

BONIFACE MUDZINGWA  
versus  
NOMMBIZ (PVT) LTD

HIGH COURT OF ZIMBABWE  
**MUSITHU & MAXWELL JJ**  
HARARE, 14 May 2024 & 2 August 2024

### **Civil Appeal**

*C Parenyi & S Chirowe*, for the Appellant  
*T Marume*, for the Respondent

MAXWELL J: This is an appeal from the decision of the Magistrates' Court sitting at Harare handed down on 9 January 2024.

#### **Background**

The first Respondent issued summons for the eviction of the Appellant and all those claiming occupation through him from Kingsmead House, 154 Mbuya Nehanda Street, Harare. Further, first Respondent claimed payment of arrear rentals and holding over damages. Appellant entered appearance to defend but failed to file a plea within the prescribed time. A default judgment was issued. Appellant approached the lower court seeking the rescission of the default judgment. He filed a hybrid application which was for upliftment of Bar and Rescission of judgment. The application was opposed on the basis that the order sought is incompetent as the judgment should be rescinded first before the bar is uplifted. Further Appellant was in willful default and there are no prospects of success at all.

#### **Judgment of the Court *a Quo***

The court *a quo* considered the law on rescission of default judgment and stated the requirements that the applicant must give a reasonable and plausible explanation for the default to show that he was not in willful default. Applicant must also show that he has a *bona fide* defence to the claim. The application should not be made with the intention of delaying the other party's claim. The court *a quo* found the explanation given for the failure to file a plea not plausible or reasonable as Appellant was legally represented. On the merits, the court *a quo* found that Appellant's defence to the claim was "mish-mashed," not clear and was simply hiding behind the technicalities. The application was dismissed with costs on an ordinary scale.

### **Grounds of Appeal**

Appellant was aggrieved and noted an appeal on the following grounds:

- 1) The court *a quo* grossly misdirected itself in holding that the appellant was in willful default when there was no evidence of gross negligence on the part of Appellant's legal practitioner who failed to file the plea timeously.
- 2) The court *a quo* grossly erred in law in dismissing the application that was before it on the basis that the defence proffered by the Appellant has no prospects of success and in doing so, the court failed to appreciate that.
  - a) A company called Linsa Investments (Pvt) Ltd had a separate legal personality that is distinct from the appellant; and
  - b) The eviction proceedings against the Appellant were fatally defective because it was an attempt to evict an occupant Linsa Investments (Pvt) Ltd without affording them a chance to be heard.

Appellant prayed for the rescission of the default judgment, the upliftment of the bar operating against him for the failure to file a plea within the five day period in the notice to plead and that the plea filed and dated 3 November 2023 be allowed to stand as a valid plea.

### **Submissions by the Parties**

In heads of argument, Appellant argued that a genuine mistake is not willful default. He referred to the case of *City of Mutare v Director of Housing and Community Services Department & Ors* HH 538/14 in which it was emphasized that only gross negligence can establish willful default subject to its being weighed against the merits of the defence. He also referred to *Zimbabwe Banking Corporation Ltd v Masende* 1995 (2) ZLR 417 (S), *Minister of Home Affairs v Vuta* 1990 (2) ZLR 338 (SC) and *Regal Insurance (Pvt) Ltd v Total Zimbabwe (Pvt) Ltd* HH 427/16.

Appellant also argued that the first Respondent had sued the wrong party as the premises were occupied by a company called Linsa Investments (Pvt) Ltd which had a separate legal personality distinct from him. He referred to the case of *Robert Tindwa v Sheriff of Zimbabwe & Anor* SC94/22 in which the concept of the separate legal personality of a company is emphasized. He also referred to the case of *Documents Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 wherein the actual party who was in occupation was not cited and the court ruled that the proceedings were fatally defective.

Appellant further submitted that the first Respondent had no *locus standi* to institute eviction proceedings as he was only a property manager and not the owner of the property. He

referred to *Mutemererwa & Anor v Tavarwisa & Anor* HH 160/2004 and submitted that first Respondent had not produced any authority to institute proceedings on behalf of the signatory to the lease agreement.

First Respondent submitted that it proved on a balance of probabilities that Appellant was the tenant in occupation of the premises. It pointed out that after eviction Linsa Investments (Pvt) Ltd did not complain or seek the rescission of the judgment. Reference was made to the case of *Rwafa v Paradzai* HH 685/20 where it was highlighted that the person said to be the owner of the property was the one supposed to take action. First Respondent also submitted that the matter had become academic and moot as eviction was carried out and renovations have taken place on the property. First Respondent pointed out that by agreement of the parties Appellant removed all his fixtures, fittings and other materials from the premises on 2 March 2024.

First Respondent argued that the court *a quo* did not err in finding that Appellant was in willful default. It pointed out that the supporting affidavit by the responsible legal practitioner did not contain sufficient information on how the default came about. It also pointed out that Appellant did not apply for the upliftment of the bar until judgment was granted. In *Main Protective Clothes (Pvt) Ltd v Ncube* HB 192/2022 the court did not accept as a reasonable explanation the fact that lawyers chose to act on presumptions when the law is readily available. First Respondent further submitted that Appellant has no prospects of success as in the “plea” Appellant accepted the *locus standi* of the Respondent. Further Appellant did not challenge the fact that all communication was in respect of him being the tenant. First Respondent referred to the case of *Baross v Chimphonda* 1999 (1) ZLR 58 (SC) in which it was stated that the Appellate court cannot interfere with the discretion of the trial court on the basis that if it had been in the position of the primary court it would have taken a different course. It submitted that the lower court properly exercised its discretion to refuse rescission and there is no basis for this court to interfere.

### **Analysis**

The issue that the matter has become academic and moot was raised in Respondent’s heads of argument. The Constitutional Court in *Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 held that:

“A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court’s jurisdiction ceases and the case becomes moot....The question of mootness is an important issue that the court

must take into account when faced with a dispute between parties. It is incumbent upon the court to determine whether an application before it still represents a live dispute as between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of ‘such a nature that the decision sought will have to practical effect or result.’”

See also *MDC & Ors v Mashavira & Ors* SC 56/20 and *ZIMSEC v Mukomeka & Anor* SC 10/20. It is our view that in seeking the rescission of the judgment of the court *a quo*, Appellant’s aim would be to prevent his eviction from the premises in question until the matter is decided on the merits. Appellant did not dispute that the eviction was carried out and that he removed his fixtures, fittings and other materials from the premises on 2 March 2024. We are of the view that the matter indeed has become academic and moot.

The next stage of the inquiry as highlighted in the *ZIMSEC* case (*supra*) is to determine whether or not it is in the interests of justice to hear a moot case. In *Vinpro NPC v The President of the Republic of South Africa & Ors* [2021] ZAWHCH 149 further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter were proffered. These include:

- a) whether any order which the court may make will have some practical effect on the parties or on others;
- b) the nature and extent of the practical effect that any possible order might have;
- c) the importance of the issue;
- d) the complexity of the issue;
- e) the fullness or otherwise of the arguments advanced; and
- f) resolving the disputes between different courts.

**Whether or not it is in the interest of justice to determine the instant appeal that is moot**

None of the factors highlighted above justifying the determining of a matter that is moot exist in this case. The lease agreement at the centre of the dispute expired. Appellant was given notice to vacate the premises which notice ran from 1 October 2022 to 31 December 2022. Appellant’s right to occupy the premises terminated on 31 December 2022.

In any event, even if it was in the interest of justice to determine this appeal, it would not succeed. The Appellant claims that he was not the tenant and therefore not in occupation of the premises. He claims that Linsa Investments (Pvt) Ltd was the occupier and therefore ought to have been cited. Order 30 Rule 4(1) of the Magistrates Court (Civil) Rules 2019 provides that:

- “4. **Application for rescission by person affected by judgment**

- 1) Any judgment of the court may, on the application of any person affected thereby who was not a party to the action or matter, made within seven days after he or she has knowledge thereof, be so rescinded, varied or corrected.”

It follows that Linsa Investments (Pvt) Ltd should be the one to seek the rescission of the default judgment. See *Rwafa v Paradzai* HH 685/20. Even after the eviction, Linsa Investment (Pvt) Ltd did not challenge the process.

**Disposition**

The appeal being moot and also not having any merits, the following order is appropriate.

The appeal be and is hereby dismissed with costs.

MAXWELL J:.....

MUSITHU J:..... I agree

*Chirorwe & Partners*, Appellant’s legal practitioners  
*Marume & Furidzo*, Respondent’s legal practitioners