PATRICK CHENGETAI MUKANGARA
versus
TEL- ONE

HIGH COURT OF ZIMBABWE
UCHENA, MWAYERA JJ
HARARE, 5 and 25 February and 11 March 2015

Civil Appeal

E Mvere, for the appellant
T.G. Mukwindidza, for the respondent

UCHENA J: The appellant was sued by the respondent in the court *aquo*, for payment of a debt arising from his telephone bills.

It is not in dispute that summons were served on him through his wife who is a primary school teacher. He did not enter appearance to defend leading to the respondent applying for a default judgment which was granted. A writ of execution was granted leading to execution which prompted the appellant to apply for rescission of default judgment and stay of execution in the court *aquo*.

His applications for rescission and stay of execution were dismissed by the court *aquo*. The appellant appealed against the dismissal of his application for rescission to this court. The following are his grounds of appeal.

1. The Learned Magistrate misdirected himself by dismissing the application for rescission of default judgment.
2. The learned magistrate misdirected himself by making a finding that the appellant was in wilful default.
3. The learned Magistrate misdirected himself by holding that the respondent’s claim had not prescribed.
4. The Learned Magistrate misdirected himself by accepting respondent’s evidence that appellant had paid US$25-00 as part settlement of the respondent’s claim in the main matter.

5. The learned Magistrate misdirected himself by dismissing appellant's defence that he only utilised respondent's telephone services during the Zimbabwe dollar era.

The respondent opposed the appeal, pointing out the improbability of the appellant's wife having mistaken the summons for a bill especially after the messenger of court had explained the exigencies thereof to her.

In the Magistrate's Court wilful default is determined separately from prospects of success, which can only be considered if the applicant's application passes the wilful default stage. If it fails, at that stage that should be the end of the magistrate's inquiry. In this case the magistrate found that the appellant was in wilful default but continued to consider whether or not he had a bona fide defence. He should not have gone further than determining the wilfulness of the appellant's default.

Order 30 r 2 of the Magistrate's Court Rules 1980 provides for the Court's decision on applications for rescission as follows;

> "2 (1) The court may on the hearing of any application in terms of rule 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.
> (2) The court may also make such order as it thinks just in regard to moneys paid into court by the applicant.
> (3) If an application in terms of rule 1 is dismissed the default judgment shall become a final judgment."

The use of the words "unless it is proved that the applicant was in wilful default" means once the court finds that the applicant was in wilful default it cannot grant the orders in terms of rules (1) (a) and (b) and (2). It will be obliged to dismiss the application, with the effect that the default judgment will become a final judgment in terms of r 2 (3) above. 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."

See also the case of *Fox and Carney (Pvt) Ltd* v *Suibindi* 1989 (2) ZLR 173 (SC) at p175, relied on by the Magistrate.

The factors which call for critical consideration in this appeal's grounds 1, 2, and 3, are the appellant's failure to enter appearance to defend. He says he is a retired civil servant who stays at his plot in Cashel Valley where there is poor telephone net- work, and only comes home at month ends. Summons were served on his wife at their house, by the messenger of court who endorsed on the summons that he explained the exigencies thereof to the appellant's wife. The appellant's wife is a responsible person in all probability could not have thought the summons were like any other bill meaning that the appellant and his wife's explanation of the default is a lie.

The appellant and his wife who belatedly filed a supporting affidavit do not dispute that the summons was served and endorsed as explained above. Their explanation is that the summons was served on his wife who took it to be one of the bills. The magistrate did not believe them. He relied on the improbability of the appellant's wife a school teacher mistaking a summons for any other bill especially after the messenger of court had explained the exigencies thereof to her. Bills are not served by the messenger of court. It is therefore improbable that the appellant's wife could have classified the summons as a bill. The Messenger of Court explained the exigencies of the service of the summons to the appellant's wife which should have left her in no doubt as to the importance of the document which had been served on her. The Magistrate's finding that the appellant was in wilful default can therefore not be faulted. A return of service by the Messenger of Court is prima facie proof of what the Messengers says on it. See the case of *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (SC) @ 229 B -F where Gubbay CJ said;

> "The decisions of the South African courts which preceded the introduction by the Legislature of that country of provisions dealing with the evidential weight attaching to the messenger's or sheriff's return of service, reveal the existence of two approaches. In earliest times the inclination was to refuse to allow the return to be impeached for want of accuracy or truth, and to leave the aggrieved party to his remedy in damages against the serving officer concerned. See *de Kock* v *van Niekerk and Johnson* (1861) 1 Ros 1; *Haycroft* v *Filmer* (1863) 1 Ros 98. Subsequently a more rational view was adopted, which recognised that a return of service was not final and conclusive but merely prima facie evidence of the contents thereof. See *Ritchie* v *Andrews* (1882) 2 EDC 254 at 257; *Wolhuter* v *Foote* (1883) 2HCG 258 at 271; *Deputy Sheriff for Witwatersrand District* v *Goldberg & Ors* 1905 TS 680 at 684; *Lister & Tocknell* v *Winter* 1906 TS 211 at 214; *van Rooyen* v *Colonial Government* (1906) 16 CTR 296. Confronted with the judicial controversy as to whether a return was impeachable at all, the South African Parliament rightly put to rest the somewhat illogical strict approach.
> But what the second series of cases I have referred to laid down, and this is important in the local context, was that the return of service of an officer of the court, whether he be the sheriff, the deputy sheriff or the messenger, was to be accepted as prima facie proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. That is a view with which I respectfully agree."

The supporting affidavit of Susan Mukangara on p 36 of the record does not besides saying she associates with para 5 of the founding affidavit, and para(s) 2, 3, 4, and 5 probably of the answering affidavit, deal with the crucial issue of how the messenger of court deliver a bill to their house demonstrating how she and her husband are clutching on straws to avoid the default judgment. Her affidavit therefore does not prove that the appellant was not in wilful default. Para 5 of the appellant's founding affidavit refers to papers which were, brought by some men. It thus confirms that some men came and gave her the summons. The messenger of court says in his return of service that he explained the exigencies of the summons to her. Her allegation that she thought it was a bill betrays her lies. I have already explained the improbability of a bill being served by a messenger of court. Her lies, destroys the credence of her husband's evidence giving credence to the Magistrate's finding that the appellant was in wilful default. It is also improbable that a school teacher would mistake a summons for a bill.

In view of the provisions of Order 30 r 2 (1) of the Magistrate's Court Rules 1980 I referred to above there is no need to deal with the *bona fides* of the appellant's defence which the Magistrate had unnecessarily dealt with.

I am therefore satisfied that the appellant was in wilful default. His appeal has no merit and must be dismissed with costs.

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

Messers Muringi Kamdefwere, appellant's legal practitioners
Messers Bere Brothers, 1st respondent's legal practitioners