ANGELA BLAZENKA GREY
and
URSUAL THERESA ANN PRETORIUS
and
FARAYI SIYAKURIMA N.O.
versus
A.CARIDADE INVESTMENTS (PRIVATE) LIMITED
t/a PORTUGAL RESTAURANT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 September and 28 October, 2016

Opposed application

T Mpofu, for the applicants
T Biti, for the respondent

MANGOTA J: The current application was simple and straightforward. The applicants applied for condonation of late filing of Heads. The respondent opposed it.

The air which surrounded the application was, however, like a poisoned chalice. The legal practitioners who represented the parties did, without doubt, exhibit an unfriendly attitude towards each other. Each of them flexed the muscles of his mind in an effort to show his colleague on the other side that he was intellectually superior to him. Their conduct depicted such often watched horror movies as the "*clash of the titans*". That fact alone tended to, and did actually, cloud the issues which were before the court in a very unfortunate manner. So unfriendly were the legal practitioners that the court had, at the end of the parties' submissions, to excuse their clients and deal with the observed matter to its satisfactory conclusion. The ending was, however, a happy one as each legal practitioner realised the folly of his conduct and tendered an apology to the other and vice versa.

The court mentions, in passing, that legal practitioners are officers of the court. Their duty is first and foremost to the court. They, however, should at all material times protect the interests of their clients. But in achieving that purpose, they should make every effort not to descend into the arena. They should separate issues which relate to themselves as

professionals from those which pertain to their clients. The ethics of their profession enjoins them to treat each other with dignity and decorum which befit their profession and their status as officers of the court. They are a college of learned friends and they must, therefore, conduct themselves as such at all material times without fail.

By way of background, the applicants issued summons against the respondent on 23 July, 2015. The respondent entered appearance to defend on 4 August, 2015. On 14 August, 2015 it filed a request for further particulars. On 21 August, 2015 the applicants responded to the respondent's request. They, on 2 September 2015, issued a notice to plead and an intention to bar. On 9 September 2015 the respondent filed its exception to the applicants' claim(s). It filed its Heads of Argument in respect of the exception. It served the Heads on the applicants on 23 September, 2015. The applicants filed their Heads on 10 November, 2015.

The respondent's exception was set down for hearing on 17 March, 2016. During the hearing, the respondent submitted that the applicants' Heads had been filed out of time. It stated that they should have been filed within ten (10) days from 23 September, 2015. They should, according to it, have been filed on 7 October, 2015. The applicants' response was that their Heads were compliant with the rules of this court. They, in this regard, relied on NDOU J J's judgment in *Union Metallurgical & Technical Services* v *Sithole & Anor*, 2005 (1) ZLR 404 (H).

TAGU J before whom the parties appeared on 17 March, 2016 postponed the hearing of the respondent's exception. He ordered the applicants to apply for condonation of late filing of Heads. TAGU J's order of 17 March 2016 did, therefore, give birth to the present application.

The applicants' understanding of the *Union Metallurgical* case was that Heads should be filed within ten (10) days from the date the matter was set down for hearing. The understanding was, with respect, erroneous. The case, in the view with the court holds, made a distinction of applications which are set down in terms of r 223 (1) from those which are set down in terms of r 223 (2) of the High Court Rules, 1971. It, in short, distinguished unopposed, from opposed, applications. It captured r 223 (1) (a) to (e), particularly subpara (e) which deals with applications in which a notice of opposition and opposing affidavit *have not been filed*. It stated that, where these have not been filed, the application is, to all intents and purposes, unopposed. It laid emphasis on the point that, in unopposed applications, the

question of the bar and the attendant application for the upliftment of the same and/ or condonation did not arise.

The facts of *Union Metallurgical* case are, without doubt, distinguishable from those of the present application. The distinction lies in that, in the current application, the applicants filed their notice of opposition as well as their opposing affidavit to the respondent's exception. The exception was, therefore, opposed. It, in that regard, fell for determination under r 223 (2), and not r 223 (1), of the rules of this court.

The respondent stated, and correctly so, that the applicants should have followed the tenor and spirit of r 238 of the High Court Rules, 1971. The rule deals with the issue of filing of Heads by parties who are legally represented. Rule 238 (1) relates to the filing of the applicant's Heads. Rule 238(2) pertains to the filing of the respondent's Heads.

The respondent which had taken exception to the applicants' claim(s) acted in terms of sub r (1) of r 238. It filed its Heads with the court and served the same upon the applicants on 23 September, 2015.

On receipt of the respondents' Heads, the applicants were enjoined to have acted in terms of sub-r (2) of r 238. They should have filed their Heads with the court within ten (10) working days of their receipt of the respondent's Heads. They should, in other words, have acted in terms of sub-r (2a) of the High Court Rules, 1971. The rule stresses that:

> "2a) Heads of Argument referred to in subrule (2) shall be filed by the ….respondent's legal practitioner (i.e applicant's legal practitioner) not more than ten days after heads of argument of the applicant or excipients, as the case maybe, were delivered to the respondent in terms of subrule (1):
>
> Provided that –
>
> (i) …..
> (ii) The respondent's Heads of Argument shall be filed at least five days before the hearing." (emphasis added).

The applicants should, therefore, have filed their Heads with the court on 7 October, 2015. The Heads which they filed on 10 November, 2015 were filed out of time. The applicants were barred in terms of sub-r (2b) when they filed the Heads on the mentioned date. It was for the mentioned reason, if for no other, that TAGU J postponed the hearing of the exception on 17 March, 2016 and ordered the applicants to apply for condonation of late filing of Heads. The current application was, therefore, the applicants' compliance with TAGU J's correct ruling.

Paragraph 11 of the applicants' founding affidavit was pertinent. It was in the mentioned paragraph that the applicants acknowledged that their Heads were filed outside the time which the rules of this court prescribed. They said:

> "At the hearing (i.e of 17 March, 2016) the Honourable Justice TAGU ordered that the matter be postponed to allow the plaintiffs (i.e the applicants) to make an application for condonation of the late filing of Heads of Argument." (emphasis added).

It was evident from the statement, that TAGU J had, as it 17 March 2016, observed that the applicants' Heads had been filed out of time. It was, accordingly, ill-advised for the applicants to have continued to base their submissions *in casu* on NDOU J's judgment as was enunciated in the *Union Metallurgical* case. It required little, if any, debate to assert that, if the *Union Metallurgical* case operated in the applicants' favour as they would have the court believe, TAGU J would not have ordered them to apply for condonation as he did. He would, in all probability, have been satisfied with the applicants' explanation as contained in the case and ruled that their filing of Heads on 10 November, 2015 was in order. The fact that he ruled to the contrary showed that their reliance on the *Union Metallurgical* case was misplaced.

The respondent stated, and correctly so, that it was not the applicants but their legal practitioners who were at fault. These and not the applicants misinterpreted the *Union Metallurgical* case. They did not appear to have read and analysed the contents of NDOU J's judgment. They also did not appear to have taken the trouble to acquaint themselves with rule 238 of the rules of this court. They inadvertently placed reliance on the cited case and, in their probably genuine but mistaken belief, remained of the view that Heads which they filed on 10 November, 2015 were not filed out of, but within, the prescribed time limits.

The applicants were not competent to effectively explain the cause of the delay. The issue of when a party's Heads should be filed with the court is, strictly speaking, one of procedure. The legal practitioner and not his client is appropriately placed to explain the delay. The applicants' legal practitioners were, therefore, better placed than the applicants to have deposed to the latter's founding affidavit as Mr Nyeperai did. The application was, to the stated extent, not defective.

The respondent stated in para 9.6 of its opposing affidavit as follows:

> "Ignorance of the law is no defence and therefore a reason based on an unreasonable understanding of the law is no reason at all."

The court remained of the view that the applicants' legal practitioners were not

ignorant of the law. They, if anything, placed an incorrect interpretation on the case which they thought supported their position. They, to the stated extent, remained fallible as all persons, legally trained minds included, often are.

The mind of a person is, by design, fallible. It sees things as real which are not such. If it was not fallible, then the world in which people live would be a perfect place in which to abide. It was as a result of society's acknowledgment of the fallibility of man's mind that the systems of justice delivery the world over put into place such corrective mechanisms as reviews and/or appeals of matters which court structures deal with on a day –to- day basis. The current is one such case which but only acknowledges the obvious – the fallibility of the minds of the applicants' legal practitioners. They entertained what appeared to have been a genuine but mistaken view of the *Union Metallurgical* case.

The applicants' legal practitioners would have done well to read NDOU J's judgment together with r 238 of the rules of this court. If they had done so, the probabilities are that they would not have fallen into the error which they fell. The error was, in the court's view, a genuine one.

That the applicants were barred when they filed their Heads outside the prescribed time limits required little, if any, debate. Whether or not the bar which operated against them should have been uplifted depended on two principles. These comprised:

(i) the applicants' explanation for the delay – and

(ii) their prospects of success on the merits in regard to the exception which the parties placed before TAGU J for determination.

The above principles were succinctly stated in *GMB* v *Muchero*, 2998 (1) ZLR 216, 220 E-F. Hebastein and Van Winsen made further clarifications of the above mentioned principles. The learned authors emphasised in *The Civil Practice of the Supreme Court of South Africa*, 4th ed, pp 897-898 as follows:

> "The factors usually weighed by the court in considering applications for condonation …. include the degree of non-compliance, the explanation for it, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

The applicants proffered a reason for their delay. The reason was not unreasonable. They file their Heads twenty-three (23) working days out of the prescribed time limits.

In *Zimplastics (Pvt) Ltd* v *Rolley Coobelt*, HH 32/14 the court held that Heads which were filed nineteen (19) days out of the period which the rules prescribed were not

inordinately delayed. The cited case fortified the view which the court held of the present application. It was convinced that the delay of twenty-three (23) days was not inordinate. That was all the more so given the misinterpretation which the applicant' legal practitioners placed upon the *Union Metallurgical* case.

The legal practitioners explained their reasons for the delay. They stated that the case which they relied upon had neither been appealed against nor set aside. Their lack of appreciation of the law was neither willful nor *mala fide*. They did not exhibit any evidence of a deliberate intention to flout the rules of court. Theirs was, in the court's view, a genuine misinterpretation of the law. Their application for condonation was, therefore, not without merit.

The court viewed the applicants' legal practitioners' misinterpretation of the law with some disquiet. They did not, as has already been stated, take the trouble to read the rule of court which pertained to the issue of filing of Heads. They placed their reason for the delay entirely on the case which they cited. They should have been more circumspective than they did. A reading of the relevant rule [i.e. 238] would easily have showed them that their reliance on the case was misplaced. They, in the process, took an unnecessary detour which was very much to the inconvenience of not only the court but also the respondent whom they put to unnecessary expense.

There was no doubt that the parties were *ad idem* on the point that the exception which the respondent took had to be argued. It was for the mentioned reason that they both appeared before TAGU J on 17 March, 20016. But for the applicants' legal practitioners' misinterpretation of the case upon which they placed reliance, the probabilities are that the parties would have done justice to their respective cases on the exception.

The applicants' application for condonation and the respondent's opposition of the same only served to confirm the parties' respective positions on the exception as well as on the main case. The need to avoid unnecessary delay in the finalisation of the exception and the main case could hardly be over-emphasised.

The court took the liberty to read the Heads which the applicants filed on 10 November, 2015. The Heads related to the exception which the respondent took. It remained satisfied that the applicants' prospects of success on the merits in respect of the exception were strong.

The court considered all the circumstances of this application. It was satisfied that the applicants proved their case on a balance of probabilities. It, in the premise, ordered as follows:

(1) That the application be and is hereby granted.

(2) That the applicants be and are hereby ordered to pay the costs of the application.

Costa & Mudzonga, applicants' legal practitioners
Tendai Biti Law, respondent's legal practitioners