PROSPECT LITHIUM ZIMBABWE (PVT) LTD
versus
DOUGLAS JAMES HENWOOD
and
KINGSTON TABVANA KAJESE
and
THORNVLEI FARMING ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 17 July 2024 & 10 March 2025

COURT APPLICATION

F Chingoma, for the applicant
D Ochieng, for the 1st respondent

MANZUNZU J

INTRODUCTION

This is a chamber application for the upliftment of bar. The application is opposed by the 1st respondent. The applicant seeks an order in the following terms:

"IT IS ORDERED THAT :

a) The automatic bar operating against the applicant in case number HCHC 42/24 be and is hereby uplifted'
b) The appearance to defend, special plea and exception in case number HCHC 41/24 filed on behalf of the applicant be and is hereby deemed to have been properly filed by the applicant from the date of this order.
c) Costs shall be in the cause."

BACKGROUND

(1) On 24 January 2024 the 1st respondent filed a summons and declaration under case number HCHC 41/24 seeking damages against the applicant, 2nd respondent and 3rd respondent.

(2) The summons were served on the applicant on 2 February 2024.

(3) In terms of Rule 10 and 12 of the High Court (Commercial Division) Rules 2020, the applicant was to file an appearance to defend on or before 16 February 2024 and its plea on or before 13 February 2024.

(4) The applicant failed to file its plea and to enter an appearance to defend as required by the rules and is barred.

THE LAW

In an application of this nature the applicant must satisfy the requirements to be met in an application for the upliftment of the bar. The requirements were spelt out in the case of *Smith N O* v *Brummer N O & Anor* 1954 (3) SA 352 (O) at p 358 as follows-

> "(a) A reasonable explanation for the Applicant's delay is forthcoming;
>
> (b) The Application must be *bona fide* and not made with intent to delay the other party's claim;
>
> (c) The Applicant must not be guilty of a reckless or intentional disregard of the rules of court;
>
> (d) The Applicant's case should not be obviously without foundation; and
>
> (e) The other party should not be prejudiced to an extent which cannot be rectified by a suitable Order as to costs".

REQUIREMENTS OF THE APPLICATION

A reasonable explanation for the Applicant's delay;

The applicant says upon being served with the summons on 2 February 2024 it sought legal advise from Messrs *Wintertons* on 5 February 2024. The applicant was advised of the need to enforce the indemnity agreement between the applicant and 2nd respondent. On 7 February 2024 the summons were then referred to the 2nd respondent though his lawyers Messrs *Mawere Sibanda* asking if the 2nd respondent was going to defend the 1st respondent's action on behalf of the applicant or if the applicant was to do it itself.

Contrary to what the applicant thought 2nd respondent would, the applicant realized that the 2nd respondent had entered an appearance to defend for himself only.

Despite this explanation, the 1st respondent maintained the applicant was in wilful default. I don't think so. In all fairness, the explanation given is reasonable.

The Application must be bona fide and not made with intent to delay the other party's claim;

There is nothing suggestive that the application is not *bona fide*. The applicant did not delay in the filing of this application. It has expressed how seriously it takes this case given the huge amount claimed against it by the 1st respondent. The 1st respondent has not shown any basis upon which this application must be treated as *bona fide*.

The Applicant must not be guilty of a reckless or intentional disregard of the rules of court;

The applicant has given a plausible explanation for the delay. No recklessness nor intentional disregard of the rules can be adduced from it. The applicant did not sleep on its laurels. No valid ground was shown that the applicant was either reckless or intentionally disregarded the rules. Any delays can only be seen within the hands of the legal practitioners. This is not a proper case where the sins of the lawyers must visit the applicant.

The Applicant's case should not be obviously without foundation;

The 1st respondent says the applicant has no plausible defence to his claim and that this application is simply to delay and frustrate him. The applicant says has prospects of success in HCHC 41/24. As the 1st respondent's claim is excipiable, *inter alia*, on the basis that the cause of action is vague and embarrassing. Furthermore, the applicant says will raise a special plea that the claim is tainted with illegality. On the merits, the applicant says is not a counter party to the agreement between 1st and 2nd respondents.

The other party should not be prejudiced to an extent which cannot be rectified by a suitable Order as to costs;

The 1st respondent has complained of delay to his prejudice. However, he does not say if the prejudice is one which cannot be cured by an order of costs.

CONCLUSION

The applicant has satisfied the requirements of this application on a balance of probabilities. The application ought to succeed. While the applicant has asked for the costs to be in the cause, this is a proper case where each party must bear its own costs for the application.

DISPOSITION

1. The automatic bar operating against the applicant in case number HCHC 42/24 be and is hereby uplifted.
2. The appearance to defend, special plea and exception in case number HCHC 41/24 filed on behalf of the applicant be and is hereby deemed to have been properly filed by the applicant from the date of this order.
3. Each party to bear its own costs.

Saidi Law Firm, applicant and 3rd respondent's legal practitioners
D Matete and Co, 1st respondent's legal practitioners