

EDWARD BUWU
and
FANI LESLEY BUWU
and
ATRAX HOLDINGS LIMITED
and
ATRAX COMMODITIES (PVT) LTD
and
ATRAX MILLING (PVT) LTD
and
ATRAX PETROLEUM (PVT) LTD
and
OMMLAND INVESTMENTS (PVT) LTD
and
FOAY INVESTMENTS (PVT) LTD
and
VILLAGE INN (PVT) LTD
and
WINTEX TRADING (PVT) LTD
versus
CECIL HONDO MADONDO N.O
and
NOKUTHULA MOYO N.O
and
SHEPHERD CHIMUTANDA
and
OFFICE FOR THE REGISTRATION OF COMPANIES
AND OTHER BUSINESS ENTITIES (COMPANIES OFFICE)
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 21 November & 8 December 2023

COURT APPLICATION – UPLIFTMENT OF BAR

Adv E Mubaiwa with T Zungura, for the applicants
M A Ruwitah, for the 2nd respondent
J Marange, for the 3rd respondent

MANZUNZU J:

INTRODUCTION

This is an application for the upliftment of the bar by the 3rd respondent. The application was fiercely contested by the applicants.

BACKGROUND

The applicants brought this court application seeking certain declaratory orders and other ancillary/consequential reliefs as contained in a lengthy draft order which runs up to 22 paragraphs. The application was filed on 28 June 2023. The third respondent (Shepherd) was served with the application on 29 June 2023.

The period within which the respondent is to file a notice of opposition is 10 days as per rule 31 of the High Court (Commercial Division) Rules 2020 which provides that:

“The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be 10 (ten) days, exclusive of the day of service.”

The ten-day period from the date of service expired on 13 July 2023. The third respondent, however, purportedly filed a notice of opposition on 26 July 2023. I say purportedly, because the third respondent was already barred in terms of r 32 (3) which provides that:

“The respondent who has failed to file a notice of opposition and opposing affidavit in terms of sub rule (1) shall be barred and the application shall be treated as unopposed and the applicant may apply for a default judgment through the chamber book without further notice to the respondent”

The third respondent also purportedly filed heads on 8 September 2023. Despite the acceptance by the Registrar of the third respondent’s notice of opposition and heads, the documents are improperly before the court because the respondent is barred.

THE APPLICATION

At the hearing of this application, the third respondent, through his legal practitioner made an oral application for the upliftment of the bar. The application was made in terms of r 39 (5) of the High Court Rules, 2021 which states that:

“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.”

While Advocate *Mubaiwa* insisted that the third respondent should have filed a chamber application for the removal of the bar, an oral application is equally permitted by the rules.

REQUIREMENTS OF THE APPLICATION

Mr *Marange* for the third respondent laid out the requirements of the application of this nature. These are:

- a) The explanation for the failure to act on time
- b) The *bona fides* of the defence
- c) Prejudice to the other party.

a) The Explanation

Mr *Marange* said the application was served through the third respondent’s business email address, who only saw it on 11 July 2023. The legal practitioner who was instructed by the third respondent took time to study the bulky case with its related cases in order to formulate a legal opinion. Among other things, three preliminary points were then noted which are capable of disposing the matter.

b) *Bona fide* Defence

It was argued for the third respondent that he has a strong defence over and above the preliminary points. The third respondent intent to challenge the *locus standi* of the applicants, that the relief is incompetent being one for review clothed as a declaratory and *lis pendens*. On the merits the third respondent intends to raise issues of non compliance with the provisions of the Companies Act and that the requirements of a declaratory were not met.

c) Prejudice

Mr *Marange* further argued that any prejudice to be suffered by any party could be cured by an order for costs.

Advocate *Mubaiwa*’s opening submission was that the application is opposed and must be dismissed. He attacked the manner in which the application was brought.

He said counsel for the 3rd respondent gave evidence from the bar though no formal objections were made at the appropriate time. He argued, 3rd respondent and the counsel he initially instructed, ought to have given evidence. The case of *Paul Gary Friendship v Cargo Carriers Limited & Or*, SC 1/13 was referred to. The case however, deals with condonation by a party who was persistently in default as opposed to the situation at hand.

In other words, the applicants' position is that there is no reasonable explanation from the third respondent to account for the delay from July 2023 to November 2023.

On the *bona fides* of the defence, Advocate *Mubaiwa* said there is none more so in the absence of opposing papers. He attacked the intended preliminary points and defence on the merits as having no merit.

On prejudice, it was argued, delay was the main factor because the estate was being dissipated.

Analysis

Ordinarily courts are inclined to grant an application for upliftment of bar unless it is shown that the barred party is up to abuse court process and has no reasonable explanation for the delay. This is so, because if the bar is not lifted, it means a party is barred from being heard and yet the application invites the respondent to oppose the application if that is his wish. A purported filing of the notice of opposition is indicative of the party's intention to defend the application.

While litigants must comply with the rules, where a party asks for condonation, the court must balance the fault of the party against the need to do justice to the parties. Each case is decided according to its own circumstances. In *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-E the said:

“It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. In recent years applications for rescission, for condonation, for leave to appeal out of time, and other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. The Supreme Court is bombarded with excuses for failure to act. The Supreme Court is beginning to hear more appeals for charity

than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.

The time had come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard.”

In casu, the third respondent has not only shown a reasonable explanation for the delay, but has demonstrated that he has an arguable defence. Justice will have failed if doors are closed against the 3rd respondent. While it is peremptory to comply with rules of procedure, the primary purpose of the courts in litigation is to resolve the disputes between the parties on merits.

The only prejudice which applicants say will suffer is the issue of delay. Such delay will be minimal given the stage at which this application is. The order of the court will further minimize any delay which may be suffered. In any event the court is currently on recess.

Despite the success of the application, the third respondent cannot escape to pay the applicants' costs.

DISPOSITION

1. The application by the third respondent for the upliftment of the bar hereby succeeds.
2. The bar against the third respondent is hereby lifted.
3. The notice of opposition and heads filed by the third respondent are deemed to have been filed on time.
4. The applicants may file an answering affidavit within 10 days of the date of this order.
5. The applicants may file supplementary heads within 14 days of the date of this order.
6. The 3rd respondent may file supplementary heads within 10 days of the date of service of supplementary heads by the applicants, if any.
7. The third respondent shall pay the applicants wasted costs of this application on the ordinary scale.

Gutu and Chikowero, applicants' legal practitioners
Thompson Stevenson, 3rd respondent's legal practitioners