DISTRIBUTABLE (8)

(1) JOSPHAT KUDUMBA (2) ELLIOT MUSWITA (3) FINGER TAPERA (4) HEADMAN MHIZHA (5) PETER MUDHUMO (6) RAFAEL SHOKO
(7) SOLOMON NDLOVU (8) HAIGWARI SAFARIS (PRIVATE) LIMITED
v
(1) APATRON MINING (PRIVATE) LIMITED (2) VUSUMUZI OSFAEL MAZIBUKO (3) DIRECTOR GENERAL ZIMBABWE PARKS & WILDLIFE MANAGEMENT AUTHORITY N.O. (4) MINISTER OF ENVIRONMENT, TOURISM & HOSPITALITY N.O

SUPREME COURT OF ZIMBABWE
MAKONI JA, CHITAKUNYE JA & KUDYA JA
HARARE: 28 MARCH 2022 & 30 JANUARY 2023

T. Zhuwarara, for the appellants

T. Mpofu, for the first and second respondents

No appearance for the third and fourth respondents

CHITAKUNYE JA: This is an appeal against the entire judgment of the High Court, sitting at Harare, handed down on 21 April 2021 wherein the court *a quo* granted a declarator in favour of the first and second respondents.

The first and second respondents obtained what is essentially a default judgment against the appellants after the court *a quo* expunged the appellants' opposing affidavit and treated the matter as unopposed. The court *a quo's* default order was predicated upon the first

and second respondents' assertion that the summons issued by the appellants in HC 1057/19 was a nullity *ab origine* as the appellants had sued a non- existent entity and had proceeded to execute the judgment against a party it had not cited.

It is trite that as a general principle a default judgment is not *per se* appealable. This appeal therefore suffers from that malaise and cannot succeed.

FACTUAL BACKGROUND

The appellants were lessees of State land designated as a wildlife area called Mujingwe Conservancy ("the property") in terms of a 25-year lease agreement, entered into between them and the fourth respondent. The appellants occupied the property in 2015 after successfully evicting the previous occupants who were challenging the allocation of the conservancy.

The genesis of the dispute between the current parties followed the cancellation of the appellants' lease by the fourth respondent. Aggrieved by that decision, the appellants issued summons under HC 1057/19 against 'Vusimusi Masibuko trading as Apatron Mining Fort Rixon', as first defendant, and two other defendants (Director General Zimbabwe Parks & Wildlife Management Authority N.O and The Minister of Environment, Tourism & Hospitality N.O), for a *declaratur* that the lease agreement entered into between them and the fourth respondent be declared valid. They also sought the eviction of 'Vusimusi Masibuko trading as Apatron Mining Fort Rixon' from the property. The first respondent, Apatron Mining (Pvt) Ltd, was not cited as a party to those proceedings. A default judgment was granted in favour of the

appellants on 23 July 2019. A writ of ejectment was thereafter issued against 'Vusimusi Masibuko trading as Apatron Mining Fort Rixon' on 19 August 2019. On 10 December 2019 the Deputy Sheriff, however, evicted the first respondent and its personnel from the property in question despite it not having been cited or made a party to those proceedings.

In response, the first and second respondents filed two applications. The first was an urgent chamber application under case number HC 10039/19 for an interdict against their eviction from the conservancy. This application was dismissed on the basis that it had been overtaken by events. The second application was for the rescission of the default judgment granted in favour of the appellants. This application was, however, withdrawn on the basis that the default judgment granted to the appellants was invalid hence it could not be rescinded.

BEFORE THE COURT *A QUO*

The first and second respondents then proceeded to file another application under case number HC 3332/20 in which they sought a declaratory order that the proceedings that had been instituted by the appellants in HC 1057/19 were invalid and that the order obtained in default was unlawful. They also sought the reinstatement of the first respondent to the property. In that application, the second respondent argued that there was no legal entity which answered to the name 'Vusimuzi Masibuko trading as Apatron Mining Fort Rixon' which was cited as the first defendant in the appellants' summons under HC 1057/19. He further alleged that he never traded as Apatron Mining Fort Rixon. In addition, the second respondent averred that the first respondent, as a duly incorporated company, was never a party to the proceedings. Thus

they regarded the summons as void *ab origine* and consequently, they deemed the order granted in default as void and of no consequence in so far as it was used to evict a party not cited in the proceedings.

In response, the appellants, through their legal practitioner, contended that the summons they had filed was not invalid as the name of the second respondent had not been improperly cited as alleged, but had been misspelt. The appellants put in issue the identity of the first respondent. Further, the appellants challenged the procedure adopted by the respondents as, in their view, the respondents ought to have applied for rescission of the default judgment against them.

In their answering affidavit, the first and second respondents raised a preliminary point against the opposition filed by the appellants. They contended that the deponent to the opposing affidavit did not have the requisite authority to depose to the opposing affidavit on behalf of the eighth appellant, a juristic person, in the absence of a resolution by the directors of the eighth appellant. They urged the court to treat the matter as unopposed in relation to the eighth appellant. Further, the first and second respondents averred that there was also no power of attorney authorizing the legal practitioner to depose to the opposing affidavit on behalf of the first to seventh appellants. Thus, they contended that the opposing affidavit be expunged from the record and the matter be treated as an unopposed application. The first and second respondents further averred that the court *a quo* had inherent jurisdiction to declare an order by a judge of the same court as invalid in as far as it cited a non-existent entity and was executed against first respondent when it was not a party to the proceedings in HC 1057/19.

Upon consideration of submissions made on the preliminary point, the court *a quo* ruled in favour of the first and second respondents. It found that the legal practitioner who had deposed to the opposing affidavit was not an official of the eighth appellant and did not give any lawful basis for purporting to depose to the opposing affidavit on behalf of the eighth appellant. In the same vein the court *a quo* held that the deponent had no authority or basis to depose to the opposing papers on behalf of the other appellants. The court further found that the legal practitioner's deposition to the appellants' opposing affidavit was based on hearsay evidence which is inadmissible. The court thus held that the application was to be treated as unopposed on that basis. By virtue of such finding the court *a quo* granted in effect a default judgment. It was also the court's finding that the summons under HC 1057/19 were invalid as they cited a non-existent party.

The court *a quo* declined to deal with issues raised in the appellants' opposing affidavit since the opposing affidavit had been expunged. It proceeded to grant the first and second respondents' application in default of the appellants' opposition.

Aggrieved by the court *a quo*'s decision, the appellants filed this appeal on four grounds. These are:-

GROUNDS OF APPEAL

1. The court *a quo* erred at law in disregarding the question of whether or not it had jurisdiction to entertain the matter. In the circumstances the court *a quo* had no

power to declare as invalid the proceedings under HC 1057/19 which had been determined by a court of parallel jurisdiction.

2. Further, the court *a quo* also erred in disregarding the opposing papers; lodged in the proceedings *a quo*. Such opposing papers had been validly attested to by the appellants' legal practitioner who could positively and lawfully swear to the facts alleged therein.

3. The court *a quo* grossly misdirected itself in finding that the proceedings under HC 1057/19 were a nullity in circumstances where the respondents cited therein had been cited with sufficient accuracy to enable such respondent to be identified and called to answer.

4. Additionally, the court *a quo* erred in concluding that the first and second respondents had satisfied the requirements of a declaratory order when such respondents had not established a cognizable right or obligation and whether public policy favored the issuance of such declaratory.*(sic*)

The relief sought is for the dismissal of the first and second respondents' application in the court *a quo* on the merits.

SUBMISSIONS BEFORE THIS COURT

At the hearing, Mr *Mpofu,* for the first and second respondents, raised preliminary points to the effect that there was no valid appeal before this Court as a default judgment was not appealable. He further argued that grounds 1, 3 and 4 of the appeal were invalid and ought to be struck out as they did not challenge the decision of the court *a quo*.

Per contra, Mr *Zhuwarara*, for the appellants, submitted that the order being appealed against was a *declaratur* which was final and definitive in nature and therefore, it was appealable. He further submitted that the issue before the court was to challenge the court *a quo*'s decision to declare as invalid an order of a court of parallel jurisdiction.

I, however, did not hear counsel for the appellant to refute the fact that the court *a quo* in effect granted a default judgment in that after expunging the opposing affidavit and proceeding with the matter as unopposed, the appellants were in effect in default. The matter was thus not argued on the merits.

On this point, Mr *Mpofu*, for the first and second respondents, submitted that if proceedings are invalid, a court of parallel jurisdiction can declare such proceedings a nullity. He further submitted that there was no legal *persona* called 'Vusimuzi Masibuko trading as Apatron Mining Fort Rixon' under Case No. HC 1057 /19, hence execution was effected on persons who were not party to the proceedings. He contended that the correct parties were not heard therefore the proceedings were a nullity. In this regard he relied on *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996(2) ZLR 246 (H) wherein the High Court set aside proceedings and judgments earlier given upon finding that the summons had been issued against a non-existent defendant and was thus null and void *ab origine*. He further submitted that the court *a quo* did not err in expunging the appellants' opposing affidavit as there was nothing on record to show that their legal practitioner had the authority to depose to the opposing affidavit.

It is clear that what the court *a quo* granted in the absence of opposing papers was therefore a default judgment. The issue is thus on the correct procedure for challenging a default judgment.

APPLICATION OF THE LAW TO THE FACTS

It appears that this matter can be resolved by determining whether or not the decision of the court *a quo* is appealable despite being a default judgment.

It is common cause that upon finding that the appellants' opposition was fatally defective, the court *a quo* treated the matter as unopposed. The court *a quo* subsequently granted judgment in favour of the first and second respondents. The effect of a matter being treated as unopposed even when the respondent was present on the day of the hearing was alluded to in the case of *Chintengo v Tredcor Zimbabwe (Private) Limited t/a Trentyre Zimbabwe* SC 67/19, wherein MALABA CJ cited with approval the South African case of *Katritsis* v *De Macedo* 1966 (1) SA 613 (A) at 618D-E in the following manner:

> "In the above case, the court, in quoting *Voet*, also emphasised that a defendant who is present but does not make a defence, is deemed to be absent. It held at 618D-E:
>
> *'Voet*, 2.11.11., makes it even clearer. I quote from *Gane's* translation:'
>
> > Moreover not only is he who does not attend at all on the day fixed to be accounted a dallier and defaulter, but also he who does indeed attend, but does not take in hand the business for the taking in hand of which the day had been appointed. For instance, a plaintiff appears and makes no claim: or a defendant does not challenge the plaintiff's claim when he should do so. He who though present makes no defence is surely reckoned in the position of one who is not there; and he who when called upon does not plead is deemed to have been futile and is expressly classed as contumacious.'" (emphasis added)

In light of this, it is apparent that as the appellants' opposition was expunged from the record, the appellants were not before the court *a quo* and could not address it. Thus the judgment handed down by the court *a quo* is for all intents and purposes, a default judgment.

The law is clear on the recourse available to a party who is aggrieved by a judgment granted in default. It is a well settled principle of our law that no appeal lies against a default judgment. The correct procedure to adopt is to make an application for the rescission of the judgment. In *Zvinavashe v Ndlovu* 2006(2) ZLR 372(S) at 375B GWAUNZA JA (as she then was) aptly noted that-

> "Counsel for the respondent contends correctly that a default judgment can only be set aside by a successful application for rescission of the judgment under the rules of the relevant court. The application must be made by the defaulting party himself, as indicated by the expression, 'purging his default."

In *Guoxing Gong* v *Mayor Logistics (Pvt) Ltd & Anor* SC 2/17 at pp 4-5 this Court underscored this position in these words:

> "It is trite that save in special circumstances which do not concern us here, no appeal lies to this court against a default judgment which is normally reversed by rescission of judgment or a declaration of nullity. It therefore, follows that in the absence of special circumstances, no valid ground of appeal can be laid at the door of this court concerning the propriety or otherwise of a default judgment."

See also *Sibanda & Ors v Nkayi Rural District Council* 1999 (1) ZLR 32 (S); *OK Zimbabwe Limited v Tazvivinga* SC 134/21.

In *casu*, it is my view that there are no special circumstances warranting a departure from the settled position that the appellants ought to have sought the rescission of the default judgment granted by the court *a quo*.

Further, the contention by the appellants that the judgment handed down by the court *a quo* was not in default because the court granted a *declaratur* which is final and definitive in nature, is without merit. Whilst it is admitted that the judgment of the court *a quo* was final in relation to the dispute between the parties, the fact still remains that such an order was made in default of the appellants, whose opposition to the application was expunged from the record by the court. It is upon the appellants to seek rescission in the appropriate court and place before that court their defence to the application before the court *a quo*.

COSTS

In the circumstances I am of the view that costs must follow the cause.

DISPOSITION

It is unfortunate that the appellants have adopted the wrong procedure in seeking to impugn the judgment of the court *a quo*. The default judgment as granted by the court *a quo* is still extant, valid and binding. It cannot be appealed against. Consequently, this purported appeal is improperly before this Court and is accordingly struck off the roll with costs.

MAKONI JA: I agree

KUDYA JA: I agree

Mutumbwa, Mugabe & Partners, appellants' legal practitioners

Ncube & Partners, 1st and 2nd respondents' legal practitioners