HC 6409/03

INDEPENDENT FINANCIAL SERVICES (PVT) LTD
versus
COLSHOT INVESTMENTS (PVT) LTD
and
THE DEPUTY SHERIFF, HARARE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 21 July and 17 December 2003

Urgent Chamber Application

Mr *Gijima* for the applicant
Mr *S J Chihambakwe* for the respondent

HUNGWE J: Applicant filed this application for stay of execution under a certificate of urgency on 16 July 2003. I directed the matter to be set down for hearing on 21 July, 2003. Respondent filed its notice of opposition and heads of argument prior to the hearing.

At the hearing of this application Mr *Gijima* who appeared for the applicant submitted that the application for stay of execution was premised on the fact that the judgment upon which the writ of execution was based had been obtained by fraud. There was an application for rescission of that judgment. If execution is not stayed, then the success of that application would be academic.

Mr *Chihambakwe*, for the respondent vigorously opposed the application. He attacked the application on three points.

The first point taken by Mr *Chihambakwe* was that as the judgment had been obtained by consent some four months before the date of the application it is an abuse of process to seek an order of stay of execution on an urgent

basis.

Secondly, the application was being made to stay execution pending the resolution of another application for rescission to be filed by the applicant. There was no application for rescission filed by the applicant indicating that in fact this present application was *mala fide.*

Thirdly applicant has not shown on the present papers that it has a good defence upon which an application for rescission of the matters in HC 1809/03 and HC 1810/03 could be granted. The judgment was obtained by consent and an allegation of fraud could not be sustained on these papers.

The background to this application is that in HC 1809/03 and HC 1810/03 first respondent sued applicant for $341 638 705,29 and $439 010 407,09. The first respondent barred applicant and sought default judgments. CHINHENGO J before who the application for default judgment was placed, summoned the parties to address him on an aspect with which he was unhappy about. In that appearance counsel for the first respondent, who still appears for it in the present case moved the court to grant default judgment since in a letter addressed to first respondent dated 16 May 2003, the applicants' erstwhile legal practitioners had admitted owing first respondent $337 million.

Counsel for the applicant consented to judgment in that amount and judgment was granted.

It is on this judgment that a writ of execution was obtained by first respondent and acted upon by the second respondent. The fact that judgment had been obtained against their client, the applicant was therefore known the very day it was granted. This was on l8 June, 2003.

Between 18 June, 2003 and 16 July 2003 no attempt was made by the applicant either to obtain rescission, if it was so advised, or to liquidate that portion which it still admits it owes, being $130 million. Up to the date of hearing, the first respondent had challenged applicant to pay $130 million into court and go to trial on the balance but again the applicants did not take up that challenge.

First respondent urged me to conclude from this failure to pay that this application is part of the applicant's delaying tactics. It owes the money. Two legal practitioners had admitted as much on its behalf. It has failed to pay even that which it admits it owes. It is simply insolvent. There is no good faith in this application.

I agree.

The lack of *bona fides* on the applicant's part is demonstrated by its failure to file an affidavit from its then legal practitioner indicating how he was deceived into giving consent to judgment of such a high amount contrary to instructions. It was not suggested that Mr Chimwaradze was unable to depose to such an affidavit nor was any explanation given why there was no attempt to file such an affidavit. This leads me to conclude that indeed the allegation of fraud is just a red herring. One would have hoped that applicant could offer to make payment into Court of the sum of $130 million that it admits owing. It did not make that offer.

Instead applicant seeks to blame its own legal practitioner for its failure to discharge its obligation and or to conduct its pleadings properly.

I have considered the papers filed in opposition and came to the conclusion that applicant merely seeks to delay the day of reckoning by filing this application. A matter is not urgent merely because property has been attached. That is self-created urgency, born out of the dilatory manner in which a party conducts its affairs. It cannot be a good reason to stay satisfaction of a lawfully due debt as here.

In the premises the application is dismissed with costs on a legal practitioner and client scale.

Dube, Manikai and Hwacha, applicant's legal practitioners.

Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners.