

JOHNSON NDOKERA  
and  
ABGAIL NDOKERA  
versus  
BEACON MBIBA

HIGH COURT OF ZIMBABWE  
**MAMBARA J**  
HARARE; 18 February 2025

**Application for a bar - *Ex Tempore* Ruling**

*K. Tundu*, for the plaintiffs  
*T. Biti*, for the defendant

MAMBARA J:

1. This is a ruling on an application made by the defendant to have the plaintiffs barred from proceeding with their claim on the basis that they have not complied with a prior order for the payment of costs. The plaintiffs oppose the application on the grounds that there is a pending application for rescission of judgment regarding the costs order and that the proceedings should not be stayed at this stage.
2. On 23 January 2023, the matter was postponed to enable the plaintiffs to be physically present in Zimbabwe for the hearing. The plaintiffs were ordered to pay wasted costs. The defendant has now raised a preliminary objection arguing that the plaintiffs should be barred from proceeding with the matter as they have not paid the outstanding costs and have failed to prosecute their rescission application diligently.

The following issues arise for determination:

- a) Whether the plaintiffs can be barred in the face of an application for rescission of judgment regarding the disputed costs.
- b) Whether the plaintiffs can be barred for failing to file heads of argument or prosecute their matter before the court has made such a pronouncement.
- c) Whether the plaintiffs, in terms of the rules, are entitled to make an oral application for the upliftment of the bar at the hearing.

- d) Whether it is premature to address these issues before the application for rescission is set down or dealt with at the instance of the plaintiffs or the defendants.

### **3. Legal Considerations**

- a) The principle of compliance with court orders is enshrined in Section 164(3) of the Constitution of Zimbabwe, which states that an order or decision of a court binds all persons and must be obeyed.
- b) The defendant relies on *Michaelson v Kent* 1913 TPD 10, which underscores that a party who has not paid costs may be barred unless the non-payment is not vexatious or abusive of court process.
- c) In *Makoni v Makoni and Another* SC 7/2018, the Supreme Court held that courts have the discretion to stay proceedings where a litigant fails to pay previously awarded costs, particularly where the failure to pay suggests an intention to abuse court process.
- d) In *Masuku v Masuku and Others* (1708/2011) [2017] SZHC 53, the court highlighted that a stay of proceedings is warranted where prior costs remain unpaid and where the conduct of the defaulting party is vexatious, oppressive, or in bad faith.
- e) In *Argus Printing & Publishing Co Ltd v Rutland* 1953(3) SA 446, the court held that the failure to pay costs may warrant a stay of proceedings, but courts should exercise discretion and consider whether the non-payment is due to mala fides.
- f) Zimbabwean courts have consistently emphasized the need to deal with substantive issues rather than procedural technicalities. In *Madzivire & Others v Zvarivadza* 2006 (1) ZLR 514 (S), the Supreme Court of Zimbabwe held that courts exist to resolve real disputes between parties and should avoid technicalities that prevent the merits from being heard. Similarly, in *Gomba v Makwarimba & Others* 1992 (2) ZLR 158 (S), the court reiterated that access to justice and substantive fairness should take precedence over procedural barriers.
- g) In *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46, the High Court of Australia emphasized that courts should be cautious in barring litigants as access to justice is a fundamental right. A litigant should only be barred if their conduct amounts to an abuse of process.

- h) The UK Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 reinforced that procedural rules should not be used to unjustly bar parties from having their claims heard.
- i) The South African Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) reaffirmed the principle that procedural fairness and substantive justice must be balanced when applying procedural rules.

#### **4. Application of the Law to the Present Case**

- a) The plaintiffs argue that barring is akin to default judgment, yet they are present in court. The practice has been to stay proceedings pending payment of costs rather than outright barring, particularly where a rescission application is pending.
- b) The plaintiffs allege that they were not served with the application for taxation and were unaware of the date of taxation. They contend that their failure to pay the costs is not deliberate but is subject to the rescission application, which remains unresolved.
- c) The defendant argues that the plaintiffs have not actively pursued their rescission application, have not filed heads of argument, and are therefore barred. However, the rules permit an oral application for the upliftment of the bar, and it would be premature to rule on the issue before giving the plaintiffs an opportunity to address this procedural aspect.
- d) The defendant seeks to proceed with its counterclaim in reconvention in the absence of the plaintiffs. However, courts exist to resolve substantive disputes rather than to determine matters on technicalities. The plaintiffs have not shown vexatious conduct or mala fides in failing to pay the costs, as they are awaiting the outcome of the rescission application

#### **5. DISPOSITION**

The court has a discretion to stay proceedings where a party has failed to comply with a costs order. However, this discretion must be exercised judiciously. Given that the plaintiffs have a pending application for rescission of judgment, and in light of the principle that barring should not be imposed prematurely, the appropriate remedy is a stay of proceedings until the issue of costs is resolved.

Accordingly, IT IS ORDERED THAT:

1. The proceedings in this matter are stayed pending the payment of the taxed costs by the plaintiffs or the resolution of the application for rescission of judgment.
2. The plaintiffs shall, within 30 days, either pay the outstanding costs or demonstrate diligent prosecution of the rescission application.
3. In the event of failure to comply with paragraph 2 above, the defendant shall be at liberty to apply for further relief, including dismissal of the plaintiffs' claim.
4. The matter is removed from the roll pending the resolution of the above issues.
5. Costs of this application shall be costs in the cause.

IT IS SO ORDERED.

**MAMBARA J:** .....

*Tundu Law Chambers*, plaintiffs' legal practitioners  
*Tendai Biti Law*, defendant's legal practitioners