

MORROS DLAMINI

And

MAY MAHLANGU

Versus

LEAH MPANDE

And

NATHANIEL SIBANDA

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 NOVEMBER 2009 & 24 NOVEMBER 2011

G Nyathi for applicants
Ms N. Tachiona for 1st respondent

Judgment

NDOU J: This is an application for stay of execution pending the determination of an application for rescission under case number HC 1853/09. The default judgment was granted under cover of case number HC 1676/07. The 1st respondent issued summons against the two applicants and 2nd respondent for replacement of her water pump using the current market value. The applicants were personally served with the summons on 15 July 2008. The amount claimed was denominated in Zimbabwe Dollar i.e. Z\$300 million. On 25 June 2008, sought to amend her claim and filed a notice of amendment on that date. The effect of amendment sought was to do away with the Z\$300 million claim and substituted it with a prayer in the following terms:-

“Wherefore plaintiff claims –

- (a) That defendant jointly or severally compensate plaintiff with a new pump or alternatively,

- (b) That defendants jointly or severally pay to the plaintiff the current fair market value of the pump at the time of judgment
- (c) ...
- (d) ...”

Going through the papers in the application for default judgment (under HC 1676/07), it does not seem that this application for amendment was served of the applicants. This is a material amendment which should have been served. There is no evidence that the application for amendment was granted either. When the matter was set down on the unopposed roll, the 1st respondent (who was the applicant) merely filed three quotations for a similar new pump. The court granted an order in favour of the 1st respondent in the sum of US\$1 500. One of the issues raised by the applicants in their application for rescission and in this application is the replacement value of the pump. This value was “amended” from Z\$300 million to US\$1 500,00. As alluded to above the papers do not evince that the application for amendment was served on the applicants. This service would have highlighted to them that the original amount in the claim was being altered. Further, there is no evidence that the application for amendment was granted. With these flaws, it seems to me that there is merit in the application for stay of execution. Further, the parties attempted to settle the matter after the service of the summons. They concluded some written agreement. The applicants said the round table meeting between the parties led them to believe that there was no need for them to defend the case. With these factors in mind I find that the application for stay of execution pending the determination of the application for rescission has merit.

Accordingly, I grant the provisional order in terms of the draft.

Sansole & Senda, applicants' legal practitioners
Bulawayo Legal Projects Centre, 1st respondent's legal practitioners