HB 182-17
HC 627-16
XREF HC 3415-15
XREF HC 356-16

M.O.B CAPITAL (PVT) LTD
versus
TERERAI EDWIN CHABATA
and
LYNETTE CHABATA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 23 JUNE 2017 AND 29 JUNE 2017

Opposed Application

S Siziba for the applicant
H Shenje for the respondents

MATHONSI J: There is absolutely no logic in pursuing this application for the upliftment of the bar all the way to the end when, subsequent to the instalment of the bar and to the knowledge of the applicant, default judgment was entered against the applicant on the basis of the bar sought to be uplifted. What it means is that the application has been overtaken by events and this court cannot be made part of the applicant's confusion by being asked to uplift a bar and leave the default judgment intact. It does not make sense which should have been apparent to the applicant from the very beginning regard being had that this court has a duty to regulate its processes.

On 29 January 2016 the applicant was served with a notice of intention to bar in HC 3415/15, a matter in which the two respondents were suing the applicant for payment of the sum of $24380-00 arising out of an investment agreement in terms of which they had invested their money with the applicant which then refused to return that out lay when it matured. The applicant did not plead but started arguing that it was entitled to further and better particulars which it had earlier requested. The applicant demanded instead that the notice of intention to bar be withdrawn within 24 hours as it had been issued prematurely. This may have been so but that

is not the issue here, the issue being that the applicant did not do anything about the notice of intention to bar until the bar was effected on 11 February 2016.

After the bar was effected the applicant filed a separate application to compel the supply of further and better particulars in HC 356/16 without doing anything about the bar. Meanwhile in the main matter, HC 3415/15, the respondents lodged a chamber application for default judgment on 16 February 2016 resulting in an order being made on 24 February 2016 in default. The respondents' legal practitioners informed the applicant of that development by letter marked "Urgent" dated 14 March 2016 which reads:

> "RE: LYNETTE CHABATA AND TERERAI CHABATA vs M.O.B CAPITAL (PVT) LTD: CASE NO HC 627/16; XREF HC 3415/15
>
> We have no doubt in our mind that you now know that default judgment was granted against the defendant in Case No HC 3415/15 on the 24th February 2016. To this extent, your application to uplift the bar has been overtaken by events, and shall for that reason be treated as a non-event.
>
> You have to confirm by close of business today 14 March 2016 that the said application shall be withdrawn. In the event that you do not withdraw the application as anticipated, we shall be constrained to file a notice of opposition and ask for costs on a punitive scale."

The applicant did not withdraw the application prompting the respondents to file opposition on 17 March 2016 and, as promised, ask for costs to be awarded against the applicant on a punitive scale. The applicant was unperturbed. It prosecuted this application with zeal and filed heads of argument on 6 April 2016 which again pressed the respondents to file their own on 26 April 2016 lest they be barred by operation of r238 (2a) as read with subrule (2b) of this court's rules. Meanwhile, although still pursuing this redundant application, the applicant had the presence of mind to file an application for rescission of judgment on 31 March 2016 in HC 798/16 which application is still pending. In that application the applicant sought the rescission of the default judgment entered against it on 24 February 2016 in HC 3415/15.

Now the question which arises is; what is the basis of the present application for the upliftment of the bar which the applicant has so fervently pursued when default judgment was entered which default judgment is the subject of a rescission application in HC 798/16? The

mind boggles. People who have nothing to do should not attempt to do it in court. Let us just assume for one moment that the application is successful and that the order for the upliftment of the bar is granted. What that would mean is that the applicant would be allowed to file a plea, the matter will go all the way to trial and at the same time, the respondents as the proud beneficiaries of a court order in their favour, would proceed to carry that order into execution at the same time that the matter is being tried. It just does not make sense.

This court has a duty not only to regulate its processes but also to protect its process and indeed its integrity. It cannot allow its processes to be brought into disrepute or to degenerate into a circus. This application was rendered superfluous the moment default judgment was entered whether correctly or wrongly. It is that judgment which the applicant should turn its attention to and not the bar. After all, a bar is only effected to facilitate the grant of default judgment. Once default judgment is entered, the issue of the bar ceases to be important, the judgment being the main consideration. In short there can be no merit in an application of this nature because it is useless and cannot be granted at all.

Given that the application was pursued with the full knowledge that default judgment had been entered and that it could not possibly overturn that judgment, the application is clearly frivolous and vexatious. It has been said that an action is frivolous or vexatious in a legal sense when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. See *Rogers* v *Rogers* SC-7-08. It occurs to me that the present matter is one such application as it was not only doomed to failure from the very beginning but was utterly hopeless judgment having already been entered when it was continued with.

The respondents asked for costs to be awarded against the applicant on the scale of legal practitioner and client in view of the fact that the applicant was implored right from the start, to withdraw this application as default judgment had already been entered but ignored that wise counsel preferring to pursue the ill-fated application.

While it is the right of every person to approach the court seeking relief, where it is apparent that the application is doomed to failure but is pursued for other obscure purposes the court frowns at such conduct. Therefore in respect of vexatious, reckless or indeed frivolous

proceedings, the court would be justified to award costs as between legal practitioner and client. See *Mahembe* v *Matambo* 2003 (1) ZLR 149 (H) 150 C-D. Regrettably this is one such instance where the respondents have been forced to fork out money to defend an application which should not have been made at all or having been made it should not have been pursued at all. The applicants deserve to be fully compensated for such loss.

In the result, the application is hereby dismissed with costs on the scale of legal practitioner and client.

Ndove, Museta and Partners, applicant's legal practitioners
Shenje and Company, respondent's legal practitioners