

AURTHUR SHOULTZ
versus
MASASA SERVICE CENTRE

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 9 March 2017 and 18 & 24 January 2018

CIVIL APPEAL

S T Mutema, for appellant
J Mambara, for respondent

CHITAKUNYE J. This is an appeal against a magistrate's decision dismissing the appellant's court application for unjust enrichment made in terms of Order 22 of the Magistrates Court Rules, 1980.

The basic facts giving rise to this appeal were to the effect that on 8 December 2015 the respondent issued summons against the appellant and one Steven Le Roux jointly and severally for arrear rentals and other expenses totalling \$2 217.00 and interest at the prescribed rate. The summons was duly served on the two defendants. The appellant did not enter appearance to defend whilst his co-defendant entered appearance to defend. As a consequence a default judgment was entered against the appellant on 5 April 2016.

On 27 April 2016 the appellant filed an application for stay of execution of the default judgment and another application for rescission of the default judgement. Both applications were in turn dismissed.

Being dissatisfied with the dismissal of his application for rescission of the default judgement, the appellant filed an application for unjust enrichment in the magistrates' court. He nevertheless paid the sum due in terms of the default judgement in order to avert execution on his property.

The dismissal of the application for unjust enrichment was primarily premised on points *in limine* to the effect that the matter was *res judicata* and that there were material disputes of facts that cannot be resolved on papers. It was also argued that appellant had filed an answering statement instead of an answering affidavit as per the rules.

The appellant's grounds of appeal were couched as follows:

- “1. The learned magistrate erred in law by assuming that an Application of unjust enrichment to succeed the judgment leading to the unjust enrichment complained of needs not to be extant. This position is wrong at law. The court *a quo* was simply supposed to look at whether or not the requirements of unjust enrichment application were satisfied, once it is shown the Respondent set legal proceedings into motion and was unjustly enriched by it, then the Application for unjust enrichment ought to be granted notwithstanding that the order used in the enrichment action has not been set aside.
2. The learned magistrate misdirected herself in facts such that no reasonable magistrate who applies her mind to the facts would have come to the same conclusion that the matter before her was *res judicata*. This misdirection was so unreasonable that it has resulted in the learned magistrate making an error of law in that it was apparent that:
 - a. An application for unjust enrichment was never brought before the Court *a quo* before. In any event the Cause of action in the Application for unjust enrichment was different to the cause of action in the application for rescission of Default judgment which was brought before the court *a quo*.
 - b. The legal requirements for unjust enrichment application are different from those for Rescission of Default judgement which is what was previously brought before the court *a quo*. It was, as part of the legal requirements for unjust enrichment application, incumbent upon the appellant to show that the Respondent had set legal action proceedings and such proceedings resulted in a Court Judgment which has unjustly enriched it. Once this and other requirements for unjust enrichment are satisfied, the application ought to have succeeded regardless of whether or not the judgment leading to the unjust enrichment of the respondent has been set aside.
 - c. For one to successfully plead *res judicata* the matter should have been decided upon on the merits. This was not done in the present matter. The order executed upon by the respondent was a default judgement. In which case, no merits were considered at all. Had this been done the court *a quo* would have realised that the respondent had no cause of action against the Appellant and judgment would not have been entered for it in the first place? It is clear that the Respondent obtained a default judgment that is why an Application for rescission of the same was made.
 - d. It is settled in our law that if an order of court is executed upon such execution in itself does not vitiate an Application for unjust enrichment and a claim for damages.

3. The learned magistrate erred in law by assuming that a claim for damages always creates a material dispute of fact when it is a liquidated claim as was the case in the unjust enrichment application.
4. The learned magistrate misdirected herself grievously in facts such that no reasonable magistrate applying her mind would have concluded the same. The misdirection was so gross to the extent of making an error of law. By holding that the relief sought in both Applications for Rescission of Default judgment and for unjust enrichment was the same. Such a finding is contrary to the facts presented before her. It was clear that the only relief sought after in the application for Rescission of Default judgment was for the matter to be heard on the merits, while in the unjust enrichment application the Applicant sought reimbursement of the payment unjustifiably paid to the respondent and damages thereof. Such misdirection in facts resulted in an error of law.”

The grounds of appeal were certainly not elegantly couched. They are more of submissions than proper grounds of appeal. Grounds of appeal must be meaningful and precise on the findings of fact or rulings of law being appealed against. In *casu* the grounds of appeal were not precise. One can however glean that effort was being made to challenge certain findings by the trial magistrate.

Upon a perusal of the record of proceedings we opted to hear the appeal in spite of the shortcomings pointed to above. In that regard we had in mind the need to put the matter to finality. The form really rests with the legal practitioner engaged to draw the grounds of appeal.

The appeal is against the dismissal of an application for unjust enrichment in which the appellant claimed that respondent had been unjustly enriched by a default judgment granted in his favour.

The appellant’s founding affidavit in support of the application for unjust enrichment shows clearly that his grievance was with the dismissal of his application for rescission of default judgement. He in effect was seeking to undo the consequences of the default judgement under the guise of a fresh application for unjust enrichment. This is evident from para 4 of the affidavit wherein he, *inter alia*, stated that:

“Before execution was done I made two Applications. The applications are namely an application for Rescission of Default Judgment and an ex-parte application for Stay of Execution pending the determination of an application for rescission of default judgment. Both applications were dismissed. Having been aggrieved by this position I have been advised and which advice I take that in the premise I am entitled to make an application for Unjust Enrichment. This is the basis upon which this current application is being made. On addition to this position, I am also making a claim for damages I incurred in an attempt to remedy the effect of the wrongful default judgment entered against me.”

Clearly therefore the fight was against the dismissal of his application for rescission of the default judgment. Unfortunately whoever advised him on the procedure to challenge that judgement may not have read the applicable law. Section 39 (1) (a) and (2) of the Magistrates Court Act, [*Chapter 7:01*] provides that:

- “(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)
(c)
(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.

Section 40(2) thereafter provides that:

- (2) Subject to subsection (1), an appeal to the High Court shall lie against—
(a) any judgment of the nature described in section *eighteen* or *thirty-nine*;
(b) any rule or order made in a suit or proceeding referred to in section *eighteen* or *thirty-nine* and having the effect of a final and definitive judgment, including any order as to costs.”

This is an avenue that was available to the appellant.

Further, in terms of Order 30 r 2(3) of the Magistrates Court Rules, 1980 where an application for the rescission of a default judgment has been dismissed, that default judgement shall become final. Once a judgement is final an aggrieved party can appeal against that judgement.

It is thus clear from the above legal provisions that appellant was supposed to appeal against the decisions to dismiss his application for rescission. To seek to circumvent the appeal process by approaching the same court purportedly on an application for unjust enrichment was not the proper procedure.

Further in terms of Order 30 r 1(2) an application for rescission of a default judgment 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.”

In *casu*, in his application for rescission the appellant filed an application supported by an affidavit. In that affidavit he explained the reasons for his failure to enter appearance to defend and proffered his defence to the matter. In that affidavit on p 53, after outlining the

circumstances of the default and his defence to the matter appellant in para 15 he concluded thus:

“I have high prospects of success since there was no contractual relationship between myself and the Respondent upon which he can be entitled at law to sue for breach of a lease agreement. Therefore there is no cause of action for the respondent.”

Further in para 18 he continued:

“If the matter is not heard and determined on merits we would suffer irreparable harm as the court would have allowed an unjust enrichment which is payment of purported outstanding rental which are neither due nor owing to the respondent.”

It is clear that the appellant alleged the lack of a cause of action, unjust enrichment and that the matter had been resolved in favour of his stance in another application (see para 17).

In the consideration of the application the learned trial magistrate considered the above and dismissed the application for rescission. It is in these circumstances that the appellant instead of appealing against the dismissal of his application for rescission, if he felt it was not justified in view of his explanation for the default and his defence as outlined above, opted to make an application for unjust enrichment. In that application he virtually regurgitates the allegations made in the affidavit for rescission; which were basically that:

1. There was no cause of action as the parties never had a legal contractual relationship (see Para 15 p55),
2. The respondent will be unjustly enriched by the default judgment (see para 17 p 55).

It was in these circumstances that the learned magistrate ruled that the matter was *res judicata*. The issue is thus whether or not the court *a quo* erred in finding that the matter was *res judicata*. This issue is discernible from appellant's grounds 2 and 4.

The requirements for *res judicata* may be summarised as follows;

- (a) The proceedings must be between the same parties or their privies;
- (b) The same question must arise for determination;
- (c) The cause of action must be the same.

See *Wolfenden v Jackson* 1985 (2) ZLR 313 (SC); *Tobacco Sales Producers (Pvt) Ltd v Eternity Star Investments* 2006 (2) ZLR 293(H).

In *casu*, it is common cause that the parties in the main action in which a default judgment was granted are the same as in the application for unjust enrichment. It is common cause that the facts giving rise to the application for unjust enrichment were basically the same as in the main matter.

The appellant sought to argue that the cause of action is not the same and so the matter is not *res judicata*.

A cause of action maybe defined as the combination of facts that are essential to prove in order for a party to succeed in his action/claim. See *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) and *Dube v Banana* 1998 (2) ZLR 92 (H)

In *casu*, the facts upon which the appellant's application for unjust enrichment is based are the same as the facts upon which respondent sued him and a decision was made. They are also the same facts he alluded to in his application for rescission of the default judgment. For instance the allegations he now makes that there was no cause of action as there was no lease agreement between the parties was the same as he raised in the application for rescission of the default judgement which application he fully argued and was dismissed. Equally the facts he alluded to in asserting that if the default judgment stood respondent would be unjustly enriched were the same as in the application for rescission and these were fully argued in the application for rescission. Upon hearing the parties the magistrate in his wisdom dismissed the application for rescission thus causing the default judgement to be final.

The issues having been fully ventilated in the application for rescission, if the appellant was aggrieved by the decision in that application his recourse was to appeal against the dismissal of his application for rescission. What the appellant was in fact seeking in the application for unjust enrichment was a second hearing on the same facts and arguments already argued in the application for rescission with the hope that another magistrate may come to a different decision as regards those same issues. This is against the essence of the defence of *res judicata*.

As aptly noted by CHIDYUSIKU J (as he then was in *Maparura v Maparura* 1988 (1) ZLR 234 (HC) at 236C-D:

“The essence of the defence of *res judicata* is that the issues being raised have been previously raised and determined by a court of competent jurisdiction.”

And further on that:

“*Res judicata* is intended to prevent repeated re-determination of the same issues. Common sense and public policy considerations demand that there be termination in dispute and finality in judicial decisions. It also serves to protect the individual from vexatious multiplication of suits at the instance of professional litigants.”

In *casu*, whilst the default judgement did not deal with the merits it nevertheless became final when the application for rescission was dismissed. In that application for rescission appellant was able to proffer his defence and the presiding magistrate made a determination which still stands as regards the facts upon which appellant claimed that there was no cause of action and that respondent would be unjustly enriched.

By bringing the same facts and arguing the same, the appellant was clearly seeking to undermine the court’s decision dismissing his application for rescission. As already alluded to above, the proper procedure was for the appellant to appeal against the dismissal of his application for rescission and not to approach the same court with a fresh application based on the same facts upon which he had been asking for a rescission of the default judgment.

In the circumstances I find that the trial magistrate did not err in dismissing the application for unjust enrichment.

The appellant also alluded to the fact that in the application for unjust enrichment he was also seeking damages and that the trial magistrate was wrong in holding that there were disputes of facts in such a claim purely because it was a claim for damages. It is however my view that in as far as it is accepted that the purported claim for damages was based on the costs for litigation he incurred in the main suit and subsequent applications, such a claim cannot escape the consequences of *res judicata*. Whatever costs appellant incurred in a lost cause cannot be recouped under the guise of damages. Surely he cannot be reimbursed for adopting a wrong procedure to reverse the consequences of a judgement that is extant.

The appellant also argued that the trial magistrate erred in its finding that it cannot review its own decision.

It is pertinent to note that in so holding the magistrate opined that:

“For someone to talk of unjust enrichment that person will look for redress from court to look at the circumstances. In this case, these are court judgements which were granted and the court wonders how then it can be termed unjust enrichment when these orders were granted by court. If the applicant was not satisfied with the court’s decision, it is my humble submission (sic) that the appropriate procedure to be adopted was to make an appeal against the court’s decision. On the other hand to then ask this court to reimburse the applicant the amount paid pursuant of judgment entered of 5 April 2016 that is indirectly asking the court to review its own judgment and the court is not in that position to do it.”

The learned magistrate was correct in this regard. He was clearly being asked to review the decision of 5 April, under the guise of an application under unjust enrichment, which appellant had failed to have rescinded in his application for rescission and which had by virtue of that become a final judgment. The basis for seeking the order was basically the same as the defence he put forth in the application for rescission and a competent court had ruled against that basis.

In the circumstances the appellant adopted the wrong procedure and so the court *a quo* cannot be faulted for dismissing the application in question.

The respondent asked for costs on a higher scale as he believed that appellant continues to persist with a hopeless and vexatious claim.

Costs on a higher scale may be given in deserving cases where court deems that a party or a litigant was either abusing the court process or falls foul of a number of factors. These factors include that a party or litigant may have been acting in a dishonest manner or malicious conduct in that he pursued proceedings that were vexatious or frivolous. See *Mahembe v Matambo* 2003 (1) ZLR 148 (H).

In *casu*, the appellant has clearly been pursuing a hopeless case in the sense that he adopted the wrong procedure when the correct procedure with which he could have challenged the court a quo's decision in dismissing his application for rescission was readily available. As a consequence respondent has been put to great expense in defending the matter. Costs on a higher scale are thus justified.

Accordingly the appeal is hereby dismissed with the appellant to pay costs on the legal practitioner and client scale.

NDEWERE J: I agree

Stansilous & Associates Law Firm, appellant's legal practitioners
Mambara and Partners, respondent's legal practitioners