METALLION GOLD ZIMBABWE **APPLICANT**

AND

EUROTECH PLANT & EQUIPMENT (PVT) LTD **1ST RESPONDENT**

AND

THE DEPUTY SHERIFF **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 AUGUST 2010 AND 19 AUGUST 2010

Mr T. Tandi for applicant
Mr M. Ncube for 1st respondent

Urgent Chamber Application

MATHONSI J: This is an urgent application for a stay of execution pending the determination of an application for rescission of judgment. The urgent application was filed on the 5th August 2010 while the application for rescission of judgment was only filed under case No. HC 1558/10 on the 12th August 2010.

When the urgent application was filed, it was filed with an incomplete draft of the provisional order which did not have the reverse page of Form 29C. The application was therefore filed without the terms of the final order sought and a prayer for interim relief.

The first Respondent filed an opposing affidavit to the application in which it raised essentially four points in limine, namely that:

(a) the matter is not urgent as the urgency that has caused the Applicant to approach the court the way it has done is self-created and therefore not the kind of urgency envisaged by the Rules of this court.

(b) there has been a signal failure to comply with the Rules of this Court in that the application is not accompanied by a draft order in Form 29C in breach of Rule 247(1)(a) of the High Court Rules and that omission is fatal to the application.

(c) the application for a stay of execution was filed prematurely at a time when no application for rescission of judgment had been made and as such it was bad at law given that execution could not be stayed pending nothing particularly where no draft order containing what was being prayed for had been made.

(d) the Applicant had an alternative remedy other than a stay of execution, that is, he could still sue for damages if he subsequently succeeds in overturning the judgment given in default against it.

At the hearing of the application the Applicant sought to file a document to amend its draft order by introducing the reverse page of Form 29C having realised that the draft order was incomplete. The application for an amendment was strongly contested by *Mr Ncube* appearing for the first Respondent who submitted that the application should be considered as it was at the time of filing and that Applicant should not be allowed to amend its papers in response to the points in limine made by the first Respondent.

The background of the matter is that starting about the 17th June 2007 and following then, the first Respondent supplied Applicant with mining equipment at the Applicant's special

instance and request. Invoices for payment were submitted in Zimbabwe dollars but no payment was made for the relevant invoices.

During subsequent months and indeed years, the first Respondent sent several written reminders and revised invoices demanding payment which payment was not made. About February 2009, the Zimbabwe dollar became moribund and multiple currencies were introduced. At some stage after the introduction of foreign currency, the Applicant requested the first Respondent to revise its invoices taking this into account and submit amended invoices denominated in United States Dollars.

The request by the Applicant for revised invoices was an admission of liability which clearly interrupted any prescriptive period which might have been running and there is no merit in the half-hearted argument over prescription.

The first Respondent submitted revised accounts denominated in United States Dollars but still no payment was forthcoming from the Applicant despite numerous demands which are filed of record in case no. HC 1111/10. On the 15th June 2010, the first Respondent issued summons against the Applicant claiming a sum of $169 755-87.

The said summons was served upon the Applicant on the 26th June 2010 and, as no appearance to defend was filed, an application for default judgment was made which was granted on the 22nd July 2010. Applicant appears to have done nothing at all about the matter until an attachment of property in execution of the default judgment was made on 2nd August 2010.

The attachment of property jolted the Applicant into action resulting in this urgent application being filed on 5th August 2010 even before an application for rescission of the judgment granted in default was made. It was only filed on 12th August 2010.

From the time that Applicant was served with the summons on the 26th June 2010, it has done absolutely nothing, quite consistent with its conduct over the years when it did not respond to any of the demands made by the first Respondent for payment.

The claim that when the summons was received a letter was written to Applicant's legal practitioners instructing them to defend the action but that the letter in question has just vanished from the surface of the earth, is simply disingenuous. Pressed by the Court to produce even a file copy of that letter to signify that at least something was done, *Mr Tandi* who appeared for the Applicant, could not do so even as he claimed to have the entire office file of the Applicant on the matter in his possession.

Not even the service of summons could incite action on the part of the Applicant. Now that its property has been attached in execution, Applicant has decided to approach the Court on an urgent basis. It was pointed out in the case of *Kuvarega v Registrar General and Another* 1998(1) ZLR 188 at 193 E- G that:

> "Urgency which stems from a deliberate or careless absention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

See also *Khumalo v Mpofu* HB 56/10 (as yet unreported) where at page 3 of the cyclostyled judgment I did state that:-

> "No litigant is entitled to be heard on an urgent basis as of right."

I am not persuaded that the urgency arising out of the facts of this matter is one contemplated by the Rules. Quite to the contrary this is not only self-created urgency but also a deliberate attempt to frustrate the first Respondent in its resolve to recover what it is entitled to. I am fortified in that conclusion by the fact that at no stage did the Applicant deny liability or that the mining equipment was delivered. All that Applicant appears to be saying is that it will not pay until the Applicant reduces the price to a level acceptable to the Applicant even though Applicant has had the benefit of the goods supplied for more than 2 years.

Having come to the conclusion that the matter is not urgent, it is not necessary to determine the other points raised in limine or to go into the merits.

Accordingly it is ordered as follows:

1. That the Application be and is hereby dismissed.

2. That the Applicant shall bear the costs of suit on an attorney and client scale.

Kantor and Immerman C/o Joel & Pincus, applicant's legal practitioners
Messrs Cheda and Partners, 1st respondent's legal practitioners