

(1) SMETHWICK TRADING (PRIVATE) LIMITED (2) SIMBA  
MANGWENDE  
v  
ROME FURNITURE MANUFACTURERS (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE**  
**ZIYAMBI JA, GWAUNZA JA & MAVANGIRA AJA**  
**HARARE, MARCH 17, 2015 AND AUGUST 18, 2015**

*P.S. Jonhera*, for the appellants

*T. Mpofo & T. Chamisa*, for the respondent

**ZIYAMBI JA:**

[1] This appeal is against a dismissal by the High Court of an application brought by the appellants for the rescission of a judgment granted by that court in default of appearance.

[2] At the outset of the appeal Mr *Jonhera* advised the court that he would confine his submissions to the point raised in Ground 2 (of the three grounds of appeal), which reads as follows.

“2. The court *a quo* erred and misdirected itself in proceeding on the assumption that the first appellant had taken control of the business when, on the papers before the court *a quo* this was an issue in dispute and the court was required to make a specific finding thereon.”

[3] To his credit, Mr *Jonhera* was alive to the fact that the grant of rescission of a judgment is an indulgence of the court and that an appeal against a decision of the court in such a case would necessarily involve an attack on the manner of exercise of the court's discretion<sup>1</sup>. Counsel were agreed that an exercise of judicial discretion could only be interfered with on limited grounds.

## **BACKGROUND**

[4] The facts forming the background of the appeal can briefly be stated as follows:  
Pursuant to an agreement between the parties, the respondent sold its furniture manufacturing business as a going concern to the first appellant represented by its managing director, the second appellant, with effect from 1 June 2013. Included in the sale were, among other things, furniture production assets, haulage trucks, compressors and edging machines. In addition, the entire workforce and liabilities associated with the business were taken over by the first appellant. The purchase price was US\$110 000 which was to be paid by way of a deposit of US\$92000 and the balance in stated installments commencing 28 February 2014. Because the premises from which the business was conducted belonged to the respondent and did not form part of the agreement of sale, the first appellant was to pay occupational rent for its continued occupation of the premises up to 31 January 2014 when it was to move to its own premises. It was acknowledged in the agreement that the premises had been leased to a prospective tenant and that any failure by the appellants to vacate the premises timeously would cause substantial loss and harm to the respondent.

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1. *Barros & Anor v Chimphonda*, 1999 (1) ZLR 58 (S)@P62; Rule 63 High Court Rules, 1971.

- [5] The second appellant signed a deed of suretyship by which he bound himself as surety and co-principal debtor ‘unto and in favour of’ the respondent in respect of all the liabilities of first appellant under the agreement.
- [6] The appellants moved onto the premises and, save for the deposit of \$92 000 which was recorded in the agreement as having been paid, made no further payment to the respondent nor did they move out on 31 January 2014 as agreed. The respondent filed a court application for their eviction as well as an order for the payment of \$75 000 which was then outstanding for occupational rent, as it was entitled to do in terms of the agreement.
- [7] No opposition having been filed within the *dies induciae*, the respondent obtained a default judgment as prayed. Following a writ of execution served on the appellants by the Deputy Sheriff, the application for rescission of judgment was filed and an urgent application for stay of execution pending the court’s decision on that application, was made. By consent the order was granted in the following terms:
- “1. The execution of the judgment obtained in Case No. HC 1317/14 be and is hereby stayed pending the finalization of the proceedings instituted in Case No. HC 3310/14.
  2. In the event that the goods have already been removed from the premises in execution the second respondent is hereby ordered to restore possession of same to the first applicant who shall provide transport to ferry the goods to the premises at corner Bell/Conald, Graniteside, Harare.
  3. The costs shall be costs in the cause.”
- [8] Before the court *a quo* the appellants argued that they were

not in willful default because they were misinformed by their security guard on whom the papers were served as to the date on which the application was served on him and that this caused them to miscalculate the *dies induciae* and file their opposing papers well out of time. In addition, they had a *bona fide* defence because the agreement was not operative since it was subject to a suspensive condition and they had, in consequence, not taken over the business which was still being operated by the respondent.

[9] The court *a quo* rejected the appellants' explanation for the default and found that there was willful default on the part of the appellants who, cognizant of the risks attendant on so doing deliberately refrained from filing papers timeously. Regarding the prospects of success, the court found that the appellants had no *bona fide* defence since the first appellant had moved onto the premises and was operating the business.

### **THE ISSUE ON APPEAL**

[10] The only issue to be determined is whether the appellants were operating the business. Clause 2 of the order sought and obtained by the appellants for stay of execution proves that the appellant was in control of the assets or else why would they seek that possession of the attached property be restored to the first appellant and not the respondent?

The record also shows that as early as May 2013 the second appellant was holding meetings with the staff and summoning employees for disciplinary hearings. In the circumstances, it is quite understandable that Mr *Jonhera* was unable to present with

much force his argument that the court wrongly proceeded on an assumption that the appellants had taken over the business.

It became obvious, on reading the papers on record that the appellants were in control of the business. We find no misdirection in the approach of the trial court.

[11] Consequently, the appellants failed to establish any ground upon which this Court could properly interfere with the judgment of the High Court.

[12] As to the question of costs, the respondent had prayed for costs on the punitive scale of legal practitioner and client. However, Mr *Mpofu* advised the court that in view of the conduct of the matter by Mr *Jonhera* it was not the respondent's intention to press for costs on that scale.

[13] We are of the view that this was the proper course to adopt and commend both counsel for their conduct of this appeal as officers of this Court.

[14] It is for the above reasons that after hearing submissions from counsel we dismissed the appeal with costs and indicated our reasons would follow in due course.

**GWAUNZA JA:**

I agree

**MAVANGIRA AJA:** I agree

*Wintertons*, appellants' legal practitioners

*Ushewokunze Law Chambers*, respondent's legal practitioners