MFARO MOYO
versus
MINISTER OF ENERGY AND POWER DEVELOPMENT
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZMBABWE
MATHONSI J
HARARE, 25 March 2015 and 1 April 2015

OPPOSED APPLICATION

S. Bhebhe, for the applicant
T. Dodo, for the respondents

MATHONSI J: This is an application in which the applicant, a spirited person, has brought a constitutional challenge against the Petroleum (Mandatory Blending of Anhydrons Ethanol with Unleaded Petrol) Regulations SI 17 of 2013 as amended by the Petroleum (Mandatory Blending of Anhydrons Ethanol with Unleaded Petrol)(No. 1) Amendment Regulations, SI 147A of 2013 (the Regulations) which were enacted in terms of s57(1) of the Petroleum Act [*Chapter 13:22*].

The applicant seeks an order declaring that it is his fundamental right to own and use property as set out in s71 of the Constitution, in this case, to use his Mitsubishi Pajero GDI motor vehicle registration number ACT 5253, that SI 147A of 2013 is constitutionally invalid as it is inconsistent with s 71(2) and (3) as well as s134(b) of the constitution and should be struck down as it is of no force and effect on the pain of costs of suit being borne by the respondents jointly and severally the one paying the other to be absolved.

The application was served upon the respondents on 19 March 2014 meaning that they had until close of business on 2 April 2014 when the *dies inducae* expired, to file opposition to the application.

Never mind the importance of the litigation, which clearly is of supreme national importance, the first respondent did not see the wisdom of filing opposition to the application. It was not until, 9 April 2014, a week out of time that he purported to do so. Interestingly, the second respondent who complains bitterly about his misjoinder succeeded in filing his opposition on time while not doing the same for the substantive party, the first respondent.

The filing of the first respondent's notice of opposition was irregular as it was done without seeking condonation for the late filing. That opposition is therefore improperly before me and the matter is, to the extent that the first respondent is concerned, unopposed.

Although the applicant's heads of argument were filed on 30 October 2014 and served upon the Civil Division of the Attorney General's office on 4 November 2014, the second respondent did not file heads of argument until the *dies inducae* expired on 18 November 2014. To the extent that the second respondent is represented by a legal practitioner he is therefore barred in terms of r 238 (2b) of the High Court of Zimbabwe, Rules, 1971. No application for upliftment of bar has been made.

The purported filing of heads of argument on behalf of the respondents on 23 March 2015, 2 days before the date of set down and without condonation, was therefore an exercise in mischief especially as in the prelude to those heads of argument, it is stated:

> "An application for the condonation of such non-compliance (not filing opposition on time, nothing is said about the bar for filing heads out of time) with the rules will accordingly be made at the hearing".

Therefore the respondents have all along been aware of the infractions that be set them but have not done anything about them. There can therefore be no doubt that the respondents have been grossly remiss in their opposition of the application. Condonation is not there to a litigant for the asking. No explanation whatsoever has been given for this dilatoriness as no formal application for condonation is before me.

It is the making of an application for condonation which triggers the discretion of the court to extend the time, *Mtsambire* v *Gweru City Council* S – 183-95 (not reported); *Forestry Commission* v *Moyo* 1997(1) ZLR 254(S) 260D, *Viking Woodwork (Pvt)Ltd* v *Blue Bells Enterprised (Pvt) Ltd* 1998 (2) ZLR 249(S) 251 C-D

What we have therefore is an application which is essentially unopposed. Rule 238 (2b) provides that the court may deal with the matter on the merits or direct that it be set down for

hearing on the unopposed roll. I am however wary of the pronouncement of the Supreme Court in *GMB* v *Muchero* 2008(1) ZLR 216(S) 221 E-F where Garwe JA said:

> "The High Court Rules permit a court to deal with a matter on the merits where the respondent has been barred for failure to file heads of argument on time. See r 238(2)(b). The rules, however, do not make provision for a matter to be dealt with on the merits where the respondent has been barred for failure to file opposing papers. Rule 236(1) specifically provides that where the respondent has been barred for failure to file opposing papers, the applicant may, without notice to the respondent, set the matter down on the unopposed roll in terms of r 223(1)(e). Given these specific provisions, I agree with the appellant that it was irregular for the trial court to hear argument on the merits of the case from both parties. At best, the matter should have been treated as unopposed until and unless an application to uplift the bar had been made and granted. As the matter was unopposed, the trial court should have granted a default judgment in the event that it dismissed the application to uplift the bar".

In the present case we have a hybrid of bars operating against the second respondents. The first respondent is barred for failure to file opposition on time while the second respondent is barred for failure to file the heads of argument timeously. These 2 scenarios make it impossible to deal with the merits.

Earlier on in the *GMB* v *Muchero* judgement, *supra*, at 220 D-G the appeal court gave guidance as to how the court should proceed when faced with such eventuality;

> "It is clear from the above provisions (rules 233 (3); 239, 83 and 84) that once a party is barred, the matter is treated as unopposed unless the party so barred makes an application before that court for the upliftment of the bar. It is also clear that, in making the application to uplift the bar, the party that has been barred can either file a chamber (not court) application to uplift the bar or, where that has not been done, the party can make an oral application at the hearing. The practice in the High Court, so far as I am aware, is that only in very few instances have oral applications to uplift the bar been entertained by the court. This is because, in such a case, the applicant must explain the reason for the delay, and thereafter convince the court that he has a *bona fide* defence on the merits…..In practice, where such an application is made, the court will direct that a written application be filed. In that event, the court will postpone any decision on the merits pending the determination of the application to uplift the bar. The court may also give a time limit within which any such application is to be made, as well as order the payment of wasted costs by the party seeking the postponement."

Counsel for the respondents has submitted that a formal application for condonation of the late filing of opposition, presumably for the first respondent, was filed on 7 August 2014 and is yet to be determined. It would be completely undesirable to proceed with this application before the condonation application has been determined. This court has a duty to regulate its process and is not in the habit of creating anarchy and confusion.

As stated by Hathorn J (as he then was) in *Abramacos* v *Roman Gardens (Pvt) Ltd* 1960 R&N 1 (SR) at 2 (quoted with approval in GMB, *supra*):

> "…. a defendant ought not to be deprived of the opportunity of having an application for condonation disposed of before default judgement is given against him where, as here, there appears to be an adequate explanation why that application is not properly before the court…."

I will be very slow in granting default judgement against the respondents. I am aware that as yet no application for the upliftment of the bar arising from the second respondent's failure to file heads of argument on time has been made. It will have to be made if the matter is to be determined on the merits.

Mr *Bhebhe* for the applicant submitted, in opposing the application for a postponement made by Mr *Dodo* for the respondents, that there are no special rules applying to the Attorney General's Office which should compete equally with other law firms. I agree. In fact it is unacceptable for that office to come to this court pleading for an indulgence because a matter is of national importance when they have not treated it as such.

While conceding that the matter cannot be dealt with on the merits in the absence of the other party, Mr *Bhebhe* submitted that the applicant has had to proceed the way he has because he was denied audience in the unopposed roll with the presiding Judge referring the matter to the opposed roll for it to be decided on the merits. I have not seen an order to that effect but think it would be strange indeed to refer an unopposed matter to the opposed roll especially in light of the sentiments of Garwe JA in *GMB* v *Muchero supra*. The matter should have been dealt with as unopposed.

In the result, it is ordered that;

1. The application is hereby removed from the roll to enable the 1st respondent to prosecute his application for condonation for the late filing of a notice of opposition and for the 2nd respondent to apply for the upliftment of the bar operating against him for failure to file heads of argument timeously.
2. The first respondent shall request a setdown of his application within 7 days of this order failing which it shall be deemed abandoned.
3. The 2nd respondent shall file his application for the upliftment of the bar within 7 days of this order failing which the present application shall be proceeded with against him as unopposed.

4. The 1st and 2nd respondents shall bear the applicant's wasted costs on the scale of legal practitioner and client.

Kantor & Immerman, applicant's legal practitioners
Attorney General's Office, respondents' legal practitioners