

**LEIGHWOODS BUS COMPANY (PRIVATE) LIMITED**

**Versus**

**COMMERCIAL BANK OF ZIMBABWE LIMITED**

**And**

**THE DEPUTY SHERIFF, BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 5 MARCH 2004

*M. Ndlovu* for applicant  
*S.S. Mazibisa* for 1<sup>st</sup> respondent

Judgment

**CHIWESHE J:** The applicant company seeks an order rescinding the judgment entered against it on the 6<sup>th</sup> March 2003 in case number HC 2742/02.

The facts of this matter are as follows. The 1<sup>st</sup> respondent issued summons against the applicant claiming the sums of \$247 195,46 and \$5 402,90 in respect of an overdraft facility extended to the applicant and bank charges respectively. When the matter reached discovery stage, the applicant failed to effect discovery. An order compelling discovery was granted on 8<sup>th</sup> July 2002. The order was served upon the applicant. Again no discovery was effected notwithstanding the terms of that order. The 1<sup>st</sup> respondent then obtained an order striking out the applicant's plea and defence and granting it leave to apply for default judgment. Default judgment was duly granted. When the 1<sup>st</sup> respondent proceeded to execute that judgment, the applicant filed the present application for rescission of that judgment on the grounds that it was not in willful default and that on the merits it had a "*bona fide*" defence.

The applicant's legal practitioner has filed a supporting affidavit explaining the reason for the default. She states that on the 16<sup>th</sup> July 2003 she received a telephone call from the applicant's director advising that the Deputy Sheriff was attaching its property. She then perused the files and ascertained that there were three matters involving the applicant and the respondent. In respect of the present matter it appeared that it was ready for a pre-trial conference as both the applicant's synopsis of evidence and pre-trial conference memorandum had been filed and served on the respondents on 13<sup>th</sup> February 2003. A further check with the

Assistant Registrar's Office revealed that an order dismissing the applicant's plea for want of discovery had been granted. She admits that the order had been served on the applicant's legal practitioner but appears to have been misplaced as it was not in her office files. She says that if she had seen the order she would have dealt with it. In fact, according to her, the applicant's discovery affidavit was prepared in January 2002 but for some reason it was never filed. She accepts that the mistake was hers and not that of the applicant itself. She was also misled by the respondent which also filed a synopsis of evidence on the 23<sup>rd</sup> September 2003, after it already had obtained the order to strike out. She says that she requested the respondent's legal practitioners to stay execution. The request was turned down, necessitating the present applicant for rescission of judgment.

I am satisfied in the absence of evidence to the contrary that the applicant was not in willful default. The default was occasioned by the tardiness of the applicant's legal practitioners in handling this matter. This has been admitted and an explanation and apology proffered. I am satisfied with the reasonableness of that explanation.

Does the applicant have a "*bona fide*" defence to the respondent's claims? The applicant's defence is stated thus: "The amount which respondent is claiming was paid to him in May 2002 and the amount claimed by respondent in the summons is largely in interest above the prescribed rate which was debited without the applicant's consent."

In my view this averment raises a *prima facie* defence to the claim. Not being a trial court it would not be proper that I proceed to deal with the merits and therefore the prospects of success as the respondent appears to suggest, nor do I think that the failure by the applicant to file an answering affidavit is fatal to its case.

Who should pay the costs of this application? The default judgment was entered because of the applicant's legal practitioner's oversight in failing to effect discovery. On the other hand, the 1<sup>st</sup> respondent's legal practitioners acted unreasonably in seeking to execute upon the judgment in the face of a request by the applicant to suspend such action given the circumstances of the case, particularly the explanation given by the applicant's legal practitioner.

In my view, this was a case in which it would have been prudent to consent to rescission of judgment rather than persist in the face of reasonable explanation for the default. By and large however, it is the applicant's legal practitioner who must bear the brunt of the blame. I am inclined to order that the applicant pays the costs of this application. The respondent prays for such costs on the higher scale. I disagree given the fact that they too acted unreasonably by

refusing to accede to the applicant's reasonable request to stay execution and consent to rescission of judgment.

Accordingly, it is ordered as follows:

- (1) The judgment entered against the applicant on the 6<sup>th</sup> March 2003 in case number HC 2742/02 be and is hereby rescinded.
- (2) The applicant be and is hereby ordered to pay the costs of this application on the ordinary scale.

*Messrs Lazarus & Sarif* applicant's legal practitioners  
*Messrs Cheda & Partners* respondent's legal practitioners