

TELONE (PRIVATE) LIMITED

Versus

UNITED TECHNICAL EQUIPMENT COMPANY (PVT) LTD

And

BRONZETT ENTERPRISES (PVT) LTD

And

THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE

KAMOCHA J

HARARE, 4 November 2003 and 28 January 2004

URGENT CHAMBER APPLICATION

R. Fitches, for the applicant

F G Gijima, for 2nd respondent

No appearance for 3rd respondent

KAMOCHA J: This is an urgent chamber application for stay of execution of judgment in the form of an interim interdict preventing the 2nd respondent from acting upon and executing any writ issued pursuant to the judgment in case number 6843/03

The brief back ground of what gave rise to these proceedings is this. On 27 July 2003 1st and 2nd respondents issued summons against applicants under case number HC 6843/03 wherein they claimed US\$118 801.32, for goods allegedly sold and delivered to the applicant. The summons was served on 15 August 2003 and appearance to defend was entered 5 days later on 20 August 2003.

On 1 October 2003, respondents issued a notice to plead and intention to bar which was served on applicant's legal practitioners on 6 October 2003. Applicant was given 5 days within which to file its plea. Applicant's plea should have been filed by 13 October 2003 but was only filed on 14 October 2003.

On that same day respondent barred the applicant and proceeded to file a chamber application requesting for a default judgment which was granted on the next day 15 October 2003.

Applicant applied for rescission of the said judgment and that application is pendente lite.

Meanwhile a writ of execution against movable property was issued on 17 October 2003 prompting applicant to seek the stay of execution on urgent basis.

The applicant submitted that it would suffer irreparable harm if execution were to proceed, as the attachment and removal of its property would be disruptive to its business. It went on to say it would suffer prejudice if its goods were sold and its application for rescission succeeded. Once an asset is disposed of, in the current hyper inflationary environment, it would be very difficult to replace it. Some of the property would entail expenditure in foreign currency which is not readily available on the local market. Since applicant, by the nature of its business, uses specialized equipment which is usually not manufactured locally the attachment, removal and sale of such property would lead to applicant suffering irreparable harm in that such assets would be difficult to replace.

Applicant said it was barred on the same day it filed its plea. Failure to file the plea a day before was due to an error by its legal practitioner who miscalculated the *dies induciae*. The legal practitioner filed an affidavit to that effect. He erroneously believed that the last day by which the plea should have been filed was 14 October 2003. He indeed filed the plea on that day. Applicant submitted its default was not willful at all. It went on to state that it was extremely improbable that, given its efforts to settle the matter and avoid judgment being taken, would have knowingly permitted a default judgment to be entered.

There was a concerted effort to avoid judgment and negotiations between the parties to reach a compromise took place.

It concluded that the default judgment was speedily obtained; the delay was only one day; there was a good defence which warranted rescission, and there was a good explanation for the delay. In its view the cumulative effect of these factors was that there maybe injustice if

execution proceeded, as there was likely to be rescission but it would have been gravely prejudiced by the execution.

In their opposing papers the respondents pointed out that since it was common ground between the parties that applicant was bared its first application ought to have been for the upliftment of that bar. This, the applicant, has not done. It therefore remains barred. Rule 83 of the rules of this court provides that:

"Whilst a bar is in operation:

- (a) the registrar shall not accept for filing any pleading or other document from the party barred; and
- (b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit:

except for the purpose of applying for removal of the bar. "
Emphasis added.

Contrary to these clear provisions, applicant filed an application for rescission and has mounted this application for stay of execution of the judgment. The applicant came to court to argue its application. It was not property before the court. It should have come to argue an application for the upliftment of the bar. This applications was ill conceived.

Having found that this application was ill conceived I would, therefore, order that it be and is hereby dismissed with costs.

Messrs Dube Manikai & Hwacha, applicant's legal practitioners
F G Gijima & Associates, respondents' legal practitioners