ACKREPT INVESTMENTS (PVT) LTD
versus
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE 2 December 2003 and 24 March 2004

Opposed Court Application

Bvekwa, for the applicant
Maguchu, for 1st respondent
No appearance from 2nd respondent

KAMOCHA J: This is an application for rescission of a default judgement entered on 26 March 2003. The applicant further seeks to have its counter-claim which was dismissed on that same day to be reinstated.

In a nutshell applicant claimed that it was not in willful default because its managing director who was then based in Botswana had a problem with his motor vehicle in Francis Town. The managing director Mr Mukungurutse was supposed to have represented the applicant at the pre-trial conference. He alleged he had left his base in Gaborone - Botswana on 24 March 2003 driving to Harare when his vehicle developed a problem in Francis Town. He engaged some self employed backstreet mechanic to repair his vehicle. The backstreet mechanic only managed to fix the vehicle in the afternoon of 25 March 2003. In his view that was then late and he could not proceed to Harare. Instead he decided to drive 440 km back to Gaborone. He averred that he telephoned his legal practitioners informing them of the problems that he had encountered.

While appreciating that the applicant being a company could have been represented by someone else, the managing director alleged that he was the only one who was useful to the court in this matter. He claimed to be the only one aware of all facts and what actually transpired relating to this matter.

Finally the managing director claimed that the applicant had good defences available to it in the matter.

In opposing the application the respondent chronicled the events leading to the granting of the judgement in default thus. After one postponement the matter was set down for a pre-trial conference on 15 January 2003 at 0930 a.m. Mr Takundwa who represented the respondent attended the pre-trial conference with his legal practitioner but the managing director of the applicant Mr Mukungurutse did not attend although his legal practitioner did.

The pre-trial conference was postponed, for reason unrelated to Mukungurutse, default, to 7 February 2003. However, the pre-trial conference could not be held because Mukungurutse was not able to attend. His legal practitioner applied for and was granted a postponement to 27 February 2003. But the conference could not take place on that day since the judge was away on circuit court.

The parties however, held discussions regarding a possible settlement. The parties agreed that Mukungurutse would attend at Takundwa's office for the purposes of further discussions. Mukungurutse promised and made assurances that he would attend. Needless to say that Mukungurutse did not attend at Takundwa's office to negotiate a settlement or at all. No explanation was given for the failure to do so. At the next pre-trial conference the judge asked Mukungurutse's legal practitioner why Mukungurutse had not kept his word and assurances. Takundwa then claimed that the explanation given was feeble and unacceptable.

The matter was then set down for 26 March 2003. The applicant and Mukungurutse defaulted leading to the default judgement being granted. Respondent submitted that Mukungurutse's explanation was not convincing at all. It was argued that if he had genuinely intended to attend the pre-trial conference he would have used public transport from Francis Town to Harare. Moreover apart from his *ipse dixit* there is no proof provided to show that he indeed had breakdown in Francis Town. His assertion is just a bald one. Finally on this point it was submitted that applicant's legal practitioner agreed at the pre-trial conference that applicant was in default that is why the judge

granted the default judgement. It was alleged that since the applicant had defaulted at least twice before the final default that was indicative of the little value it placed on the matter.

It seems to me that if indeed Mukungurutse was keen to attend the pre-trial conference he would have proceeded to Harare when the backstreet mechanic finished to work on his vehicle in the afternoon of 25 March 2003. But he chose to drive back 440 km yet he was already near the border.

His assertion that he phoned his legal practitioner and informed him that he had a breakdown is also unconvincing because if that was the case the legal practitioner would have advised the judge accordingly. Similary his claim that no one else could have represented the company is equally unconvincing. In the result I hold the view that the applicant was in wilful default.

On the merits the applicant's defence was that it signed the agreement after having been pressured that the tender for $5 000 000.00 that had been awarded to it would be withdrawn if the agreement was not signed. Applicant felt that it would have been economically unwise if it declined to take up the shares since it had borrowed from its bank and was going to repay the loan with interest.

It is significant to note that applicant's reason for signing the amended agreement was that it had already borrowed money from its bank and it felt it unwise to decline to do so. It never raised any economic duress. Quite clearly the defence of economic duress is an afterthought raised for the purpose of this application and cannot be allowed to be used.

The applicant contended that the agreement between the parties was concluded at the time its tender offer was accepted. But that cannot be correct because the parties themselves did not treat it as such. Documents filed of record establish the parties themselves accepted that the agreement had not been finalised and it was subject to further negotiations. That explains why Mukungurutse, on 28 February 2000, said,

> "we are anxious to finalise the agreement of sale and we are looking forward to signing the agreement of sale ……."

The agreement being referred to is the amended one which contains provisions relating to the loan repayments.

Consequently I am not at all convinced that the applicant has a good defence. Its application must, therefore, fail and is hereby dismissed with costs.

Bvekwa Legal practice, applicant's legal practitioners
Messrs Dube Manikai & Hwacha, respondent's legal practitioners