

MBADA DIAMONDS (PVT) LTD
versus
S.M.C. LTD
and
THE SHERIFF (N.O)

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3 March 2015 and 20 May 2015

Urgent Chamber Application

I Ndudzo, for the applicant
Ms D Gapare, for the respondent

BHUNU J: On 10 December 2014 the respondent issued summons against the Applicant claiming payment of US\$231 933.00 under case number HC 10947/14 being payment for diamond drilling services rendered. The summons was served simultaneously with the declaration on the respondent on 11 December 2014.

The applicant's legal practitioners Mutamangira & Associates entered appearance to defend on 8 January 2015. Despite the filing of the appearance to defend the respondent filed a chamber application claiming default judgment on 7 January 2015. On 10 February 2015 the respondent obtained default judgment against the applicant in the sum claimed. A writ of execution was then issued on 19 February 2015 with the Sheriff issuing notice of removal on 27 February 2015 thereby prompting the applicant to lodge this urgent chamber application seeking stay of execution pending the outcome of its application for rescission of judgment under case number HC 1737/15.

For the application to succeed the onus was on the applicant to satisfy the court that an injustice would result if the application for stay of execution was not granted. See *Chibanda v King* 1983 (1) ZLR 116 and *Cohen v Cohen* 1979 (3) SA 420.

At the hearing before me Mr *Ndudzo* took the point that respondent had prematurely obtained default judgment because in terms of r 17 as read with r 119 where the plaintiff has served his declaration together with the summons as provided for in r 113 the *dies induciae* is 20 days instead of the ordinary 10 days when summons is not issued together with the

declaration. For that proposition of law he placed reliance on the impeccable reasoning of CHIGUMBA J in *Finwood Investments Private Limited & Another v Tetrad Investment Bank Limited & Another* HH – 69 – 14 where the learned judge observed that:

“My reading of r 17 is that it applies in the normal course of things where summons is served; appearance to defend may be entered within 10 days. Rule 17 implies that summons may be served with or without a declaration. Rule 119 expressly stipulates, in its proviso, that where summons is served together with a declaration, a further ten day period is added onto the normal *dies induciae* provided by r 17, within which to enter an appearance to defend. There is no other construction of these rules which would not lead to an absurdity.”

Confronted by the above legal argument and precedent Ms *Gapare* for the respondent was unable to advance any coherent sensible counter argument. Her submissions bordered on conceding that the law was in fact as articulated by counsel for the applicant and the legal precedent he relied upon. She was hesitant and kept on vacillating as to whether or not she was in fact making a concession.

At the end of the hearing I made an *extempore* judgment granting the relief sought. I then asked her if she required reasons for judgment to which she answered, “No”. Two days later on 5 March 2015 I was surprised to receive a letter from counsel addressed to the Registrar requesting reasons for judgment. The letter reads:

“We write to request his Lordship to provide reasons for the judgment in the above mentioned matter. We had indicated that we did not need reasons but our client has insisted that it requires the reasons for judgment.

If we may have your usual assistance in obtaining the same.”

On 19 March 2015 before I could reduce the reasons for judgment to writing I was again pleasantly surprised to receive a consent to judgment from respondent’s lawyers without any explanation and without the curtesy of withdrawing the prior request for reasons for judgment. The consent to judgment reads:

“The Respondent hereby consents to judgment on the following terms;

1. The default judgment granted by the honourable Justice Mtshiyi on 10th of February 2015 under case number HC 1094/14 be and is hereby rescinded.
2. Costs to be costs in the cause.”

The consent to judgement dispenses of the need for me to give reasons for my earlier judgment. In the case of *Munashe Exavier Wamabo N.O. v Melvin Boxter and Another* HB 91/02 Kamocha J rightly refused to give reasons for judgment where the requester’s erstwhile

legal practitioner had withdrawn the application and consented to the dismissal of the application. Likewise I decline to give reasons for my earlier judgment because of the respondent's consent to judgment.

The net result is that my initial provisional order has been superseded by the consent final order crafted to avoid costs for the unnecessary hearing occasioned by the respondent's insistence on defending the indefensible. Costs are however, at the discretion of the court. The general rule is that costs follow the event. In *Green Span Brothers (Pvt) Ltd v Commissioner of Taxes* 1960 (1) SA 452 (A) Young J had occasion to remark that:

“In ordinary litigation the rule of course, is that in the absence of special circumstances costs follow the event and judicial discretion is geared to that principle.”

In this case the applicant has been put to unnecessary expense in respect of this unnecessary hearing. Had the respondent made the concession to judgment timely the applicant would have been spared the unnecessary expense arising from this hearing. Thus regardless of the outcome in the main matter, the applicant is entitled to its costs for this hearing. It is accordingly ordered that:

1. The default judgment granted by the honourable Justice Mtshiyi on 10th of February 2015 under case number HC 1094/14 be and is hereby rescinded.
2. That the respondent shall meet the costs of these proceedings.

Mutamangira and Associates, the applicant's legal practitioners
Scanlen & Holderness, the respondent's legal practitioners