

HB 125/18  
HC 316/17

**THE SHERIFF OF ZIMBABWE**

**APPLICANT**

**Versus**

**CORESIL MINING (PVT) LTD**  
**Represented by Kelvin Kaguru**

**CLAIMANT**

**and**

**KUSAFUNGA ISMAEL KAGURU**

**JUDGMENT DEBTOR**

**And**

**ESTER MOYO (NEE KELLIE)**

**JUDGMENT CREDITOR**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 30 MAY & 7 JUNE 2018

**Opposed Application**

*H. Chimbetete*, for the applicant  
*Miss P. Mvundla*, for the claimant  
*I. Mafirakureva*, for the judgment creditor

**MAKONESE J:** The applicant is the Deputy Sheriff for Bulawayo. Pursuant to the provisions of Order 30 Rule 205A as read with Rule 207 of the High Court Rules, 1971, the applicant filed an interpleader notice in this matter. The Judgment Creditor obtained judgment in case number HC 735/15, and subsequently instructed the applicant to attach certain property comprising 2 tractors, earth moving equipment and a 3 stamp mill, a crusher and a motor. Upon such attachment, the claimant informed the applicant that the attached property belonged to it, and not to the judgment debtor. The claimant and judgment creditor were called upon to deliver particulars of their respective claims to the attached property in terms of For No. 29A, together with one or more opposing affidavits, with the Registrar of the High Court. The notice specifically called upon the parties to lodge their papers within ten days from the date of service of the notice.

The claimant seeks relief for the release of the attached property on the basis that such property is not executable as it does not belong to the judgment debtor. The claimant attached to its papers certain invoices to prove its claim to the attached property. The claimant's claims are resisted by the judgment creditor who contends that the directors and shareholders of the claimant are the judgment debtor and one Kelvin Kaguru, the judgment debtor's son.

Before dealing with the merits of the matter the judgment creditor raised certain preliminary points, which, if upheld would dispose of the matter without further ado.

The first point raised by the judgment creditor is that the claimant is barred in terms of the Rules of this Court in that it failed to file its opposing papers within the time stipulated in the rules. It is common cause that the claimant was served with the interpleader application on the 2<sup>nd</sup> February 2017, and ought to have filed opposing papers on or before 16<sup>th</sup> February 2017. The claimants failed to do so, and only filed their opposing papers on the 27<sup>th</sup> February 2017 and served the judgment creditor on 2<sup>nd</sup> March 2017, way after the 10 day period stipulated by the rules. In terms of Rule 210 of the High Court Rules it is provided that:

“where a claimant to whom an interpleader notice and affidavit have been delivered has failed to file and serve a notice of opposition in terms of Rule 233 or is in default of appearance at any hearing of the matter the court may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject matter of the dispute.”

From the submissions made by *Ms Vundla*, appearing for the claimant it was abundantly clear that the claimant was barred. She however invited the court to condone the non-compliance with the rules. An attempt was made to request the court to invoke the provisions of Rule 4C of the Rules of this court. The only difficulty with this course of action is that there was absolutely no explanation placed before the court why there was non-compliance with the rules. *Mr Mafirakureva*, appearing for the judgment creditor indicated that the matter ought to be treated as unopposed as there was no application for the upliftment of the automatic bar. He further drew the court's attention to the fact that the judgment debtor was also duly barred as opposing papers had been filed way after the stipulated ten (10) days had elapsed. As regards the

failure to file a notice of opposition within the stipulated time frame is concerned, there can be no doubt that the claimant was out of time and therefore duly barred. See *Regina Gumbo v Steelnet (Zimbabwe) & Anor* HB-84-13.

Further, and in any event, the notice of opposition filed by the claimant is defective for lack of compliance with the rules of the court. In terms of Rule 233 of the High Court Rules, a notice of opposition must be in Form No. 29A. The claimant and judgment debtors' notice of opposition are not in compliance with the Rules. The claimant and judgment debtor have not sought condonation for their failure to comply with the rules. Their papers are to that extent fatally defective. See *Jack v Mushipe NO & Ors* HH-318-15 and *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101.

For the foregoing reasons, I am satisfied that the preliminary points raised by the judgment creditor should be upheld.

I accordingly make the following order:

1. The claimant's claim be and is hereby dismissed.
2. The attached goods as set out in the notice of seizure dated 14<sup>th</sup> December 2016 be declared executable.
3. The claimant pays the costs of suit of the judgment creditor and the applicant.

*Coghlan & Welsh*, applicant's legal practitioners  
*Mutuso, Tarvinga & Mhiribidi*, claimant's legal practitioners  
*Moyo & Nyonis*, judgment creditor's legal practitioners