

MINISTRY OF PRIMARY AND SECONDARY EDUCATION  
versus  
OSWELL SECURITY (PRIVATE LIMITED)

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
HARARE, 24 November 2016 and 17 February 2017

### **Opposed application**

Miss *T. Musangwa*, for the applicant  
*E. Hamunakwadi*, for the respondent

CHIWESHE JP: This is an application for condonation of late filing of heads of argument in case number HC 3268/16 (the main matter) in contravention of order 32 Rule 238 (2a) of the Rules of Court.

The background facts are briefly as follows. The respondent obtained an arbitral award against the applicant. The arbitral award was registered as an order of this court under case number HC 3917/15.

The respondent (applicant in the main matter) has applied for a garnishee order to be raised against the applicant, in order to satisfy the arbitral award. The applicant filed opposing papers but was barred for failure to file its heads of argument within ten days as require by law. The present application seeks an order in the following terms:

“IT IS ORDERED THAT:

1. The application for upliftment of the bar is hereby granted.
2. The failure by applicants to file their heads of argument timeously is hereby condoned.
3. The applicants be allowed to file their heads of argument within ten days of receipt of this order.”

The factors to be taken into account in an application for condonation are well documented. They are the degree of non-compliance with the Rules of Court, the explanation proffered for

such non-compliance, the importance of the case, the applicant's prospects of success in the main matter, the respondent's interest in the finality of the case, the convenience of the court and the avoidance of undue delay in the administration of justice. These factors are to be considered cumulatively rather than individually – see *Cliff Mineral Exploration (Zimbabwe) (Pvt) Ltd v Union Carbide Management Services (Pvt) Ltd and Ors* 1989 3 ZLR 338 (SC) . For example the length of the delay should be considered “in the light of the explanation thereof and the prospects of success on the merits”. In the instant case the delay was an inordinate four weeks. Further the applicant's conduct in the main matter and the arbitral proceedings has been dilatory. The explanation for the delay is that the officer tasked to handle the matter in the Civil Division of the attorney General's Office had been involved in a road traffic accident and subsequently hospitalised. However, no evidence has been adduced in support of that explanation. Neither has an explanation been offered as to why the case had not been timeously allocated to another officer in that department.

Whilst the applicant's explanation for the delay leaves a lot to be desired, its prospects of success in the main matter are extremely high.

The respondent's application in the main matter seeks to impose a garnishee order on the funds of the applicant in order to satisfy the debt owed to it in terms of the arbitral award. In short the respondent seeks in the main matter to attach state property, the applicant being a government department. The respondent erroneously interprets section 5 (3) of the State Liabilities Act [*Chapter 8:14*] to mean that a garnishee order can be raised against the State. The provision reads as follows:

“(3) Where any money is payable by the State to a judgment debtor and the judgment creditor would, if the money so payable were money payable by a private person, be entitled to obtain from any court an order, known as a garnishee order, for the attachment of the money, such court may, subject to any other enactment and in accordance with any rules of court, make a garnishee order restraining the judgment debtor from receiving the money and directing payment thereof to the judgment creditor or any other person specified in the order.”

The provision simply means that where a judgment debtor is for one reason or another due to be paid some money by the State, the judgment creditor may make an application for an order that such monies be paid directly to such judgment creditor in satisfaction of the debt owed to him by the judgment debtor. The provision does not in any way imply that the State itself would be the subject of such garnishee arrangements! On the contrary the Act prohibits the execution or attachment of State property. Section 5 thereof provides as follows:

**“5 No execution or attachment to be issued, but nominal defendant or respondent authorized to pay the sum awarded**

(1) In subsection (3)—  
“judgment debtor” means a person who, under any order of any court, is liable to pay any money to any other person, and “judgment creditor” shall be construed accordingly.

(2) Subject to this section, no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings referred to in section *two* or against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be.

(3) .....

To the extent that the application for a garnishee order in the main application is based upon that provision of the State Liabilities Act, the application is doomed to failure. For that reason the prospects of success on the part of the applicant are very high. Although the applicants have a history of non-compliance with the Rules of Court, the respondents cannot succeed in the main matter. Their application for a garnishee order against a government department has no basis at law. This factor alone overrides any other factor including those discussed in the *Cliff Mineral Exploration* case *supra*.

For that reason I will grant the applicant the indulgence it seeks.

Accordingly it is ordered as follows:

1. The application for upliftment of the bar be and is hereby granted.
2. The failure by the applicant to file its heads of argument timeously be and is hereby condoned.
3. The applicant be and is hereby allowed to file its heads of argument within ten days of receipt of this order.