

**MUNTED TRACTORS & IMPLEMENTS**

**Versus**

**ISHMAEL MUREMBWA**

**And**

**DEPUTY SHERIFF**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 13 MARCH 2013

*L. Mchiso and Tokwe* for applicant  
*M. Ncube* for 1<sup>st</sup> respondent  
No appearance from 2<sup>nd</sup> respondent

Urgent Chamber Application

**KAMOCHA J:** After hearing both legal practitioners on whether or not this matter was urgent I concluded that it was not urgent and dismissed it for want of urgency and I indicated that my reasons would follow in due course. These are they.

On 9 March 2013 the applicant simultaneously filed this application on a certificate of urgency and an application for rescission of a default judgment in case number HC 3223/12 granted on 13 December 2012.

Summons was properly served on the defendant on 26 September 2012 which entered appearance to defend on 12 October 2012. That was two days after the expiration of the *dies induciae*.

Instead of seeking condonation for entering appearance to defend out of time the defendant wrote a letter to the plaintiff arguing that the matter was being defended. The plaintiff could, therefore, not apply for a default judgment as it had done.

Defendant went on to point out that in any event, the summons did not comply with the rules of court as there was no address of service that was within the 5km of the radius of the court house. In essence there was no process before the court. Defendant concluded that the appearance to defend had been entered *ex abundante cautela* and suggested that the plaintiff should seek legal advice.

The plaintiff held a different view and continued with the application for a default judgment on the basis that the appearance to defend was entered out of time. The default judgment was granted on 12 December 2012.

The defendant did not seek to have the default judgment rescinded. The result was that

the Deputy Sheriff in Chiredzi executed that judgment by attaching defendant's property on 20 December 2012. The defendant knew from that date that the property would be auctioned one day or another but did not take any action such as seeking to have the default judgment rescinded.

On 4 January 2013 the respondent's legal practitioners addressed a letter to the Registrar of this court effectively seeking rescission of the judgment by letter. That was not the proper way to seek rescission of a judgment which the defendant believed had been erroneously granted.

The letter by the defendant was referred to a Judge who directed that both parties should appear before him in chambers so that they could explain what was happening. The parties did appear before the Judge on 22 February 2013 who, pointed out that the defendant should have made a proper application for rescission if it wished to have the judgment which, in its view, had been erroneously sought and granted.

The defendant still did not act until it saw an advert in the Herald Newspaper of 7 March 2013 showing that the attached property would be auctioned on 9 March 2013. It was only then that it simultaneously filed the application for rescission and this urgent application fifteen days after it was advised that the proper route to take was to apply for rescission.

The amended interim order that was being sought was as follows:-

"That pending the finalization of the application for rescission of judgment under case number HC 636/13:-

(1) The confirmation of the sale under case number HC 3223/12 be and is hereby stayed."

The defendant who is now the applicant has only decided to take action because the auction of its property was imminent. Applicant was for a long time well aware that its attached property would be auctioned one day or another but chose not to act. It now seeks to have the matter jump the queue to be dealt with urgently. A matter does not become urgent because the inevitable is imminent. See *Kuvarega vs Registrar General and Anor* 1998 (1) ZLR 188 at 193E – G. No satisfactory explanation was proffered why the applicant could not have acted earlier.

In the result the application was dismissed for want of urgency.

*G. N. Mlotshwa & Company*, applicant's legal practitioners  
*Cheda & Partners*, 1<sup>st</sup> respondent's legal practitioners