NETONE CELLULAR (PRIVATE) LIMITED
versus
BACNET TRADING (PRIVATE) LIMITED
and
MINISTER OF LOCAL GOVERNMEMT, PUBLIC WORKS & NATIONAL HOUSING
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 27 October 2014 and 2 March 2015

Opposed application

Adv. E. Matinenga, for the applicant
T. P. Machiridza, for the first respondent
J. Mbengegwi, for the second respondent
No appearance for the third respondent

MAFUSIRE J: As far as I am concerned, it was either a failure or refusal to apply one's mind properly to the relevant documents, or plain obstinacy, that resulted in this matter having to be determined in court. I am reminded of complaints by two judges of this court against the conduct of some legal practitioners. In *Commercial Bank of Zimbabwe Limited v MM Builders and Suppliers (Private) Limited & Ors*[1] GILLESPIE J said[2]:

> "There may exist those silver-tongued orators who prove that black is white(!), but I am unable to hold that the argument advanced on this point is valid."

In *Vengesai and Others v Zimbabwe Glass Industries Ltd*[3] the same learned judge said[4]:

> "I have to say that argument on the law, with appropriate citation of all relevant cases, including adverse decisions, is as rare amongst legal practitioners as are hens' teeth. Yet it is to counsel that a judge must look for appropriate research and argument if he is to be able to give judgments efficiently and correctly. It is that duty of him, who would undertake the responsibility of an advocate, a duty owed both to the client and

[1] 1996 (2) ZLR 420
[2] At p 442E
[3] 1998 (2) ZLR 593 (H)
[4] At p 596D - E

the court, to do all relevant research and to present that research to the court. A judge cannot be expected to undertake himself all the original research in every case."

In *Ndlovu v Murandu*[5] SIBANDA J delivered the following scorcher[6]:

"When the applicant sought legal advice, it must be assumed that he was keen to be advised as to the legality of his conduct in seeking termination of the contract… I have no doubt in my mind that his legal practitioner knew at all material times that the agreement he sought to terminate was valid and legally binding…Thus these proceedings amount to an unacceptable abuse of the court process…. It was … the duty of the legal practitioner to advise his client properly as to the legal status of the contract. It was his duty to advise his client that the agreement … was perfectly valid and legally binding. Instead he chose to act as a catalyst in the applicant's attempt to frustrate and defeat the intention of the parties. He must be made to pay the price of his indiscretions …"

It shall soon become apparent why I preface my judgment with the above complaints.

On 27 October 2014 I delivered my ruling *ex tempore*. I said written reasons would be provided upon request. I heard nothing further until about four months later. In early February 2015 a letter from the registrar of this court was brought to my attention indicating that an appeal had been noted against my ruling and that the written reasons were now required. The record was brought to me. The appeal had been noted by the second respondent. Tucked inside was a letter dated 31 October 2014 from the first respondent's legal practitioners asking for the written reasons. The letter had not been brought to my attention.

The actual order that I granted *ex tempore* but which appears not to have been captured properly was this:

1. That the application for the upliftment of the bar (operating against the first and second defendants for their failure to file heads of argument timeously) is dismissed with costs.

2. That the application for a postponement of the matter by the first respondent is dismissed with costs.

3. That a default judgment be entered in favour of the applicant as follows:

[5] 1999 (2) ZLR 341 (H)
[6] At pp 350C -351A

3.1 the applicant is declared the rightful owner of the property known as the Remainder of Lot A Chikurubi, measuring 131,3710 hectares and held under Deed of Grant 13832.

3.2 the first respondent is interdicted from subdividing, developing, disposing of any portion of or dealing in any manner, with the property.

3.3 the second respondent is interdicted from allocating or authorising the allocation of the property to anyone.

3.4 the third respondent is interdicted from entertaining any transfer or alienation of the rights in the property to anyone except in favour of the applicant.

3.5 that the first and second respondents shall pay the costs of the application on the legal practitioner and client scale.

The central dispute in this case was who owned the property known as the Remainder of Lot A of Chikurubi that was held under deed of grant 13832 of 1953. The property was 131, 3710 hectares in extent. Henceforth I shall refer to it as "***the Remainder of Lot A of Chikurubi***" or, depending on the context, "***the bigger property***" or "***the bigger piece***." The applicant said it was the owner. The first and second respondents disputed that. They claimed the Government, through the second respondent, was the owner.

Connected to the dispute or argument around the Remainder of Lot A of Chikurubi was a smaller piece of land called Stand 2 Cleveland Township of Lot A of Chikurubi, measuring 4, 9521 hectares and held under Certificate of Registered Title 4089/75. I shall refer to this property as "***Lot 2 of Cleveland Township***", or, again depending on the context, "***the smaller property***" or "***the smaller piece***". The applicant disowned this property and claimed it was what the Government owned. The second respondent, supported by the first respondent, equally disowned it and equally claimed that it was what the applicant owned. The applicant produced documents to back up its claims. The first and second respondents relied on the same documents but read something different. In the end it was a matter of interpretation. None of the facts germane to the point was in dispute.

However, if the first and second respondents, particularly their legal advisers, had cared to read the documents, including the small print, and if they had cared to listen to the third respondent, i.e. the Registrar of Deeds, perhaps this case would not have come to court.

How the matter came to court was this. Sometime in the early 2000s the second respondent, then headed by one Dr Ignatius Chombo as Minister, allocated a portion of the

bigger property to the first respondent, fronted by one Charles Chombo, as Managing Director. It was to be converted into a low density residential area. Appropriate subdivisions permits and developmental plans were drawn up and approved by the local authority. The first respondent embarked on the project and, among other things, started selling subdivision units, or residential stands, to members of the public.

When the applicant learnt about this development, it implored its line ministry, Transport and Communications, to intervene and stop it on the basis that the land was its own property and that it had different plans for it. The applicant's basic position was that originally the property had been part of an original bigger piece of state land then known as Lot A of Chikurubi. Hereafter I shall refer to that original piece of land as "***the original mother property***". Sometime in 1953 the then Government of Southern Rhodesia had granted this original mother property to the then Posts and Telecommunications Corporation ("***the PTC***"), then a government agency, under a deed of grant. The land would be used for communication purposes only.

The applicant said that sometime in 1975 Lot 2 of Cleveland Township had been excised or deducted from the original mother property. A titled deed had been created in favour of the Government. The ownership of the Remainder of Lot A of Chikurubi had remained vested with the PTC. Eventually the PTC had unbundled into several successor companies. One of them was the applicant. It had inherited the Remainder of Lot A of Chikurubi. It planned to construct a sophisticated multi-billion dollar telecommunications centre. Such a development was incompatible with a housing project.

There was communication between the parties at both ministerial and executive levels. The housing project was halted. The second respondent explored the prospects of an amicable settlement. He enquired whether the applicant could consider utilising only that portion of the bigger property as was adequate for its developmental plans and allow the housing project to proceed on the excess land. However, the applicant was emphatic that such an arrangement was not possible. The first and second respondents changed tack. They charged that the applicant's claim of ownership of the Remainder of Lot A of Chikurubi was misplaced. The property was in fact owned by the Government. All that the applicant owned was the smaller property. The first respondent's erstwhile legal practitioners entered the fray. They dispatched a snotty letter to the applicant, among other things, stressing that the bigger property was owned by the Government and that all that the applicant owned was the smaller

piece. The letter gave immediate notice of the first respondent's plans to resume the housing project and warned that they would brook no interference. That seemed to have been the spark that ignited the legal confrontation.

The applicant responded by filing an application, in the main seeking a declaratory order that it was the owner of the Remainder of Lot A of Chikurubi. Ancillary relief sought was in the form of an interdict to restrain the first respondent from proceeding with the housing project. The first and second respondents opposed the application. All the pleadings were filed timeously except the first and second respondents' heads of argument.

When the matter came up for determination, argument was predominantly on the preliminary points. Mr *Machiridza*, the legal practitioner that appeared for the first respondent, applied for a postponement on the basis that the legal practitioner of record for the first respondent had gone out of the country on an emergency. He himself professed to have no substantial knowledge of the case. He said the absent legal practitioner had become the fundi on land matters and that the interests of justice would be served by postponing the matter so that the first respondent would be represented by counsel of its choice.

Mr *Mbengegwi*, for the second respondent, applied for condonation or the upliftment of the automatic bar operating against the second respondent for having filed the heads of argument some months out of time. A formal court application to this effect had been filed on 15 August 214. But it seems no further steps had been taken by any of the parties. The reason proffered for the delay was that the copy of the applicant's heads of argument that had been served at the offices of the Civil Division of the Attorney General, the second respondent's legal practitioners of record, had been misfiled. The relevant averment in Mr *Mbengegwi's* affidavit read as follows:

> "4. This is an application for condonation for late filing of Heads of Argument. Applicants filed their Heads of Argument on 3 April 2014 and they were received by our office on the same day. I was not personally aware that Heads for the Applicants were already filed as there was some unfortunate incident of misfiling of documents by our office Clerks. It only came to light that the heads of Argument by the applicants were filed when I contacted 1st Respondent enquiring whether they had received anything from the Applicants."

On the merits, Mr *Mbengegwi* stuck to the second respondent's version as set out in the notice of opposition, namely that the applicant was mistaken as to which property it owned.

Mr *Matinenga*, for the applicant vehemently opposed the applications. He accused Mr *Machiridza* for having been economic with the truth. The first respondent's erstwhile legal practitioners had been Messrs *Manase & Manase*. Mr *Matinenga* averred that it was Mr *Machiridza* who had settled the first respondent's notice of opposition whilst still at *Manase & Manase*. He had then moved over to Messrs *Antonio & Dzvetero*, the first respondent's new legal practitioners of record. Mr *Machiridza* was still the same legal practitioner dealing with the case on behalf of the first respondent.

Mr *Matinenga* also pointed out that the first respondent's heads of argument had been filed way out of time. As such the first respondent had been automatically barred. Therefore, Mr *Machiridza* had no right of audience on any aspect of the matter other than an application for the upliftment of the automatic bar. But no such application had been made.

With regards the second respondent, Mr *Matinenga* argued that no cogent reasons for the default had been given. No dates as to when, for example, Mr *Mbengegwi* had become aware of the fact that the applicant's heads of argument had been filed, had been mentioned. Without them the court could not possibly assess the extent or reasonableness of the delay. Furthermore, the argument continued, no affidavit by the filing clerk had been produced to explain what actually had happened.

Mr *Matinenga* concluded that the merits of the case were overwhelmingly in support of the applicant's cause. Respondents' opposition had no merit. There were no prospects of success.

In reply, Mr *Machiridza* averred that although he had settled the first respondent's notice of opposition whilst still at *Manase & Manase*, he had done so on behalf of the senior partner who was then handling the matter. He denied the insinuation that when he had moved across to the new law firm, which was now the first respondent's legal practitioners of record, the first respondent had followed him there. He said the first respondent had been attracted to the new law firm because one of the partners there had made a name for himself in land cases.

That was the case before me. As said previously, I dismissed the application for postponement and the one for the upliftment of the bar. I granted the orders sought by the applicant. These were my reasons.

In terms of Order 32 r 238 of the Rules of this Court, a respondent who is to be represented by a legal practitioner at the hearing of, *inter alia*, an application, is required to

file heads of argument not more than ten days after the applicant's heads of argument are delivered to him. The failure to file such heads of argument results in the respondent being barred. The court can then deal with the matter on the merits, or direct that it be set down for hearing on the unopposed roll.

In terms of Order 12 r 84, a party that has been barred can make a chamber application or an oral application at the hearing, for the removal of the bar. The judge or court may allow the application on such terms as to costs and otherwise as he or it may think fit.

Just as in an application for rescission of judgment in terms of Order 9 r 63, a party seeking the removal of a bar must show "**good and sufficient**" cause for the bar to be removed. The court or judge hearing the application undoubtedly has an unfettered discretion. The discretion is of course exercised judiciously and not capriciously or whimsically. Not only must there be a reasonable explanation for the default but also the applicant must show his defence on the merits. Dealing with r 84 GARWE JA stated as follows in *Grain Marketing Board v Martin Muchero*[7]2008 (1) ZLR 216 (S), at p 220D - F:

> "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 the 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 that 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**" (emphasis added).

What constitutes wilful default and a *bona fide* defence depend on the merits of each case. In *Zimbabwe Banking Corp Ltd v Masendeke*[8] McNally JA, held that wilful default occurred when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter[9]. In my view, in bar situations, wilful default amounts to a deliberate failure or neglect to file process timeously, or to refrain from doing so altogether. Thus "**good and sufficient**" cause is the sum total of all the facts explaining the default and merits of the defence. These facts are considered cumulatively. No single aspect

[7] 2008 (1) ZLR 216 (S), at p 220D -F
[8] 1995 (2) ZLR 400 (SC)
[9] See also *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp* 1997 (2) ZLR 47 (HC)

is decisive. In *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp*[10], even though the court found that the explanation for the default was acceptable, it was far outweighed by the unreasonableness of the defence proffered on the merits.

In this case the defence proffered by the first and second respondents was palpably bogus. That is what largely influenced my decision to reject their applications and to grant the relief sought by the applicant. But even the explanations for the delays were deficient. However, much energy was spent on the merits of the defence. I prefer to deal with them first.

Frankly, it has been difficult to appreciate what the respondents were saying by way of a defence. The documents proving ownership were unequivocal. So were the explanations by the various people connected to the properties. The situation was this. By Deed of Grant No. 13832 issued on 10 September 1953 by the then Governor of the Colony of Southern Rhodesia on behalf of Queen Elizabeth II of Britain, the original mother property was transferred to the Government of the Colony of Southern Rhodesia, it successors or assigns. The land was 159.1596 morgen in extent. According to my research "morgen" was an imperial unit of measurement which has fallen into disuse. One morgen was equal to 8 565m^2. It appears from the documents that the 159.1596 morgen translated to 136,3231 hectares.

The Deed of Grant aforesaid had two conditions, namely; (1) that the land would be used for communication purposes only, and (2) that should it not be used for that purpose then the municipality would have the right of first refusal to purchase it at five pounds.

The next development was in 1975. Out of the original mother property was deducted or carved out Stand 2 Cleveland Township. This was at the instance of the then Minister of Local Government and Housing, through the Assistant Secretary in the ministry who furnished a power of attorney to the Registrar of Deeds to make the deduction and the transfer. The recitals on that power of attorney were quite insightful. Among other things, it stated that whereas the Government of the Colony of Southern Rhodesia was the registered owner of a certain piece of land situate in the district of Salisbury, being Lot A of Chikurubi, measuring 136, 3231 hectares, held by virtue of Deed of Grant dated 10th September, 1953 (registered No. 13832)…. This, of course was the original mother property.

[10] 1997 (2) ZLR 47 (HC)

The power of attorney went on to recite that whereas it was desired that Stand 2 Cleveland Township of Lot A of Chikurubi, measuring 4, 9521 hectares, be held by the President of Rhodesia under Certificate of Registered Title….. The power of attorney then recorded that the Assistant Secretary, on behalf of the President of Rhodesia in terms of the powers granted by a Government Notice of 1967, was applying in terms of the Deeds Registries Act for the issuance by the Registrar of Deeds of the Certificate of Registered Title. The power of attorney was dated 2 October 1975.

The next development was the issuance of the Certificate of Registered Title No. 4089/75 by the Registrar of Deeds on 6 October 21975 in respect of Stand 2 Cleveland Township. Again the recitals on that Certificate of Registered Title were insightful. They recounted the history of the land. It stated that the President of Rhodesia had applied for the issue to him of a Certificate of Registered Title in respect of the land registered in the name of the Government of the Colony of Southern Rhodesia, and that the Government of the Colony of Southern Rhodesia was the registered owner of Lot A of Chikurubi, measuring 136, 3231 hectares and held by it under Deed of Grant No. 13832 registered on 10 September 1953 (i.e. the original mother property). The Certificate of Registered Title then went on, in the vesting clause, to record the fact that the Registrar of Deeds was certifying that the President of Rhodesia, his successors in office or assigns, was the registered owner of Stand 2 Cleveland Township, measuring 4, 9521 hectares, as would appear more fully on the Deed of Grant No. 13832 of 10 September 1953. The two conditions that the property would be used for communication purposes only and that the Municipality would have the right of first refusal were carried forward and incorporated.

The next development was on 3 December 1975. The Registrar of Deeds placed the following endorsement on the face of the Deed of Grant (i.e. for the original mother property):

> "The within land vests in the Posts and Telecommunications Corporation in terms of Section 28(2) of the Posts and Telecommunications Act No. … subject to conditions I and II contained in the under-mentioned consent"

On 3 June 2008 there was another consent endorsed by the Registrar Of Deeds on the same Deed of Grant in respect of the same "… ***within land*** …". However, this time the vesting was in the name of Netone Cellular (Private) Limited, the applicant herein. Among the applicant's exhibits was a letter from the Registrar of Deeds dated 23 January 2014 which

the respondents did not put in issue. It explained the concept of vesting of ownership of land by means of consents endorsed on the title deed where there is no change of beneficial interest. The material portion of the letter read as follows:

> "The remainder of Lot A Chikurubi is registered in the name of Netone Cellular (Private) Limited under Deed of Grant 13832.
>
> The property was originally owned by the Government of Zimbabwe who later transferred it by endorsement of PTC who also later transferred it to Netone Cellular (Private) Limited by the same method. It is a method we use where there is no change of beneficial interest. The words 'The within Land" on the endorsement simply refer to the land in the deed, the remainder of Lot A Chikurubi.
>
> The endorsement has the same effect like a transfer stamp. The piece of land held under Certificate of Registered Title 4089/75 that is stand 2 Cleveland Township is owned by the Government of Zimbabwe."

Despite that clear explanation by the Registrar of Deeds the respondents still maintained that the applicant did not own the bigger property, but that the Government did. They argued that the reference to "***[t]he within land …***" was a reference to the smaller property. They resorted to the dictionary for interpretation of the word "***within***". Paragraph 6 of the second respondent's heads of argument read:

> "6. The issue of concern in this matter seems to be the interpretation of the word within land as mentioned on the endorsement. If at all the endorsement is valid, according to Black's Law Dictionary, at page 1437, the word within means, '*inner or interior part of something* …' If this interpretation is to be taken, the within land which was referred to by the endorsement would only logically mean whatever that was given to PTC was the inner or interior part of something. In this case, the within land was Stand 2 Cleveland township which was the interior part of the Remainder of Lot a Chikurubi measuring 131, 3710 hectares."

From the premise that it did not own the bigger property, the respondents went on to argue that the applicant had no *locus standi* to bring the proceedings. A whole gamut of cases on *locus standi* was cited.

With all due respect, the respondents' argument was plainly ludicrous. GILLESPIE J's complaint in *MM Builders and Suppliers, supra*, about "***silver-tongued orators who prove that black is white***" could not have been more apposite The basic position that the respondents seemed unable to grasp, or simply refused to accept, was that when the Registrar of Deeds, on 3 December 1975, endorsed the Deed of Grant of the original mother property, thereby passing ownership of that property to the PTC, the smaller piece of property

measuring 4,9521 hectares had already been deducted or excised from or carved out of the original mother property. By the Certificate of Registered Title, that smaller property had been transferred to the Government on 6 October 1975. It had ceased being part of the original mother property. So in no way would the endorsement refer to a property that was no longer part of the whole. The reference to "***[t]he within land …***" on the endorsements was plainly a reference to the land referred to in the Deed of Grant, namely the original mother property, less the smaller property. It was now called the Remainder of Lot A of Chikurubi. A new title deed would need to be created. That was done in the form of the endorsement.

The same position is arrived at even if one were to go by the hectarage or measurements of the properties. The original mother property had been 136, 3231 hectares in extent. Out of it 4, 9521 hectares were deducted or excised to create Lot 2 of Cleveland. The balance was 131, 371 hectares, exactly the extent of the Remainder of Lot A of Chikurubi claimed by the applicant.

When the PTC unbundled, the applicant, as one of the successor companies, "inherited" Lot A of Chikurubi. Ordinarily, a new deed of transfer would be required to signify the transfer of the property from the defunct PTC to the applicant. But again, by the endorsement of 3 June 2008, the Registrar of Deeds transferred the ownership to the applicant.

It is significant that the two conditions on the original Deed of Grant relating to the use of the land for communication purposes only, and the granting of the right of first refusal to the Municipality, were carried forward to the two newly created properties. Therefore, apart from anything else, the second respondent could not just have allocated Lot A of Chikurubi for a housing project. That would be contrary to law.

At the hearing the second respondent shifted emphasis to argue that the Registrar of Deeds could make the endorsements only on the direction of the Minister in terms of the then Posts and Telecommunications Act No. 9 of 1970. Reference was made to s 28 of that Act which transferred the assets and rights, liabilities and obligations of the Government in respect of the services carried out by the Ministry of Posts, to the PTC. Section 28(2) provided that the Registrar of Deeds:

> "… shall, <u>where so directed by the Minister</u>, make such endorsement on the appropriate title deeds and in his registers as may be required by reason of the transfer to the Corporation of the assets, rights, liabilities and obligations referred to in

subsection (1) and all transfers shall be exempt from stamp duty, fees of office and other such charges." (**underlining for emphasis by second respondent's counsel**)

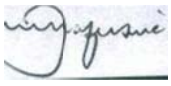
Mr *Mbengegwi* argued that the applicant had not produced the directive by the Minister to the Registrar of Deeds authorising the endorsement and that therefore the endorsements on the title deeds remained just endorsements and not proof of ownership! With respect, nothing could be more preposterous. It must have been the same kind of argument that had driven GILLESPIE J to complain the way he did in the *MM Builders and Suppliers* case. At that rate, Mr *Mbengegwi* could as well have demanded the proof of the directive from Queen Elizabeth II to the Governor of the Colony of Southern Rhodesia granting the original mother property to the then Government of Rhodesia. The Deeds Office is a public office. There was nothing stopping the second respondent from examining the documents therein. Unless it had proof to the contrary there was nothing to upset endorsements that seemed regular on the face of it.

Thus, I found no merit in the respondents' defence. I also found no merit in their explanations for the delay in filing the heads of argument timeously. I was wholly satisfied with Mr *Matinenga's* arguments. In particular, it was quite apparent that Mr *Machiridza* had not been truthful. Among other things, the first respondent's notice of opposition had been signed by him. It was referenced "**TPM**". Those were his initials. In all probabilities the first respondent had followed him when he had crossed over from *Manase & Manase* to *Antonio & Dzvetero*. The application for a postponement was, in my view, a gimmick to buy time.

With regards the second respondent, the explanation for the default was deficient. In the absence of the relevant dates there was no telling the extent of the default. Furthermore, how the alleged misfiling of the applicant's heads of argument had occurred was not properly explained, particularly in the absence of an affidavit or affidavits from the filing clerks.

It was for those reasons that I granted the orders that I did.

2 March 2015



Mhishi Legal Practice, applicant's legal practitioners
Antonio & Dzvetero, first respondent's legal practitioners
Civil Division of the Attorney-General's Office, second respondent's legal practitioners