MATTHEW HOPGOOD
versus
THE MINISTER OF LANDS, AGRICULTURE, WATER AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 13 October 2022 & 3 May 2023

Opposed Application – Review

Ms L Dzumbunu, for the applicant
Ms N Chiro, for the respondent

MUSITHU J: The applicant approached this court seeking relief by way of review challenging the respondent's decision to withdraw his offer letter. The relief sought is captured in the draft order as follows:

> **"IT IS HEREBY ORDERED THAT:-**
> 1. The Respondent's decision to withdraw an offer letter to the applicant be and is hereby set aside.
> 2. The respondent shall bear the costs of suit if they oppose this application."

The parties appeared before me on 13 October 2022, and I granted the order sought with an amendment to paragraph 2 to read: "There shall be no order as to costs." The order was granted following concessions made by Ms *Chiro* appearing for the respondent. At the time that the parties appeared before me, the respondent had been barred for failure to comply with r 59(8) as read with r 59(9) and (13) of the High Court Rules, 2021. Rules 59(8) and (9) state as follows:

> "(8) As soon as possible, in any event not later than seven days after filing a notice of opposition and opposing affidavit in terms of subrule (7) the respondent shall serve copies of them upon the applicant and, as soon as possible thereafter, but not later than forty-eight hours, shall file with the registrar proof of such service in accordance with subrule (8) of rule 16.
> (9) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (8) shall be barred."

The application was issued out of this court on 21 December 2021. It was only served on the respondent on 5 January 2022, owing to the festive holiday. The respondent filed his notice of opposition through his legal practitioners on 19 January 2022, the day the *dies induciae* was set to expire. The notice of opposition was not served on the applicant's legal

practitioners as commanded by r 59(8). The respondent was consequently barred in terms of r 59(9). In terms of r 59(13), where a respondent is barred in terms of r 59(9), the applicant may, without notice to the respondent, set the matter down for hearing in terms of r 64. That rule provides for the setting down of matters on the unopposed roll.

On the date of hearing, it also emerged that the respondent's legal practitioners had not filed heads of argument as required by the rules. The reason given by Ms *Chiro* for the non-compliance with the rules was that they were waiting for the filing of the applicant's answering affidavit. The answering affidavit had been served at the respondent's offices. Be that as it may, despite being aware of the set down, the heads of argument had not even been prepared at the time of the hearing.

Ms *Chiro* applied for the uplifting of the bar operating against the respondent in respect of the non-service of the notice of opposition and the failure to file heads of argument. Following exchanges between counsel and the court regarding the merits of the application and the respondent's defence, Ms *Chiro* conceded that the applicant's application was unassailable on the merits. She also conceded that the respondent's case was devoid of merit. It was at that point that she abandoned the application for the removal of the bars. In light of the concession which was properly made in my view, Ms *Dzumbunu* for the applicant, in a clear exhibition of professional courtesy, abandoned her claim for costs against the respondent. That explains the amendment to paragraph 2 of the draft order.

With the above background in mind, it therefore came as a complete surprise when on 2 November 2023, I received through the registrar's office, a letter from one L.T. Muradzikwa of the Attorney General's office seeking written reasons for the order which for all intents and purposes was granted by consent. The reason given for that somewhat strange request considering the circumstances under which the order had been granted, was that their client wanted to appeal against that order. Be that as it may, I hereby render the reasons that were requested.

The Background to the Applicant's Case

The applicant was in occupation of Glebe Farm, Goromonzi, measuring 669, 1865 hectares registered under Deed of Transfer No. 224/1996 (hereinafter called the farm). The farm was listed for compulsory acquisition by the respondent. The two parties entered into a deed of settlement which was later reduced into an order of the Administrative Court. In terms of that deed of settlement, the applicant was to retain 142.38 hectares of the farm and relinquish

the remaining 526.81 hectares to the respondent. The deed of settlement was registered as an order of the Administrative Court under LA2898/02 in August 2003. That consent order reads as follows:

> "IT IS ORDERED BY CONSENT THAT:-
> 1. The Acquisition of the under mentioned property in terms of Section 7 of the Land Acquisition Act [Chapter 20:10] be and is hereby confirmed
>   a) Portion of GLEBE measuring 526.81 hectares situated in the District of GOROMONZI HELD under Deed of Transfer No. 224/96 ne and is hereby withdrawn.
> 2. The Acquisition proceedings in respect of the remaining portion of GLEBE measuring 142, 38 hectares situated in the District of GOROMONZI held under Deed of Transfer No. 224/96 be and is hereby withdrawn.
> 3. The Applicant shall subdivide GLEBE and pay the Subdivision costs thereof.
> 4. There shall be no Order as to costs."

Without any regard to the said court order under LA2898/02, the respondent went on to subdivide the farm and allocated it to several beneficiaries between 2008 and 2014. The applicant was only left with 35 hectares of arable land. That precipitated a series of litigation between the applicant and recipients of the offer letters for the subdivided portions of the farm.

In November 2020 the applicant applied for an offer letter for the 35 hectares that he remained with, and the offer letter was duly issued by the respondent. In June 2021 the respondent wrote to the applicant indicating that he wished to withdraw the offer letter on the grounds that the applicant had been given land that did not exist. The applicant was invited to make representations within seven days of the notice of intention to withdraw the offer letter. The applicant wrote to the respondent on 15 June 2021objecting to the intended withdrawal of the offer letter. According to the applicant, his submissions were neither acknowledged nor responded to. On 16 September 2021, the respondent wrote to the applicant notifying him of the "immediate withdrawal" of the offer of the said piece of land. The letter also gave the applicant 30 days within which to wind up all operations at the said farm.

It was that decision to withdraw the offer letter that triggered the approach to this court. The applicant contends that the reason given for the withdrawal of the offer letter was vague and defied logic. The respondent could not allege that the farm did not exist when the applicant was in occupation of that very same piece of land. The applicant also averred that the respondent's decision flied in the face of the hallowed principles of natural justice which require that a party against whom an adverse decision is to be made has a right to be heard before that decision is taken. The applicant also averred that he was carrying out commercially viable operations on the farm even before its compulsory acquisition. That position had not changed to this date.

The grounds for review were summarized as follows. The respondent's decision was grossly irregular in that no sufficient reasons were given for the withdrawal of the offer letter. The respondent did not produce a survey diagram to confirm the non-existence of the piece of land that the same authority had offered to the applicant. The applicant is the custodian of agricultural land and all records pertaining to farming land in Zimbabwe. The respondent's decision was therefore a nullity as it contravened principles of natural justice and the Constitution.

The Respondent's Case

The nub of the respondent's opposition was that the offer letter had been issued in error as there was no such farm called *'the remaining extent of the Glebe'*. The Glebe farm was divided into 18 subdivisions, all of which were allocated to beneficiaries. The farm in question was already occupied by farmers who were holders of offer letters. The applicant's offer letter was issued in respect of a non-existent property. The respondent also averred that he could not provide a map in respect of a non-existent farm. The error made in the allocation of a non-existent farm could only be regularized by the withdrawal of the irregular offer letter. The withdrawal of the offer letter was therefore above board.

The Hearing

When the parties appeared before the court on the day of the hearing Ms *Dzumbunu* rose to her feet and submitted that the respondent had no right of audience since he was barred for reasons stated earlier in the judgment. It was at that point that Ms *Chiro* applied for the uplifting of the double bar. She made concessions following exchanges with the court. Those concessions culminated in the granting of the said order.

The Brief Analysis

The respondent stands barred from these proceedings for reasons alluded to earlier. Not once but twice. In his answering affidavit, the applicant forewarned the respondent that he was in breach of the rules. The respondent did nothing to regularize that anomaly up to the point of the hearing. The respondent further violated the rules by failing to file heads of argument. Even on the day of the hearing, the respondent's counsel did not have a draft copy of the heads that would have been placed before the court had the application for the removal of the double bar been successful.

The rules are clear that once a party is barred, they have no right of audience before the court until that bar is removed. While an oral application is permissible in terms of the rules,

the preference of the Courts is that such applications be in writing[1]. Each case must be determined on its own peculiar circumstances. In *Roysen Traders (Pvt) Ltd t/a Alliance Ginneries* v *Quton Seed Company (Pvt) Ltd*[2], CHITAPI J explained the position of the law as follows*:*

> "The respondent who is barred can only appear in person or by a legal practitioner for purpose of applying for the removal of the bar. The removal of the bar is sought through a chamber application or by applying orally at the hearing for its upliftment. The relevant rules of court providing for the upliftment of a bar are rules 83 and 84. The choice as to whether or not to make a chamber application for upliftment of bar or to apply orally at the hearing is a matter not provided for in the rules. Perhaps the rules should do so. Speaking for myself I have preferred the oral application route where heads of argument have been prepared by the barred party and he is holding them and has served the other party but cannot however file them because of the bar operating against such party whose effect in terms of r 83(a) is to preclude the Registrar from accepting for filing any pleading or other document from a barred party whilst the bar is in operation." (Underlining for emphasis).

I associate myself with the views of the learned Judge. The respondent had ample time to regularize his papers before coming to court on the date of the hearing but chose to do nothing. It meant that even if the court had granted the application for the removal of the double bar, the matter was still not going to be heard because the respondent's counsel had not yet prepared the respondent's heads of argument. Such outright contempt towards the rules of court cannot be condoned. Such a casual approach to the business of the court ordinarily invites the wrath of the court. Court business is no stroll in the park so to speak. An applications to be condoned for having breached the rules of court is not just there for the taking. The court must be satisfied that the conduct of a litigant or its legal practitioner is worth condoning. The court has no time for litigants who want to play some hide and seek with it.

This court is reposed with discretion even when determining an application for the removal of a bar. Rule 39 (5) states as follows:

> "(5) A party who has been barred may—
> (a) make a chamber application to remove the bar; or
> (b) make an oral application at the hearing, if any, of the action or suit concerned;
> and the judge or court may allow the application on such terms as to costs and otherwise as the judge or court, as the case may be, considers fit." (Underlining for emphasis)

From a reading of the rule, it is clear that the court may allow the application for the removal of the bar on such terms as to costs and otherwise as the court may consider fit. In so doing, the court may interrogate the merits or demerits of the respective cases before it

[1] *GMB v Muchero* 2008(1) ZLR 216
[2] HH 12/17

consistent with the inherent powers it enjoys to protect and regulate its processes in the interests of justice in terms of s 176 of the Constitution. It was for that reason that the respondent's counsel was also asked to advert to the merits of the respondent's own case in the course of her making the application for the removal of the bar. It was that consideration that also informed her decision to abandon her application for the removal of the double bar and consent to the granting of the relief sought. The respondent's conduct was grossly unreasonable and even if the double bar had been removed, the respondent's case was devoid of merit on the papers. It was for the foregoing reasons that the court granted the following order:

IT IS HEREBY ORDERED THAT:-

1. The respondent's decision to withdraw an offer letter issued to the applicant be and is hereby set aside.
2. There shall be no order as to costs.

Mlotshwa Solicitors, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners