SOUTHERN AFRICA TOURING SERVICES
(PRIVATE) LIMITED
versus
HALAM ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 September 2011 & 26 October 2011

Mr *Zuze,* for the applicant
S. Nyerere, for the respondent

MTSHIYA J: This is an application for rescission of a default order granted by this court on 29 March 2010. The order reads as follows:

> "IT IS ORDERED THAT:
>
> The judgment with costs be, and is hereby entered for plaintiff in the sum of US$17 116.00 with interest thereon at the prescribed rate from 20 July 2009 to date of payment."

The application is opposed.

The respondent argued, as points *in limine*, that the applicant as an incorporated company had no *locus standi* as the order relied on was against Southern Africa Touring Services (which applicant said was the trading name) and that the application was not in conformity with r 230 of the High Court Rules, 1971.

I failed to find merit in the preliminary issue relating to *locus standi* and the format of the application. The parties to this dispute know each other fully well and their trading names are also known to each other. I have no doubt in my mind that the defendant referred to in the court's order of 29 March 2010 is the applicant in *casu*. Furthermore I do not think the format of the court application prejudices the respondent in any way. Accordingly the points *in limine* cannot be upheld.

The applicant, despite accepting that the summons relating to the matter was served on it on 3 February 2010, claims that it only became aware of the default judgment on 4 May 2010 when served with a writ of execution of the property. In the main, the applicant's explanation is that, through an oversight on the part of its office orderly who did not advise it of the summons, the default situation would not have arisen. The applicant submits there was no wilful default.

The applicant then goes further to dispute the amount in the default order and also raises the issue of compliance with foreign exchange control legislation. This is so because the amount in the order granted is in US dollars and yet /the debt arose before February 2009. The applicant also raises issue with the rate of interest. However, on the issue of the rate of interest, the court order only makes reference to the prescribed interest rate. The prescribed interest rate of 5% per annum was gazetted on 23 October 2009 under S.I. 164 of 2009. That in my view, would be the prescribed rate applicable from the time of gazetting. There was no applicable prescribed rate prior to 23 October 2009. In my view, that becomes an administrative issue relating to the calculation of figures.

The respondent submits that it is untrue that the office orderly, a responsible person, did not bring to the attention of the applicant the existence of the summons. The respondent believes that the applicant is deliberately trying to mislead the court and yet at the same time acknowledging that the summons was indeed delivered and acknowledged at its offices.

Furthermore, the respondent argues, the applicant wants the court to believe that the summons was never brought to its attention at <u>any time</u> until 4 May 2010 when it got the execution notice. The respondent says that is remotely possible and does not therefore accept the assertion that the applicant's default was not wilful.

On the amount reflected in the order granted by this court, the respondent submits that the amount is confirmed through exchange of correspondence and that the parties were actually using the US dollars in their engagements. Indeed some of the relevant e-mails from the applicant and respondent read as follows:-

> **"Feb 20** **mail from Greenfield Mbeya of Applicant to Gary Archer of respondent:**
> My apologies for not reverting back to you with regards to the correspondence sent to Farai. I am the caretaker in finance, whilst I acknowledge the debt I will make arrangements and advise you how this will be liquidated. But it will settled in instalments that is a fact I should not hide from you and please be appraised.
>
> **Feb 25** **mail from Greenfield Mbeya to Gary Archer**
> The truth is I am having cash flow problems a thing I should not mention.
> But I thought I should be man enough to acknowledge your mail and indicated I will revert back to you early next week with my payment arrangements. Kindly bear with me as I do not want to lie and make empty promises. I will revert to you next week.

March 13 **mail from Greenfield Mbeya to Gary Archer**
I feel very bad more so when I gave you a positive picture. Things are not that good however I will try to squeeze at least US$1 000 for the next three months and thereafter at least $4 000.00 monthly. It might not be to your amusement at least I am being realistic.

May 4 **mail Greenfield Mbeya to Gary Archer:**
I honestly regret the inordinate delay in reverting back to you. The honest truth is that I am not able at this time to settle the account and I make two proposals to that effect being –

(a) We enter into an agreement whereby we do your transfers so that we are able to knock of the outstanding balance. I believe that this would be the best and feasible method to liquidate our obligations;

(b) The other but not feasible method is acknowledging our indebtedness to yourselves and agree that once the situation picks we will make efforts to pay the outstanding amounts. We believe the good times will come back and therefore feel the best route at this juncture is option (a) proposed above.
However, there is no justification in having remained silent so far and I hope you will agree with our proposal.

December 2 **mail from Gary Archer to Martin Mashingaidze**
Please can you advise when we can expect payment for the amount of USD 17116.01 outstanding into Africa Mowana Safaris, as you can see from the below correspondence this issue has been long outstanding and I would like to resolve this as urgently as possible, your attention in this matter is greatly appreciated and look forward to hearing from you."

The debt being acknowledged in the above correspondence is the sum of US$17 116.01 which forms the basis of the summons issued by the responded on 27 January 2010. The respondent also referred to payment made in US dollars as far back as January 2006 as was the practice in the tourism industry. That is an issue which I believe was long settled between the parties.

I find merit in respondent's submissions. It cannot be true that the responsible office orderly in the employ of the applicant did not advise his superiors of the summons until May 2010. That possibility is indeed remote. The applicant does not disclose as to what became of the summons served on its office orderly but decides to concentrate on the writ of execution served on it on 4 May 2010. My doubts about the truth of the applicant's explanation renders it difficult for me to accept that there was no wilful default.

Furthermore, given the exchange of information found in some of the applicant's documents quoted above, I also find it difficult to allow the applicant to now dispute the amount. The applicant's acceptance of its indebtedness to the respondent is clearly evident from its own correspondence. The mode of payment cannot, under the circumstances of this case, be used as a defence. The debt was admitted in full in United States dollars. I therefore see no bona fides in the applicant's purported defences. Prospects of success are therefore, in my view, nil.

The applicant has correctly cited relevant case law regulating the grant of an application for rescission. The applicant states in its heads of argument:-

"7.2.1 The court in Stockil vs Griffiths 1992 (1) ZLR 172 (S) held that the requirements for an application for rescission are as follows;

7.2.1.1 The reasonableness of the Applicant's default.

7.2.1.2 The bona-fides of the Application to rescind the judgment

7.2.1.3 The bona-fides of the merits – and specifically whether that defense carries some prospects of success."

Taking into account the above and affidavit evidence, I refuse to accept that this application meets the legal requirements for rescission. Accordingly, I find merit in the respondent's opposition to the relief sought.

The application is dismissed with costs.

Matsikidze & Muchenje, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners