DISTRIBUTABLE (18)

BACNET TRADING (PRIVATE) LIMITED
v
(1) NETONE CELLULAR (PRIVATE) LIMITED
(2) MINISTER OF PUBLIC WORKS AND NATIONAL HOUSING (3) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & BHUNU JA
HARARE 31 MARCH 2017 & FEBRUARY 22, 2019

T. Dzvetero, for the appellant

E. Matinenga, for the first respondent

S. M. Hashiti, for the second respondent

No appearance for the third respondent

BHUNU JA: This appeal was heard on 31 March 2017. At the conclusion of submissions by counsel this Court issued the following order:

> "Having considered submissions by counsel, we are of the unanimous view that this is a proper case for remittal to the court *a quo*. Accordingly we order as follows:
>
> 1. The appeal is allowed with costs.
> 2. The judgment of the court *a quo* is set aside.
> 3. The matter is remitted to the High Court for a determination of the merits by a different judge.
> 4. **The reasons for this order will be made available on request by any of the parties**" (*My emphasis).*

None of the parties requested for written reasons in terms of para 4 of the order within a reasonable time thereby prompting the Registrar to treat the matter as completed and

closed. She therefore, in accordance with set down procedures returned the appeal records to the court *a quo* and closed her records.

Thereafter counsel for the second respondent belatedly wrote to the registrar about one and a half years later on 10 October 2018 requesting for reasons for the court's decision. The letter reads:

> "Kindly place this urgent letter before the Honourable **Garwe** JA for his attention. The record will show that this matter was argued before:
>
> (i) **Garwe JA**
> (ii) **Bhunu JA**
> (iii) **Mavangira JA**
>
> After full argument, the matter was referred back to the High court for argument on the merits. The matter has been pending before the High Court for a long time as the High Court judges want to have sight of the Supreme Court Judgment before they hear the matter on the merits.
>
> We by copy of this letter request the reasons for the decision of the court such that the matter can be finalised".

It is needless to say that the delay in rendering the reasons for judgment in this case was self-created by the parties' failure to timeously request for the reasons. The court order having been issued on 31 March 2017 it took the second respondent more than one and half years to request for reasons for the court's decision. The delay is inordinate and inexcusable.

The delay was compounded by the fact that the Registrar had great difficulty in tracing the record of proceedings at the court *a quo*.

Notwithstanding the inordinate delay, I now turn to render the reasons for the court's order in this matter. The epicentre of this appeal is ownership of a certain piece of

immovable property known as the Remainder of Lot A of Chikurubi measuring 131,3710 hectares in extent held under deed of grant 13832 of 1953 and stand 2 Cleveland Township of Lot A of Chikurubi measuring 4,9521 hectares in extent.

The genesis of this appeal is that sometime in 2000 the then Minister of Local government Dr Ignatius Chombo allocated the Remainder of Lot A of Chikurubi to the Appellant fronted by one Charles Chombo its managing director. The first respondent disputed the entitlement of the appellant to ownership claiming to have acquired the property through a deed of grant issued by the Queen in 1953. In 1975 Lot 2 of Cleveland Township was carved out of the original piece of land.

On 27 October 2014 the matter came up for hearing before MAFUSIRE J. At that hearing the appellant applied for postponement of the matter without success. Both respondents applied for the upliftment of the bar operating against them for failure to timeously file heads of argument also without success.

After dismissing both interlocutory applications the learned judge proceeded to issue a default order against both first and second respondents. The court *a quo*'s consolidated order reads as follows:

"1. That the application for the upliftment of the bar (operating against the first and second defendants for their failure to file heads of argument timeously) is dismissed with costs.
2. That the application for a postponement of the matter by the first respondent is dismissed with costs.
3. That a default judgment be entered in favour of the applicant as follows:
    a. the applicant is declared the rightful owner of the property known as the Remainder of Lot A Chikurubi, measuring 131,3710 hectares and held under deed of grant 13832.
    b. The first respondent is interdicted from subdividing, developing, disposing of any portion or dealing in any manner with the property.

c. The second respondent is interdicted from allocating or authorising the allocation of the property to anyone.
d. The third respondent is interdicted from entertaining any transfer or alienation of the rights in the property to anyone except in favour of the applicant.
e. That the first and second respondents shall pay the costs of the application on the legal practitioner and client scale".

The appellant has now approached this Court on appeal complaining that the court *a quo* ought to have granted the application for postponement. Mr Machiridza submitted that he was only standing in for the appellant's legal practitioner of choice who had travelled abroad on an emergency. Mr *Matinenga* for the first respondent however, strenuously opposed the application on the basis that Mr Machiridza had previously represented the appellant in previous proceedings in the same matter. He therefore argued that Mr Machiridza was well versed with the matter to be able to proceed with the hearing in the absence of the appellant's legal practitioner of choice.

It is however trite that a litigant is entitled to representation by a legal practitioner of his own choice at every stage of the proceedings. It is not for the court to usurp that right and choose a legal practitioner for the litigant against his will. For that reason, the fact that Mr Machiridza had previously represented the appellant in the same matter was an irrelevant consideration. In the absence of any evidence contradicting the appellant's undisputed assertion that his legal practitioner was unavailable on account of an emergency, there was merit in the appellant's application for postponement.

Despite the appellant's reasonable plea for an opportunity to be represented by a legal practitioner of its choice, the court *a quo* erred by brushing aside the plea and

proceeding to enter default judgment against the appellant when it was not at fault in any way.

Considering that the appellant's legal practitioner of choice was unavailable on account of an emergency, it was only fair and in the best interest of the due administration of justice that the matter be postponed to enable the appellant to have its day in court.

The general rule in our courts is that the applicant is entitled to postponement in the absence of prejudice to the other party or prejudice which can be addressed by an appropriate award of costs. In this case the question of irreparable prejudice which could not be addressed by an appropriate award of costs did not arise. For that reason the court erred and fell into error by refusing to grant the application for postponement to facilitate the appellant's right to representation by a legal practitioner of his choice.

Having come to that conclusion, it follows that all the proceedings done in the absence of the appellant's preferred legal practitioner were tainted with fatal procedural irregularity. It is for these reasons that the court set aside the judgment of the court *a quo* with costs and ordered remittal of the matter in the interest of justice and fair play. The appeal against the court *a quo*'s refusal to grant both the application for upliftment of the bar and late filing of heads of argument necessarily falls away to be determined by the court *a quo* afresh in terms of the remittal order of this Court.

GARWE JA: I agree

MAVANGIRA JA: I agree

Antonio & Dzvetero, appellant's legal practitioners

Mhishi, Nkomo Legal practice, 1st appellant's legal practitioners

Civil Division of the Attorney-General's Office, 2nd respondent's legal practitioners