REPORTABLE ZLR (53)

Judgment No. SC 59/07
Civil Appeal No 224/06

GRAIN MARKETING BOARD v MARTIN MUCHERO

SUPREME COURT OF ZIBABWE
CHEDA JA, GWAUNZA JA & GARWE JA
HARARE, JUNE 17, 2007 & MARCH 11, 2008

H Zhou, for the appellant

J B Wood, for the respondent

GARWE JA: The background giving rise to this appeal is in the main common cause. The respondent, who was the Chief Executive Officer of the respondent, was suspended from his employment following allegations of misconduct leveled against him. Owing to the position he occupied with the appellant, difficulties arose as to which disciplinary proceedings were applicable to him. The respondent thereafter filed an application in the High Court challenging his suspension. That application was dismissed on the basis that the same matter was pending before the Labour Court. The respondent then appealed to this Court and after due consideration this Court remitted the matter to the High Court but further gave the appellant leave to file its opposing papers within fourteen days of the date of the order. The appellant, as it so happened, failed to file its opposing papers within the stipulated time. The matter was then set down again before

the High Court. Both parties were legally represented. It was common cause that having failed to file its opposing papers within fourteen days as stipulated by this Court, the appellant was automatically barred. The High Court, however, proceeded to deal with the matter on the merits and concluded that the suspension was a nullity. The court also found that no application to uplift the bar had been made. For those two reasons the court *a quo* declared the suspension a nullity.

The appellant has now appealed to this Court against this decision. In particular the appellant submits that an oral application was made before the court *a quo*. The court *a quo* should therefore have adjudicated on that application first. The appellant further submits that it was improper for the court *a quo* to deal with the case on the merits without adjudicating on the application to uplift the bar. In any event, so the appellant further argues, the court *a quo* erred in dealing with the merits of the application in a situation where a default judgment was to be granted. The appellant's prayer is for the matter to be remitted so that the court *a quo* can make a decision on the application for the upliftment of the bar.

The respondent on the other hand submits that the court *a quo* heard argument on the merits from both parties. The court then made a decision on the merits. Whether or not the appellant made an application to uplift the bar is immaterial. The court was satisfied that the appellant did not have a defence on the merits and was not prepared to lift the bar. The respondent further argues that in his grounds of appeal the appellant is not challenging the decision on the merits.

What happened at the hearing is not entirely clear from a perusal of the record. It is apparent, however, that the opposing papers had indeed been filed but out of time. The appellant was therefore barred. The appellant's legal practitioner has submitted in his heads of argument that an oral application to uplift the bar was made before the court. It was in that context that the legal practitioner told the court *a quo* that the delay in the filing of the papers had been occasioned by ill health on his part. The judgment of the court a quo confirms that the legal practitioner made this submission. This contention does not seem to be disputed by the respondent. In p 9 of his heads the respondent states as follows:

> "9. Whether or not the procedure adopted by the appellant amounted to application to uplift the bar is immaterial. The learned Judge was not satisfied with that procedure and was not prepared to uplift the bar on the basis thereof. The appellant had ample time within which to make a written application and having chosen not to do so, must live with the consequences".

It is apparent in the circumstances that an oral application to uplift the bar was made before the court *a quo*. The court did not determine that application immediately but instead proceeded to hear argument from both parties on the merits. The court then made a decision on the merits and also concluded that no proper application to uplift the bar had been made. The trial Judge has remarked in his judgment that the lawyer told the court "that the delay was due to him being taken ill." I accept therefore that an oral application was made by the appellant before the court *a quo*.

The main issue for determination by this Court is whether the trial court erred, as contended by the appellant, in failing to adjudicate on the application to uplift the bar. Other subsidiary issues that have been raised in the heads of argument are whether the court *a quo* erred when it dealt with the matter on the merits and whether the appeal should be dismissed on the basis that the appellant has not challenged the finding of the court *a quo* on the merits.

Rule 233 of the Rules of the High Court of Zimbabwe provides:

"233. Notice of opposition and opposing affidavits

(1) …

(2) …

(3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

Rule 239 provides:

"**239 Hearing of application**

At the hearing of an application –

(a) …

(b) …

Provided that if one of the parties has been barred the court shall deal with this application as though it were unopposed unless the bar is lifted."

Rules 83 and 84 provide:

"83. **Effect of bar**
Whilst a bar is in operation -

(a) the registrar shall not accept for filing any pleading or other document from the part barred; and

(b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit;

except for the purpose of applying for the removal of the bar:

84. **Removal of bar**

(1) a party who has been barred may –

(a) make a chamber application to remove the bar; or

(b) make an oral application at the hearing, if any, of the action or suit concerned; and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be, thinks fit;

(2) … ."

It is clear from the above provisions 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 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. Most Judges of the High Court believe this cannot properly be done by oral application as the other

party would not have been afforded the proper opportunity to prepare and possibly contest the application. 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 the wasted costs by the party seeking the postponement. As stated by HARTHORN JA in *Abramacos v Roman Gardens* (*Pvt) Ltd* 1960 R & N 1 (SR)at p 2:

> "… a defendant ought not to 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 the bar, and granted the postponement … ."

I am satisfied that the court *a quo* erred when it failed to deal with the application to uplift the bar. If the court was of the view that the appellant should have filed a written application then it should have said so and proceeded to grant a postponement for such application to be filed. As already noted, the court could have allowed the postponement on such conditions as it deemed necessary. Once the application to uplift the bar had been made, the court became seized with the matter. The court was enjoined to make a determination on that application. It did not do so. Instead

it proceeded on the basis that there was no such application before the court. In this regard the court erred.

I am satisfied that the trial Judge erred in disregarding the oral application and proceeding as if none had been made.

The Rules of the High Court 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 rule 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.

The respondent has submitted that there is no appeal against the decision of the court *a quo* on the merits. That is indeed correct. It is clear, however, that the

appellant seeks an order setting aside the decision of the trial court and remitting the matter to that same court for a determination of the application to uplift the bar. Once it is accepted that there was a failure to determine the application to uplift the bar then the decision on the merits would be incompetent and cannot stand.

The appeal must therefore succeed. I therefore make the following order:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for the determination of the application for the upliftment of the bar.

CHEDA JA: I agree

GWAUNZA JA: I agree

Muzangaza, Mandaza & Tomane, appellant's legal practitioner

Byron, Venturas & Partners, respondent's legal practitioner