ROYSEN TRADERS (PVT) LTD
t/a ALLIANCE GINNERIES
versus
QUTON SEED COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 May 2016 and 4 January 2017

Opposed Matter

E R Samkange, for the applicant
T Chagudumba, for the respondent

CHITAPI J: There has been a delay in the handing down of judgment in this application. I reserved judgment after argument on 26 May 2016. The applicant's legal practitioner wrote a follow up letter to the Registrar enquiring as to when judgment could be expected to be delivered. The letter was written on 28 October 2016 and forwarded to my clerk on 31 October 2016.

Regrettably I have not been able to deliver my judgment until today. There is no other reason for the delay except that I have been too engaged in the criminal court to which I was deployed in the second term of 2016. It has been a busy court with almost all cases set down taking off thus leaving me with hardly any spare time to attend on outstanding judgments.

I will therefore acknowledge the delay as well as the follow up letter aforesaid. A party to litigation before a court has a right to expect that justice be not unduly delayed and has a legitimate expectation to expect the court to hand down its judgment with reasonable promptitude and am mindful of the provisions of s 165 (1) (b) of the Constitution of Zimbabwe Amendment (No 20) Act, 2013 to this effect. Follow ups on delayed judgments should be received by the judge with an open mind and not as interference with the independence of the judicial officer. I share the *dicta* of the Supreme Court of South Africa in *Pharmaceutical Society*

of South Africa (Pty) Ltd v *Tsabalala Msimang N.O*; *New Clicks South Africa (Pty) Ltd* v *Minister of Health* 2005 (3) SA 238 (SCA) at p 261 where the court discussed at length the judicial duty not to express irritation or displeasure where a party to a reserved judgment makes a follow up on the progress of his or her case. The judgments concluded that such flow ups or complaints are to be understood as arising from a party's frustration and disillusionment with a delay in knowing how his or her case has been disposed of. Whilst such follow ups may be construed as interference with judicial independence, it was reasoned by the South African Supreme Court in the said cases that "it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary…". The parties in this matter are accordingly advised that there has not been a deliberate abstention on my part from delivering judgment in this matter and a few others but the delay is attributed to job pressure and redeployment to another Division of this court.

I now turn to the determination of this matter in substance. The applicant filed a chamber application for dismissal for want of prosecution pursuant to the provisions of r 236 (3) (b) of the High Court Rules, 1971. The respondent opposed the application. The application was thereafter set down for argument on the opposed roll. One would surmise that this is an easy application to deal with but it apparently is not because there are several legal issues which require ventilation. It is therefore necessary to set out the background to the application, albeit in brief to the extent that I am able to.

1. On 16 November, 2015, the respondent filed a "court application" for an anton piller order in terms of the common law and as provided for in s 25 D of the Plant Breeders Rights Act, [*Chapter 18:16*]. The respondent based its claim on a suspicion that the applicant was selling or multiplying seed varieties belonging to the respondent and passing them off as those owned by the applicant.
2. The respondent believed that its plant breeders rights of cotton varieties QM 301 and QM 302 were being infringed upon. The anton piller order was meant to enable the respondent to obtain a civil search warrant (so called) which would enable it to enter applicant's premises and uplift samples of seed so that it establishes that there was no infringement of its rights.

3. TSANGA J granted the order sought on 9 December, 2015. The application was as in procedure made *ex-parte* by the respondent. The order granted was in the nature of a provisional order. I do not propose to repeat verbatim the terms of the provisional order. Suffice however to state that the order appointed the Registrar and a named person to act as an inspector. They were authorised to enter the premises of the applicant or under its control and to uplift samples of seed which they had to properly mark, record and seal. The samples were then to be delivered to named companies in South Africa and Zimbabwe for DNA testing. The results of the examinations were to be delivered to the Sheriff. The applicant was also ordered to avail records of seed sales for the period 1 January, 2015 to the date of search. The records would enable the respondent to quantify its claim for damages should the examination have revealed an infringement of its breeder's rights. The respondent was to pay for the uplifted samples. With regards to costs, the respondent would pay costs of the DNA examinations in which case such costs would be deemed to be in the cause in the event that the respondent subsequently instituted proceedings for infringement of its rights. If it did not, then there would be no order as to costs.
4. It being a provisional order, the order of TSANGA J had to be confirmed as a final order. As per procedure the applicant was granted 10 days to file its opposing papers and a further leeway to anticipate the return date as provided for in the said provisional order.
5. On 1 December 2015, the respondent filed a supplementary affidavit. On 18 December, 2015, the applicant filed its notice of opposition and opposing affidavit. The respondent did not file an answering affidavit nor set down the application for hearing. It was this inaction on the part of the respondent which resulted in the applicant filing a chamber application for dismissal for want of prosecution. The applicant filed its application for dismissal on 16 February, 2016. The respondent then filed its notice of opposition thereto on 1 March, 2016. On 4 April, 2016 the applicant filed its answering affidavit to the respondent's opposition.
6. Consequent upon the chamber application for dismissal for want of prosecution being opposed, the matter was therefore referred to the opposed motion roll. This is how the

application ended up being placed before me when I presided the opposed roll on 26 May, 2016.

7. The applicant filed its heads of argument on 7 April, 2016. The respondent was required to file its heads of argument within 10 days of the filing and service of the applicant's heads of argument. The certificate of service of heads of argument show that the same were served upon the respondent's legal practitioners on 8 April 2016. The respondent did not file heads of argument and had not done so when the matter was called on 26 May, 2016.
8. When the matter was called, Mr *Chagudumba* for the respondent applied for a postponement of the matter. Mr *Samkange* submitted that the respondent was barred for failure to file its heads of argument. He moved the court to grant an order in terms of the draft order and further submitted that he had no further submissions to add to the applicant's founding papers.
9. In moving for a postponement, Mr *Chagudumba* submitted that the applicant had briefed counsel, Mr *Zhuwarara* who was however not available as he was engaged in the Supreme Court. He further submitted that the notice of set down had only been served on the respondent's legal practitioners on the afternoon of 24 May, 2016 at 4:45pm to be precise. Mr *Chagudumba* acknowledged that the respondent was barred. He however submitted that Counsel was going to deal with the issue of the bar.
10. Mr *Samkange* opposed the application for the postponement. He submitted that the application before the court was a procedural one in which the respondent had not complied with the rules of court. He also submitted that the notice of set down had also been served at his offices on 24 May, 2016. The respondent's legal practitioner had not taken the initiative to advise him beforehand that an application for a postponement would be made. Mr *Samkange* further submitted that it was unethical for counsel to have accepted the brief when he knew that he would be engaged in another court. He further argued that the respondent did not appear to be moved to have the application finalized on the merits because it was enjoying the advantage of holding an order in its favour.

11. I asked Mr *Chagudumba* whether the respondent had prepared heads of argument which but for the bar would have been filed. He responded that he could not say whether or not the heads of argument had been prepared yet as the brief was with counsel. He could not commit to saying when the heads of argument would be ready. Mr *Samkange* responded that the respondent's conduct did not show seriousness in having the matter determined and that the conduct showed an indifferent attitude with its degree of tardiness in the prosecution of the matter qualifying to be described as gross.

I reserved judgment in the matter then. There are two issues which fall for my determination. The first issue is whether a postponement should be granted and if not whether I should grant the application for dismissal as sought by the applicant.

Dealing with the issue of the postponement, I am not persuaded that just cause was demonstrated by the respondent to merit the indulgence of a postponement. The respondent was barred in terms of r 238 (2b) of the rules of this court for not filing heads of argument. The effect of the bar being in operation was that the court had the option in its discretion to deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll. In my view the rule should be revisited and specify that the court can either hear the matter on the merits or strike out the respondents opposing papers before referring the matter for determination on the unopposed roll. To simply provide that the court may direct that the matter be set down on the unopposed roll for hearing creates an unnecessary burden or uncertainty since the judge sitting on the unopposed roll may waste precious time reading through all the filed papers instead of disregarding the opposing papers and only concentrating on the founding papers.

The respondent who is barred can only appear in person or by a legal practitioner for purposes of applying for the removal of the bar. The removal of 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 aftermaths 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. See *Obadia Giya* v *Ribitiger t/a Triangle Tyres* HH 59/16. It was because of my approach as stated above that I enquired of Mr Chadambuka whether the respondents' heads of argument had been prepared and were to hand. In my view, where the barred party is not ready to proceed with the matter because apart from the bar, the pleading for whose default in filing timeously is still to be prepared, then a chamber application as provided for in r 84 (1) (a) would commend itself as the most appropriate procedure to adopt because the barred party would not be ready to argue the matter even if the court were to use its discretion to condone noncompliance with the rules and uplift the bar summarily.

I have read the judgment of GARWE JA in *Grain Marketing Board* v *Muchero* 2008 ZLR 36 (SC) also available as SC59/07. The learned judge dealt with the issue of the consequences of a bar in a court application as well as its removal. The learned judge stated at p 220 D-G 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 this has not been done the party can make an oral application at the hearing…."

The learned Judge further observed that the practice in this court in so far as he was aware was that oral applications had been entertained in only "a few" instances. Such few instances or some guide lines as to the nature of the instances when such applications have been or should be entertained were however not discussed. The learned judge stated that the bias by High Court judges towards requiring that a written chamber application to uplift bar be preferred to an oral application were two fold, namely, the need for the applicant to explain the reasons for the default coupled with the need to convince the court that such barred party had a *bona fide* defence on the merits. The second reason was that the judges believed that the process of explaining the reason for the delay and demonstrating a bona fide defence could not be properly ventilated through oral application as the other party would also need to be afforded a reasonable opportunity to respond. The learned judge then reasoned that "in practice, where such application is made, the court will direct that a written application be filed. In the 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 such application is to be made as well as order the payment of the wasted costs by the party seeking the postponement. As stated by HARTHORN JA in *Abramacoz* v *Roman Gardens (Pvt) Ltd* 1960 R & N 1 (SR) at p 2:

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

The judge continued at p 3

> "In those cases in which the defendant's counsel has asked for a postponement in order to enable a proper application for removal of the bar to be made and has given a satisfactory explanation why such an application was not then before the court, I have treated the appearance as the first step in an application for the removal of bar."

It must be noted that in *GMB* v *Muchero* (*supra*) the Supreme Court was dealing with r 233 (3) (1). The rule deals with a bar consequent upon a default by the respondent to file opposing papers. In this matter, opposing papers were filed but heads of argument were not filed. The bar as already observed was founded on rule 238 (2b) and not r 233 (3). I therefore read the remarks of GARWE JA in the *GMB* v *Muchero* case as applicable to r 233 (3) and not of general application.

Lest I digress substantially from the issues for consideration and determination, the respondent's counsel did not only seek a postponement in circumstances where the respondent was barred for not filing heads of argument. The heads of argument had actually not been prepared. Even if I was going to be sympathetic to the respondent and postpone the application or stand down the hearing for Mr *Zhuwarara* to finish his Supreme Court commitment, the matter was still not going to be argued as the respondents' heads of argument were not to hand.

Mr *Chagudumba* appeared to be out of depth with regards the procedures and the respondent's difficulties. He appeared not to appreciate that his right of audience was a limited one and that he could only be heard with respect to uplifting of bar as per r 83 (b). He did not indicate that the respondent was applying to have the bar uplifted nor that it intended to do so. He was content to apply for a postponement for counsel to be available. He submitted that counsel was going to deal with everything. Such an approach could not be countenanced by the court. A party should appreciate that the making of an application for a postponement of a matter before the court is a process which can succeed or fail. Where it succeeds then fair and well. Where the application fails, then the party should be prepared to proceed. The indulgence of a

postponement will be granted by a court if the court is satisfied that it is in the interests of justice to grant the indulgence. See *National Police Service Union & Others* v *Minister of Safety & Security & Others* (2000) ZACC 15; 2000(4) SA 1110 (CC), *Myburgh Transport* v *Botha* 1991 (3) SA 310; *R* v *Zackey* 1945 (AD) 505; *Joshua* v *Joshua* 1961 (1) SA 455.

GOWORA JA in the Supreme Court of Zimbabwe decision in *Apex Holdings (Pvt) Ltd* v *Venetican Blinds Specialists Ltd* SC 33/2015 underlined that the grant of a postponement of a matter which has been set down for hearing is in the nature of an indulgence which the court will grant or refuse in its discretion. Obviously as with the exercise of any judicial discretion, it must be exercised judiciously. The learned judge cited the *National Police Service Union* case (*supra*) and other decisions. In my reading of the authorities, I discern that the applicant seeking a postponement must furnish a satisfactory explanation as to why a postponement should be granted. *In casu*, the application just came from the blue without prior warning. The respondent was under a bar, and there had been no attempt to seek condonation or an extension of time to apply for upliftment of bar. I also considered the nature of the main application whose dismissal the applicant sought.

The respondent was the holder of a civil search warrant which was granted by this court following an anton piller application in which the respondent obtained a provisional order. The respondent would have been expected to be the one to take active steps to have the order confirmed. It was on the contrary the applicant which took the initiative to file heads of argument and set the matter for hearing. Whilst the respondent came to court under a certificate of urgency, as soon as it got the interim order, it became content with the advantage it now had secured, hence the failure without explanation to file heads of argument. Mr *Samukange* understandably argued that the respondent was seeking to abuse the court process. This matter is of a public interest and affects cotton farming activities. The applicant stands to suffer prejudice if it cannot because of uncertainty of whether or not a damages suit will be instituted against it, continue to trade in the disputed cotton seed. The respondent on the other hand will not suffer prejudice because it will still claim damages if it establishes its claim. The court should not fold its arms and disadvantage one commercial player *ad infinitum* against the other gaining advantage.

The respondent decided to appoint counsel who was already engaged in another court. The respondent's position appears to have been that once it submits that its choice of counsel

was engaged in the Supreme Court, a postponement becomes a formality. This court will as a matter of practice defer to its senior court. Thus, where counsel who is supposed to be appearing in this court has also to appear in a Senior Court at the same time, this court will defer to the Senior Court. It will stand down or postpone a matter for such counsel to first finish his or her engagement in the Senior Court. Counsel however has a duty to inform the court of his or her engagement in the Senior Court. Counsel should not accept a new brief in a junior court when he knows that it will clash with another engagement in a Senior Court. The Supreme Court is a stone's throw from this court. It commences its hearings at 9.30 a.m. This matter was set down for 9.00 a.m. There was ample time for Mr *Zhuwarara* to appear in this court or before me to explain his predicament. Mr *Zhuwarara* has been known at least by myself to be a courteous legal practitioner and I would have expected him to timeously advise the court of his unavailability. Mr *Chagudumba* did not know the case which Mr *Zhuwarara* was seized with in the Supreme Court or for how long it was set down for. I was therefore not satisfied with the *bona fides* of the application. I therefore dismiss the application for postponement.

I now consider whether I should dismiss the application for want of prosecution as prayed for. I have the option to either refer the matter to the unopposed roll or deal with it on the merits. I have already expressed my sentiments about referring a matter to unopposed roll without striking out the notice of opposition. I however propose to determine the matter on the merits. There are really no merits to consider. This court granted the respondent an anton piller order. It was executed upon. The applicant complains that the seed which was uplifted by the respondent in terms of the provisional order was not paid for. The applicant can sue for the cost thereof. The applicant also argues about the miscitation of the parties. If it suffered loss as a result of the wrong citation if proved, it has a remedy of damages. On its part the respondent already has results of the examination of the samples. What it sought to achieve has now been achieved. It could well be that the inaction on its part arose from the fact that it achieved its objectives.

In the premises therefore, it appears to me that the justice of the case demands that the application for dismissal for want of prosecution should be granted. I therefore order as follows:

The provisional order granted by TSANGA J in HC 11063/15 on 9 December, 2015 is hereby discharged with costs.

Ventures & Samukange, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners