TOBACCO RESEARCH BOARD
Versus
BERGATTAL TOBACCO INC (PRIVATE) LIMITED
AND
MOSES MACHINE

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 23 May and 7 June 2024

Opposed application

S.R Patsvani for applicant
T. Nyahuma for first and second respondent

CHILIMBE J

BACKGROUND

[1] On 23 May 2024, I refused first and second respondents` application for upliftment of a bar. I furnished the reasons thereof *ex tempore* and issued the following order; -

1) The application for upliftment of the bar by First and Second Respondents for failure to file heads of argument in terms of the Rules of Court be and is hereby dismissed with costs.
2) Matter to proceed as unopposed.

[2] I thereafter proceeded to hear Mr. *Patsvani* (for applicant) and thereafter issued the below order; -

1) The respondents be and are hereby ordered to pay the sum of USD39,000.00 the one paying the other to be absolved, together with interest, calculated at the rate of 20% per annum, calculated from 24 May 2021 to date of payment in full.
2) The respondents be and are hereby ordered to pay applicant`s costs of suit on the scale of legal practitioner and client.

REQUEST FOR REASONS FOR A DEFAULT JUDGMENT

[3] The next day, the respondents` legal practitioners of record addressed a letter to the Registrar communicating the following request; -

1) The costs for the order that was issued in the matter on 23 May [2024] and the written reasons thereof
2) During the proceedings that culminated in the court`s order in question, an application was made on behalf of the respondents for upliftment of the bar that was operating against them. That application was dismissed. May we also have written reasons thereof.

[4] Before addressing the request, I set out the relevant rule that resulted in the bar. The respondents were barred for failure to file heads of argument as required by r 36 (2) as read with r 36 (3) of the High Court (Commercial Division) Rules, 2020 SI 123/20 which state thus;

> 36 (2) Where an application, exception or application to strike out has been set down for hearing in terms of Rule 223 subrule (2)[1] and any respondent is to be represented at the hearing by a legal practitioner—
>
> (a) he or she shall file with the registrar, within ten (10) of the delivery of the applicant's heads of argument, his or her own heads of argument clearly outlining the submissions relied upon by him or her and setting out the authorities, if any, which he or she intends to cite; and
>
> (b) immediately thereafter deliver a copy of the heads of argument to every other party; and
>
> (c) thereafter file a certificate of service in Form No. CC 13, within twenty-four (24) hours thereof.
>
> (3) Where a respondent fails to file heads of argument as required in terms of this rule, he or she shall be barred and <u>the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll.</u>

[1] Now part IX rules 64-66 of the High Court Rules 2021 SI 202/21

[5] In terms of the underlined part of r 36 (3), I proceeded to deal with the matter as unopposed. Although Mr. *Nyahuma* remained in the virtual hearing, he was no longer participant. The court had non-suited his clients and as an old adage goes, "had withdrawn its ears". The matter proceeded as a default judgment.

[6] In that respect, the written request for reasons for issuance of the order in default becomes misplaced. I can do no more that refer to the remarks of GWAUNZA DCJ in *Chaza v Chawareva & Anor* SC 2-18 to the following effect; -

> "She submitted that consideration by the court *a quo* of the merits of the matter, did not alter the legal position, that in fact the judgment *a quo* was given in default. Counsel relied for these contentions on a judgment of this court, *Zvinavashe v Ndlovu* 2006 (2) ZLR 372 (S) where the following was stated at pg 375;
>
> "for the avoidance of doubt, it is declared that the giving of reasons for the default judgment in question by the court *a quo* was unnecessary and consequently of no force or effect. It does not convert the default judgment into a judgment on the merits".
>
> None of the authorities cited by the appellant contradict this position. Since it was a default judgment, the proper course of action was for the appellant to have obtained a rescission thereof in the court *a quo.* Accordingly, this matter is not properly before us and it is our unanimous view that it should be struck off the roll."

THE APPLICATION FOR UPLIFTMENT OF BAR

[7] I will now furnish the reasons for dismissing the application for upliftment of the bar. Mr. *Nyahuma* for the respondents moved that application from the bar. His prayer and basis thereof were quite clear. Firstly, counsel commendably assumed full responsibility for the breach of the rules that led to the bar. He admitted to being entirely liable for failure to file heads of argument. He stated that he had "somehow missed the notification".

[8] In doing so, counsel did not, however take the court into confidence to disclose what it is that had caused the mishap. Was it sheer inadvertence caused possibly by pressure of work? Or was it on account of a debilitating bout of flu? Perhaps he was distracted by other taxing circumstances in the personal or business realm?

[9] Secondly, Mr. *Nyahuma* did not request for stay of the matter in order to profit from the opportunity to file a written applicant fully ventilating the prayer for condonation. This being the route suggested in *GMB v Martin Muchero* 2008 (1) ZLR 216 (S). Counsel`s view was that a written application was merely going to aggravate issues by further delaying the matter.

[10] Thirdly, counsel drew attention to the desirability of resolving the dispute on its merits for finality. As his fourth point, Mr. *Nyahuma* undertook to remedy the default by filing the heads of argument concerned in a matter of days. On that aspect, he also committed to availing himself to an early set down date for argument. Counsel's residual submissions included a tender of costs to underscore his compunction. He also emphasised the respondents` readiness to address the breach in order to expiate any prejudice on applicant.

[11] Mr. *Patsvani* opposed the application rather robustly. His position was that in an application for condonation, the applicants had to earn the court`s reprieve. The requirements necessary to earn a party such a reprieve were well established. The applicant seeking condonation had to tender a reasonable explanation the default. In particular, a party was obliged to demonstrate that it had not been derelict, and that its application was *bona fides*. In support of his submissions, counsel for applicant cited *Mtetwa & Anor v Benbert Investments (Private) Limited* HB 134-19.

[12] Additionally, Mr. *Patsvani* indicated that the respondents had both ample time and opportunity to avert or mitigate the breach. He submitted that the IECMS system accorded parties a spectrum of advantages in as far as management of litigation was concerned. The system triggered periodic notices to alert parties of papers filed or steps that need to be taken.

[13] According to Mr. *Patsvani*, the timeline of events exposed respondents` derelict. On 4 March 2024, the Registrar invited applicant to file its heads of argument. Applicant duly complied by 25 March 2024. A month later on 25 April 2024, the Registrar issued a notice of set down. This was followed up by a notice of hearing of 15 May for 23 May 2024.

REASONS FOR THE COURT`S RULING

[14] I recognised Mr. *Nyahuma`* s candour in assuming full responsibility for the breach. Unfortunately, as noted above, it was not followed up by further disclosure regarding indicative reasons why counsel omitted to file heads.

[15] The need to adhere to the rules of court is a matter regularly emphasised to the courts. I will advert to this aspect before closing. And in this instance, the respondents deigned to file heads of argument. In *Nan Brooker v Mudhanda & Anor* SC 5-18, the Supreme Court reminded that heads of argument serve a purpose; -namely to expound the law as applicable to facts before a court.

[16] Exposition of the law serves a deeper function. Clarification of the law and legal principles in turn, assist the dispute resolution process by exposing the merits and demerits of each respective side`s case. Such an exposure not only helps the court in adjudication, but the litigants themselves who may be inspired to settle, withdraw or take some other step to escalate dispute to closure.

[17] Whilst it is always desirable to resolve a dispute on the merits, the court found it difficult to disabuse the mind that the derelict herein had been serious. This given the absence of a fuller explanation in addition to the adequate “early warning triggers” generated by the IECMS system. I did express some solace in that even though the matter was to proceed unopposed, the applicant would still need to motivate the basis of the order sought.

[18] I further took into account the fact that the breach herein was traceable directly to respondents` legal practitioner. I received no submissions from either side on why the breach ought not be visited on the respondents themselves. That aside, I found nothing to suggest a departure from the standard approach that a litigant must carry the cross of its legal practitioners` aberrations. The authorities dealing with this point were discussed in *Nyarai Mudungwe & Anor v Arosume v Rhodia Photo & 2 Ors* HH 646-23.

[19] I return in closing, to the requirements which a party seeking condonation ought to satisfy. Whilst the courts demand fastidious adherence to rules of court, they recognise that in appropriate circumstances, parties may be pardoned for breach. But if one may be chiastic, a breach of the rules of court, can only be remedied by adherence to the rules of court dealing with a breach to the rules of court. In other words, the underlying rules of court have created within them, further rules that guide parties on how to address breach to the underlying rules.

Again I referred the parties herein to the authorities traversed in *Rinos Terera v Zimbabwe Housing Corporation (Pvt) Ltd & Anor* HH 445-22.

[20] Finally, in refusing the application, I was alive to the considerations that exercised the court`s mind in *Chimpondah & Anor v Muvami* HH 81-07. Therein, the court recognised that in dealing with applications for condonation, the need to do real justice "as between parties" remained a critical objective. Nonetheless, I noted that the delay was inexcusable given the circumstances of the matter. Particularly the adequate warmings and opportunity to remedy that characterised the matter.

[21] On prospects of success, I have also taken into account that herein, applicant seeks to enforce the terms of a deed of settlement. Therein, the respondents had acknowledged indebtedness to applicant for payments due over tobacco seed supplied. Mr *Nyahuma* himself did not advert to the respondents` prospects of success in the main matter.

[22] The matter herein is a commercial dispute. The need to dispose of such disputes expeditiously is not only a commercial imperative, but a directive reposed in the rules[2] and purpose of the court[3] .The corollary is that delays would inconvenience the applicant and impair the objects of justice as set out in the rules.

DISPOSITION

[23] It is for the aforegoing reasons that the application for upliftment of the bar by first and second respondent was refused with costs and matter ordered to proceed as unopposed.

Chihambakwe, Mtizwa & Partners - applicant`s legal practitioners
*Nyahuma`s Law*-first and second respondent`s legal practitioners.

[CHILIMBE J__7/6/24]

[2] See rule 4 of the Commercial Court Rules as read with the Second Schedule

[3] In General Notice 640-17 published in the Gazette on 27 October the Chief Justice of the Republic Honourable Mr Justice L.Malaba declared as follows ;-"NOTICE is hereby given in terms of section 46A of the High Court Act [Chapter 7:06], that after consultation with the Judge President and in the interest of expediting justice delivery and promoting the ease of access to justice, a specialised division of the High Court to be known as the Commercial Division of the High Court is hereby created to adjudicate commercial law disputes and hear all appeals, reviews, applications and petitions which lie to the High Court relating to commercial disputes".