Judgment No. HB 49/07
Case No. HC 2754/02

THE ZIMBABWE BATA SHOE COMPANY

Versus

BEIRA INTERNATIONAL TRADE & COMMERCIAL CENTRE

And

JAMES ZUWA DZUMBIRA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 15 SEPTEMBER 2003 & 26 APRIL 2007

K I Phulu, for applicant
R Nyathi, for respondents

Judgment

CHIWESHE J: The applicant company issued summons against the respondents on 12 July 2001 in pursuit of monies owed to it. The summons was served upon the respondents and the time during which an appearance to defend should have been entered expired on 8 August 2001. Default judgment was entered against the respondents on 12 September 2001.

The respondents filed an application for rescission of that judgment on 29 January 2002, three months out of time. Further, no application for condonation of the late filing of the application was made as is required of a party acting out of time. The respondents were automatically barred in the absence of a successful application for condonation. In other words the application could not be entertained. It was accordingly dismissed on that basis. Assuming the respondents had gotten over this first hurdle it would have become incumbent on them to show that firstly they were not in wilful default and secondly that they have a *bona fide* defence to the claim.

Aggrieved by the dismissal of the application for rescission the respondents filed a notice of appeal against that decision. At the time of filing of the notice of appeal no written judgment or reasons had been handed down.

The applicant contends that the notice of appeal has been filed for purposes of delay and that the respondents have no *bona fide* defence to the claim. On that basis it filed the present application seeking leave to execute the judgment pending appeal.

In view of the substantial amounts claimed, it is inconceivable that a diligent litigant would have reacted so hopelessly out of time as the respondents did in this case if it was seriously intended firstly to defend the action and secondly to have the default judgment rescinded. The respondents only reacted when the applicant sought to execute the judgment. The conduct of the respondents can only lead to one conclusion – that the notice of appeal has been lodged for purposes of delay, itself a gross abuse of court process (see *Bresford Land Plan (Pvt) Ltd* v *Urquart* 1975(3) SA 619(RAD)).

It appears to me that in an application such as the present the order sought should not be granted save under compelling circumstances. The sums involved are substantial and applicant would be severely prejudiced if it were ordered to suspend execution in an appeal in which the respondent's prospects of success appear so remote that one is persuaded to conclude that the purpose of such an appeal is to buy time. Further, the claim sounds in money so that in the unlikely event of the appeal succeeding the applicant should be able to make recompense. In my view the balance of convenience favours the applicant.

Accordingly, it is ordered as follows:

1. That the applicant be and is hereby granted leave to execute the judgment in case number HC 2021/01 pending appeal.

2. That the respondents pay the costs of this application.

Messrs Dazinger & Partners c/o Coghlan & Welsh, applicant's legal practitioners
Messrs Mabuye & Co c/o Messrs Sibusiso Ndlovu & Partners, respondents' legal practitioners