AFRICAN BANKING CORPORATION OF ZIMBABWE
and
ABC HOLDINGS LTD
versus
LESLEY FAYE MARSH (PVT) LTD T/A PREMIER DIAMONDS
and
RAYDIAAM BVBA
and
ZARDIAM DMC
and
THE NEW MILLENIUM POWER AND HEAVY EQUIPMENT ZIMBABWE (PVT) LTD
and
JAMAL JOSEPH HAMED
and
NEOCLIS CHARITONOS
and
EXODUS FUELS (PVT) LTD
and
BACKLODGE INVETSMENTS (PVT) LTD
and
ITCHESTER INVETSMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE 31 March 2015 & 19 July 2016

OPPOSED MATTER

T Mpofu, for the applicants
J Samukange, for the respondents

CHATUKUTA J: After hearing counsel, I granted an order in favour of the applicants herein. I am advised that an appeal against my decision has since been noted and a request for reasons for the judgment has been communicated to the Registrar. These are my reasons.

This is an application for the dismissal of the respondents' application in case number HC 2754/2014 for rescission of a default judgment granted in case number HC 8991/2014.

The background to the applications is as follows:

The applicants issued summons in case number HC 8991/13 against the respondents claiming the sum of US$ 4 634 547-72 with interest thereon at the rate of 38% per annum. The applicants also claimed that three properties be declared specially executable. The claim was defended.

After closure of pleadings, the matter was set down for a pre-trial conference on 25 March 2014 at 9:30am. Mr *Mpofu* and his client were in attendance. Mr *McGown*, a legal practitioner with Venturus and Samukange, attended for the respondents. None of the respondents were in attendance either personally or through their representatives, in the case of the respondents who are companies. It appears Mr *McGowan* was appearing on behalf of Mr *Samukange* with instructions to apply for the amendment of the defendants' counterclaim and further to agree on the issues to be referred to trial. The application was opposed by the applicants. Mr *McGown* was not conversant with the facts of the matter. It was agreed that the pre-trial conference be postponement to 1 April 2014, to allow Mr *Samukange* who was conversant with the facts to attend the pre-trial conference.

On 1 April 2014, Mr *Mpofu* was in attendance in the judge's chambers. Neither the respondents nor their counsel were in attendance. Mr *Mpofu* telephoned the offices of Venturus and Samukange and spoke with Mr *Everson Samukange*, a legal practitioner at the firm, from whom he inquired the whereabouts of Mr *Samukange*. No one appeared for the respondents soon thereafter and the pre-trial conference proceeded without the respondents. The respondents' defence was struck off. Default judgment was granted in favour of the applicants.

On 2 April 2014 the respondents filed an application in case number HC 2754/14 seeking rescission of the default judgment granted on 1 April 2014 in case number HC 8991/13. The applicants opposed the application on 17 April 2014. The notice of opposition and opposing affidavit were served on the respondents on the same date. The respondents did not file an answering affidavit or take any other step to prosecute the application for rescission of judgment within 30 days of the date of service of the applicants' opposing papers.

The applicants filed the present application in case number 2754/14 on 30 June 2014 seeking the dismissal of the respondents' application for rescission of judgment. Soon thereafter, the respondents filed their answering affidavit in case number HC 2754/14 on 10 July 2014, heads of argument on 18 July 2014 and the notice of set down on 23 July 2014. The applicants filed their heads of argument on 1 August 2014.

The circumstances of the present application are that, after the applicants filed the application on 30 June 2014 they served the application on the respondents on 8 July 2014. The respondents filed their opposing papers on 14 July 2014. The applicants filed both their answering affidavit and heads of argument on 29 July 2014. The heads of argument were served on the respondents on 29 August 2014. The respondents filed their heads of argument on 19 February 2015 almost six months after the applicants filed their heads.

The applicants contended that the basis for the application was that they filed their opposing papers in case number HC 2754/14 and served the same on the respondents on 17 April 2014. The respondents did not file their answering affidavit as is required in terms of r 236 (3) (b) of the High Court Rules neither did they prosecute their case necessitating the filing of the present application on 30 June 2014. The respondents only filed the answering affidavit on 10 July 2014, a delay of forty one days and after the present application had been filed and only two days after the service of the application on them.

The respondents opposed the application on the basis that this court did not have jurisdiction to determine the application because one of the respondents (not identified by name out of the nine respondents) was not a Zimbabwean resident. It was contended that the respondents were not compelled under r 234 (1) to file an answering affidavit. It was further contended that the applicants did not want the claim in case number HC 8991/13, which involved substantial amounts of money, resolved on the merits. The respondents prayed for the application to be dismissed.

The matter was set down for hearing on 20 February 2015. The notice of set down of the hearing was served on the respondents' legal practitioners by the Sheriff on 9 February 2015. On 19 February 2015, the respondents filed their heads of argument. On the same date and by letter addressed to the Registrar of the High Court, they requested that the present application and the application for rescission in case number HC 2754/14 be determined on the same date on 20 February 2015.

At the commencement of the hearing on 20 February 2015, it became clear that Mr *Mpofu* did not have instructions to deal with the application for rescission. The parties agreed to a postponement to enable Mr *Mpofu* to take full instructions on whether or not the applicants would consider arguing the application for rescission in light of the present application for dismissal. The parties agreed to the postponement subject to their legal practitioners approaching the Registrar for a suitable date.

On 13 March 2015, Mr *Mpofu* attended court to argue the present application on the understanding that the parties had agreed to that date. Mr *Samukange* was not present. Instead Mr *Hungwe,* a legal practitioner with Venturus and Samukange, later attended court and intimated that Mr *Samukange* was not aware of the date of hearing and would not attend. The matter was postponed to a specific date, 31 March 2015. The application was ultimately argued and determined on that date.

At the commencement of the hearing on 31 March 2015, the applicants indicated that they were proceeding with the application for dismissal of the application for rescission of judgment. They proceeded to raise a point *in limine.* Mr *Mpofu* submitted that the respondents were barred in terms of r 238 (2a) for failure to file their heads of argument timeously. He further submitted that the respondent's heads of argument were therefore improperly before the court as the applicant had not sought the upliftment of the bar before filing the heads. It was argued that the applicants had ample time to have filed a chamber application for the upliftment of the bar and failed to do. There being no such application before the court, he moved for default judgment.

Mr *Samukange* initially submitted that he was not aware that the respondents' heads of argument were filed out of time and therefore there was no need for the respondents to have made an application for upliftment of the bar. He changed his argument upon it bring brought to his attention that the respondents had admitted in their heads of argument that the heads had not been filed timeously. An application for the upliftment of the bar had been intimated in the heads. Mr *Samukange* thereafter argued that the applicants had been placed on notice in the heads that the respondents intended to apply for upliftment of the bar. He contended that as result, the applicants were not going to suffer any prejudice if the application was granted. He further submitted that, he believed that the application was not going to be opposed. He explained that the respondents had failed to file heads timeously because of misfiling of the applicants' heads of argument in the legal practitioner's office. The misfiling was attributed to the number of cases that Mr *Samukange* was seized with relating to the present parties. Mr *Samukange* further submitted that the respondents were desirous of having the matter resolved on the merits as evidenced by the application for rescission in case number HC 2754/14. The respondents argued that they were permitted under r 84 (b) to seek upliftment of a bar either orally at the hearing of the application or through a chamber application before the hearing. They opted to apply orally at the hearing.

I shall first proceed to determine whether or not the respondents ought to have filed a chamber application for the upliftment of the bar. It is not in issue that the respondents' heads were filed out of time. The respondents were required in terms of r 238 (2) (a) to file their heads of argument within ten days of the service of the applicants' heads on them. They were served with the applicants' heads as far on 29 August 2014. They were therefore required to file their heads of argument by no later than 12 September 2014. (See *Vera* v *Imperial Asset Management Co* 2006 (1) 436, *Beverly Building Society* v *Rwafa* 2005 ZLR (1) 109 (S)). They only filed their heads on 19 February 2015, five months later. They were therefore automatically barred and could only be heard by the court after successfully applying for the upliftment of the bar.

Upliftment of the bar is provided for in r 84. Rule 84 (1) provides that:

> "(1) A party who has been barred may—
> (*a*) make a chamber application to remove the bar; or
> (*b*) make an oral application at the hearing, if any, of the action or suit concerned;
> and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be, thinks fit."

Rule 84 (1) (b) indeed permits a party to make an oral application for the upliftment of the bar as argued by the respondents. I am, however, in agreement with the applicants that the history of this matter was such that it was necessary for the respondents to have filed a chamber application for upliftment of bar. As would be apparent in the pleadings in case number HC 2754/14, there were counter statements as to what transpired after 25 March and on 1 April 2014 giving rise to the default judgment in case number HC 8991/14. The delay of five months in filing the heads was considerable. Any prudent legal practitioner would have been aware that it was not sufficient for the legal practitioner to make averments from the bar. (See *GMB* v *Muchero* 2008 (1) ZLR 216 at 220D- 221B.)

Midstream the addresses by the parties on the point *in limine*, the respondents made a turn around and applied for a postponement to enable them to file a chamber application for the upliftment of the bar. The application was vigorously resisted. The applicants argued that the application for postponement ought to have been made before the application for upliftment of the bar and argument on the application.

A court has a discretion whether or not to grant a postponement to enable a party to prepare an application for the upliftment of bar. The discretion must however be exercised in a judicious manner. A postponement must be granted where justice demands that a party

should be afforded further time for the purpose of presenting its case so as to avoid occasioning prejudice to the party.

I was sensitive to the observations by Garwe JA in *GMB* v *Muchero* (*supra*) that a party who is barred and wishes to apply for the upliftment of the bar, should be granted, in a proper case, a postponement to do so. Garwe JA at 221A-C cited with approval the observations by Hathron JA (as he then was) in *Abramacos* v *Roman Gardens (Pvt) Ltd* 1960 R & N 1 (SR) at 2 that:

> "…. a defendant ought not to be deprived of having an application for condonation disposed of before default judgement is given against him where, as here, there appears to be an adequate explanation why that application is not before the court…."

The learned judge continued at 3:

> "… in those cases in which the defendant's counsel has asked for a postponement in order to enable a proper application for removal of the bar to be made and has given a satisfactory explanation why such an application was not then before the court, I have treated the appearance as the first step in an application for the removal of the bar, and granted the postponement….."". (See also ***Galante* v *Galante*** 2002 (1) 521 where the requirements for an application for a postponement are summarised in the headnote to that case at 521F-522D)

I do not believe that this is a proper case to indulge the respondents. The explanation by the respondents for not having filed a written application was simply that they were entitled to make an oral application at the commencement of the hearing. Such an explanation cannot be said to be satisfactory given the history of the matter which is riddled with the respondents' non-compliance with the Rules.

The notice that the respondents gave of their intention to apply for the upliftment of the bar was totally inadequate. The notice was a day's notice. The respondents had five months within which to make their application. They did not file the application. They were served with the notice of set down of the hearing of this application on 9 February 2015. They therefore had ten days before the hearing on 20 February 2015 to file their chamber application. The matter was further postponed on two separate occasions to 13 March 2015 (giving then an additional 20 days) and then to 31 March 2015, giving then a further 18 days within which to file an application for the upliftment of the bar. The respondents still did not consider it prudent to make a written application. After the hearing on 20 February 2015 they sat back and waited only to make an oral application on 31 March 2015. They may have been forgiven on the first occasion but certainly not on the second and third occasions.

Further, unlike in *GMB* v *Muchero* where an application for postponement appears to have been made at the commencement of the hearing, the application in the present matter

was made after the respondents had not only applied for the upliftment of the bar but both the applicants and the respondents had presented their arguments on the application. It appears the respondents had apparently realised the limitations of their submissions and consequently the need for a written application which they should have filed in the first place. The turn-around by the respondents was ample evidence that this is a case that begged for a chamber application.

To allow a postponement under such circumstances would, in my view, be tantamount to assisting the respondents to correct the inadequacies in their arguments at the expense of the applicants. It is trite that civil proceedings are party driven and the court should not be seen to be assisting one party to build its case the detriment of the other party.

Turning to the question whether or not the bar should be lifted, these courts have, time and again, pronounced that the upliftment of a bar is not automatic upon the mere asking. (See *Mutizhe* v *Ganda & Ors* 2009 (1) 241 (S) and *Chimonyo* v *Route Toute BV & Ors* No. SC 20/10). A party seeking the upliftment of a bar must satisfy the requirements for such an application. These are:

(a) the extent of the delay;

(b) the reasonableness of the explanation for the delay;

(c) whether the litigant himself is responsible for the delay;

(d) the prospects of success should the application be granted;

(e) the possible prejudice to the respondent should the application be granted.

(*Kombayi* v *Berkout* 1988(1) RLR 53(S) and *Jensen* v *Acavalos* 1993(1) RLR 216(S)).

The respondents did not, in my view, satisfy the requirements.

The respondents' heads of argument were only filed on 19 February, on the eve of the hearing on 20 February 2015, five months late. The filing of the heads was obviously not in compliance with the Rules as no order for the upliftment of the bar had been granted.

The explanation by the respondents for the delay of five months was unacceptable. Mr *Samukange* sought to persuade the court that there was misfiling of the applicants' heads at the legal practitioner's offices. There was nothing before the court other than Mr *Samukange's* say so, to prove that there had been such misfiling of documents.

In fact, Mr *Samukange's* submissions disclosed a high degree of insincerity. The heads of argument appear to have been prepared by Mr *Samukange* himself. They bear the same date that they were issued by the Registrar, that is, 19 February 2014. The preamble to the heads state as follows:

> "The present Heads of Argument are filed out of time and at the hearing of the matter, an oral application for the removal of the bar for failure to file Heads of Argument timeously will be made."

It is therefore apparent that the respondents' legal practitioner was aware as of 19 February 2015 that the heads had been filed out of time. This matter was heard on 31 March 2015. Mr *Samukange* cannot genuinely have expected the court to believe that he had forgotten within a period of 40 days what was contained in the heads of argument. Assuming he had forgotten, this is reflective of a lackadaisical attitude. It would mean that he had not prepared for the hearing. Had he done so, it would have been at the fore of his mind that he was required to apply for the upliftment of the bar first. He, however, had to wait for the applicants to raise the issue. This lackadaisical attitude is further compounded by Mr *Samukange's* own submissions that he believed that the applicants were not going to oppose the application for the upliftment of the bar. A prudent legal practitioner would have engaged the applicants prior to the hearing on whether or not the application was going to be opposed. Assuming that the application was not going to be opposed, the respondents were still required to apply for removal of the bar and advise the court that the application was not opposed.

It is apparent that the respondents were too presumptuous, turning a blind eye on all their previous transgressions. The transgressions were indicative of the respondents' disdain of the rules. The following are the respondents' transgressions which are a clear reflection of their dilatory approach to the entire litigation between the parties:

1. On 25 March 2014, Mr *Samukange* who was familiar with the matter in case number HC 8991/13 did not attend the pre-trial conference. Mr *McGowan* who was not familiar with the matter attended with instruction to make an application on a matter he was not familiar with necessitating the postponement to 1 April 2014 in order for Mr *Samukange* to attend the pre-trial conference.
2. Mr *Samukange* did not attend the pre-trial conference on 1 April 2014. An explanation was given in the application for rescission for the non-attendance of the legal practitioner being that he was in Belgium attending the wedding of the daughter of the fifth respondent. The legal practitioner opted to attend the wedding of the respondent's daughter ahead of court.
3. There was no prior communication to the court or to the applicants that Mr *Samukange* would be unavailable to attend the pre-trial conference on 1 April

2014. The explanation for the lack of communication given in the application for rescission is that the legal practitioner gave instructions to his secretary to prepare a letter explaining his unavailability on the date of hearing and seeking the postponement of the matter. It appears the alleged letter never left the legal practitioners' offices. In any event, it is not proper to seek a postponement by letter and believe that the request would be granted without a formal application. The respondents clearly had the misconception that an application is granted on the mere asking.

4. None of the respondents attended the pre-trial conferences on both 25 March and 1 April 2014. The respondents required the leave of the judge to absent themselves from the PTC and it appears they did not have the leave. Except for the explanation for the failure of the fifth respondent to attend on 1 April, 2014 because he was at his daughter's wedding, there was no explanation why the other respondents did not attend both pre-trial conferences. One would understand if at least one of them appeared on behalf of all of them.
5. After filing an application for rescission of the default judgment, the respondents neither filed an answering affidavit nor set the matter down for hearing within 30 days of service of the applicant's opposing papers on their legal practitioners as is expected in terms of the Rules.
6. An answering affidavit was filed out of time on 10 July 2014 and apparently in response to the present application filed on 30 June 2014 and served on the respondents on 8 July 2014. In other words, the answering affidavit was filed two days after service of the application. This was obviously intended to defeat the purpose of the present application.
7. The respondents did not file their heads of argument timeously in the present application. The applicants filed their heads of argument on 29 July 2014 and served the same on the respondents on 29 August 2014. The respondents only filed their heads of argument on 19 February 2015, almost six months after service of the applicants' heads on them.
8. The respondents were served with the notice of hearing on 9 February 2015. The respondents' legal practitioner only wrote to applicants' legal practitioners on 19 February 2015, 10 days after service of notice of set down and a day before the hearing, seeking a consolidation of cases number HC 2754/14 and HC 5356/14. This

was the second occasion to file papers out of time, the first having been failure to file the respondents' answering affidavit in case number HC 2754/14.

9. Despite being aware that their heads of argument were out of time, the applicants did not file a chamber application seeking the upliftment of the bar.
10. Despite the matter having been postponed on two occasions, giving the respondents 48 days after the date of service of the notice of set down of the hearing within which to file an application, they still failed to do so.
11. On the date of hearing of the application on 31 March 2015, the respondents did not immediately make an application for upliftment of the bar at the commencement of the hearing only doing so upon the issue being raised by the applicants.

Given the extent of 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. The blame for respondents' predicament cannot be placed on anyone other than the respondents themselves and their legal practitioner. In fact, it is the applicants who have suffered prejudice by failing to realise the benefits of an order granted in their favour because of the respondents' ineptitude.

The trajectory of all the three matters was necessary as the manner in which the respondents conducted themselves in the matters had a bearing on the determination of the applications for upliftment of bar and postponement. The conduct clearly reflects the respondents' and their legal practitioner's 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 in case number HC 2754/14.

The respondents have exhibited a casual approach to all the matters between the parties. The interests of justice do not justify the upliftment of the bar or that they be given further time to file a written application for the upliftment of the bar. There must be finality to litigation and the respondents cannot be over-indulged for their ineptitude to the detriment of the applicants.

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

It was accordingly ordered that:

1. The application by the respondents for postponement to enable the applicants to file a chamber application for upliftment of the bar be and is hereby dismissed.
2. The application by the respondents, for the upliftment of bar for failure to file heads of argument, be and is hereby dismissed.
3. The application for dismissal of case number HC 2754/14 be and is hereby granted with costs.

Chimbote Maraca Attorneys, applicant's legal practitioners
Ventura's and Samukange, respondent's legal practitioners