

HWANGE COLLIERY LTD

Versus

MINISTER OF HIGHER & TERTIARY EDUCATION

And

DEPUTY SHERIFF, HWANGE DISTRICT

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 3 DECEMBER 2012 & 17 JANUARY 2013

V. Majoko for applicant
C. Dube-Banda for respondent

Urgent Chamber Application

KAMOCHA J: After hearing the two legal practitioners representing the respective parties I refused to hold that this matter was urgent and dismissed it on that basis:

The applicant sought an interim relief in the following terms:-

“Pending the final determination of this case the applicant be and is hereby granted leave to:- (*sic*)

1. The operation of the writ of execution sued out by the 1st respondent in case number HC 3807/11 be and is hereby stayed until this application is fully determined.
2. The 2nd respondent be and is hereby prohibited from in any way giving effect to the writ of execution in case number HC 3807/11 and, if at the time this order is granted the 2nd respondent has removed any of the applicant’s property the 2nd respondent restore possession of such property to the applicant, until a contrary order is made or until this matter is fully determined.”

The brief facts giving rise to this application were these. Case number HC 3807/11 was set down for a pre-trial conference before a judge on 17 September 2012. The defendant which is the applicant in this case did not send its official to attend the pre-trial conference but its legal practitioner one *W. Nyabadza* was in attendance. He had not filed the defendant’s issues and synopsis of evidence. *Mr Nyabadza* failed to proffer an explanation for the

defendant's official's absence at the pre-trial conference and to file issues and synopsis. The presiding judge then authorized the plaintiff to set the matter down on the unopposed roll for a default judgment.

The matter was set down on the unopposed roll for 1 November 2012. The same judge happened to be presiding. Mr *Majoko* appeared for the defendant and tried to move the court for a postponement, but his explanation was not acceptable to the court which proceeded to grant the judgment. Although *Majoko* was in attendance the judgment that was granted was a default one as no arguments were heard on the merits. He sought to explain the failure to attend a pre-trial conference by the defendant's officials and failure to file defendant's issues and synopsis but the explanation seems to have been rejected by the court. His suggestion to have the matter postponed did not find favour with the court either.

Once the removal of the case from the roll was refused the defendant was effectively in default. In the result, a default judgment was granted. Procedurally, therefore, the defendant should have sought a rescission of the judgment, rather than appeal against it. See *Sibanda & Ors vs Nkayi Rural District Council* 1999 (1) ZLR 32 (SC).

When the default judgment was granted on 1 November 2012 no action was taken by defendant until 16 November 2012 when it filed its appeal. A writ of execution was served on it on 7 November 2012 but defendant did nothing to protect whatever right it might have thought it had until 27 November 2012 when it filed the present application. The defendant itself did not treat the matter as urgent until the imminent arrival of the day of reckoning. The matter is not urgent – see *Kuvarega vs Registrar-General & Anor* 1998 (1) ZLR 188.

The defendant seems to approbate and reprobate. On 13 November 2012 it addressed the following letter to the plaintiff's legal practitioners.

"Attention: Mr Bukuta

Dear Sir

Re: Debt Payment Plan

I refer to the above.

We are in receipt of a writ of execution for \$596 203,22. We are in the process of doing our reconciliation on the ZIMDEF account, however, while that is going on we are keen to engage ZIMDEF to reach an amicable payment plan.

We intend to ring fence the full outstanding debt effective November 2012. We ensure that all ZIMDEF deductions are remitted. This way our debt with ZIMDEF will progressively go down.

We request to settle the outstanding debt in six months equal monthly instalments starting end of November 2012 and clearing the balance by April 2013.

If need be we are prepared to have a meeting with ZIMDEF so that we explain our situation as well as our plan of debt liquidation.

We await your response.

Yours faithfully
For Hwange Colliery Company Limited

L. Musasa
FINANCE MANAGER"

There is nowhere, where liability is denied in the above letter. Neither is the sum of \$596 203,22 disputed. Instead the defendant was proposing a payment plan and promising to ring fence the full outstanding debt owed to the plaintiff so as to properly liquidate the debt in six monthly equal instalments commencing at the end of November 2012 with the last installment being paid by April 2013. Mr *Majoko* who deposed to the founding affidavit seems to contradict his client by taking issue with what the client is admitting. This is a typical case of one hand not knowing what the other is doing.

It was for the above reasons that I declined to treat this matter as urgent and dismissed it with costs on that basis.

Majoko & Majoko, applicant's legal practitioners

Dube-Banda, Nzarayapenga & Partners, respondent's legal practitioners