

THE SHERIFF OF ZIMBABWE  
versus  
ALPHA & OMEGA DAIRY PRIVATE LIMITED  
and  
SEED POTATO CO-OPERATIVE LIMITED

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 29 October and 6 November 2019

### **Opposed application**

*FR Mabhungu*, for the applicant  
*M Muvhunduse*, for the claimant  
*K Kanyemba*, for the judgment creditor

TAGU J: This Interpleader Notice is filed pursuant to the provisions of Order 30 Rule 205A as read with Rule 207 of the High Court Rules 1971. The facts are that the judgment creditor obtained judgment in case No. HC 4994/18 against Gushungo Holdings Private Limited on the 2<sup>nd</sup> day of July 2018. Pursuant to the judgment the judgment creditor instructed the applicant to attach property in execution. On the strength of a Writ of Execution the applicant attached various properties as reflected on the Notice of Seizure and Attachment dated 30 May 2019. The claimant is now claiming all the movable property which appears on the Notice of Seizure and Attachment as its property.

At the hearing of the matter the claimant made an oral application for upliftment of the bar that is operating against it. The bar was effected following the claimant's failure to file its heads of argument in time. Its legal practitioner claimed that there was a misfiling at the offices of its legal practitioners and the omission was only observed today when the matter was about to be argued. Relying on the case of *Smith NO. v Brummer NO. and Anor* 1954 (3) SA 352 at 358 the counsel submitted that the requirements of upliftment of the bar have been satisfied, more so in that the claimant has an arguable case.

The applicant in this case indicated that it did not oppose the application for the uplifting of the bar since it has no interest in the case save for its costs. It further submitted that the claimant has to pay the wasted costs first before it files its heads of argument and before the matter is reset for hearing.

However, the judgment creditor strongly opposed the application for the upliftment of the bar. It urged the court to consider the degree of none compliance with the Rules of this Honourable Court. The contention by the judgment creditor was that the applicant's heads as well as the judgment creditor's head of argument were served on the claimant on the 24<sup>th</sup> of July 2019. Today is the 29<sup>th</sup> of October 2019 and this is gross none compliance with the Rules because a period of over three months has elapsed and the claimant has not filed its heads. Further the judgment creditor submitted that the claimant could not have missed or miss filed two sets of heads of argument filed and served on it on the same day and at different times. According to the judgment creditor the only explanation is that the claimant did not intent to file its heads at all hence are barred. It urged the court to dismiss the application because there has to be finality to the litigation.

In response the claimant dispute that it delayed to file its heads for over three months and claimed it has an arguable case.

In the case of *Smith NO. v Brummer No. and another* cited by the counsel for the claimant it was indeed said at page 353 that-

“In an application for the removal of bar the court has a wide discretion which it will exercise in accordance with the circumstances of each case. The tendency of the Court is to grant such an application where –

- (a) The applicant has given a reasonable explanation of his delay;
- (b) The application is *bona fide* and not made with the object of delaying the opposite party's claim;
- (c) There has not been a reckless or intentional disregard of the Rules of Court;
- (d) The applicant's action is clearly not ill-founded and
- (e) Any prejudice caused to the opposite party to the opposite party could be compensated for by an appropriate order as to costs. The absence of one or more of these circumstances might result in the application being refused.”

The court found that the claimant's legal practitioner's explanation lacks merit in that the legal practitioner only discovered today that they had not filed heads of argument. Surely one wonders what they thought they were coming to court to do other than to delay proceedings unnecessarily. The claimant is therefore automatically barred and the application for upliftment of bar has no merit and is dismissed.

Having considered the application the claim by the claimant is also dismissed.

IT IS ORDERED THAT

1. The application for upliftment of the bar be and is hereby dismissed.
2. The claimant's claim to all the movable property which was placed under attachment in execution of judgement HC 4994/18 is hereby dismissed.
3. All the movable property attached in terms of Notice of Seizure and attachment dated 30 May 2019 issued by applicant is hereby declared executable.
4. The claimant is to pay the judgment creditor's and applicant's costs on an attorney and client scale.

*Dube –Banda, Nzarayapenga & Partners, applicant's legal practitioners*  
*Messrs Chikore Dzingira Group of lawyers, claimant's legal practitioners*  
*Messrs Chitewe Law Practice, judgment creditor's legal practitioners*