

DISTRIBUTABLE (3)

Judgment No. SC 4/06  
Civil Appeal No. 301/05

JOHN NYAKAMHA v LOBELS BREAD (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE  
SANDURA JA, CHEDA JA & GWAUNZA JA  
HARARE, FEBRUARY 13 & MARCH 7, 2006

The appellant in person

*H Zhou*, for the respondent

GWAUNZA JA: In the court *a quo*, this dispute was heard as an unopposed application for the confirmation of a provisional order. The appellant, who was then the first respondent, was present in court and objected to it being heard as an unopposed matter. He indicated that he had filed a notice of opposition, and opposing papers. The learned trial judge then stood the matter down in order to give the parties an opportunity to clarify the matter.

In his short judgment, the learned trial judge explained what then transpired.

“On 9 September 2005, after exhaustive presentations by both parties, it turned out that the first respondent had filed papers in opposition to the initial granting of the provisional order, which did not find favour with the court which proceeded to grant the provisional order. The first respondent did not file any papers in opposition to the confirmation of the provisional order, but erroneously insisted that the papers filed in opposition to the initial granting of the provisional order should be considered as opposition to the confirmation of the provisional order.

After a painstaking explanation to the first respondent of the procedures relating to provisional orders, which he appeared to understand, I confirmed the provisional order, because technically, the matter was unopposed and the applicant had satisfied all the requirements for confirmation.”

Contrary to what the learned judge *a quo* indicated, the appellant did not or chose not to, understand the explanation made to him concerning provisional orders, and has appealed to this Court. He insists that he opposed the application in the court *a quo* and that the matter should have been heard on that basis.

The appellant concedes that while he had filed papers opposing the granting of the provisional order in question, he had not, as he was clearly called upon to do by such order, filed any notice and supporting documents opposing the confirmation of the order. He attributes this default to ignorance and submits that he believed the same opposing affidavit filed in opposition to the granting of the provisional order, would serve the same purpose in respect of its confirmation.

There is in my view doubt as to the genuineness of this submission. The learned trial judge took the trouble to explain, to the appellant, the procedures relating to provisional orders. He gave the impression to the judge that he had understood the explanation. It is evident that he chose to ignore this explanation and proceeded to embark on a course of action that was clearly futile. Equally evident from the drafting style and content of his appeal papers is the fact that the appellant is receiving wrong advice from someone. He now submits that he has filed an application with the court *a quo* for rescission of the judgment he is appealing against. Clearly he cannot pursue both of these actions simultaneously.

As the provisional order in the court *a quo* was, effectively, unopposed, it was not legally open to the appellant to appeal against it. He should rather have pursued only the application for rescission of the judgment. The appeal is therefore,

not properly before this Court.

The appellant prayed for leniency on the question of costs. I am not satisfied he has made a case for such leniency. He not only disregarded the explanations tendered by the learned trial judge, he has also persisted with the “appeal” knowing very well that an application by him for the rescission of the same judgment was pending in the High Court. He is in my view not deserving of any leniency, having so abused the process of this Court.

The appeal is accordingly struck off the roll with costs.

SANDURA JA: I agree.

CHEDA JA: I agree.

*Atherstone & Cook*, respondent's legal practitioners