DISTRIBUTABLE (8)

1) LESLEY FAYE MARSH PRIVATE LIMITED T/A PREMIER DIAMONDS 2) RAYDIAM BVBA 3) ZARDIAM DMCC THE NEE MILLENIUM POWER AND HEAVY EQUIPMENT ZIMBABWE PRIVATE LIMITED 4) JAMAL JOSEPH HAMED 5) NEOCLIS CHARITONOS 6) EXODUS FUELS PRIVATE LIMITED 7) BACKLODGE INVESTMENTS 8) INCHESTER INVESTMENTS PRIVATE LIMITED

v

AFRICAN BANKING CORPORATION OF ZIMBABWE PRIVATE LIMITED AND ABC HOLDINGS PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JA & MAKONI JA
HARARE 25 JUNE 2018 AND 15 FEBRUARY 2019.

S.M. Hashiti for appellants,
T. Mpofu for respondents.

MAKARAU JA: This is an appeal against the whole judgment of the High Court handed down on 31 March 2015, in which the court *a quo* dismissed the appellants' application for rescission of judgment for want of prosecution.

The facts.

The respondents issued summons against the appellants out of the High Court, claiming the sum of US4 634 547-72 together with interest thereon at the rate of 3 percent *per annum* from the date of summons to date of payment in full. The claim was not only defended but was also met with a counterclaim for US2,1 million.

When the appellants and their legal practitioners failed to attend a pre-trial conference scheduled for the matter, the respondents successfully applied for the appellants'

defence to be struck off and a default judgment was entered in their favour. By design or by omission, the counterclaim was left extant.

No issue turns on this development. The determination of the counterclaim has proceeded independently and was at the pre-trial conference stage at the time of the hearing of this appeal. I merely highlight the development in passing as it is one of the instances in which the determination of the dispute between the parties has been fragmented. I will highlight the other instance in due course as I frown at the piecemeal fashion in which this dispute has been presented and is proceeding.

A day following the granting of the default judgment, the appellants filed an application seeking to reverse the default judgment that had been granted against them. In view of the fact that the respondents subsequently filed another application to dismiss this application and which I refer to below, I shall refer to this application as "the application for rescission" for convenience and clarity.

The respondents opposed the application for rescission. The appellants did not file any other papers in the matter for a period in excess of one month. Thereafter, the respondents filed a chamber application to have the application dismissed for want of prosecution. I shall refer to this second application as "the application for dismissal".

Immediately after the filing of the application for dismissal, the appellants filed answering affidavits and heads of arguments in the application for rescission. The respondents also filed their heads of argument in the matter. The exact dates on which each party filed its papers are fully captured in the judgment *a quo.*

It is recorded in the judgment *a quo* that before the set down of the application for dismissal, the appellants wrote to the Registrar of the High Court, requesting that both applications be heard on the same date. The letter is not on record. It is however not clear from the judgment *a quo* whether the request to the Registrar and which was forwarded to the judge, was given any consideration by the court. It is also not clear whether the appellants followed this request with a formal application before the court for the consolidation of the hearing of the two applications. What emerges from the judgment *a quo* is that no hearing of either matter took place on the first set down date as counsel for the respondents successfully applied for the matters to be postponed to enable him to take instructions on whether or not to argue the application for rescission.

When the court *a quo* resumed its sitting, only the chamber application for dismissal was argued and determined. On the turn, the court granted the application sought by the respondents, effectively dismissing the application for rescission of judgment.

Whilst the issue of consolidation of the hearing of the two applications does not arise in this appeal, I raise the issue because had that practical course been taken, this appeal would not have arisen and again the piecemeal fashion in which this dispute has proceeded would have been minimised or avoided. This is yet another incident in which the determination of the dispute between the parties was fragmented. It is undesirable that disputes, especially commercial disputes such as the one between the parties *in casu*, be dealt with in a piecemeal fashion as this tends to unnecessarily protract the resolution of the dispute.

Ratio decidendi of the judgment *a quo*.

At the hearing of the matter in the court *a quo*, the respondents took a point *in limine*. They contended and correctly so, that the appellants were barred, having filed their

heads of argument out of time. After dismissing the application to lift the bar, the court *a quo* held that as a consequence of the appellants remaining barred, the application for dismissal was unopposed. It treated the application as such and granted the order prayed for by the respondents. In its words, the court *a quo* held:

> "It is clear that once a party is barred and remains barred, the matter is treated as unopposed."

I form the above view on the *ratio* of the judgment *a quo* notwithstanding that the court made some reference to the poor prospects of success of both applications on the merits. Having listed the many transgressions of the appellant and its legal practitioners, the court *a quo* opined:

> "Given the non-compliance with the rules, I am of the view that the respondents do not have any prospects of success in the event of this application being determined on the merits. Any prejudice to be suffered by the respondents is of their own making……"

Having expressed itself thus, the court however proceeded to conclude as follows:

> "The trajectory of all three matters was necessary as the manner in which the respondents conducted themselves in the matter had a bearing on the determination of the application for the upliftment of bar and postponement. The conduct clearly reflects the respondents' and their legal practitioners' dilatoriness. The analysis of the conduct should therefore not be seen as an attempt to determine the merits of the present application or the application under case no HC 2754/14."(The emphasis is mine).

On the basis of the above, it appears clearly to me that whilst expressing a view on the prospects of success of both applications, the court *a quo* did not determine the application for dismissal on its merits.

The appeal.

Aggrieved by the decision, the appellants noted this appeal, raising three grounds of appeal. The essence of the appeal is to attack the court's failure to consider the application

on its merits and in particular, to make reference to the defence that the appellants had raised in the application for rescission of judgment.

The issue.

The issue that falls for determination in this appeal therefore is whether or not the court *a quo* was correct in treating the application for dismissal as unopposed and to proceed to grant the order prayed for without making any reference to the defence proffered by the appellants.

The determination of this issue entails interpreting the rules of procedure regulating the powers of a court when a respondent defaults in filing heads of argument on time.

The law.

The law governing the powers of the court in circumstances where a respondent files heads of argument out of time is clearly spelt out in r 238(2) (b). The Rule provides:

> "(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."

Rule 238 (2) (b) is self -contained and deals exclusively with instances where the respondent has filed heads of argument out of time. In the self- contained provision, it is expressly provided that a respondent who defaults in filing heads of argument out of time is barred for that reason. The Rule then proceeds to regulate how the matter in which the respondent has defaulted is to be disposed of. This is to be contrasted with the provisions of r 239 which also governs the hearing of applications generally and in the proviso to the rule, the hearing of applications where a party is barred.

Rule 239 provides that:
"At the hearing of an application-

(a) Unless the court otherwise orders, the applicant shall be heard in argument in support of the application, and thereafter, the respondent's argument against the application shall be heard and the applicant shall be heard in reply.
(b) The court may allow oral evidence.
Provided that if one of the parties has been barred, the court shall deal with the application as though it were unopposed, unless the bar is lifted."

Clearly, it is only when the court is proceeding under Rule 239 that it shall treat the application as unopposed if the respondent is barred. This is the point that GARWE J A made in *GMB V Muchero* SC59/07. In useful *orbiter* in that matter, the learned judge drew the distinction between the effect of a bar in proceedings under r 238(2) (b) and in proceedings under r 239 as read with r 233.

A clear reading of the rules and of the decision in *GMB v Muchero* (*supra*) makes it clear that the effect of the bar arising from the late filing of heads of argument and a bar arising from any other default in terms of the rules are different.

It presents itself quite clearly to me that where the respondent is barred for failing to file his or her heads of argument on time, the application cannot be treated as un -opposed. The provisions of r 238 (2) (b), which I have cited in full above, are clear on that point. The provisions of the rule direct the court hearing such an application where heads have been filed out of time, to either hear the matter on the merits or to refer it to the unopposed roll. The rule does not deem the application unopposed.

The Rule appears to me to be sound and based on the fact that once a notice of opposition and opposing papers have been validly filed, the late filing of heads of argument cannot automatically have the effect of negating or nullifying such filing. The rule re-asserts

the common-sense position that the pleadings, having been validly filed, remain extant until struck off the record by a competent court order. A referral of the matter to the unopposed roll is one such competent court order that will have the effect of nullifying or striking off the record, the otherwise validly filed pleadings. A specific order striking off the notice of opposition and opposing affidavits is yet another competent order that can be made in the circumstances.

For reasons of expediency, it may be argued that a court hearing such an application where heads have been filed out of time may convert itself into "the unopposed court" envisaged by the rule and dispose of the matter by granting the order sought. I express no views on this procedure. The point to make is that there must be a referral of the matter after holding that the respondent is barred. The referral has the same effect as striking off the respondent's defence. Whether a court can then thereafter refer the matter to itself or not is not a matter that arises in this appeal.

In *casu*, the court *a quo* fell into the error of holding that once a party has been barred under r 238 (2) (b), and "remains barred" the matter is treated as unopposed.

As I have shown above, the application does not automatically become unopposed. The court or judge may, using their discretion, proceed to determine the matter on the merits or negate and nullify the respondent's defence by referring the matter to the unopposed roll. In other words, the court has to either dispose of the matter on the merits or declare it to be now unopposed by reason of the default.

Disposition and costs.

The court *a quo* fell into error by treating the application as un- opposed in disregard of r 238 (2) (b) of the High Court Rules. Its decision cannot therefore stand as it is not in accordance with the law. Accordingly, the appeal must succeed and succeed with costs. The matter must be remitted for it to be dealt with in terms of the Rule.

In view of the fact that the court had expressed its views on the merits of the matter, the matter must be remitted to a different judge.

In the result, I make the following order:

1. The appeal is allowed with costs.
2. The matter is remitted to the High Court for it to proceed in terms of Rule 238 (2) (b) of the High Court Rules 1971.
3. The Registrar of the High Court is directed to place the matter before a different judge.

GWAUNZA DCJ I agree.

MAKONI JA I agree.

Venturas & Samkange, appellant's legal practitioners.

Sawyer& Mkushi, respondent's legal practitioners