Judgment No. HB 147/04
Case No. HC 3490/04

LANDFISH ENTERPRISES (PVT) LTD

Versus

ROBERT MOYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 OCTOBER 9 DECEMBER 2004

S Mazibisa for applicant
A J Sibanda for respondent

Judgment

NDOU J: The respondent is automatically barred on account of failing to file opposing papers timeously. The respondent's delay is two days. Prior to the expiry of the period within which the respondent was supposed to file his papers, he however, wrote to the applicant informing the latter that he may not meet the deadline and requested for extension of this period by two days. This request was turned down by the applicant's representative. As soon as the respondent was barred the applicant set the matter down as an unopposed matter on the motion roll.

Mr *Sibanda*, for the respondent appeared on the set down date and sought the indulgence of the court to remove the matter from the roll in order to afford the respondent an opportunity to be heard on the merits. The respondent simultaneously tendered costs. The applicant did not consent to the upliftment of the bar. In fact the applicant adopted a very hard-line approach against the respondent. The question of costs is not in issue. The only issue is whether the respondent has made out a good case for removal of the bar. In terms of order 12 Rule 83(b) of the High Court of Zimbabwe Rules, 1971, I have a discretion to allow the barred party appearance "for

the purpose of applying for the removal of the bar." In *casu*, I exercised my discretion and allowed the respondent appearance for the said purpose.

I agree with Mr *Mazibisa*, for the applicant, that ideally and generally, application for removal of the bar should be a substantive one and by court application – Rule 84 (1). However, Rule 84 (2) makes provision for the barred party to "make an oral application at the hearing, if any, of the action or suit concerned …" Although Mr *Sibanda*, for the respondent did not specifically cite this sub-rule, I can only assume that is what he had in mind when he made the oral application. I have already highlighted the steps taken by the respondent informing the applicant of his predicament. The respondent requested an indulgence of two days. The reasons for the brief delay were reasonable. Prejudice, if any, to the applicant may be cushioned by an award of costs against the defaulting party. In any event, the respondent has tendered wasted costs. I find the following remarks by MCNALLY JA in *Sangare* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 213A, instructive –

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence."

But, a party who has been barred should not merely, upon tender of wasted costs, be entitled to insist, as of right that the non-defaulting party should consent to the removal of the bar. The barred party should make out a good case for the removal – *Gool* v *Policansky* 1939 CPD 386 at 390 and *Sampson* v *Union & Rhodesia Wholesale Ltd (in liquidation)* 1929 AD 468. A bar can always be set aside by this court on good cause shown – *Nangle* v *Aronowitz* 1949(2) SA 713 (SR) at 716. I am satisfied that good cause has been shown and I allow the application in the following terms:

It be and is hereby ordered that-

1. The bar operating against the respondent be removed.
2. The respondent ordered to file opposing papers within two(2) days of this order.
3. The respondent to bear wasted costs.

Cheda & Partners, applicant's legal practitioners
Joel Pincus Konson & Wolhuter, respondent's legal practitioners