GLORIA NOMAZWE MABHENA
PORTIA SIBANDA
NOKUTHULA SIBANDA
BIATHA NDLOVU
PAMELA NDLOVU
TENDAYI MOLINAH MATSHONGWE
NOKUKHANYA GARRICCS FERGUSON
ZANELE SANDRA MAZIBUKO
TSHIYIWE MPOFU
VUSO NDWANDE MPOFU
NOTHANDO MTETHWA
THULISILE MOYO
NOMALANGA NDLOVU
SIMISO SIBANDA
LUCY MAGAGULA
ELIZABETH MABIKA
SITHABILE SITHOLE

Versus

QOKI ZINDLOVUKAZI
QOKI ZINDLOVUKAZI INVESTMENTS (PVT) LTD
SITHULE TSHUMA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 25 MARCH & 10 JULY 2024

Opposed Application

N.L. Vitorini for the applicants
K. Phulu for the respondents

MANGOTA J

I heard this matter on 25 March, 2024. I delivered an *ex tempore* judgment in which I granted the application in terms of the draft order which is annexed to the applicant's founding papers.

On the following day, 26 March 2024, the respondent wrote requesting reasons for my decision. These are they:

The applicant, a group of seventeen (17) Zimbabwean women all of whom are in the diaspora, applies for a *mandamus*. It moves me to:

i) prohibit the respondent from transferring or allocating any portion of the Remainder of Subdivision E of Douglousdale, Bulawayo ("the property") which is 38, 8495 hectares in extent to any person who has not contributed to the purchase of the same;
ii) compel the respondent to furnish to it, through its legal practitioners of record, the list of all persons who contributed towards the purchase of the property;

iii) compel the respondent to notify it, through its legal practitioners, of any lawsuit, dispute or engagement involving the property within forty-eight (48) hours of such lawsuit, dispute or engagement having been brought to the attention of the respondent- and

iv) declare that the property cannot be attached, sold, ceded or executed upon without the citation of the applicant.

The applicant, in a nutshell, claims to have contributed towards the purchase of the property. It is for the mentioned reason that it applies as it is doing. It served its application upon the respondents on 22 November, 2023.

On 14 December, 2023 the third respondent filed her notice of opposition. The notice does not speak for, and/or on behalf of, the first and second respondents. Nor does the third respondent claim that it is speaking for the last-mentioned two respondents. Paragraphs (2) and (3) of its notice of opposition are relevant in the mentioned regard. They show that it is speaking for no one else but for itself.

Because of the observed matter, counsel for the applicant successfully moved me to treat the first and second respondents as being out of court. It, in short, moved me to enter judgment against both of them without any further ado. Judgment was, therefore, entered for the applicant as per the latter's prayer. The judgment places the first and second respondents out of the match. This leaves the applicant and the third respondent in the equation.

On 30 December, 2023 the applicant filed its answering affidavit. On 10th January, 2024 the applicant filed and served its Heads upon the respondent which, for some unknown reason, filed its Heads on 19th March, 2024. Because the respondent's Heads were filed outside the *dies,* the applicant applied, through counsel, to have judgment entered in its favour on the allegation that the respondent was barred and had not unbarred itself.

The application which the applicant placed before me has its roots in sub-rule (2) of Rule 59 of the High Court Rules, 2021. The sub-rule reads, in the relevant part, as follows:

> "*Where heads of argument that are required to be filed are not filed within the period specified in sub-rule (21), the respondent concerned shall be barred and the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll*".

The adverse effects of a bar remaining in operation against a party are well tabulated. Reference is made in the mentioned regard to Rule 39(4) (a) and (b) of the High Court Rules, 2021. The operation of the bar, for instance, prohibits the registrar of the court from accepting, for filing, any pleading or other document which is authored by, or has anything to do with, the party who is barred. It also prohibits the party who is barred from appearing, in person or through counsel, in any subsequent proceedings in the action or suit.

A party who is barred and cannot, therefore, file any process or speak in respect of the case to which the bar applies, can move to unbar himself or herself. He (includes she) can do so by invoking sub-rule 4 of Rule 39 of the rules of court. He, in short, can apply through the chamber book to remove the bar. He can also apply orally at the hearing of the action or suit concerned

to remove the bar. The choice remains with him. He can employ the one or the other of the mentioned options which the rules have placed at his disposal.

It is on the strength of paragraph (b) of sub-rule (4) of Rule 39 of the rules of court that counsel for the respondent applied orally to unbar the latter so that the application could be heard on the merits. In doing so, he wittingly or unwittingly, threw himself into a dilemma. The dilemma was that he remained unaware of the reasons as to why the respondent whom he was representing failed to file its Heads within the *dies induciae*. The statement which *Mr Phulu* made in his effort to have the bar which operated against the respondent lifted shows that *Mr Phulu* was in the least prepared to exercise, on behalf of the respondent, the latter's rights in terms of paragraph (b) of sub-rule (4) of Rule 39 of the High Court Rules, 2021. He exposed his unpreparedness to exonerate the respondent when he asserted as follows:

> "*We concede that, in terms of the rules of court, we were barred in terms of Rule 21. I apply to remove the bar in terms of Rule 29. There was confusion between legal practitioners of the respondents. That led to this delay in not filing Heads*".

Rules 21 and 29 which he made mention of in his concession have nothing to do with the issue of a bar. Rule 21 refers to a judgment by consent and Rule 29 refers to correction, variation and/or rescission of judgments and orders of court. It is therefore clear that *Mr Phulu* who made up his mind to speak off-the-cuff, as he did, only managed to embarrass himself when he applied to uplift the bar which operated against the respondent without giving any reason as to what caused the respondent to file its Heads some thirty-nine (39) days after the event. Its delay in filing Heads is not only inordinate. It is also without any explanation let alone a plausible one.

The confusion which accompanied the oral application for removal of the bar was/is unfathomed. It gave the impression of a legal practitioner who was/is ill-prepared to apply in the manner that he did. It depicted the character of a legal practitioner who had not applied his mind to what he intended to achieve for, and on behalf of, the respondent whom he represents. He had, and still has, no explanation for the respondent's default. He could not, in short, conjure up any tricks to explain away the respondent's default other than to concede, as he did., that the respondent filed its Heads outside the *dies*.

It is a matter of good law as well as sound reasoning that a litigant who concedes to flouting the rules of court, as the respondent did *in casu*, must advance an acceptable explanation for his infraction of the rules. Where he (includes she) fails to explain himself, as the respondent is doing, the court remains constrained to uplift the bar which operates against such a litigant. It remains constrained on the supposition that the litigant would have taken the rules of the court for granted. The rules have not been placed at the disposal of litigants as a matter of fashion. They exist and they do assist in the effective as well as smooth administration of justice. Where they are flouted, as the respondent flouted them, the flouting party must explain himself to the satisfaction of the court. He must give a reasonable explanation for flouting the court's rules. Where he fails to do so, he has no one but only himself to blame, so to speak.

The respondent's failure to explain itself offers me the opportunity to remain at large. It is, in the result, ordered that:

1) The application for upliftment of the bar is dismissed;

2) The main application is treated as unopposed; and
3) Judgment is entered for the applicant as prayed in the draft order.

Tafirei & Company applicant's legal practitioners
Ncube & Partners, respondent's legal practitioners