AL SHAMS GLOBAL BVI LIMITED
versus
HSBC PRIVATE BANK (UK) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 2 November and 21 December, 2016

Opposed application

F Girach, for the applicant
A De Bourbon, for the respondents

MANGOTA J: The respondents are *peregrini* financial institutions. They are domiciled in the United Kingdom.

The applicant is a *peregrine* entity. Its principal place of business is Shed No. B1, Al Khabaissi United Arab Emirates, Dubai. One of its directors, a Mr Jayesh Shah ["Mr Shah"] is a resident of Zimbabwe.

The story which relates to the present application, as the applicant unfolds it, runs in this order: In or about February 2007, the applicant concluded a loan agreement ["the agreement"] with the Reserve Bank of Zimbabwe ["RBZ"]. In terms of the agreement, the applicant would lend and advance to RBZ $22 million ["the loan"]. RBZ would, it was agreed, pay the following fees to the applicant:

(i) an arrangement fee of 18% (i.e. $3 960 000) of the loan-and

(ii) a disbursement fee of 1% (i.e. $220 000) of the loan.

In toto, therefore, RBZ was enjoined to pay the sum of $4 180 000 to the applicant.

At about the time of the conclusion of the agreement, Mr Shah operated a personal bank account with the first respondent. The account number was/ is 244970, HSBC, London Branch. In July 2006, Mr Shah transferred $28 541 718. 92 which he held at his Geneva based Credit Apricole Indosuez ["CAI"] Bank to his London based account number 244790. He later instructed the first respondent to re-transfer the stated sum, with interest, into his CAI account. The first respondent, he alleged, did not carry out his instructions.

Mr Shah averred that it became apparent to the applicant and him that the respondents, through the employee of one of them, had made a suspicious activity report ["SAR"] to the Serious Organised Crime Agency ["SOCA"] concerning his bank transactions. The report, he stated, was followed by three similar reports. The employee, he said, was acting within the course and scope of the respondents' business. He stated that RBZ got to know of the reports which the respondents made to SOCA. It carried out its own investigations of the matter especially on the applicant's business operations. It, according to the applicant, remained concerned about whether or not the applicant, or Mr Shah, or both committed any money laundering offence in Zimbabwe or elsewhere.

The applicant alleged that it, on numerous occasions, requested the respondents to allay the fears of RBZ but they did not. It said in November 2006, it notified the respondents that it would hold them accountable for any loss or prejudice which it would suffer as a result of their failure to furnish RBZ with a convincing explanation as to why the applicant and Mr Shah were being investigated. It stated that in February 2007, RBZ cancelled the agreement and returned the loan to the applicant. It claimed that the respondents caused the cancellation when they failed to furnish RBZ with the requisite information explaining the basis on which the SAR had been made. It, therefore, sued them for recovery of the fees which it said it would have earned if RBZ had not cancelled the agreement.

The above constituted the substance of the applicant's suit against the respondents. It sued them in delict and not in contract. It claimed what are often referred to as delictual damages.

The applicant's suit was preceeded by its successful application:

(a) to confirm the jurisdiction of this court- and

(b) for leave to serve process on the respondents at the latter's registered addresses in the United Kingdom.

It filed summons and declaration on 14 August, 2013. It served those on the respondents on 3 September, 2013.

The respondents entered appearance to defend on 24 September, 2013. They, on 18 October, 2013, filed:

(i) a special plea of prescription:

(ii) a special plea of jurisdiction- and

(iii) an exception to the applicant's summons.

They filed their Heads on 7 November, 2013. They served these upon the applicant on 18 November, 2013.

The matter which related to the special plea and exception was set down for hearing on 18 July, 2014. On the mentioned date, the hearing was postponed to 21 July, 2014.

In terms of the rules of this court, the applicant should have filed its Heads ten (10) days from the date of its receipt of the respondents' Heads or five (5) days from the date of the hearing of the special plea and the exception. It should, therefore, have filed its Heads either on 3 December, 2013 or on 10 or 14 July, 2014 [depending on whether or not the set down date was 18th or 21st July, 2014].

The applicant did not file its Heads on 3 December 2013. It also did not file those on 10 July, 2014 for the set down date of 18 July, 2014 or on 14 July, 2014 for the set down date of 21 July, 2014. It filed them on 18 July, 2014 when the bar which the rules of court imposed upon it was already operative.

The applicant unsuccessfully sought the co-operation of the respondents. It requested them to consent to the upliftment of the bar. These refused to oblige. It, as a last resort, filed the present application. It moved the court to condone its late filing of Heads as well as to lift the bar. It submitted that the late filing of Heads was not of its making. It blamed counsel whom it said it engaged, briefed and requested to prepare and file its Heads within the time which the rules of court prescribed. Counsel, it said, remained of the view that he could file the Heads five days before the hearing date. It stated that counsel was, owing to the complexity of the matter, unable to finalise and file the Heads in, but out of, time. It acknowledged its fault for not filing its heads timeously. It sought the court's indulgence as, according to it, the omission which it stood accused of was not intentional. It submitted that no party would suffer any prejudice if the matter was allowed to proceed to be decided on the merits. It remained of the view that justice demanded that it be heard on the merits. It submitted that it had a good cause of action. It stated that it would not be fair for it to be denied its day in court as a result of circumstances which were not directly of its own making.

Lewsi Uriri whom the applicant engaged and requested to prepare as well as file Heads on its behalf deposed to an affidavit supporting the application. He stated, under oath, as follows:

> "(3) ……
> (4) After accepting the brief and perusing the documents contained therein I became aware of the fact that preparing the Heads would require a substantial amount of time to prepare the

> same. I advised the applicant that the heads of argument would only need to be filed five days before the date of hearing and was optimistic that I would be able to meet that deadline.
> (5) Given the issues raised in the respondents heads of argument as well as the time available for me to complete them, I was unable to complete the heads of argument in time for the hearing of this matter and only completed them shortly before the hearing."[emphasis added].

Dududzile Ndawana, the respondents' legal practitioner, deposed to her client's opposing affidavit. She refrained from making specific comments with regard to paras 1, 2 and 5 to 19 of the founding affidavit. She stated that the respondents denied the recitation of the background facts. She said they did not admit the contents of the mentioned paragraphs. The respondents, according to her, filed the exception, special plea to jurisdiction and prescription on 18 October 2013. She stated that the applicant failed to file its Heads within ten (10) days of its receipt of the respondents' Heads. She averred that the applicant filed its Heads on 18 July, 2014 in anticipation of the set down date of 21 July, 2014. She stated that, at the hearing of 21 July 2014, counsel who appeared for the applicant did not make any oral application for condonation. He, according to her, moved that the matter be postponed as the advocate who was to represent the applicant at the hearing was said to have been out of the country. The hearing, she said, was postponed and the court ordered the applicant to pay wasted costs. She took issue with the manner in which the present application was prepared and filed. She stated that it was filed some twenty (20) days after it had been prepared. She said the delay of twenty (20) days was not explained in the founding affidavit. She averred that the requirements for the condonation sought were not set out. She insisted that the applicant should not be granted the indulgence which it was/is seeking. She stated that the date when the advocate was instructed to prepare the applicant's heads was not stated. She confirmed the applicant's assertion which was to the effect that the respondents' did not consent to the upliftment of the bar. She said the applicant and its legal representatives were to blame for the late filing of the applicant's Heads. She averred that the long delays which accompanied the applicant's prosecution of its claim were not made in good faith. It was, according to her, intended merely to harass the respondents. She insisted that the present application was not valid and had no prospects of success. She moved the court to dismiss it with costs on a higher scale. She prayed that the applicant's action under HC 6561/13 be determined in the respondents' favour on the basis of either the exception, the special plea to jurisdiction or on the basis of prescription with costs on the same scale.

The respondents' prayer was very startling. They engaged in what may, for lack of a better phrase, be described as pre-emptive action. They moved the court to:

(a) dismiss the present application;

(b) uphold their exception, special plea to jurisdiction and splecial plea on prescription and, on the strength of such stated matters-

(c) dismiss the applicant's claim which it filed under case number HC 6561/13.

They moved the court to make a decision on paragraphs (b) and (c) above without hearing the applicant. They not unnaturally requested for what they knew could not happen. No court which is worthy its salt would decide as they moved the court to do *in casu*.

The respondents' prayer cannot be viewed in isolation. It should be viewed in light of their refusal to consent to the upliftment of the bar as well as the special plea and the exception which they raised. All this, it would appear, was meant to stall progress in the hearing and finalisation of the main case which the applicant filed under case number HC 6561/13.

The current is an application for upliftment of the bar. The applicant filed it under r 84 of the High Court Rules, 1971. The rule reads:

"84 Removal of bar and effect

(1) A party who has been barred may-
(a) make a chamber application to remove the bar; or
(b) make an 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.
(2)……."

The applicant stated that it made up its mind not to act in terms of r 84 (1) (b). It said it decided to act in terms of para (a) of subrule (1) of r 84. It submitted that it did so out of its desire to avoid unnecessary further delay of the hearing of the matters which the respondents raised and, by way of logical sequence, of the main suit.

But for the attitude of the respondents, this application would not have been necessary. Their refusal to consent to the upliftment of the bar when requested to do so compelled the applicant to apply as it did. The application consumed the time, energy and effort of not only the court but also the applicant.

That the applicant filed its heads out of time required little, if any, debate. The applicant's assertion which was to the effect that there was no express requirement for an applicant to file its Heads within ten days of a respondent filing its Heads was misplaced. The applicant did not appear to have read and understood the contents of r 238 of the High Court Rules, 1971 : The rule refers to Heads of Argument. It reads, in part, as follows:

"(1) If, at the hearing of an application, exception or application to strike out, the applicant or excipient, as the case may be, is to be represented by a legal practitioner –

(a) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he intends to rely on and setting out the authorities, if any, which he intends to cite; and
(b) immediately afterwards, he shall deliver a copy of the heads of argument to every other party and file with the registrar proof of such delivery.

(1a) ……..

(2) Where an application, exception or application to strike out has been set down for hearing in terms of subrule (2) of r 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar in accordance with subrule (2a), heads of argument clearly outlining the submissions relied upon by him and setting out the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party " [emphasis added].

The contents of the cited subrules are clear, cogent and to the point. They relate to opposed applications where both parties are legally represented. They insist that the applicant [the respondents *in casu*] who is legally represented would not have his special plea and exception set down for hearing unless he complies with paragraphs (a) and (b) of subrule (1) of r 238. They also call upon the respondent, [the applicant *in casu*], who has been served with the other party's heads to make a corresponding response in accordance with subrule (2a) of r 238 of the High Court Rules, 1971. The subrule reads:

"(2a) Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subrule (1)" [emphasis added]

Subrule (2a) of r 238 is clear. It is mandatory. It is not discretionary as the applicant would have the court believe.

The applicant received the respondents' Heads on 18 November, 2013. It should, in terms of subrule (2a) of r 238, have filed its Heads on 3 December, 2013. It did not do so for the reasons which Lewis *Uriri* stated in his supporting affidavit to the application for condonation of late filing of Heads. It waited for a stretch of some thirty-three (33) weeks. The delay appeared to have been very inordinate. It was, accordingly, barred in terms of subrule (2b) of r 238 of the rules of court.

Lewis Uriri said he relied on the proviso to subrule (2a) of r 238. The proviso reads, in part, as follows:

"(2a) ……..
Provided that –

> (i)……..
> (ii) the respondent's heads of argument shall be filed at least five days before the hearing." [emphasis added].

He filed the Heads on 18 July, 2014. He did so in anticipation of the set down date of 21 July, 2014. He filed them four days out of the time which the proviso prescribed.

The applicant, once again, remained barred to the observed extent. It suffered double jeopardy. It was barred in terms of the main rule. It was also barred under the *proviso* to the *main rule.*

Lewis Uriri took responsibility for the applicant's misfortunes. He said he misjudged the complexity of the matter which the applicant engaged him to perform for them. He submitted that the issues which the respondents raised were of a formidable character. He stated that he wanted to do justice to the applicant's case and his work in the mentioned regard accounted for the delay. His explanation is not unreasonable.

It is debatable whether or not *Uriri* should have relied on the main rule or the proviso to the same in his preparation and filing of the applicant's Heads. In *Vera* v *Imperial Asset Management*, 20016 (1) ZLR 436 MAKARAU J (as she then was) made a distinct effort to clarify the meaning and import of the main rule and its proviso. She stated as follows:

> "The operative part of the rule is not to be found in the *proviso*. It is in the main provision and is to the effect that the respondent is to file his or her Heads within 10 days of being served with the applicants' Heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant's Heads close to the set down date, he or she shall not have the benefit of the full 10 days period within which to file and serve Heads as stipulated in the main provision, but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule."

MUTEMA J followed closely the reasoning of MAKARAU J. He remarked in *Assistant Master & Anor* v *Ellingbarn Trading*, 2013 (1) ZLR 332 that:

> "the respondent is to file his Heads within ten days of being served with the applicant's Heads. If the respondent has been served with the applicant's Heads close to the set down date, he shall not have the benefit of the full ten day period within which to file and serve Heads but must do so five clear days before the set down date."

The reasoning and logic of the learned judges make a lot of good sense. Be that as it may, the same does not preclude the respondent who has been served with the applicant's Heads from taking advantage of the proviso and still file his Heads within five clear days from the set down date. As long as the proviso remains in the rules, a party who, relying upon it, files its Heads five days from the set down date, cannot be barred let alone be penalised for not having complied with the main rule in preference to the *proviso*.

It is, in the court's view, imperative that the attention of the High Court Rules Committee be drawn to subrule (2a) of r 238 of the rules of court with a request to attend to the proviso. The proviso appears to offer an unfair advantage to one party over the other. It causes legal practitioners who rely upon it to be lax in the preparation and filing of their clients' Heads with the effect of causing unnecessary delays which adversely affect the due administration of justice.

A party who has been served with the other party's Heads may not act until he receives a set down date from the registrar. The Heads which such party prepares and files with the court five days from the date of hearing of the matter put a lot of pressure and strain not only upon the court but also upon his adversary who has to read and digest with little, if any time, the Heads which he files five days before the set down date in response to Heads which were served upon him, say, six or seven months ago.

A case in point on the stated aspect of the matter is that which Mr *Uriri* stands accused of. He received the respondents' Heads in November 2013. He relied on the *proviso,* properly so, and filed the applicants' Heads some thirty-three weeks later. He, therefore, had all the time in the world to research and make a very good case for the applicant. It would, under the stated circumstances, have made little, if any, sense for the respondents' legal practitioners to have read and contextualised the applicant's argument as contained in its Heads five days before the set down date. The court, in this regard, associates, itself with the remarks of ROBINSON J who, in *Muzerengi* v *Muchekwa*, 1972 (1) ZLR 58 (H) said:

> "Legal practitioners are forewarned that, in future, they will be required to comply with r 232 (c) in regard to the filing of their heads of argument. This will have the dual advantage of signalling to the judges due to hear the opposed matter that it is likely that the matter will proceed on the appointment date and of enabling the judge to study and consider the points and authorities raised in the Heads before the date of hearing which, in turn, should result in a more meaningful hearing for all concerned."

The court remains satisfied that, on the strength of the proviso to subrule (2a) of r 238, the degree of non-compliance which the applicant suffered was minimal. It filed its Heads four days out of time. The explanation which Mr *Uriri* gave for non-compliance was not unreasonable. The matter which the applicant filed with the court under case number HC 6561/15 involves a huge sum of money. It is, therefore, of substantial importance to the applicant. The respondents' attitude and conduct towards the issue of the bar contributed in a material way to unnecessary delays which could easily have been avoided. [See *Maheya* v

Independent African Church SC 58/07, *Bish* v *Secretary for Education*, 1989 (2) ZLR 240 (H) 242D – 243C].

The applicant hinged its case on paragraphs 13, 16, 18 and 19 of its founding affidavit. The respondents' opposition of those paragraphs was devoid of merit. They were not privy to the contract which the applicant said it concluded with the Reserve Bank of Zimbabwe.

The applicant, as already stated, sued the respondents' in delict. It must have its day in court. The court will naturally decide if the respondents are, or are not, liable.

The court has considered all the circumstances of this case. It is satisfied that the applicant proved its case on a balance of probabilities. The application is, accordingly, granted as prayed.

Dube, Manikai & Hwacha, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners