JOSEPHINE T MUKUTE

versus

INNOCENT T MARINGA

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 9 October 2012 and 17 October 2012

**Opposed Application**

*R Mutasa*, for the applicant

*D Mbidzo*, for the respondent

MATHONSI J: The applicant instituted summons action against the respondent seeking judgment in the sum of US$51 013-00 together with interest at the rate of 5% per annum from 31 July 2011 to date of payment and costs of suit, due by the respondent in terms of an acknowledgment of debt signed on 28 July 2011.

The respondent entered appearance to defend and in due course filed a plea in the following:

“Defendant pleads to plaintiff’s claim and declaration as follows;

1. Ad Para 1

Admitted

1. Ad Para 2

Admitted save to say defendant has paid US$10 000-00.

1. Ad Para 3
   1. Defendant denies liability to the extent indicated in the various acknowledgments of debt and puts plaintiff in strict proof thereof.
   2. The interest levied was *usurious*, plaintiff not being a registered money lender and could not recover interest above the rate of 5% per annum for a loan.
   3. Consequently the interest levied is unlawful.
   4. Each acknowledgment of debt incorporated unlawful interest as part of the capital debt.
   5. Consequently plaintiff lent and advanced defendant capital sum of US$33 000-00 of which US$10 000-00 was paid
   6. Defendant denies liability to the extent stated in the plaintiff’s claim
   7. The rest of the averments are denied and plaintiff put to strict proof thereof.

Wherefore defendant prays for judgment in his favour with costs.”

I have stated that the applicant’s claim is premised on an acknowledgment of debt signed by the respondent. In his plea the respondent did not deny signing the acknowledgment of debt and did not even suggest that it was signed under any form of duress. Instead he only takes issue with the interest charged without even attempting to disclose the basis upon which that interest can be deemed to be unlawful beyond saying that the applicant was only entitled to levy interest at the prescribed rate of 5% per annum.

This prompted the applicant to launch an application for summary judgment which was filed on 15 November 2011 in which she argues that the respondent has filed appearance for purpose of delay as he does not have a *bona fide* defence to her claim mainly because it is based on an acknowledgment of debt.

Although the respondent opposed the summary judgment application, he is now barred by reason that his legal practitioners were served with the applicant’s heads of argument on 29 February 2012 but failed to file heads of argument within the time allowed by the rules of court.

Rule 238 (2) of the High Court of Zimbabwe Rules, 1971 provides that where any respondent is to be represented by a legal practitioner, such legal practitioner shall file heads of argument which shall be delivered to the other party. Subrule (2a) provides:

“(2a) Heads of argument referred to in subrule (2) shall be filed by the respondent’s legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered on the respondent in terms of subrule (1).”

Subrule 2 (b) provides:

“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.”

At the commencement of the hearing Mr *Mbidzo*, for the respondent made an application for a postponement of the matter to enable the respondent to file an application for the upliftment of the bar operating against the respondent by reason of failure to file heads of argument.

No application for the upliftment of that bar was filed and although the respondent was served with a notice of set down of this application days earlier, nothing was done about that bar only for Mr *Mbidzo* to appear and seek a postponement aforesaid. He submitted that he needed time to make an application for the upliftment of the bar, an application which had not been made at all at the time of the hearing.

Where a party is barred as in the present case, such party does not have a right of audience and where a postponement is sought to enable such party to prepare and then file an application to remove a bar which has subsisted for eight months, surely such application cannot be said to have any merits at all. The court’s hands are tied. It was for these reasons that I dismissed the application for a postponement and proceeded to deal with the matter on the merits to the exclusion of the respondent.

On the merits the only issue for consideration is the lawfulness or otherwise of the interest charged against the respondent. In his plea, the respondent averred that the applicant was only entitled to interest at the prescribed rate of 5% per annum.

Section 4 of the Prescribed Rate of Interest Act [*Cap 8*:*10*] does not prescribe any rate of interest for the parties. It reads:

“If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the grounds of special circumstances relating to that debt, orders otherwise.”

In *casu*, the parties agreed on a rate of interest applicable to the debt owed by the respondent and that is contained in the acknowledgment of debt signed by the respondent. Clearly therefore the prescribed rate of interest does not apply in the present case. See *Farmers World Holdings* (*Pvt*) *Ltd* v *Manica Zimbabwe Lmited* HH 297-12 at pp 5 - 6.

The respondent did not fully develop his argument relating to *usurious* interest. Neither did he attempt to show why the interest he undertook to pay is *usurious* especially as the Usuries Act was repealed a long time ago. What is clear though is that the interest being claimed is less than the capital debt of US$33 000-00 which the respondent admitted having received. I am therefore unable to find any fault in the interest claimed.

I therefore conclude that the applicant has made out a case for summary judgment. I make the following order, that:

1. Summary judgment with costs is hereby granted.
2. The respondent shall pay the applicant the sum of US51 013-93 together with interest on that sum at the rate of 5% per annum from 31 July 2012 to date of payment in full.

*Dube*, *Manikai & Hwacha*, applicant’s legal practitioners

*Mbidzo Muchadehama & Makoni*, respondent’s legal practitioners