NATIONAL FOODS OPERATIONS
versus
PERFECT BAKERY (PVT) LTD
and
GIFT MABVUNZA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3 February 2015 and 4 March 2015

R. Stewart, for the applicant
Ms *N Mazhandu*, for the respondents

SUMMARY JUDGMENT

BHUNU J: This is an application for summary judgment initially brought against both respondents. The first respondent is a company duly registered in terms of the laws of this country whereas the second respondent is its managing director.

On 2 June 2014 the applicant issued summons against both accused claiming payment of US$16 817.30 plus 15% interest per annum from 13 January 2014 to date of payment in full with costs at the higher scale. The plaintiff's claim against the respondents was joint and severally one paying and the other to be absolved.

The respondents duly entered appearance to defend on 5 June 2014 whereupon the applicant filed this application for summary judgment on 3 December 2014. The matter was then set down for hearing before me on 3 February 2015. At that hearing Mr *Stewart* counsel for the applicant withdrew his client's claim against the first respondent on account that they had received written communication that the first respondent had been placed under judicial management. He however persisted with his claim against the second respondent.

Ms *Mazhandu* for the second respondent however objected to the applicant proceeding against her client on his own. She strenuously argued that the claim being withdrawn cannot proceed against the second respondent alone because when the first respondent was placed under judicial management all claims were stayed. She then applied that the parties be given time to file heads of argument.

Mr *Stewart* countered that the operation of law against the first respondent has no bearing on second respondent's liability as the applicant's claim was joint and severally one paying and the other to be absolved. Despite the withdrawal against the first respondent both respondents were already barred for want of compliance with r 238 (2a) and (2b) upon failure to file heads of argument within the prescribed 10 day period after receipt of applicant's heads of argument. The rule provides as follows:

> "(2a) heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subrule (1):
>
> Provided that—
>
> (i) No period during which the court is on vacation shall be counted as part of the ten-day period;
>
> (ii) the respondent's heads of argument shall be filed at least five days before the hearing. [subrule substituted by S.I. 192 of 1997]
>
> (2b) where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll."

Rule 83 prohibits a litigant who has been barred from being heard for any other purpose other than for the upliftment of the bar. It reads:

> ***"83. Effect of bar***
>
> While a bar is in operation—
>
> *(a)* The registrar shall not accept for filing any pleading or other document from the party barred; and
>
> *(b)* the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit; except for the purpose of applying for the removal of the bar:"

What this means is that Ms *Mazhandu*'s objection against the applicant proceeding against her client in the absence of the first respondent cannot be entertained as long as the bar is operating against her client. She however appears not to have appreciated the effect of a bar as appears from her response in this respect in which she had this to say:

"Ms Mazhandu: the heads of argument do not take into account the issue of withdrawal. Second respondent should be given a chance to respond to the amended draft order otherwise he shall not have been accorded a fair hearing.

Court: you have not addressed me on the question of the bar operating against your client.

Ms Mazhandu: the 2nd respondent we were no longer representing him I can't for sure say what transpired. I can't dispute there was a bar but the bar was against both respondents. Things have since changed. This is now a different matter.

Court: does that lift the bar.

Ms Mazhandu: it does not. If the court can allow me to apply for upliftment of the bar.

Mr Stewart: the applicant stands prejudiced. There are no triable issues. The defendants' plea merely indicates that they have been experiencing difficulties in paying the plaintiff. That is no defence. In subsequent correspondence they admit owing the applicant. Heads of argument were filed at the 11th hour. They now seek to uplift the bar.

Ms Mazhandu: I am not privy to any of the correspondence. This matter cannot be finalised on summary judgment. There are so many issues raised. I refer to the notice of opposition the respondent has a *bona fide* defence and all the agreements referred to are not part of the record. They are also not part of the applicant's case. I therefore do not see the prejudice if the bar is uplifted."

The above exchanges make it clear that the application for upliftment of the bar was made as an afterthought without careful consideration of the legal requirements for such an application to succeed.

Where a litigant has been barred the other party gains an advantage that cannot be easily swept away. Rule 84 provides for the required procedure for upliftment or removal of a bar as follows:

"***84. Removal of bar and effect***

(1) 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 he or it, as the case may be, thinks fit.

(2) the withdrawal or removal of a bar shall not preclude a subsequent bar for subsequent default."
[rule substituted by S.I. 33 of 1996]

Thus before the bar can be lifted the barred party has an onerous duty to justify the upliftment of the bar. Unless the other party consents to the upliftment of the bar, the barred party must apply for the upliftment of the bar either in writing or orally at the hearing. The application should be supported by an affidavit or some other facts which must:

(a) Give good and sufficient reasons or excuse for the delay.
(b) Sufficiently address the applicant's prospects of success on the merits.

In *Markides and Hessam* v *Levendale* 1954 SR 77 Beadle J, as he then was emphasised the need to satisfy both requirements. In that case the learned judge rejected as inadequate an averment in an affidavit simply stating that, *"the defendant's plea disclosed a valid and bona fide defence to the plaintiff's plea"*

Thereafter he proceeded to remark that in matters of this sort the defendant should set out in his affidavit briefly what his defence is, what the facts are on which he relies for his defence, so that the court can form some opinion on the merits of his defence.

It is needless to say that the applicant's application falls far too short of the legal requirements in all material respects in so far as it does not state the reasons for delay and fails to articulate the applicant's prospects of success on the merits. His application amounts to no more than simply stating that he must be accorded his right to be heard otherwise the court would have denied him his constitutional right to a fair trial. This argument is untenable in circumstances where he has failed to articulate the basis of his defence. In particular he dismally failed to deal with and rebut the allegation that his plea raises no triable issue as he admitted liability as alleged.

There is no substance in that complaint because the applicant was accorded the right to be heard and he wasted that chance and has not proffered any reasonable excuse as to why he failed to act within the stipulated time frame.

As previously stated in the original draft, the applicant sought an order against both respondents but has since withdrawn its claim against the first respondent. Consistent with that withdrawal the applicant has now amended its claim to reflect the withdrawal by dropping the second respondent's name from the proceedings. I can perceive no prejudice to the second respondent arising from the withdrawal because he was always liable to pay the

full amount claimed as the plaintiff's claim was right from the onset joint and severally one paying and the other to be absolved.

The claim being for a debt or liquidated demand, it is competent to award summary judgment in terms of r 64. The application can therefore only succeed in terms of the amended draft. It is accordingly ordered:

1. That the application for removal of the bar against the 2nd respondent be and is hereby dismissed.

2. That summary judgment be and is hereby entered against the 2nd respondent in the following terms:

    a) The 2nd respondent shall pay the sum of US$16 817.30 (sixteen thousand eight hundred and sixteen United States of America dollars and thirty cents) to the applicant.

    b) The 2nd respondent shall pay interest on the above sum on the above sum at the rate of 15% per annum from the 13th of January 2014 to the date of payment in full.

    c) The 2nd Respondent shall pay costs of suit at the ordinary scale.

Wintertons, applicant's legal practitioners
Gama and partners, respondents' legal practitioners