CBZ BANK LIMITED
versus
CALEB DENGU
and
WILSON NYABONDA
and
ALLIED BANK LIMITED

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 1ST APRIL, 2019 and 30th October 2019

OPPOSED MATTER

P. Nyatsanga for the applicant
R.S. Ncube for the 1st and 2nd respondents
No appearance for the 3rd respondent

WAMAMBO J: This is an application to reinstate case HC 432/13. Case HC 432/13 is a matter wherein the third respondent in this matter is the plaintiff while the 1st and 2nd respondents in this case appear in the same capacity. On 11 September 2017 MUREMBA J. granted an order which reads as follows: -

"*IT IS ORDERED BY CONSENT THAT*

1. *Matter removed from the roll.*
2. *Plaintiffs need to amend their pleadings to include CBZ's claim*."

On 20 September 2017 the Registrar of the High Court wrote to applicant's legal practitioners informing them as follows: -

"*RE: ALLIED BANK LTD vs CALEB DENGU & ANOR.*

We refer to the above matter which was removed from the roll by the Honourable Judge on 11 September 2017.

Be advised that in terms of paragraph 10 of Practice Direction 3/13 you have 3 months calculated from the date of postponement/removal from the roll within which to set this matter down.

Failure to set the matter down within the stipulated time will result in the Registrar regarding the matter as abandoned and deeming it to have lapsed in terms of paragraph 10 of Practice Direction 3/13."

Long after the 3 months mentioned in the above letter had lapsed applicant's legal practitioners filed a notice of amendment to their declaration which amendment effectively added CBZ Bank Limited as a second plaintiff in HC 432/13. The notice of amendment was filed on 4 April 2018 and served on defendants' legal practitioners the next day. The defendant's legal practitioners wrote to the plaintiff's legal practitioners on 26 April 2018 acknowledging receipt of the notice of amendment of plaintiff's declaration. Defendant's legal practitioners averred that the matter has lapsed pursuant to the Registrar's letter dated 20 September 2017.

On 27 November 2018 applicant's legal practitioners filed a chamber application for reinstatement and served same on respondents who on 10 December 2018 filed a notice of opposition.

On the date of the hearing of this application *Mr Nyatsanga* for the applicant intimated that applicant's heads of argument were filed out of time. He applied orally from the bar for the upliftment of the bar. The reasons advanced are that the delay is not inordinate, that there are good prospects of success in that in the main matter HC 432/13 the respondents essentially do not deny liability. Respondents on the other hand vociferously argued that good and sufficient cause has not been demonstrated by applicant for the bar to be uplifted. It is averred by respondents that applicants are only now at the hearing conceding that they filed their heads out of time. Prior to the hearing applicants never demonstrated that they were pursuing their matter vigilantly. This against the background that applicants made the instant application after an entire year.

The respondents also argued that applicants filed their heads of argument after receipt of the notice of set down.

The point was raised that once a party is barred then the matter is unopposed.

In *Roysen Traders (Pvt) Ltd t/a Alliance Ginneries* vs *Quton Seed Company (Pvt) Ltd.* HH 12-17 CHITAPI J said as follows at page 5: -

> "*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*."

The learned Judge CHITAPI J went on to refer to the matter of *Grain Marketing Board* v *Muchero* 2008 ZLR 36 (SC) wherein GARWE JA dealt at length with the consequences of a bar in a court application and its removal.

In this case not only did respondent receive a copy of the applicant's heads of argument before the set down date but somehow a copy thereof formed part of the record to the extent that I had read the applicant's heads of argument before the hearing of this matter.

After a serious consideration of the circumstances and that respondent had received and read applicant's heads of argument I will proceed to uplift the bar and deal with the matter on the merits.

The application for the removal or upliftment of the bar is not for the taking. It would appear that applicant took it for granted that the court would either endorse the upliftment of the bar without further ado. It appears that applicant probably thought respondent did not notice the delay or would withdraw the bar. The matter is going round in circles. Adopting a robust approach and with an eye on litigation reaching finality I will allow the application for the removal of the bar in the peculiar and particular circumstances of this case as will become clear in the case of this judgment.

Outside the merits of the case it was not only the issue of filing the applicant's heads late that was raised.

Respondents also raised the sole point *in limine* of non-compliance with the Rules in the sense that the form of the application is not in accordance with the Rules.

The form of the application does not comply with the prescribed form for court applications as set out in Form 29 of the Rules of Court.

It is also to be noted that the application reflects that it is a chamber application for reinstatement.

Applicant readily concedes that he used the wrong form according to the Rules of court. He avers the form he adopted in this case is Form 29 B instead of Form 29.

Rule 229 C of the High Court Rules 1971 provide *inter alia* that the fact that an applicant has instituted a chamber application instead of a court application shall not be ground for dismissing the application unless the court of judge, as the case may be considers that –

(i) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form, and

(ii) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs.

Granted Form 29 carries with it procedural rights alerting a respondent which is not included in the format of Form 29 B which applicant used in this case.

In *Juddy Chimango and Patricia Chireshe* v *International Committee of the Red Cross* HH 96/16 MTSHIYA J at pages 5 – 6 said;

> "The rules of court ought to be strictly adhered to but such adherence should never be allowed to stand in the way of justice. This is why the rules allow for flexibility (i.e. rules 4C and 229 C above). To that end, I firmly believe that this court should be able to manage and control its own purposes".

Much as the form used in the instant case is the wrong one it would appear that no prejudice was occasioned to the respondent. Respondents were served with the application on 27 November 2018 and were able to file their notice of opposition on 10 December 2018. I find no merit on this point *in limine* and I dismiss it.

I will now proceed to the merits of the case.

The background of the application is set out in applicant's founding affidavit summarily as follows: -

Applicant is a registered commercial bank and 1st and 2nd respondents were directors in a company which has since been liquidated. The two respondents were sureties and co-principal

debtors of the now liquidated company. The 3rd respondent is a failed banking institution under liquidation.

A loan was advanced by 3rd respondent to a company in which 1st and 2nd respondents were directors. On 22 January 2013, 3rd respondent instituted a claim against the 1st and 2nd respondents. 3rd respondent fell into commercial hardships leading to its liquidation. During that period a number of 3rd respondent's debts including the current debt were ceded to the applicant. The money advanced to 1st and 2nd respondents had been borrowed by 3rd respondent from applicant. The securities exchanged between the debtors and 3rd respondent were ceded to applicant effectively meaning applicant could now claim these amounts from both 1st and 2nd respondents on the one hand and 3rd respondent on the other hand.

When the main matter HC 432/13 which makes up the above facts was removed from the roll on 11 September 2017 and while litigation was on going applicant and 3rd respondent's liquidator was in discussions over how the debts would be settled.

The discussions circled around what amounts if any were owed by the debtors (*including 1st and 2nd respondents*) and what amount would be paid by 3rd respondent.

The discussions were particularly important in that they had the potential to illuminate what amounts were claimable by the debtors to the applicant. The discussions have since been concluded and amounts owed by other debtors have substantially changed. However, the amount owed by the 1st and 2nd respondents remains the same.

The clarity brought upon by the discussion has enabled applicant to continue with the matter.

Of particular interest are the surety documents filed by 1st and 2nd respondents in the main matter. These are persuasive that there are outstanding issues needing resolution through a trial.

The above are the reasons proffered by the applicant for an order of reinstatement of HC 432/13 so that the matter can proceed to finality.

First respondent filed an opposing affidavit. Second applicant is content to associate himself with the averments by second respondent. Applicant also filed an answering affidavit.

In the circumstances of the matter it is of importance to set out second respondent's averments in the opposing affidavit in some detail. At least he is the only one who provides some answers with some particularity to applicant's application.

Second respondent responses in his opposing affidavit as follows: -

There is need for an end to litigation. HC 432/13 lapsed for want of prosecution almost a year before this application and the delay is too long.

When the debt in issue was incurred 1st and 2nd respondents were not directors of the principal debtor. 1st and 2nd respondents are not aware of any discussions between the liquidator of 3rd respondent and the applicant.

The 1st and 2nd respondents were never lent any money. They also have no knowledge of applicant lending 3rd respondent money. The only security held by 3rd respondent was a mortgage bond passed by 2nd respondent. This is what was ceded see Annexure "B". The cession by 3rd respondent to applicant is not acknowledged by the 1st and 2nd respondents. The applicants were informed on 26 April 2018 by respondent's legal practitioners that the main matter HC 432/13 had lapsed. Thereafter there were some few correspondences between the parties with applicant indicating that they would file an application for reinstatement. The application for reinstatement is being launched in this case at the very late hour. This means applicant is not desirous to prosecute the matter to finality.

In both parties heads of argument and in oral submissions they were agreed that in an application for reinstatement the applicant has to explain the extent of the delay, the reasonableness of the explanation thereof and the prospects of success.

The parties have both referred extensively to case law dealing with reinstatement.

There may be differences as to whether an applicant seeks reinstatement of an appeal or a trial matter for instance but the principles applied remain the same.

In *FBC Bank Limited* vs *Robert Chiwanza* SC 31/17 GWAUNZA J.A. at page 2 said;

"*In considering an application for reinstatement MALABA JA (as he then was) held that:-*

> *The question for determination is whether the applicant has shown cause for the reinstatement of the appeal. In considering applications for condonation of non-compliance with its Rules the court has a discretion which it has to exercise judicially on the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are : the degree of non-compliance, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interests, the convenience to the court and the avoidance of unnecessary delays in the administration of justice."*

In *Champion Constructors* v *Modrack Mkandla and Patience Chipo Mkandla* SC 18/07 at page 3 GARWE JA had occasion to state as follows: -

> "The position is now settled that in an application for the reinstatement of an appeal which was regarded as abandoned and deemed to have been dismissed the applicant must show good cause for the default. *Susan Chipo Vera* v *Mitsui & Company Limited* SC 32/04. The requirements that have to be satisfied in an application of this nature are the same as in an application for condonation for late noting of an appeal and for extension of time within which to file an appeal.
>
> There are (i) the extent of the delay, (ii) the reasonableness of the explanation proffered for the delay, and (iii) the prospects of success on appeal."

I now turn to the facts of this case vis-à-vis the above stated requirements.

The extent of the delay

The Registrar informed the applicant by letter that it effectively had 3 months from the 11th of September 2017 within which to set the matter down. The result of not adhering to the stipulated 3 months would be regard of the matter as having been abandoned or deemed to have lapsed. The 3 months passed and at the time of the filing of this application for reinstatement a considerable period had passed. If one counts from the stipulated 3 months there was a period of about 11 months delay. In *Champion Constructors* v *Modrack Mkandla and Patience Chipo Mkandla* (supra) a delay of 7 months was found to be inordinate under normal circumstances. I find that the extent of the delay is inordinate.

The reasonableness of the explanation proffered for the delay

Applicant avers that there were discussions under way between the applicant bank and the 3rd respondent to seek clarity on the debts incurred by the various debtors including that incurred by 1st and 2nd respondents. 1st and 2nd respondents claim no knowledge of these discussions and negotiations. No proof is availed of these developments. In any case the explanation is not reasonable in the circumstances.

Not reasonable because there is no explanation why these discussions did not take place earlier that is before the matter was removed from the roll. There is no attempt to explain if there were any such discussions why it took a whole 11 months. In any case as it turns out the alleged amounts owed by the 1st and 2nd respondents remain the same. If any such discussions took place, there is no proof they affected the 1st and 2nd respondents.

There is further no attempt on the part of the applicant to register with the Registrar of this court the difficulties faced in setting the matter down within the stipulated period.

Applicant instead of having the matter set down proceeded to file a notice of amendment on 4 April 2018 four months after the stipulated 3-month period.

Inspite of being informed by respondents' legal practitioners by letter dated 26 April 2018 that the matter had lapsed the applicant only filed this application 7 months thereafter.

Inspite of the above delays applicant again filed heads of argument late. Granted the operative bar was lifted in this regard. It however means that the flagrant disdain of the rules did not end with the main matter. It continued into this application which application was mounted by the applicants.

I find in the circumstances that the explanation proffered for the delay is unreasonable.

Prospects of success

It would generally appear that applicant did not take this matter and the main matter seriously.

One is reminded of the wise counsel by DUMBUTSHENA CJ in *S* v *McNab* 1986(2) ZLR 280 (3) at 284 E when he said:-

> "*I have dealt at length on this point because it is my opinion that laxity in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice*".

I say applicant appears not to have taken the matter seriously because it does not address the requisite issue of prospects of success. If one has regard to the founding affidavit only one paragraph namely paragraph 16 deals with the merits of the main matter. The paragraph deals very broadly and vaguely with the merits of the main matter. Reference is made to the surety document filed by the 1st and 2nd respondents and that it indicates that there are issues to be resolved through a trial. The import of the document is not discussed. How it reflects that there are issues to be resolved by trial is not canvassed.

I am cognisant that an application falls or rises on the founding affidavit. The founding affidavit by applicant leaves out a fundamental issue as discussed above.

The application is brought by applicant. Applicant does not bring forth and candidly too the whole nature and import of their application. They bring allegations piecemeal and in an apparently deliberately evasive manner.

In *Spectron Motors* and *Topbridge (Pvt) Ltd Society Union Limited and Others* HH 855/17 MANGOTA J. lamented the flouting of the Rules by the applicant and raised issue with applicant's incoherent version of events.

At page 7 MANGOTA J. said:-

"*The rules of court are not there for cosmetic purposes. They assist the court and legal practitioners to move matters forward from one stage to the next. Where such are violated, avenues for correction are contained in the same. These should have been taken advantage of by the applicants and the latter's legal practitioners. They were not. The matter cannot unfortunately continue to have life in it. The effort on the part of Mr Simango to breathe life into it, though commendable, could not assist the applicant's case.*"

After due consideration of the full circumstances of the matter I am satisfied that the application fails.

To that end I make the following order:-

The application is dismissed with costs.

G.N. Mlotshwa & Company, applicant's legal practitioners
Honey and Blanckenberg, 1st and 2nd respondents' legal practitioners