

BLUMO TRADING (PRIVATE) LIMITED
t/a COLCOM COMMODITIES
versus
MORGAN MUDUVURI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 3 February 2012

Opposed Application

Ms R Taran, for the applicant

R Chavi, for the respondent

MATHONSI J: The respondent was served with the applicant's heads of argument on 23 May 2011. In terms of r 238 (2a) of the High Court Rules, as the respondent is represented by a legal practitioner, the said legal practitioner was required to file heads of argument not more than ten days after receiving the applicant's heads of argument.

That provision is peremptory and in terms of subrule (2 b) of r 238 a respondent who fails to file heads of argument within the prescribed period of time is automatically barred and the court is entitled to deal with the matter on the merits or direct that it be set down unopposed.

Mr *Chavi* appearing on behalf of the respondent conceded that the respondent's heads were not filed on time. In fact they were only filed on 16 January 2012 well out of time. No application for condonation was made and as such the respondent has no right of audience.

I intend therefore to deal with the matter on the merits. I have studiously gone through the papers filed of record and I am of the view that a good case has been made for an order of summary judgment.

In order to defeat an application for summary judgment the respondent is required to satisfy the court that he has a good *prima facie* defence. He must allege facts that if proved at the trial would entitle him to succeed at the trial.

I am of the view that the respondent has failed to do so. What he has done is to dispute the purchase price of the maize that he delivered to the applicant when in fact the price was agreed upon between the parties and he appended his signature on the various documents signifying delivery.

It remains for me to deal with the penalty stipulation of 10% monthly interest. I do not agree with Ms *Taran* that it does not violate the provisions of the Contractual Penalties Act [Cap 804]. To me 10% interest a month is excessive.

In terms of s 4 (2) as read with s 4 (4) of the Act, if it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the breach, the court may reduce the penalty and grant what is fair and just in the circumstances.

Without going into the arithmetics of the debt I am of the view that the computation made by the applicant to justify the penalty is not convincing as it exaggerates the prejudice suffered. It is best practice, where interest is to be reckoned on a monthly basis, to place it at about 3 to 5%. I am of the view that in *casu* it should be pegged at 5% per month.

In the result, I make the following order that:

1. The application for summary judgment is hereby granted.
2. The respondent shall pay the applicant the sum of US\$27224-19.
3. The respondent shall pay the applicant interest on the aforesaid amount at the rate of 5% per annum from 2 December 2010 until date of full and final payment.
4. The respondent shall pay the applicant a penalty amount on both the capital and the interest amount aforesaid on a compounded basis at the rate of 5% per month from 12 January 2011 until date of full and final payment.
5. The respondent shall pay costs of suit on a legal practitioner and client scale.

Scanlen Holderness, applicant's legal practitioners

I Murambasvina Legal Practitioners, respondent's legal practitioners