

MTHANDAZO SINDA MONO

Versus

MZILIKAZI HIGH SCHOOL

And

DEPUTY SHERIFF N.O. BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 18 SEPTEMBER 2003

M Ncube for the applicant
N. Mazibuko for the respondent

Stay of Execution

CHEDA J: This is an application for a stay of execution pending determination of applicant's application for rescission of judgment.

First respondent issued out summons against applicant on 16 June 2002 for the payment of \$500 000 plus interest at 30% per annum calculated from date of issue of summons to date of full payment and costs of suit against Bosmount Electrical P/L t/a Bosmount Contractors (1st Defendant), Sinda Mono also known as Mthandazo Sinda Mono (2nd defendant) (now applicant) and Mr Kanyai 3rd defendant.

On or about 23 October 2001 first respondent entered into an agreement with Bosmount Electrical whereby Bosmount Electrical P/L t/a Bosmount Contractors undertook to erect a durawall and brick wall for 1st respondent at a total of \$147 000 of which \$145 000 was paid leaving a balance of \$1 100 to be deducted as compensation to 1st respondent for the 5 bags of cement which had been supplied by 1st respondent.

HB 95/03

Applicant did not satisfactorily complete the work his company was contracted to do, this resulted in 1st respondent looking for another company to complete the work at an estimated cost of \$500 000. Thus 2nd and 3rd respondents' liability to plaintiff in the main action is based on their positions as directors of 1st defendant. Summons were served on 5 September 2002 on Mr Kanyai in his personal capacity as director of 1st defendant and also as a representative of 1st and 2nd defendants. Applicant failed to defend the said action and this resulted in 1st respondent obtaining a default judgment against all of them and subsequently attempted to execute its judgment. Applicant in his application for rescission of judgment raises three issues namely:-

1. That summons were not served on him but on Kanyai whom he states was wrongly joined "as he was never a director of the defunct above company as alleged by 1st respondent. Kanyai is merely a friend." In an attempt to prove his point he produced a CR 14 a company form which shows the directors of the company. It shows that indeed Kanyai was not a director, but this was as of 22 July 1996. The contract between the parties was in 2001. In order for applicant to prove his point, he should have produced a CR 14 for the relevant period. This argument therefore does not take his case any further as I find it to be false. According to the Deputy Sheriff's return of service Kanyai received summons for all the defendants and did not object to the service of the said summons on him, even when the exigencies were explained to him. Surely if he was not part of the contract, he would have said so.

HB 95/03

2. Applicant further stated that he only became aware of 1st respondent's actions on 20 May 2003 whereupon he went to seek legal advice as he was of the view that the matter was complicated. This argument, with greatest respect, does not make any sense. If it was that complicated then the more reason for him to have sought legal advice timeously rather than unduly delay in the manner he did.
3. Applicant through Nhlanhla Sibanda stated in his affidavit that the application for rescission was filed out of time and that his lawyer was going to file the application for condonation before the end of that week. This affidavit was deposed to on 18 June 2003 but up to the time of hearing, his lawyer had not applied for condonation.

In this application, applicant instructed one Nhlanhla Sibanda to depose to an affidavit. *Mr Mazibuko* for 1st respondent has argued that Rule 227(2)(b) has not been complied with, and I agree with him totally. Probably, before I even go further, it is a requirement that an application for condonation must be filed first or at most be filed together with an application of this nature. It is not enough to merely refer to it. Applicant's handling of this matter was to say the least curt. He has not jumped the 1st hurdle yet, in his case and it is therefore improper to deal with his application in that manner.

While the court has a discretion to condone such tardiness, such condonation must be applied and prayed for in terms of the High Court rules. The court can then determine the said application in conjunction with the merits of the case.

HB 95/03

In this matter, applicant's averments are far from convincing as they are full of contradictions. It is my opinion therefore that applicant has not properly placed this application before the court and I agree with *Mr Mazibuko* that it is indeed still born.

There is therefore no need for the court to examine the requirements for this type of application as there is no application before the court anyway. Application is therefore dismissed with costs.

Hare & Partners applicants' legal practitioners

Calderwood Bryce Hendrie & Partners 1st respondent's legal practitioners