SUSAN JASON MURADZIKWA

versus

GREATERMANS STORES (1979) (PVT) LTD

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 17 May 2012

**CHAMBER APPLICATION**

 MATHONSI J: This is a chamber application in which the applicant seeks the following order:-

 “IT IS ORDERED THAT

1. The application for condonation for late filing of application for rescission of judgment is hereby granted. Applicant is hereby ordered to file her application within 10 days of the date of this order.
2. The execution of the order granted in case No. HC 2474/11 be and is hereby suspended pending filing and finalisation of the application for rescission of judgment.
3. Each party to bear its own costs.”

The respondent instituted proceedings against the applicant in case No. HC 1534/11 seeking payment of the sum of US$47 059,80 for household goods sold and delivered to the applicant on credit. The applicant duly entered appearance to defend the claim prompting the respondent herein to make an application for summary judgment in case No HC 2474/11 on the basis that the applicant had not a *bona fide* defence to the claim.

In that application, the respondent sought interest at the rate of 36 percent per annum calculated monthly from 1 February 2011 to date of payment. The applicant opposed the application contesting mainly the minimum instalment being claimed and the rate of interest. For some reason when the matter was heard, by BERE J on 8 September 2011, the applicant was in default. An order was then issued in the following terms:

“IT IS ORDERED THAT:

1. Summary judgment in case number HC 1534/11 be and is hereby granted in favour of the applicant and against the respondent in the sum of US$47 059,80 together with interest on that sum at the rate of 5 percent per annum calculated monthly from 1 February 2011 to the date of full and final payment.
2. Respondent shall pay costs on an attorney and client scale.”

Clearly therefore the respondent was not awarded the interest that it had prayed for but was granted interest at the rate of 5 percent per annum which is the prescribed rate of interest.

In this application the applicant states in her founding affidavit that after being served with a writ of execution against property, she negotiated with the respondent resulting in her making a down payment of US$20 000-00 towards her indebtedness to the respondent. This signified her preparedness to comply with the court order operating against her. She goes on to say that although she had undertaken to clear the balance by 31 March 2012 she failed to do so due to financial challenges she is facing. Her request for an extension of time has not found favour with the respondent.

She points out that the respondent has given a break down of what is owing factoring in attorney and client costs including collection commission resulting in an unjustified balance of US$38 637-89 allegedly still outstanding. For that reason she now wants to apply for a rescission of the judgment made by BERE J on 8 September 2011. As she is now out of time to make the rescission of judgement application she seeks condonation to file the application out of time.

In considering whether to condone a failure to comply with the rules of court, there are broad factors to be taken into account. These are;

1. That the delay involved was not in ordinate, having regard to the circumstances of the case;
2. That there is a reasonable explanation for the delay;
3. That the prospects of success should the application be granted, are good; and
4. The possible prejudice to the other party should the application be granted.

See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at 260 C-H and 261A; *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (S) at 357 D-G; *Ncube* v *CBZ Bank Ltd and Ors* HB 99/11 at p3 and *Qalisa Investments (Pvt) Ltd* v *Drummond* HB146/11.

The court has a discretion to condone a failure to comply with the rules taking into account the foregoing factors. In the present case the application does not measure up to the standard set out above. The delay in bringing the application is in ordinate given that the applicant has known of the existence of the judgment for several months. She has not tendered a reasonable explanation for the delay.

More importantly, there are no prospects whatsoever of the success of the rescission of judgment application. The applicant is questioning the inclusion of attorney and client costs in what is still due by her. She has previously set about trying to comply with the court order. Now that she does not agree with the computation of what she has to pay in terms of the court order, she would like to have the order rescinded.

This has never been an acceptable reason for seeking rescission of judgment. The applicant is legally represented and as such her legal practitioners should have been the first to know that where the costs which were ordered by the court are in dispute, that dispute can only be settled through the taxation of a bill of those costs by the taxing officer and not by rescission of judgment.

Collection Commission is an attorney and client charge and to the extent that an order for such costs was given, collection commission can be levied against the applicant. The calculation of it is provided for in the Law Society of Zimbabwe Regulations and that is a matter the parties can determine among themselves upon reference to those regulations and not by approaching the court. The same applies to interest which can be ascertained by reference to the court order.

In all circumstance, there is no basis for seeking a rescission of judgment. That being the case, the applicant is not entitled to condonation.

In the result the application is dismissed with no order as to costs.