TSITSI EBAH GWANZURA
versus
WITNESS CHINODEWENYU
and
MAGISTRATE NCUBE
and
MAGISTRATE MITI
and
MAGISTRATE NDHLOVU

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 2 July 2021 and 11 May 2022

Court Application

T Kabuya, for the applicant
P Mufunda, for the 1st respondent
2nd, 3rd and 4th respondents in default

MANZUNZU J: On 2 July 2021 I treated this court application as unopposed and granted the following order;

"IT IS ORDERED THAT:

1. The application for dismissal of the application under case number HC 5387/20 for want of prosecution be and is hereby granted.
2. The application for review under case number HC 5387/20 be and is hereby dismissed for want of prosecution.
3. The respondent be and is hereby ordered to pay costs of suit."

Counsel for the first respondent has asked for the reasons for granting this application. These are they;

The applicant filed this court application on 6 April 2021 seeking a dismissal of an application under case number HC 5387/20 for want of prosecution. The application was made in terms of Order 32 rule 236 (3) (b) of the then High Court Rules 1971 which read;

> "(3) Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either—
> (a) ….
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he hinks fit."

The background to this application is that on 24 September 2020 under HC 5387/20 the first respondent filed an application to review the decisions of the second to fourth respondents. The applicant is the first respondent in that case. The applicant was served with the court application under HC 5387/20 on 7 October 2020. He filed a notice of opposition on 21 October 2020.

It is the applicant's case that 5 months later the first respondent had neither filed an answering affidavit nor set the matter down. The applicant then invoked the provisions of r 236 (3)(b) in this application.

The application was opposed by the first respondent who through his lawyer has deposed to the opposing affidavit filed on 21 April 2021. The applicant has responded with the answering affidavit on 29 April 2021. The applicant filed heads of argument on 4 May 2021 and served the same on the first respondent's lawyers on 5 May 2021.

On 14 June 2021 the Sheriff served upon the first respondent's lawyers a notice of set down for the hearing of the application on 2 July 2021. Four days before the hearing of 2 July 2021 the first respondent filed heads of argument on 28 June 2021.

At the hearing Mr *Kabuya* who was the first to address the court urged the court to treat the matter as unopposed as the first respondent was barred in terms of r 238 (2) and (2a) which provide that;

> "(2) Where an application, exception or application to strike out has been set down for hearing in terms of subrule (2) of rule 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with subrule (2a), heads of argument clearly outlining the submissions relied upon by him and setting out the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party.
>
> (2a) Heads of Argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subrule (1):*"(emphasis is mine)*

It is not in dispute that the first respondent's heads were filed way out of the 10 days. This is why Mr *Mufunda* who had appeared for the first respondent orally applied for the upliftment of the bar. He advanced two reasons for the delay. First, he said he was experiencing some health challenges. Second, he said he had problems in getting in touch with his client. His third leg was that in any event the first respondent's heads can be ignored and the matter proceeds to be heard on the merits. For this proposition he relied on rule 238 (2b) which states that:

> "(2b) Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll."

I do not share the interpretation he affords to this rule. This is for the simple reason that if a respondent is barred for failure to file heads, one cannot at the same time be heard on the merits. If one is barred one cannot be given audience to be heard on the merits unless the bar is uplifted. This is why the court has two choices where the respondent is barred, either to

allow the applicant to move the application on the merits or refer the matter to the unopposed roll. In *casu* the court opted to hear the merits.

The application to uplift the bar was opposed. Legal practitioners must not treat an application to uplift the bar as given by virtue of a mere application. The applicant must show good cause why he/she must be condoned. See *Bishi* v *Secretary for Education 1989 (2) ZLR 240 (HC).*

It is not sufficient for counsel to merely say he has health challenges without production of any evidence to that effect or that he had problems in contacting his client without elaboration. This reminds me of what was said in *Ndebele* v *Ncube 1992 (1) ZLR 288 (S) at 290 C-E* that;

> "The time had come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard."

The explanation by the first respondent's counsel is not reasonable enough to justify the upliftment of the bar. The first respondent failed to take the court into his confidence by his failure to take the court through the requirements of condonation and the factors which are taken into account for one to show good cause. For these reasons I proceeded to hear the matter as unopposed and granted the relief as I did.

Matsikidze Attorneys at Law, applicant's legal practitioners
Chengeta and Mufunda Law Chambers, first respondent's legal practitioners