finding of wilful default renders the consideration of grounds of appeal numbers 5 to 7, which are premised on the merits of their case and their having always wanted to defend the case unnecessary.

The appellants’ appeal is therefore dismissed with costs.

MWAYERA J agrees-------------------------------

*Musimwa and Associates*, Appellants’ Legal Practitioners

*Zuze Law Chambers*, Respondents’ Legal Practitioners