

LESLEY ANN MORRIS-DAVIES

and

RUTH ANGELA FRANGCON HOD

versus

ERIC B POCKLINGTON

And

VIVIEN POCKLINGTON

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 12 NOVEMBER 2002 AND 9 DECEMBER 2004

J James for plaintiffs

E E Marondedze for respondent

Trial Cause

NDOU J: In this matter I made the following order:

“It is ordered that:-

1. Judgment be and is hereby entered jointly and severally against the defendants for the payment of 50% of \$3 390,00 together with interest calculated at the prescribed rate from 1 April 1994 to date of payment in full and 50% of \$146 100,00 together with interest thereon calculated at the prescribed rate from 1 January 1995 up to date of payment in full.
2. Mr R M McIndoe is declared a necessary witness and cost incurred and incidental to the preparation of his report to be borne, jointly and severally, by the defendants.
3. Mr Morris-Davies is declared a necessary witness.
4. Defendants are ordered to pay costs, jointly and severally on party and party scale up to the time of submission of referees report to this court and on a legal practitioner and client scale for the period thereafter.”

I did not give reasons then and this judgment provides such reasons.

This matter has a chequered history dating back to 1997. I will deal with details relevant to the determination of the preliminary issue I dealt with on the

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date of the trial. The defendant sought a postponement of the matter on the basis that the first defendant was too ill to stand trial. The application was vigorously opposed as the matter has been dragging since 1997. The plaintiff contended that the first defendant's illness was not such as to prevent him from attending trial as he was on long term oxygen therapy. The plaintiffs said previous attempts to set the matter down had failed on account of first defendant's ill health which necessitated his treatment outside the country. Meantime, the judgment would be rendered a puerile victory on account of inflation. They further submitted that the second defendant is able to appear in court and testify if need be. In fact it was pointed out that it was the defendant who specifically requested that the matter be set down in November 2002. Initially Mr *Maronedze* had submitted that the defendants were already in Harare preparing to board a plane to London. Apparently, during the adjournment the plaintiffs went to defendants' place of abode. As plaintiffs' suspected the defendants were present at their house in Bulawayo. Mr *Maronedze* conceded, without giving reasons that it was indeed incorrect that the defendant were in Harare. Dr Guga was called in support of the application for postponement. He saw first defendant briefly. The latter was able to walk short distances but has some difficulty. If he walked a distance his respiration would be severe. He was not using his oxygen mask. Dr Guga stated that there was nothing that would prevent first defendant from coming to sit in court especially if he is brought by wheel chair. After the testimony of Dr Guga, Mr *Maronedze* submitted that he had laboured to see the defendants during the adjournment and they were unwilling to come to court. He said he explained the consequences of their conduct. He then submitted that in the circumstances a default judgment may be entered against them with costs on an ordinary scale. I agree with

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Mr *James* that this is a classical case of the defendants delaying as far as possible the date of reckoning. They told untruths about the whereabouts of the defendants. They tried to use the first defendant's ill health to avoid liability and buy time.

It is for this reason that costs were granted at punitive scale. They disputed an independent referee's report only to have it produced at the very last minute.

Coghlan & Welsh, plaintiffs legal practitioners
Sibusiso Ndlovu, defendants' legal practitioners