GOVINDBHAI BAGHIBHAI AND VALLABHAI BAGABHAI PATEL v MONILE HOLDING COMPANY LIMITED (1993 - 1994) Z.R. 20 (S.C.)

SUPREME COURT
NGULUBE, C.J., GARDNER AND CHAILA, JJ.S.
25TH FEBRUARY AND 15TH JUNE, 1993.
(S.C.Z. JUDGMENT NO. 6 OF 1993)

Flynote

Civil Procedure - Pleadings - Judgment in default of appearance when appealable.

Headnote

In an appeal against rulings by the deputy registrar and a High Court judge to set aside judgment in default of appearance against the first appellant, the Court considered the merits of the case.

Held:
Even if the defendant did not act *bona fide*, the Court will set aside a default judgment if a triable issue is disclosed.

Case referred to:
(1) Mwambazi v Morester Farms Ltd. (1977) Z.R. 108.

For the appellants: D. M. Luywa of Luywa and Co.
For the respondent: M. B. Michelo of Namukamba Chambers.

Judgment

NGULUBE, C.J.: delivered the judgment of the Court.

On 25th February, 1993, we dismissed this appeal and said that we would give our reasons later. We now give those reasons.

This is an appeal against rulings of the deputy registrar and a High Court judge on appeal refusing to set aside judgment in default of appearance against the first appellant.

The history of the case is that the respondent issued a specially endorsed writ against the appellants, trading as Zambezi Travel Bureau. The claim in the writ was for repayment of money lent in the sum of K40,000,000 plus interest at 31% per annum. The writ was served on the first appellant and there is now no dispute about its proper service.

No appearance was entered by the first appellant and judgment in default of appearance was entered on 29th May,1991.

The district registrar refused an application to set aside the default judgment and an appeal to a High Court judge against that refusal was unsuccessful.

In the first *ex parte* application to set aside the judgment Mr Luywa swore an affidavit that, according to instructions received from the appellants, neither of the appellants had been served with the writ nor had they been served with copies of the judgment before execution

was effected. It transpired during the later proceedings *inter partes*. When affidavits of service and the appropriate document duly endorsed with acknowledgment of receipt by the first appellant were produced, that his instructions to Mr Luywa were not true and this line of argument was not pursued on behalf of the first appellant. There were various interlocutory

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proceedings in connection with the application to set aside the judgment and in connection with an application to stay execution and these were supported by affidavits from the first appellant and one Peter Luka, the managing director of the respondent company. In his affidavit sworn on 27th November, 1992, Mr Lukantika averred that in 1989 the appellants' travel bureau owed large sums of money to international airlines. The respondent sympathised with their plight and agreed to lend K50,000,000 to reduce their indebtedness. The money advanced was in three separate amounts of K2,500,000, K7,500,000 and K40,000,000 which were acknowledged in three separate letters each dated 23th February ,1989, and signed by Mr Varghes Mathew, the bureau's commercial manager.

The letters contained promises to repay the money as to K2,500, 000 by 30th September,1989, as to
K7,500,000 by 30th September, 1989, and as to K40,000,000 by 31st March, 1991. The last letter acknowledged an agreement to pay interest on the total loan of K50,000, 000 at 31% per annum. Each letter acknowledged receipt of the amounts loaned.

The dependent further averred that the appellants defaulted in respect of the first two loans amounting to
K10,000,000, and writs were issued in respect of the two amounts due. In both cases judgments in default of appearance were entered against the first appellant and repayments by instalments were made by the first appellant.

The dependent also averred that after the default judgment in this action had been served on the first appellant he approached the respondent's advocates with promises to pay by instalments. However, because such promises were not adhered to, the respondent found it necessary to levy execution. It was only after the issue of execution proceedings that the first defendant raised the suggestion of fraud. This was over a year after the default judgment had been served on the first appellant.

In reply to two matters raised by the first appellant the dependent averred that particulars of the amount due were endorsed on the writ and were contained in the letter of demand of which there was proof of personal service on the first appellant.

On 10th December, 1992, the first appellant swore an affidavit in reply to the affidavit of Mr Lukantika to which we have referred.

The appellant averred that the claim was a fraud because the parties to the action had never negotiated a loan of K40,000,000 or K50,000,000. He further averred that the reference to his having paid part of the
K50,000,000 loan was irrelevant because the writ in this action was for K40,000,000. He said the contents of the paragraphs in this respect were ''misleading and denied''.

The appellant averred that as the letter of demand was fraudulent he was not bound to reply to it. He further averred that the service of the writ and notice of judgment was irrelevant because they did not affect the decision of the Court.

Mr Lukantika in paras.19 and 20 of his affidavit averred that the defendant did not report the alleged fraud to the police, nor did he raise the question of fraud until 18 months after the letter of demand. In para.21 he averred that on several occasions, after the judgment, the first defendant contacted the respondent's advocates and promised to pay the judgment debt by instalments, which promises were not kept. In reply the first

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defendant averred that paras.19, 20 and 21 contained issues which were the subject matter for trial and the respondent was insisting on winning through default of appearance knowing very well that it was fraudulent.

In paras.23, 24 and 25 of his affidavit Mr Lukantika averred that K2,500,000 and K7,500,000 of the K50,000,000 loan had been recovered from the first defendant by judgment in default of appearance. In paras.26 and 27 he averred that the signatures of Mr Mathew on the letters acknowledging the loan were the same signatures throughout. In reply the first appellant said that paras.23, 24, 25, 26 and 27 were denied and that the first defendant had never seen Mr Mathew sign in the way that he was alleged to have done on the letters of acknowledgement of the loan. In his affidavit Mr Lukantika exhibited receipts for moneys alleged to have been paid by the first appellant in reduction of the first part of the loan. In his affidavit, in reply, the first appellant pointed out that the receipts were made out in the name of ''B.G. Patel'' and all of them appeared to have been issued consecutively from the same receipt book and written on the same day.

We have seen the receipts in question and we note that they are numbered consecutively and appear to have come from the same receipt book. They all have a similar appearance but it is impossible to tell whether they were written on the same day. They are in fact in the name of ''B.G. Patel'' instead of G.B. Patel the first appellant, but it does not appear to be disputed that money was in fact paid by the first appellant in respect of the K10,000,000 loan . He does not deny the K10,000,000 loan and its repayment. He maintains that it has nothing to do with the respondent's claim for K40, 000, 000.

In an earlier affidavit dated 30th November, 1992, the first appellant averred that he had never singly or severally borrowed K40,000,000 or K50,000,000 from the respondent, that the sum of K40,000,000 claimed on the writ was never explained and no details were given to him, that Mr Mathew had never been authorised to sign for K40,000,000 and that the usual signature of Mr Mathew, which he had known over the years, was as shown on a bank authorisation form and cheque exhibited to the affidavit. We have seen the exhibits referred to and noted that the signatures on the exhibits are in two totally different forms.

Mr Luywa on behalf of the appellants argued that there was a defence disclosed by the appellants. He argued that fraud had been alleged and that there were many suspicious circumstance that suggested that, if the matter went to trial, the defendant would succeed. He pointed out that the receipts alleged to have been given to the first defendant came out of the same book with consecutive numbers and that the letters of acknowledgement of the loans were insufficient to support such a large loan. He said that in such cases there should be a formal agreement, although he conceded that the requirements of s.9 of the Money Lenders Act (cap.188) did not apply. He argued that the letters of acknowledgement were signed months after the alleged loans and this fact should raise a doubt as to the *bona fides* of the claim. As to why no appearance has been entered, Mr Luywa conceded that no reason had been given in any of the first defendant's affidavits and said that the first defendant might not

have been alert enough to know the importance of entering an appearance. As to the significance of the earlier loans of K2,500,000 and K7,500,000 which

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were repaid by the first appellant, Mr Luywa said that these sums were paid for other reasons. In answer to enquiry from the Court, he said that the first appellant may have paid because he was threatened as he, counsel, had been threatened. He also said that because of threats no complaint of fraud had been made to the police.

Mr Michelo for the respondent argued that the first appellant must have appreciated the consequences of failing to enter an appearance. He maintained that the first appellant had not acted *bona fide* and that he was not entitled to have the judgment set aside.

He further pointed out that the first defendant had raised the allegation of fraud on inadequate evidence and that the first defendant had not denied that he had contacted the respondent's advocates with promises to pay by instalments.

Mr Luywa drew our attention to our comments in the case of *Mwambazi v Morester Farms Ltd.* [1] when we said that it is the practice in dealing with *bona fide* interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties. We shall bear that principle in mind together with the principle that when considering such applications it is of prime importance to consider whether there is a triable issue.

In this case the first appellant himself did not give to the Court any reasons why he did not enter an appearance. However, in order to obtain the first ex parte stay of execution he told his advocate, according to the affidavit sworn by Mr Luywa, that he had not been served with the writ or a copy of the judgment. This was clearly untrue, not only because there was an affidavit of service of the writ, but because the allegation of non-service was abandoned in all further arguments put before the Courts. The suggestion by Mr Luywa that the first appellant may not have been alert to the need to enter an appearance cannot be credible having regard to the fact, which is a matter of record which this Court has seen, that the first appellant had judgment in default of appearance entered against him in the earlier two actions as a result of which he had to pay in respect of the first two claims. These are matters which seriously affect our consideration of the *bona fides* of the first appellant. We must take into account the fact that the appellant was untruthful to his own advocate as a result of which that advocate swore a misleading affidavit upon which the Court made an *ex parte* order staying execution. We must also take into account the fact that, knowing full well the result of a failure to enter appearance, the appellant did nothing when he was served with the writ. In those circumstances there is very little to be said for the *bona fides* of the first appellant and the evidence of the merits of his defence would have to be strong indeed to justify the setting aside of the judgment. The merits as argued by Mr Luywa are that the appellants are likely to succeed in their defence that the claim for K40,000,000 is fraudulent because:

(1) The signature of Mr Mathew on the acknowledgement of loan differs from that on his authority to sign cheques;
(2) there is no formal document acknowledging receipt of the loan money and no other evidence of the loan except the disputed letter;
(3) the acknowledgement of the loan is dated months after the money was alleged to have been advanced; and

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(4) the receipts for money paid by the first appellant are all from the same receipt book with consecutive numbers, and given rise to suspicion.

We have considered the argument that the signature of Mr Mathew differs on two sets of documents. As we have said, we have seen the signatures and find that they are totally different. The signatures on the three acknowledgements of loan are clearly legible as ''V. Mathew'' and the signatures on the bank authority form and the cheque are illegible to the extent that it is impossible to decipher the name at all. It is impossible, without expert opinion, to say whether they were or were not written by the same person. However, the use of different signatures for bank accounts and other purposes is not in any way uncommon and although the first appellant averred that the usual signature that he had known Mr Mathew to use over the years was the one used on the exhibited cheque, that is not evidence contradicting the evidence of Mr Lukantika that he saw Mr Mathew sign the acknowledgements of loans with the signature that appears on them. With regard to the argument that there should have been a formal document and other evidence that the loan was made, we have already indicated that no formal document was legally required in this case, and in our view the acknowledgement of loan is sufficient *prima facie* evidence of the loan without any need for any other evidence except, possibly, that Mr Mathew was seen to sign the acknowledgement on behalf of the bureau.

With regard to the suggestion that because the acknowledgement of loan is dated months after the loan it should be treated with suspicion, there does not appear to be any evidence of the date of loan in the documents before us.

However, we can see no reason why any suspicion should arise because the acknowledgement of a loan is signed later than an actual loan.

In particular, the letter referred to appears to intend to give a list of all loans acknowledged, including two earlier ones, and is an acknowledgement of indebtedness at the date from which it was agreed that interest should run. If in fact the acknowledgment was signed at a much later date that is no reason to doubt the authenticity of the letter.

With regard to the third point raised by Mr Luywa that the form of the receipts gives rise to suspicion, we cannot agree that there is anything suspicious in the use of one receipt book for this one transaction. It is already accepted that the respondent is not in the business of a money lender and there is nothing suspicious in keeping a private loan separate from its other business. In any event, as we have said, the receipts were given in respect of one of the earlier loans for which judgment was entered and satisfied. Certainly there is nothing about the receipts which gives rise to any suspicion about the loan for K40,000,000.

In connection with the repayment of the first two loans amounting to K10,000,000, although the first appellant maintains that this is irrelevant to these proceedings, he has not satisfactorily answered the respondent's argument that the first loans were negotiated with Mr Mathew in the same way and acknowledgments signed by him with the same signature as that used to acknowledge the K40,000,000 which is the subject of this action. This is telling evidence in support of the respondent's claim which, as we have said, has not been satisfactorily answered by the appellants.

A further point raised by Mr *Michelo* was that the first appellant on

several occasions after judgment in this action called on the advocates for the respondent and promised to pay the judgment debt by instalments. This averment was not denied by the first appellant and indicates that the first appellant was in fact indebted as claimed. As the deponent for the respondent averred, it was not until execution was levied that there was any mention by the appellant of any fraud.

We have noted Mr Luywa's allegation of threats against himself and the first appellant but there is no affidavit to support such allegation and in any event the allegation of fraud has been raised now without any physical harm having been suffered.

In our view the allegation of fraud is so serious that if it is true it should have been reported to the police, and we cannot accept Mr Luywa's suggestion that it has taken a long time to obtain details of the fraud to support a report to the police. The details are clear; either Mr Mathew received a loan of K40,000,000 from the respondent and did not tell the appellants about it so that he himself benefited, or there was no loan but Mr Mathew fraudulently agreed with the respondent to sign a false acknowledgement of such a loan for their mutual benefit. In the first example the appellants, having held out Mr Mathew as a person with authority to negotiate and receive loans, would in any event be liable, but in either case the details could easily have been reported to the police if there was any truth in the allegations.

We find that in this case the first appellant well knew the result of the failure to enter an appearance and it is doubtful whether, in such circumstances, any defendant could say that he was *bona fide* and was entitled to defend because his case has merit.

We appreciate that, according to the note to order 13/9/5 of the Supreme Court Practice (The White Book) 1988 edition, even if a defendant tells a lie about his reasons for delay, a default judgment should be set aside if a triable issue is disclosed; but in this case, apart from the appellant's presumed lie to his advocate, the appellant took no step at all when he knew from past experience the result of failure to enter appearance.

It was not sufficient for the appellant to say that Mr Mathew has no authority to negotiate the loan. The evidence concerning the first two loans indicates that Mr Mathew was held out as having the necessary authority, and the same evidence indicates that the same form of acknowledgment and the same signature of Mr Mathew were used in respect of all three loans. In the light of the evidence relating to repayment by the appellant of the two earlier similar loans and his offer to pay by instalments in this action it was not enough to raise a triable issue in respect of the K40,000,000 loan simply to allege that it was fraudulently claimed. We do not accept the unsworn allegation that the appellant repaid the first two loans because he was improperly threatened.

For the reasons we have given we do not accept the *bona fides* of the appellant and we do not consider that he has discharged the *onus* on him to show that there is a triable issue.

The appeal is dismissed with costs to the respondent.
Appeal dismissed.