PREMIER TOBACCO AUCTION FLOORS P/L
versus
TICHAONA MESOENYAMA
and
BOKA TOBACCO AUCTION FLOORS

HIGH COURT OF ZIMBABWE
UCHENA AND MWAYERA JJ
HARARE, 4 & 19 November 2014

Civil Appeal

T. Mpofu, for the appellant
K. Gama, for the 1st respondent

UCHENA J: The appellant is a tobacco merchant to which the first respondent a tobacco farmer sold his tobacco. The appellant for reasons which have not been clarified paid the proceeds of the first respondent's tobacco sales, to the second respondent another tobacco merchant.

A simple dispute over whether the first respondent authorised a stop order over the proceeds of his tobacco sales has seen this case coming this far over whether or not a default judgment should be rescinded. The appellant after acknowledging receipt of the notice of set-down of a pre-trial conference defaulted leading to a default judgment being granted against it. It applied for rescission which was dismissed by the court *a quo*.

The appellant noted this appeal on the following grounds;

1. That the Magistrate equated negligence to wilful default, on the basis that there was no wilful intention to abstain from the proceedings in view of the staff turn-overs at appellant.
2. The Magistrate erred by not addressing her mind to the *bona fides* of the defence of the applicant as quite clearly the applicant had a defence which if proved at trial would entitle it to succeed.

3. The learned Magistrate erred and misdirected herself by failing to pay due regard to the provisions of Order 19 Rule 1 (2) of the Magistrates Court Rules as the default judgment should not have been entered in the first place.

The application for rescission was strenuously resisted in the court *a quo* and before this court on appeal, on the basis that the appellant's legal practitioner in the court *a quo* had previously threatened his client with withdrawal of service if he did not put him in funds. That type of communication does not, usually leak to the adversary, as it did in this case.

The appellant and his legal practitioner did not attend a pre-trial conference that was set-down for 1 October 2013. The appellant's legal practitioner had confirmed by his letter dated 28 August 2013 that they had been served with the notice of set-down of the PTC.
The failure to attend is therefore either wilful or negligent. It would be wilful if the reason for none attendance was because the legal practitioner's fees had not been paid. It would be due to negligence if it was due to failure to properly diarise the set-down date. A deliberate abstention by a party's legal practitioner from attending court on the set down date in protest against the client's failure to pay fees is wilful default. If a legal practitioner is not happy with his client's failure to pay he should renounce agency instead of holding the court, his client and the other party to ransom for his fees. A client in those circumstances is expected to come to court on the set-down date, to apply for a postponement so that he can resolve issues with his legal practitioner. Failure to attend court in those circumstances by both the legal practitioner and his client constitutes wilful default. One cannot be allowed to default in the hope that he will raise money, pay his legal practitioner and then apply for rescission. That would be an abuse of court process.

The facts of this case on the diarisation of the PTC are easy to digest. It cannot be said that the appellant's legal practitioner was not aware of the set-down date. He admits receiving the notice and communicated with the first respondent's legal practitioner about it specifically and accurately mentioning the date on which the PTC was to be held. Mr Ncube's supporting affidavit which should have explained how the "matter fell out of diary" did not explain what he meant, or what falling out of diary is. He and his client had a duty to candidly tell the court what happened. This is especially so in view of the leaked intention to abandon the client's case due to his failure to pay the legal practitioner's fees. The first respondent placed that information before the court to prove wilful default. The appellant cursorily grossed over this serious allegation leaving the appellant's default not satisfactorily

explained. In spite of its short comings the Magistrate's judgment specifically state's that rescission will not be granted if a party "freely takes a decision to refrain from appearing."
Mr *Mpofu* for the appellant submitted that the trial magistrate did not clearly bring out the reasons for his finding that the appellant's default was wilful. He submitted that the alleged "4 incoherent reasons" for the appellant's default remained stored in the magistrate's mind. This was in reference to the magistrate's reasons for judgment on p 7 of the record where he said; "Respondent herein seems to have 4 incoherent reasons warranting his none appearance on the day in question. Taken in totality the court connects an element to wilfulness and accordingly will not investigate the merits". It is true that the magistrate did not mention the 4 incoherent reasons, but clearly stated that the applicant's reasons for default are incoherent and point to his having been in wilful default.

Mr *Mpofu* also submitted that the use of the word "respondent" in the magistrate's reasons for judgment, instead of "applicant" means that, that judgment could be for the respondent's prior application for rescission. That cannot be correct because the respondent's application for rescission was not opposed. It was granted by consent. If there was any doubt as to which application the magistrate dismissed it is clarified in the magistrate's comments to the grounds of appeal where she says, "The appellant was clearly in wilful default--."

In respect, of the magistrate's reference to "4 incoherent reasons warranting his none appearance on the day in question," Mr *Mpofu* submitted that a judgment should bring out the reasons for the decision, and that the reasons should not remain stored in the judicial officer's mind. I, partially, agree with that criticism. It is true that the magistrate did not mention in detail, the "4 incoherent reasons" but clearly stated that they are incoherent. Their description thus remained stored in her mind, but she clearly stated their effect to the application. Mr *Mpofu* relied on the case of *S* v *Makawa* 1991 (1) ZLR 142 (SC) at p 146 A- E where EBRAHIM JA said, failure to give reasons for judgment is a fatal irregularity which warrants the upholding of the appellant's appeal and the setting aside of the court *a quo*'s decision. I agree with the Supreme Court's decision in *Makawa* (*supra*), but the issue in this case is not failure to give reasons for judgment, but failure to clearly spell them out.

It is true that the magistrate did not write a good judgment which lucidly explains why he dismissed the appellant's application for rescission. It is however clearly stated in the judgment, that the default was not satisfactorily explained. An analysis of the judgment leads to the inescapable conclusion that she accepted the first respondent's evidence of the

appellant's legal practitioner having deliberately withdrawn his services because he had not been paid.

A failure to give reasons for judgment, or "a large portion of the trial court's considerations" for judgment, must be distinguished from a failure to adequately analyse the evidence led in a given judgment. A poorly written judgment is a judgment. It cannot be equated to a situation where there is no judgment. It is in my view dangerous to extend the rational in *S* v *Makawa* (*supra*), were "a large portion of the trial court's considerations remained stored in his mind instead of being committed to paper", to poorly written judgments which to an appreciable extend spell out the court's findings but merely omits the details thereof. Judgment writing is a skill which judicial officers acquire and polish as they progress in the profession. Appellate courts should, in cases of poorly written judgments endeavour to make sense out of the trial court's reasons for judgment. It is only when no sense can be made out of it, or no reasons for a particular finding were given, when it can be said the reasons for judgment or a part of the judgment, remained stored in the judicial officer's mind. The distinction must be found in the missing reasons for judgment. In my view the mere failure to spell out the "4 incoherent reasons," which the magistrate found to be incoherent, does not justify the result sought by Mr *Mpofu*.

I must in this case consider the findings of the judicial officer and weigh them against the evidence led, which he may have failed to articulate. The court *a quo* specifically found that the appellant's explanation of his default was incoherent. This to me means the explanations given for the default do not stick together, and were therefore not accepted by the court *a quo*. The acknowledgment of receipt of the notice of set-down and the subsequent alleged falling out of the diary is indeed incoherent. I do not find fault with the conclusion arrived at by the court *a quo*. The resignation of Chironzi and the alleged failure to assign someone else to attend the PTC is also not convincing. The appellant should have gone to court with a coherent explanation as its legal practitioner had previously threatened not to carry on with the case until his fees had been paid. There is no explanation or proof that the legal practitioner was paid before the set-down date. Such evidence would have taken away the legal practitioner's motive to withdraw services from the client.

Mr *Mpofu* for the applicant's submission that the letter of 28 August 2013 is evidence that the appellant's legal practitioner continued to work for the appellant does not prove that he thereafter did not deliberately default court because his fees had not been paid. The facts which were placed before the court *a quo*, by the respondent called for clear proof that the

appellant's legal practitioner did not carry out his threat. His incoherent alleged falling out of the set-down date from the diary is not satisfactory. I am satisfied that the magistrate's decision though not lucidly articulated is correct.

Mr *Mpofu* further submitted that the default judgment was not competently granted because a Magistrate cannot *mero moto* grant a default judgment in chambers if the other party does not attend a pre-trial conference. Mr *Gama* for the first respondent submitted that the court is entitled to do so if an application for default judgment is made by the party in attendance. I agree. Mr *Gama* further submitted that he applied for default judgment which was granted.

Order 19 r 1 (11) of the Magistrate's Rules 1980 provides as follows;

> "(11) If a party fails to comply with directions given by a magistrate in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4), the court may, on court application being made therefor by any other party, dismiss the claim or strike out the defence or make such other order as may be appropriate."

Mr *Mpofu* submitted that default judgment was granted without an application being made for it by the respondent. That is not correct Mr *Gama* who appeared for the respondent made an application which the court granted. A default judgment can be granted on an oral application being made in chambers once the other party's default is established. Nothing therefore turns on this issue.

The appellant's reliance on the Magistrate's failure to determine whether or not the appellant's case was meritorious is defeated by the provisions of Order 30 r 2 (1) which provides 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." (emphasis added)

The use of the words "**unless it is proved that the applicant was in wilful default"** means once the applicant for rescission is proved to have been in wilful default there is no need to consider the merits of his case. Proof of wilful default is a bar to the applicant being granted the orders provided under Order 30 r 2 (a) and (b) of the Magistrate's Court Rules 1980. 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 r 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."

In the result the appellant's appeal is hereby dismissed with costs.

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

Messrs Gill Godlonton & Gerrans, appellant's legal practitioners
Messrs Gama & Partners, 1st respondent's legal practitioners