ADHESIVE PRODUCTS MANUFACTURERS (PRIVATE) LIMITED

Versus

PARKAM ENTERPRISES (PRIVATE) LIMITED

(Under the provisional judicial management of N. Motsi)

And

THE ASSISTANT MASTER OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 17 DECEMBER 2020 and 1 FEBRUARY 2021

Application for default judgment

Moyo, for the applicant
N. Mazibuko, for the respondent

DUBE-BANDA J: This application was set-down during vacation, i.e. on the Motion Court for the 17 December 2020. When this matter was called, *Mr Moyo,* counsel for the applicant rose and made a submission that the papers were in order, and he prayed for an order in terms of the draft order. *Mr Mazibiko,* stood up and said he was representing the 1st respondent. I noted that 1st respondent was not served with the notice of set-down, *Mr Mazibuko* might have only become aware of the application because the matter was called out in his presence in the Motion Court. I pointed out to *Mr Mazibuko* that the 1st respondent was barred and application was not opposed. He was not deterred, he attacked the validity of the service of the application on the 1st respondent, and attacked the competence of the application itself. Notwithstanding that he was further advised that 1st respondent was barred, he argued that he was raising points of law, and in his view a court cannot grant such an order as sought by the applicant. On his part, *Mr Moyo* contended that the 1st respondent was barred for want of filing a notice of opposition, and the application was not opposed, and he submitted that his papers were in order and prayed for an order in terms of the draft. After briefly hearing both counsel, I granted the order sought, couched in the following terms:

1. The provisional judicial management order issued on the 1st day of March by this court, under cover of HC 3455/15 be and is hereby discharged.

2. Nyasha Motsi, in his personal capacity, be and is hereby directed to pay applicant's costs of suit on an attorney and client scale.

Following the granting of the order quoted above, Messrs Calderwood, Bryce Hendrie and Partners addressed an ultimatum to the Deputy Registrar of the High Court, and I reproduce below the ultimatum in full:-

> We confirm that this matter was on the unopposed roll on Thursday 17 December 2020. We further confirm that the application was granted by the Honourable Mr Justice Dube-Banda. However, in his granting the application, the Honourable Judge did not indicate whether he was granting on the basis that the 1st respondent was barred or on the basis of the substantive verbal submissions made by both counsel as to whether the application should be granted. The distinction is important as the 1st respondent would like to know the correct step to take hereafter as in the case of the former, an application for rescission would have to be filed whist in the case of the latter, then an appeal must be filed. May you therefore as a matter of urgency clarify with his Lordship which of the two is the position, if is the latter position, we would be pleased if his Lordship were to provide his written reasons.
>
> As you would appreciate that there are timelines for filing once one or the other, we would appreciate a speedy response from your office.

I believed that after the brief hearing, I stated that 1st respondent was barred for want of filing a notice of opposition, and the application was not opposed. The ultimatum containing a lecture from Messrs Calderwood, Bryce Hendrie and Partners came as a total surprise to me. However, if I did not state that I was granting the order sought on the basis that the 1st respondent was barred and application was not opposed, the oversight is regrettable and it was not intended.

The letter from Calderwood, Bryce Hendrie and Partners concludes as follows: "as you would appreciate that there are timelines for filing once one or the other, we would appreciate a speedy response from your office." A letter to the Deputy Registrar is in essence a letter to the presiding judge, and in general to demand of a judge to provide "*a speedy response*" is rather taking discourtesy to new heights. The office of a judge must be respected. It is not about the person of the judge - it is about the office, it is about the court as an institution. See: *Ex Parte Zondo and Others; In Re: Administrator of JS Moroka and Others v Kubheka and Another* (1170 / 2020) [2020] ZAMPMHC 12 (29 May 2020).

The brief relevant facts of this matter are on the 1st March 2016, 1st respondent was placed under provisional judicial management. This is an application for the discharge of the provisional judicial management order. The anchor of this application is that the order was obtained fifty-six months ago, and it has not been confirmed. It is contended that the order is a sham designed and calculated to shield 1st respondent from paying its debts. Applicant then sued out this court application on the 12 August 2020. A copy of the application was served by the Sheriff on the 1st respondent on 9 September 2020. Again, another copy of the application was served by a clerk in the employ of applicant's legal practitioners on the 8 October 2020. There is proof that the Assistant Master of the High Court was served with a copy of the application. 1st respondent, on the papers before me, had not filed a notice of opposition. The Assistant Master filed a report, and made the point that she was not opposed to the order sought by the applicant, and made the point that the provisional judicial management order must be taken by the court as dead.

I then took the view that 1st respondent was barred for failure to file a notice of opposition and opposing affidavit within the time allowed by the rules of court, then the application was not opposed. The bar against the1st respondent in such circumstances is automatic and brings about a default.[1] I took the view that, in this application, *Mr Mazibuko* had no right of audience before court, because 1st respondent was barred. The effect of a bar is that while it is in operation, the party barred shall not be permitted to appear personally or through a legal practitioner in any subsequent proceedings in the action or suit; except for the purpose of applying for the removal of the bar.[2] It is clear from rule 83(b) of the High Court Rules, 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 application to uplift the bar or where this has not been done the party can make an oral application at the hearing. See: *Grain Marketing Board v Muchero* SC 59/07.

Mr Mazibuko, was not applying for the removal of the bar. He was attacking the application. In fact, I found his conduct somehow unacceptable, that after I had pointed out to him that 1st respondent was barred, and that the application was therefore not opposed, he persisted in argument. After considering a number of factors, I refrained from calling him to order. I take the view that such conduct is a deviation from the normal practice, it is inappropriate and unnecessarily belligerent towards the court, and it serves no useful purpose in litigation.

In the result, in deciding this application for default judgment, I did not factor into the equation *Mr Mazibuko's* submissions. I concluded that, the respondents having been duly barred in terms of the

[1]Rule 233 (3) of the High Court Rules, 1971 provides that a respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred.
[2] Rule 83(b) of the High Court Rules, 1971.

rules of the court, and not having made an application for the upliftment of the bar, the application was unopposed. I took the view that the papers before me were in order, and the order sought was competent, I then felt inclined to grant the order in terms of the draft.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Calderwood, Bryce & Hendrie, 1st respondent's legal practitioners