

DIVINE HOMES (PVT) LTD
versus
THE SHERIFF
And
H S M USHEWOKUNZE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 10 December 2003 and 21 January 2004

Mr *Chikumbirike*, for the applicant
Mr *Matinenga*, for the respondent

Opposed Application

BHUNU J: In this case both counsel are agreed that the matter should be postponed sine die pending the determination of the Supreme Court in an appeal against the judgment of MAVANGIRA J in case No. 6491/02 which has a bearing on the outcome of this case.

The only issue which arises is the issue of wasted costs. Counsel for the applicant seeks costs on a higher scale on the basis that the respondents through their counsel repeatedly set down the matter for hearing well knowing of the pending judgment in the Supreme Court which may have the effect of disposing of this matter.

It is not in dispute that the respondents set down this matter for hearing on numerous occasions well knowing of the pending determination in the Supreme Court.

The respondents however resist paying costs at the higher scale or at all on the basis that the applicant acquiesced to the numerous set downs when it failed to object. The applicant countered that when the matter was set down they had no option but to appear and then object at the hearing.

The evidence on record however establishes that although the matter was set down on numerous occasions the applicant did not object raising the issue of the pending determination in the Supreme court.

There is therefore some merit in the respondent's submission that the applicants to some extent acquiesced to the numerous set downs well knowing of the effect of the pending determination in the Supreme Court. Despite that finding I consider that the respondents were to a large extent to blame for repeatedly setting down the matter for hearing well knowing that it was inappropriate to set down the matter at that stage.

The applicant's acquiescence in failing to object to the set downs has the effect of mitigating the respondent's blameworthiness such that there is no justification for awarding costs on a higher scale.

In the result it is ordered:

- 1) That the matter be and is hereby postponed sine die pending the Supreme Court decision in case number 6491/02
- 2) That the respondents be and are hereby ordered to pay the applicant's costs on the ordinary scale jointly and severally, one paying and the other to be absolved.

Chikumbirike and Associates, legal practitioners for applicant
Dube Manikai and Hwacha, legal practitioners for respondent