TICHAFA BRIAN CHIKASHA
versus
ABISHA NJANI
and
BISHPERP ENTERPRISES (PRIVATE) LIMITED
and
PERPETUA NJANI

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 6 May 2025 & 13 June 2025

Chamber application for removal of bar

J.T. Wuchiri for the applicant
S. Kuchena for the respondent

DUBE-BANDA J:

[1] This is a chamber application for the removal of a bar in terms of r 39 of the High Court Rules, 2021. The applicant seeks that the bar in HC 3614/23 ("the main matter") be removed, and all the pleadings and documents filed after the automatic bar became operational be deemed to be properly before court, and that he be granted leave to file his replication and bundle of documents.

[2] The application is opposed.

[3] The background of the matter is that on 1 June 2023 the applicant as the plaintiff caused a summons to be issued in HC 3614/23 against the respondents as the defendants therein. Initially, the action was against the first and second respondents. The first and second respondents entered an appearance to defend and filed a plea, and on 25 July 2023 filed a plea. The third respondent was later joined into the action, as third defendant, and filed her plea on 17 May 2024. On 22 May 2024, the applicant filed his replication and joinder of issue with the third respondent. The parties filed all documents in preparation for a pretrial conference and on 2 September 2024 filed a joint pre-trial conference minute.

[4] The issue in this application is about the applicant's failure to file his replication in answer to the first and second respondents' plea. In a founding affidavit deposed by his legal practitioner, the applicant contends that on 6 September 2023 a replication was drawn up,

however counsel forgot to file it. The draft replication on record is dated 6 September 2023. The applicant contends that the respondents would suffer no prejudice should the order sought be granted.

[5] The respondents took issue with the fact that the answering affidavit exceeds the length of the founding affidavit. It was further submitted that the applicant sought to make out a case in the answering affidavit, which is impermissible, and the court ought to strike out the entire answering affidavit, or at least the portions introducing the new averments. The application is attacked on the basis that the founding affidavit does not address the issue of prospects of success. Further the application is attacked from several fronts, e.g. that the draft replication on record is a fabrication.

[6] It is trite that an application stands or falls on its founding affidavit. See *Fuyana* v *Moyo* SC 54-06; *Muchini* v *Adams & Ors* SC 47/13. Consequently, I attach no weight to the averments in the answering affidavit that introduce matters not canvased in the founding affidavit.

[7] The first issue for determination is whether the applicant has been barred for failure to file a replication, if indeed there is a bar in existence, the effect of such a bar. Rule 40(9) states that:

> "Any party who fails to file and deliver a replication or subsequent pleading within the time stated in this rule shall be as a result of this fact barred."

[8] The bar referred to in r 40 (9) must be understood in the context of the entirety of r 40. Rule 40(1) states that the plaintiff shall be <u>where necessary</u> file a replication within twelve days after service upon him or her of a plea. Rule 40 (2) states that no replication which would be joinder of issue or bare denial of the allegations shall be necessary, and the pleadings shall be deemed closed in terms of r 44. A replication becomes necessary only if it would serve a useful purpose, like to meet the allegations in the plea. A party who has not filed a replication within the twelve days timeline provided in r 40 (1), cannot do so after the expiry of this timeline, because he or she would have been barred in terms of r 40 (9). This bar only relates against the filing of a replication, however, a party may proceed to prosecute its case, notwithstanding the failure to file a replication. In other words, it is not in every case that a replication is filed. It is only filed when the plaintiff has reason to reply to the plea due to the material issues raised therein. Where such replication is filed, it must be filed within the timelines provided in r 40, otherwise the plaintiff is barred in so far as the

filing of a replication is concerned. This is so because the progression of the matter is not dependent upon the filing of a replication. It follows therefore that all other processes filed by the plaintiff are properly before court as no bar operated the filing of such processes.

[9] What a party cannot do is to file a replication while the bar is still in force. Therefore, r 39 (4)(a)(b) which state that while the bar in in operation the registrar shall not accept for filing any pleading or other document from the party barred; and that the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit has no application against a party who has been barred for want of filing a replication. In fact, r 44 (d) clarifies the issue further, in that the pleadings shall be considered closed if the last day allowed for filing a replication has lapsed and it has not been filed. Once the pleadings are closed, the other processes provided in the rules take place e.g. discovery etc. Therefore, the applicant in HC 3614/23 is only barred in respect of failing to file a replication. All other processes and documents filed are regular and properly before court.

[10] The sting of the opposition is that the founding affidavit does not address the prospects of success. This requires closer scrutiny. The question is whether the prospects of success are decisive such that when such are not addressed the application must fail. The applicant has been barred for failure to file a replication, and prospects of success of a replication cannot be assessed in isolation. For one to consider the prospects of success, one has to consider the entire pleadings and consider that there is still evidence to be adduced. KABASA J in *Mwanza* v *Ncube & Anor* 2020 (2) ZLR 445 (H) at 449 said ".. It therefore cannot be said a failure to address on the issue of prospects of success is fatal to an application for condonation." This statement applies with equal force to an application for the removal of a bar to file a replication. My thinking is that in such a case, prospects of success recede to the remote background. It therefore cannot be said a failure to address prospects of success is fatal to an application for the removal of a bar to file a replication.

[11] The question is, was the applicant in willful default in not filing his replication? I do not think so. The facts show that he timeously filed his replication in respect of the third respondent's plea. In respect of the replication for the first and third respondents' plea, the deponent to the founding affidavit states that he prepared it on 6 September 2023. In fact, the draft annexed to this application is dated 6 September 2023. The insinuation by the respondents that it was backdated has no substance. To find that a legal practitioner, an officer of the court, backdated the draft for the purpose of misleading is a serious finding

and cannot be made without cogent evidence. In fact, the attack of the applicant's version is merely speculative and general. It has no cogency. I consider that he timeously filed all the pleading, and in addition timeously filed a replication in respect of the third respondent's plea, this shows his desire to file pleading within the timeline allowed by the rules of court. The failure to file a replication in respect of the first and second respondents' plea was a result of a genuine mistake. In the circumstances, the applicant was not in willful default in not filing the replication within the timeline allowed by the rules.

[12] The respondents would suffer no prejudice in the prosecution of their defense if the order sought by the applicant is granted. I say so because there is no subsequent pleading that the respondents can file in answer to the replication. The main matter is ready for a pre-trial conference before a judge, in the event the replication raises issues of concern to the respondents, such can be considered at the pretrial conference and referred for determination at the trial.

[13] In conclusion, the applicant's failure to address prospects of success is not fatal this application. He was not in willful default for failure to file a plea timeously; and the respondents would suffer no prejudice in the prosecution of their defence if this application is granted. It is for these reasons that this application must succeed.

[14] The question of costs remains remaining to be considered. Good grounds exist for a departure from the general rule that costs follow the event. The applicant sought an indulgence from this court. It is he who did not file a replication within the time allowed by the court rules. Notwithstanding his success in this matter, he is not entitled to costs. A no cost order will meet the justice of this case.

In the result, I order as follows:

i. The bar operating against the applicant in HC 3614/23 be and is hereby removed.

ii. The applicant to file his replication in HC 3614/23 within ten (10) days of this order.

iii. There is no order as to costs.

DUBE – BANDA J: …….

Machingura Legal practitioners, plaintiff's legal practitioners
L.T. Muringani Law Practice, defendants' legal practitioners