

BINDURA UNIVERSITY OF SCIENCE EDUCATION
versus
S.O.S CHILDREN'S VILLAGE ASSOCIATION
OF ZIMBABWE
and
THE TRUSTEES OF THE S.O.S CHILDREN'S
VILLAGE ASSOCIATION OF ZIMBABWE
and
MINISTER OF STATE FOR MASHONALAND CENTRAL
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 November, 2015 and 10 May 2017

Opposed Matter

I. Ndudzo, for the applicant
T.A. Toto, for the 1st and 2nd respondents
H. Magadure, for the 3rd and 4th respondents

CHITAPI J: Judgment which I reserved in this matter has delayed owing to my reassignment to the Criminal Division soon after the hearing of the application. The follow up enquiries made by the parties as to when judgment would be ready are acknowledged and noted. The delay is deeply regretted by me and I note for the record my regret to the legal practitioners and parties of this matter for this occurrence.

In this application, filed on 10 July, 2014 the applicant seeks the following relief as detailed in its draft order:

IT IS ORDERED THAT:

1. Applicant is declared the lawful occupier of the whole of the subdivision of Glen Avilin Farm situate in Shamva District of Mashonaland Central Province measuring 534.61 hectares in extent.
2. 1st and 2nd Respondents are hereby ordered to immediately vacate the farm called the whole of subdivision Glen Avilin Farm, situate in Shamva District of Mashonaland Province, together with all the persons who claim occupation

through them, their employees, their personal effects, their personal belongings and chattels.

3. 1st and 2nd Respondents to pay costs of suit, jointly and severally, the one paying and the other being absolved.

The first and second respondents on 29 July, 2014 filed a notice of opposition to the application which was followed by the applicant filing an answering affidavit. The third and fourth respondents albeit having been served with the application did not file any opposing papers.

On 19 December, 2014 some 5 months after the filing of the first and second respondents opposing papers, the applicant filed an answering affidavit. On 13 January, 2015, the applicant filed its heads of arguments. On 27 January, 2015, the fourth respondent filed heads of argument despite the non-filing of opposing papers. I should observe that according to the certificate of service filed by the applicant, the application was served on the third and fourth respondents on 11 July, 2014. They should have filed their responses within 10 court recognized days reckoned from 11 July 2014. The third and fourth respondents were barred in terms of the High Court Rules 232 and 233. The bar was not uplifted. The fourth respondent's heads of argument should not have been accepted by the Registrar as provided for in r 83 of the said rules. Mr *Magadure* who appeared for the fourth respondent was equally barred and in any event did not seek to address the court. For the record, the fourth respondent's heads of argument were improperly filed and are expunged from the record.

On 9 February, 2015, the record shows that the applicant's legal practitioners filed another document headed "notice of opposition and an opposing affidavit. The document is clearly misfiled because although it bears the case No. HC 5766/14 which is allocated to the present application and the parties are the same, they are cited with the first and second respondents in *casu* being the applicants and the applicant and third and fourth respondents in *casu* being the first, second and third respondents. A cursory glance at the opposing affidavit shows that the applicant herein was responding to a court application made by the first and second respondents herein. The document would in any event not have been properly before the court in the absence of leave having been granted in terms of r 235 for either of the parties to file additional affidavits after the filing of the answering affidavit. In addition to the improperly filed opposing papers, the applicant filed heads of argument relevant to that other application. Both documents are accordingly expunged from the record and no regard will be had to them.

The applicant proceeded to set down the application for hearing. The first and second respondents did not file heads of argument within 10 days of the filing and service of the applicant's heads of argument. Consequently the first and second respondents were barred pursuant to the provisions of r 236 (2b). According to the certificate of service of the applicant's heads of argument upon the first and second respondents, the same were served on 13 March, 2015. As at the date of set down of this application on 24 November, 2015, a period of 8 months had lapsed without the first and second respondents having taken steps to have the bar lifted and filed heads of argument. The notice of set down for hearing of this application was served on the first and second respondents' legal practitioners on 5 November, 2015. Despite the service of the notice of set down, no steps were taken to address the issue of the bar.

On 20 November, 2015, Messrs T.A. Toto Attorneys, Legal Practitioners filed an assumption of agency for the first and second respondents. They also addressed a letter to the applicant's legal practitioners, a copy of which was filed of record. In the aforesaid letter it was intimated that the first and second respondents newly appointed legal practitioners would seek an indulgence to "allow the respondents to file heads of argument in this matter." The letter went on to outline reasons for not filing the heads of argument. I will deal with these when I consider submissions which were then made by the first and second respondents at the hearing.

When the matter was called, Mr *Toto* for the first and second respondents stood up and submitted that the first and second respondents were barred. He however moved the court to use the powers it enjoys under r 4 C to condone or authorise a departure from the rules and to uplift the bar operating against the first and second respondents. He submitted that there were two other applications between the parties wherein the first and second respondents were seeking a stay of this application pending the determination of an Administrative Court case LA 15/14 and another one for an order that certain documents be expunged and some paragraphs in the answering affidavit of the applicant be regarded as *pro non scripto*. The submissions made by Mr *Toto* followed the contents of his letter I have referred to. Mr *Toto* also observed that the first and second respondents' erstwhile practitioners had only filed their renunciation of urgency, the previous day on 23 November, 2015 after he had already assumed agency. With regards the timing of the filing of renunciation of agency nothing in my view turns on this. In terms of order 2 r 5 (i); a litigant can at any stage dispense with the services of his legal practitioner which is what the first and second respondents did. The

filing of the renunciation of agency would simply have served as confirmation of the change of legal practitioners. There is nothing which turns on the sequence or timing of filing of the assumption and renunciation of agency respectively.

Mr *Ndudzo* for the applicant opposed the application. He clarified that the applications which Mr *Toto* had referred to were filed under case No HC 549/15 and HC 737/15. He further submitted that the two applications had not been pursued and the applicant considered that the first and second respondents had abandoned them. The applicant had therefore proceeded to set down this main application for determination. He noted that the applicant had in fact since filed chamber applications under case Nos HC 11240/15 and HC 11241/15 for the dismissal of applications HC 549/15 and HC 737/15 for want of prosecution. Mr *Ndudzo* submitted that there was no justifiable basis submitted by Mr *Toto* for indulging the first and second respondents. In consequence, he submitted that the application be determined on the merits.

I asked Mr *Toto* whether in fact the first and second respondents' heads of argument were to hand and ready to be filed if I was persuaded to uplift the bar. It turned out that he did not have the heads of argument ready. In short, contrary to his submission that he sought the indulgence of the court to lift the bar so that he files heads of argument, the same were not available. They had not been prepared.

The rationale or purport of a bar is to debar the defaulting litigant from filing any pleading when the bar is in operation. The rules do not bar a party from preparing pleadings. In my view when a party applies for upliftment of bar, the implied understanding which one infers is that the party so applying is ready to file the pleading but for the bar which obliges the registrar not to accept any pleading or document from the barred party. Simply put when a bar is in operation, the court record is sealed to the barred party. I will in passing therefore comment that strictly speaking, even the letter dated 20 November, 2015 by the first and second respondents' legal practitioner which I have commented upon should not have found its way into the record because it is a document as envisaged in r 83 (a). The first and second respondents' legal practitioners should not have filed the letter and the registrar was wrong to accept it let alone franking it with the court stamp. At best the first and second respondents' legal practitioner could have sought to produce it over the bar at the hearing upon making an application in terms of r 84 (1) (b) to uplift bar or made it part of the applicants' chamber application if so advised, for upliftment of bar in terms of r 84 (1) (a).

I do not consider that it is proper for the barred party to apply orally for the bar to be uplifted when the party will not be ready to immediately purge the default or non-compliance. The position which Mr *Toto* advocated for was akin to a person who finds the concert doors opened for him to be admitted. When the doors to the concert which were otherwise shut are opened, instead of entering, the person then wants to be given time to go and bath, dress up and return. In short there is no logic in applying for upliftment of a bar so that one then seeks time to prepare a pleading which one wants to file. To draw a parallel, logic and common sense dictate that the barred person be prepared that he can be indulged and the matter heard subject to the court's convenience and any prejudice to the other party. In practice however, one expects that the barred party will beforehand have availed the pleading or document the subject of the bar to the opposite party.

The position which Mr *Toto* presented to me was therefore untenable. There was also no apparent reason or basis for asking the court to invoke r 4C because r 84 (1) (b) allowed Mr *Toto* to address me orally in relation to the upliftment of bar. See *Obadia Giya v Ribitiger t/a Triangle Tyres* HC 59/16. What Mr *Toto* should have been advised to do was to make application for postponement of the matter to enable him to apply for upliftment of bar. In my reasoning, the fact that r 87 (b) allows limited audience by the court to a barred party for purposes only of applying for upliftment of bar in terms of r 84 implies that the party can properly apply for a postponement of the hearing of such application. Mr *Toto* did not apply for a postponement of the matter but for upliftment of bar. I did not find the application for upliftment of bar to be well grounded as I shall briefly outline.

The first and second respondents have been dilatory in the conduct of their defence in this matter. I have considered related court records HC 549/15 and HC 737/15. As I have already indicated, case No HC 549/15 was a court application to expunge evidence from the applicants' answering affidavit. It was filed in January, 2015. It was not pursued. The same applies to case No HC 737/15 for stay of this application pending determination of Administrative Court case No. LA/15/14. It was filed on 27 January, 2015. It was not pursued. In fact case No. LA 15/14 was on 4 March, 2015 struck off the roll. The conduct of the applicant can best be described in the words of my brother MATHONSI J, in *Collen Kwaramba v Winshop Enterprises (Pvt) Ltd and Anor* HH 788/15 when he stated on p 4 of the cyclostyled judgment, thus –

“..... In fact, the conduct of the applicant throughout has been such a serious affront of the rules of court, a lamentable disdain of the rules and a lack of seriousness bordering on contempt. One really wonders how a party that has conducted himself by his own conduct

and that of his host of legal representatives would want the court to exercise its discretion in his favour. Rules of court are there to regulate the practice and procedure of court and therefore must be adhered to. They are the courts' tools fashioned for its own use : *Nxasama v Minister of Justice & Anor* 1976 (3) SA 744.

Non-compliance with the rules of court will be condoned upon good cause being shown by the applicant and there must at all times, be a reasonable explanation given by the applicant for failure to adhere to the rules. *Makaruse v Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S); *General Accident Assurance Co SA Ltd v Zampelli* 1998 (4) SA 407 (c) 411 C – D”

The first and second respondents 8 months from the time they were barred to the time of the hearing had not prepared heads of argument let alone applied for upliftment of bar. Their fire-fighting approach of simply appearing before the court on the date of hearing to apply for upliftment of a bar which existed for such a long period belies their lack of *bona fides*. The court cannot in all fairness grant them any indulgence under the circumstances.

In consequences of the first and second respondents being barred and their application to uplift bar being without merit, the court has to dispose of the matter in terms of r 238 (2) (b) as with the proviso to r 239. The matter must be disposed of on the merits. The issue at play is simple. It concerns rights to land acquired by the State in terms of the Gazetted land (Consequential Provisions) Act [*Chapter 20:28*]. The piece of land in question was compulsorily acquired by the State and the acquisition was not set aside by a court. The land was offered to and accepted by the applicant for institutional agricultural use albeit the land remaining vested in the state. The applicant as holder of a valid offer letter which it accepted has a right to seek the eviction of any occupier by virtue of it being the offeree of the land and holder of an offer letter See *Chamunorwa Charles Mutyambizi v MM Fretorius (Pvt) Ltd* HH 288/11; *Commercial Farmers Union and 9 Others v Minister of Lands & Rural Resettlement & Ors* SC 31/10.

The first and second respondents are well aware of the acquisition of the land in question. Their continued clinging onto the land constitutes an act of defiance of the law. A reading of the applicants' papers clearly shows that its claim is unassailable and despite the respondents being barred, I have considered the opposing affidavit of the first and second respondents and it lacks merit and a defence essentially because the first and the second respondents have not shown that the acquisition of the land in question was set aside by law. They do not deny that there was a handover of the land to the applicant but aver that such handover was a nullity. It can only be a nullity if the acquisition is shown to have been reversed.

I therefore dispose of the application by granting an order in terms of the draft order as follows:

1. Applicant is declared the lawful occupier of the whole of the subdivision of Glen Avilin Farm situate in Shamva District of Mashonaland Central Province measuring 534.61 hectares in extent.
2. 1st and 2nd Respondents are hereby ordered to immediately vacate the farm called the whole of subdivision Glen Avilin Farm, situate in Shamva District of Mashonaland Province, together with all the persons who claim occupation through them, their employees, their personal effects, their personal belongings and chattels.
3. 1st and 2nd Respondents to pay costs of suit, jointly and severally, the one paying and the other being absolved.

Mutamangira & Associates, applicants' legal practitioners
T A Toto Attorneys – 1st & 2nd respondents
Civil Division – 3rd & 4th respondents