

REPORTABLE ZLR (48)

Judgment No. SC.40/06
Civil Appeal No. 90/06

CHRISTOPHER ZVINAVASHE v NOBUHLE NDLOVU

SUPREME COURT OF ZIMBABWE
CHIDYAUŠIKU CJ, SANDURA JA & GWAUNZA JA
HARARE, OCTOBER 31 & DECEMBER 7 2006

K Gama, for the appellant

D Dindikwa, for the respondent

GWAUNZA JA: The appellant purports to appeal against a judgment of the High Court, which was granted in default after he, as the applicant, had failed to appear.

The respondent, in the court *a quo*, issued summons against the appellant for recovery or transfer to her of certain items of property acquired during the period in which the two co-habitated. It is not in dispute that the appellant failed to timeously enter appearance to defend the action, leading to a default judgment being entered against him. The appellant subsequently filed two applications; the first one for rescission of the judgment entered in default of his appearance and the second one for a provisional order interdicting the respondent from executing the judgment pending the determination of the application for rescission.

On the date of hearing of the application for rescission of judgment, the appellant was in default, a circumstance that led to the respondent's legal practitioner successfully applying for the dismissal of the application for want of prosecution.

It is at this juncture pertinent to refer to Rule 62 of the High Court Rules, which deals with just such a situation. It reads:

“62 When on the calling of any case the defendant appears in court personally, or by his legal practitioner, and the plaintiff makes default, the defendant shall be absolved from the said suit or action, unless sufficient cause to postpone the same, or to make some other order therein, appears to the Court.”

There can be no dispute that the defendant/respondent can only be “absolved” from the suit or action in question, through the dismissal of the plaintiff’s - in this case, the applicant’s case.

The court *a quo* did dismiss the application, as it properly was entitled to do in terms of Rule 62. The court also discharged the provisional order referred to. However, before dismissing the application, the learned Judge considered it “proper and prudent” to deal with the matter on the merits as they appeared from the papers filed of record.

The appellant does not dispute that he was in default on the day his application for rescission of this judgment was to be heard. Nor does he dispute that, under these circumstances, the court was entitled to enter default judgment against him. He however, takes issue with the fact that, in dismissing his application, the court *a quo* had delved into the merits of the matter and given its reasons for the judgment against him. He contents the resultant judgment is appealable.

In reality, as is evident from its judgment, the court *a quo*, did not deal only with the merits of the application for rescission of judgment, it went beyond that to consider the merits of the main dispute between the parties, that

is, the action instituted by the respondent *in casu*, for recovery of the property referred to earlier.

Although the parties cited other cases¹, in support of their respective contentions, they have both in addition cited the case of *Sibanda & Ors v Nkayi Rural District Council* 1991 (1) ZLR 32, as authority for the proposition that a default judgment cannot be appealed against. Rather the proper procedure is for the aggrieved party to seek rescission of the judgment.

The appellant, however, calls upon this Court to "clarify" *Sibanda's* case (*supra*) in view of the following comments, made by the learned Judge therein:

"That order of 23 May 1997, as I understand it, was effectively a default judgment. The practitioner who appeared for the appellants presented no submissions on the merits. There were no reasons given for judgment. Once postponement was refused the appellants were effectively in default."

The appellant's contention, therefore is that the present case, having been determined on the merits, with reasons for judgment being given, was appealable. In other words, the appellant is arguing that the tendering of reasons for the judgment had, somehow, divested what otherwise would have been an ordinary default judgment, of its "default" nature, and left in its place a judgment that was appealable.

I do not find the appellant's argument to be persuasive. The defining feature or essence of a judgment granted after a party fails to appear is the "default" of the absent party, that is his failure to do what he ought to have

¹Ramvali Trust's Trustees v UDC & Ors 1998 (1) ZLR 110; Sparks v David Polliack & Co (Pty) Ltd 1963 (2) SA 491; Argos Fishing Co Ltd v Friopesca SA 1991 (3) SA 255

done. *In casu*, what the appellant failed to do was to appear and prosecute the application. Hence a judgment by default has been defined as one obtained by "non resistance" (per JARVIS CJ in *Prev v Square* 10 CB 915, cited in Strouds Judicial Dictionary 5 ed at p 659).

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". It follows that *in casu*, the appellant's default remained unpurged even as the learned Judge *a quo* considered the merits of the matter and gave reasons for his judgment. By virtue of Rule 62 the learned Judge *a quo* could simply have "absolved" the respondent from the application, that is, dismissed it, as long as he was not considering postponing the application or making any other order. The consideration by the Judge *a quo* of the merits of the case, and the giving of his reasons for judgment, therefore had no effect on the status of the judgment given, which remained that of a default judgment.

It should be noted that the court normally considers issues like the explanation for a default, the *bona fides* of the applicant and the prospects of success on the merits, within the context of an application for rescission of judgment or condonation of the late filing of papers required by the rules of the court, to be filed within a given time frame. There was, in my view, therefore no call for the court *a quo* to consider such issues in its determination of an oral application for the dismissal, for want of prosecution, of the appellant's application for rescission of judgment. This is because the very same issues would come in for consideration in the event that the appellant *in casu* decides to approach the court *a quo* - as he can still do - for rescission of its judgment dismissing his application.

There was, also, no call for the court *a quo* to consider the merits, on the papers, of what in effect was an action which, in the ordinary course of events, fell to be determined upon consideration of oral evidence led during trial.

Be that is it may, the decision by the court *a quo* to dismiss the appellant's application, effectively for want of prosecution, was correct. As has already been explained, that decision remained a default judgment whose setting aside could only follow a successful application for its rescission.

For the avoidance of doubt, it is declared that the giving of reasons for the default judgment in question, by the court *a quo*, was unnecessary and consequently, of no force or effect. It does not convert the default judgment into a judgment on the merits.

Sibanda's case (*supra*) in my opinion, does not need any clarification, despite its reference to reasons for judgment not having been given. Having read that judgment in full, I am satisfied the appellant has misinterpreted the import of the comments cited. In that case the applicants in an application for rescission of a default judgment sent their legal counsel to appear on the scheduled hearing date, with instructions not to prosecute the application, but to seek a postponement. The court turned down the request for postponement and proceeded to dismiss the application, prompting the applicants to file an appeal to this Court. The learned Judge of Appeal noted that the judgment was effectively a default judgment which could only be set aside through an application for its rescission. The comments in question, in my view, were made by way of emphasising why the judgment was regarded as a default judgment, as opposed to one that was reached after consideration of submissions on the merits. The absence of submissions on the merits, and the lack of the resultant reasons for judgment, are characteristics of a judgment given in default. I am

satisfied the comments cannot and should not be, interpreted to mean that a default judgment in which, rightly or not, reasons for judgment are given, is appealable. As I have already made clear, reasons or no reasons, a default judgment remains that until it is set aside in the prescribed manner.

This "appeal" was in reality not properly before this Court. I have made reference to "appeal" and "appellant" merely for convenience.

In the result the appeal, such as it is, is struck off the roll with costs.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

Madzivanzira & Partners, appellant's legal practitioners

Muskwe & Associates, respondent's legal practitioners