MICHELLE NYAMANGUNDA
versus
MASHONALAND TURF CLUB

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 April, 2013

T. Mawere, for the applicant
T.S. Manjengwa, for the respondent

MANGOTA J: This is an application for the upliftment of a bar which the respondent imposed against the applicant.

HISTORY OF THE CASE

On 13 March, 2012 the respondent (plaintiff in the main case) issued summons against the applicant (defendant in the main case) claiming:

(a) An order for the eviction of the respondent and all those occupying through her from the property known as Zimbabwe Betting and Sports at the Borrowdale Park Race course – and

(b) Payment of costs of suit.

On 10 April, 2012 the applicant entered appearance to defend and, on 8 May 2012, the applicant filed a request for further particulars.

The respondent refused to furnish the applicant with further particulars. It communicated its refusal in this mentioned regard through a letter which it addressed to the applicant on 9 May, 2012.

On 5 June, 2012 the respondent filed with the court, and served upon the applicant, a notice to plead and an intention to bar. The notice gave the applicant five (5) days within which it had to file its plea to the respondent's claim failing which the respondent would file a copy of the notice with the Registrar as a bar. The applicant did not file its plea within the stipulated five days and, on 13 June 2012, the respondent placed a bar against the applicant. It is this bar which is the subject of these proceedings.

ANALYSIS OF THE CASE

In its application for the upliftment of the bar, the applicant did not give a complete story of the matter. It attached to its application a document, Annexure B, which related to its request for further particulars. That document, read alone, would not assist anyone who is dealing with the matter to appreciate the circumstances which surrounded the applicant's request for further particulars. One for instance needs to know whether, or not, the request which the applicant made was a genuine attempt on its part to have issues placed in their clear perspective and, in the process, assist it in its pleading to the respondent's claim.

The need to have a clear position of the matter prompted me to call for the record which related to the main case. My intention was to examine the present application in a holistic, as opposed to an isolated or piecemeal, manner which would not do justice, but injustice, to the parties whose case had been placed before me for consideration. I had, in short, to convince myself, without going into the merits of the main case, that:

- the applicant's request was not frivolous and/or vexatious – and
- the present application is not devoid of substance or merit.

The applicant made a number of technical blunders which, taken from a superficial point of view, tend to dent its case in a very serious way. I, for the avoidance of doubt, state some of the blunders hereunder as follows:

(i) the applicant entered appearance to defend on 10 April, 2012 and it made its request for further particulars on 8 May, 2012 which is a stretch of twenty (20) working days after its initial action. It did not proffer any explanation for this delay and one is left to wonder as regards the fact of what the cause of the delay was.

(ii) the applicant became aware of the respondent's attitude to its request for further particulars during the period which extends from 10-15 May, 2012. The exact date remains unknown. What is known, however, is that the applicant became aware, within that stated period of time, that the respondent had refused to furnish it with further particulars. That knowledge on its part notwithstanding, the applicant, for some unexplained reasons, refrained from seeking to enforce its rights in terms of rule 142 (b) of the rules of this court. The rule, in part, reads:

> "If a party applies for particulars, the time for replying to the pleading of which particulars are sought shall be calculated –
>
> (a) ……..
> (b) Where the particulars are refused and the applicant fails to make a court application for an order within……"

The cited rule shows, in a clear and unambiguous language, that a party which requires the other party to furnish it with further particulars has every right to approach, and request, the court to compel the refusing party to furnish it with the particulars which it requires to enable it to plead. The applicant gave no explanation at all for its failure to invoke the provisions of this rule which, to all intents and purposes, was, and is, for its own benefit.

(iii) On 5 June, 2012 the respondent served the applicant with the notice to plead and intention to bar. The notice in question reached the law firm of the applicant's legal practitioners at about 12 mid-day of its date of issue as well as service. The applicant remained unaware of the notice from the date it was served upon it right up to 28 June, 2012 when, according to the applicant's legal practitioner one Tatenda Mawere, the respondent's legal practitioners alerted him of the notice. What this means is that the notice was in the offices of the applicant's legal practitioners' law firm for a stretch of sixteen (16) working days without being acted upon.

The dilatory manner in which the applicant's legal practitioners handled their client's case is inexcusable. If the applicant is made to suffer, it will endure the suffering not because of its own action or conduct, but because of its legal practitioners' cavalier approach to their work. The ripple effect of this analysed set of circumstances is that the applicant's choice of legal practitioners amongst many which are within, and outside, the jurisdiction of this court causes it to endure the suffering, if it will. Its law firm's legal practitioner, Tatenda Mawere, who deposed to an affidavit in support of the present application laid the entire blame on the applicant's lawyers for the mishap which pertained to matter of the notice to plead and intention to bar. One would not stop at that; but would go further and assert that the applicant's firm of legal practitioners cannot excuse themselves at all in respect of all the three matters which the court has had occasion to observe. That is so because a party which engages the services of a legal practitioner generally does repose its

trust and confidence in its legal practitioners to perform, on its behalf, all necessary work which must be performed as and when such work is due. The party does not, for instance, know that:-

- there are time lines within which certain actions must be carried out in litigation; or
- there are rules which guide and govern the operations of the court particularly such matters as the issuance, servicing and/or filing of court process; or
- failure to comply with the rules of court can be fatal to its case.

Those who are trained in the law, legal practitioners, do know or, at the very least, are presumed to have knowledge of all of the abovementioned and, indeed, many more matters which relate to litigation. The question which begs the answers is should a party which engages a legal practitioner who makes serious technical blunders in the course of prosecuting the case of, or defending, his client be penalised for the obvious mistakes of its legal practitioner(s). Put differently, that question is should the sins which a party's legal practitioners commit be visited upon the party itself. The answer to that question does, and should, in my view, depend on the circumstances of each case. Generally, the answer is in the affirmative. That is so in situations where a party's case is hopelessly devoid of merit. Where, however, a party's case seems, on the face of it, to command some merit, the interests of justice would best be served if the court makes a conscious distinction between the sins of a party's legal practitioners which sins arise out of the practitioners' cavalier approach to the work of their client and the substance of the party's case as a whole. The duty of the court is not to always allow parties to hinge their cases on technicalities. Its sworn duty is to dispense real and substantial justice.

The foregoing does not, in any way, suggest that the rules of court should be taken lightly or ignored by litigants. Those rules are so important that a party whose case is before the court must always make every effort to comply with them for its own benefit. The court put the rules in place as a way of ensuring that its work operates in a smooth and clearly defined manner. The rules assist the parties to move their respective cases forward leading to a speedy resolution of disputes. It follows from this set of circumstances that non-observance of, or non-compliance with, the rules of court by a party does, as a general rule, lead to a party's case falling. That is particularly so where a party's case, viewed holistically, is, on the face of it, hanging on nothing. Where, however, a party's case, taken as a whole, appears to be substantially strong, an injustice would have been visited upon the party which has, out of

the inadvertence of its legal practitioners, failed to observe, or to comply with, this or that rule of court if the court were to allow the case to fall on the basis of those procedural failures. The present matter is one such case where the applicant's legal practitioners made some errors which, viewed in isolation, tend to make the applicant's case an inexcusable one.

As was stated in the foregoing paragraphs, the complexity of the matter and the need on my part to appreciate the circumstances of this case prompted me to call for the parties' record in the main case. That record was duly provided and I went through its contents. I, in particular, focused my attention on the respondent's declaration. I did so as I remained alive to the fact that the declaration forms the substance, or the basis, of the respondent's cause of action. On going through it, and without applying much effort to what was contained in the declaration, I realised that its contents raised more questions than answers. I realised, further, that the declaration as read together with annexure J made it very difficult, if not impossible, for one to ascertain the exact relationship which the parties to this case had created between themselves. Annexure J is the letter which the respondent, through its legal practitioners, wrote to the applicant's legal practitioners on 17 November 2009. The applicant filed that letter as an annexure in support of its application. The letter, in *extenso*, reads:

> "… our client's position as outlined earlier on in the proceedings HC 253/08 and our subsequent letter of 20th April, 2009. Your client had the right to occupy the portion described as the **area extending from the middle of the eastern side of the shop floor rectangular in shape, together with the adjoining offices in the built up area of ZBS measuring approximately 35 m^2**. This is as per the attached shop floor illustration. Your client's right of occupation was on the basis of a sublease with the then substantive tenant Lunar Graphics (Pvt) Ltd which our client ratified. As far as our client is concerned, when it terminated the substantive tenants' lease, your client's right was also terminated and your client remained in occupation without our client's consent.
>
> Our client has since June 2009, entered into another lease with the former substantive tenant **who has authority over the whole premises,** 360 m^2 in size. As Lunar Graphics are the tenant for the whole premises, if your clients want to regularise their position, they will have to approach Lunar Graphics, for our client cannot purport to lease out a portion of what they have already leased to Lunar Graphics.
>
> What our client can only do is, if it is in Lunar Graphics' best interests and their best interests, ratify any agreement of sublease that your client may be granted as they have done previously. They reiterate that they are not due any rentals from you, but from Lunar Graphics and if you intend to compensate anyone for your unilateral occupation, then it has to be Lunar Graphics.

> It remains that our client as Lunar Graphics' landlord has an obligation to ensure peaceful enjoyment of the whole leased premises and if your client's position is not regularised within a reasonable time; they will have no option but to institute proceedings to evict your client from the premises."

The contents of the letter, annexure J, spells in a clear and succinct manner that there was, or is, no privity of contract between the applicant and the respondent. The declaration, on the other hand, tends to suggest that the applicant was, or is, the tenant of the respondent. Howard Mukundu who is the respondent's Operations Executive deposed to an affidavit in opposition to the application. His affidavit left the matter which related to para 21.7 of Tatenda Maware's affidavit totally unanswered. Yet it is within the context of that paragraph that annexure J was made part of this application. Paragraphs 16, 17, 18 and 19 of Mr Mukundu's affidavit confused the issues further than where the declaration and annexure J had left them. He states, in paragraph 16 of his affidavit that **the issues surrounding the dispute between the parties centred on the fact whether the applicant was a tenant or subtenant**. He goes on to state that **the tender of rentals and subsequent acceptance of such tender by the respondent meant the formalisation of a landlord and tenant relationship.** He states, further, and in the same paragraph that **after the acceptance of the tender, the applicant was obliged to perform in terms thereof.** All this and many other observed matters which have not been specifically mentioned run contrary to the letter and spirit of the contents of annexure J where the respondent stated, in clear and an ambiguous language, that there is no privity of contract between the applicant and the respondent. The import of the last sentence of annexure J is that it is Lunar Graphics (Pvt) Ltd and no one else who has the right to evict the applicant. Such matters as these are probably the reasons which prompted the applicant to request the respondent to furnish it with further particulars.

Accepting, as we must, that there is no privity of contract between the parties, the issue of the respondent's *locus standi* in the case cannot be glossed over let alone be ignored. The relationship of the parties, it has been observed, is not as clear as the respondent seems to want to suggest. It is clouded with many interlocking matters which, in the interests of real and substantial justice, would have been cleared by the respondent furnishing the applicant with the particulars which the latter had requested. The answers which the respondent was going to give would, in all probability, have assisted the parties to clarify and define the relationship which existed, and exists, between the parties. The respondent was accordingly

not being reasonable when it refused to furnish the applicant with answers to the questions which it had posed in the form of an application for further particulars. Counsel who are seized with this matter know as much as I do that litigation is not like a game of chess. It is not a game where one party makes a conscious and deliberate decision to ambush the other and, as it were, catch it unawares, so to speak. It requires little, if any, emphasis to state that the duty of counsel, as an officer of the court, is to protect the interests of its own client and to assist the court to arrive at real and substantial justice in any matter which is before the court.

Counsel submitted heads of argument in support of their respective positions. They drew my attention to a number of authorities in an effort to persuade me to go with the one, or the other, party's view. I commend counsel's effort in this mentioned regard. The authorities which they cited did not only enrich my understanding, but they also widened my knowledge, of the law. Those authorities did not, however, assist in the resolution of the matter with which I am currently seized.

It has been observed that this case requires further ventilation of issues. The ventilation would assist the parties to define the relationship which exists between them. That clarified position will be of benefit to the parties themselves as well as to the court which will deal with the main case.

On 8 May 2012 the applicant made, and filed with the court, a formal application for further particulars. It did so as it realised that there were issues which required clarification for its own benefit as well as that of the respondent and, more importantly, the court. The respondent unreasonably refused to furnish the applicant with the particulars which it had requested. From the time of the respondent's refusal to furnish the requested particulars todate, the parties went on what I may refer to as a wild goose chase with one party making every effort to knock the other down on procedural technicalities, which exclude the substance of the case, and the other putting up a spirited fight in an effort to remain in the boxing ring, if you may favour the comparison. The net effect of all this was that a lot of time was unnecessarily wasted when it could have been served for the benefit of the court which was, or is, dealing with the main case and the parties themselves.

Conclusion

I have, in the circumstances of this case, as well as in the interests of justice and the need for the case to move forward, no option but to invoke the provisions of r 4 C of the rules of this court and order that:

(i) The bar which operates against the applicant be, and is hereby lifted,

(ii) Within 5 days of its receipt of this order, the respondent furnishes the applicant with the particulars which it sought from it on 8 May, 2012;

(iii) Thereafter, the matter be, and is hereby, allowed to proceed in terms of the rules of this court.

(iv) Each party bears its own costs.

Mawere & Sibanda, applicant's legal practitioners
Wintertons, respondent's legal practitioners