MINISTER OF FINANCE & ECONOMIC DEVELOPMENT
versus
MEIKLES LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 21, 22 and 26 June 2017 & 26 July 2017

Opposed Application

H Magadure, for the applicant
F Mahere, with *A Rutanhire* for the respondent

DUBE J: The applicant has filed a chamber application for removal of a bar in in terms of Order 12 r 84 (1a) of the High Court Rules 1971, [hereinafter referred to as the rules].

The applicant is the Minister of Finance and Economic Development, cited in his official capacity. The respondent is Meikles Limited, a company carrying on business in Zimbabwe. The brief background to this dispute is as follows. Around January 1998, the respondent placed a deposit of $42 620 947.30 with the Reserve Bank. The funds were subsequently seized and used by the Government of Zimbabwe. The money remained unpaid over the years and a balance of $42 648 378.76 remains outstanding. In August 2015 the Reserve Bank (Debt Assumption) Act, Chapter 2015, [hereinafter referred to as the Act], was promulgated. In terms of s4 of the said Act, the applicant assumed the Reserve Bank debt.

On 25 October 2016 the respondent filed an application claiming the money outstanding. The respondent avers in its application that it compromised on the interest rate chargeable on the debt and agreed to a reduction of interest from 12 % to 8% per annum. In terms of a schedule to the Act, the interest rate applicable to the outstanding debt due to the respondent is 8 % per annum. Section 3 (d) of the Act contradicts the schedule in that it provides for interest at 5% per annum. The respondent asserts that the discrepancy with regards the

interest rate amounts to an unlawful deprivation of property. The respondent challenges the applicant's position which is to calculate interest from 2009 instead of 1998 which it argues amounts to an unjustifiable and unconstitutional deprivation of the respondent's property. The respondent seeks an order declaring the assumption of the Reserve Bank debt by the applicant unconstitutional for violating s 57 and s 71 of the Constitution of Zimbabwe. In the alternative it seeks an order declaring the interest rate in relation to the respondent as prescribed by s 3 (d) of the Act unconstitutional and a declaration that the respondent is entitled to accrual of interest on its debt at the rate of 8% interest per annum calculated from 1998 until the date of full payment. It also seeks an order for the outstanding balance and a declaration that the functions assigned to the Debt Management Office of the applicant's Ministry in terms of s5 of the Act violates s 68 (1) of the Constitution. The applicant failed to file opposing papers within the stipulated times resulting in it being barred in terms of Order 32 r 233 (3).

The applicant's explanation for the failure to file a notice of opposition on time is as follows. After receiving the application on 26 October 2016, the parties engaged in negotiations with a view to agreeing on an out of court settlement. A meeting was held between the Governor of the Reserve Bank of Zimbabwe and the respondent's representatives on 14 November 2016. A follow up meeting was held between the Minister himself and the Chairperson of the Meikles Board the following day. Owing to the complexity of the issues arising at the meeting, the parties agreed that court process would be suspended to afford the parties an opportunity to revisit the figures and paper trails to establish the applicable rates of interest and amounts due. The date on which the parties had agreed for the purposes of tabling workable terms upon which a settlement could be achieved was the 18th of November 2017. The parties agreed to extend the period of negotiations to 22 November 2016, which period was extended to an unadvised date to allow the process of reconciliation of documents to take place. The confusion arose when, out of respect for the court, the applicant's legal practitioners wrote to the Registrar of the court on 18 November 2016 informing him that the parties' negotiations remained ongoing. On 5 December 2016, the respondent's legal practitioners wrote to the Registrar and made indications that there was no such arrangement involving suspension of court process and that the applicant was in fact barred effective 18 November 2016.

The applicant submitted that because the debt was contracted by the Reserve Bank in 1998 and the fact that the paper trail surrounding the debt spans nearly two decades, it became necessary to establish the paper trail as the debt involves an institution separate and detached from his Ministry. This fact had a bearing on the pace at which the negotiations proceeded. A conscientious analysis of the paper trail surrounding the issue dating back to the contraction of the debt in 1998 was necessary. The Minister was, during these negotiations, required to attend to other national duties such as preparing the national budget for the following year. He was left with little room for other assignments. He was for this reason, not available to have a meeting to conclude the matter with the respondent. The attitude of the respondent's legal practitioner has forced their well-intentioned offer of negotiations off the table and has left them no choice but to pursue the litigation route.

The Minister submitted further that the application is *bona fide* and that he has not made this application with any form of malice or underhandedness nor any intention to delay the respondent's claim. He asserts that there has not been any reckless or intentional disregard of the rules of court as the applicant did not take a unilateral decision not to file opposing papers. He did so in consultation and agreement with the respondent. The applicant submitted that he should be allowed to allow for important constitutional issues raised to be fully ventilated. The question regarding the validity of s5 of the Act should be fully argued and decided as it has a bearing on some other debts assumed by Government.

On the merits, the applicant submitted that it has prospects of success or defense to the main claim. The Minister denies that the respondent is owed anything. The applicant stated that the admissions made were made on a without prejudice basis. His position that the respondent has already been issued securities to offset the indebtedness of 49 million dollars in full through the issuance of treasury bills amounting to 78 million dollars. He contended that the respondent is indebted to the applicant in the sum of thirty million dollars resulting from an overpayment. The applicant should be paid back the balance arising from that computation. The Minister is contemplating making a counter claim. He challenges the applicant's claim of 8% compounded interest which he avers was never agreed on. He wants the issue of interest to be determined. He insists that there was a violation of the *in duplum* rule resulting in it being overcharged. The applicant submitted that the respondent's application is replete with material disputes of fact. Its

claim ought not to have been brought as an application. The applicant contended that because the respondent's application deals with constitutional issues these require adequate submissions from both parties. His position however is that these lack merit.

The respondent defends the application. At the hearing, I allowed the parties, for convenience, to argue both the preliminary points and the merits of the application all at once. A determination of all the issues would be made in one judgment if need be. The respondent took the point that the rule 84 (1a) followed by the applicant in making this application is not applicable to applications but is limited to action procedures and that this renders the application fatally defective. The respondent also did not take the point that the application was prematurely made as the applicant has not applied for default judgment in the main application nor has the Registrar confirmed the existence of the bar in terms of the rules. It maintained that the applicant ought to have waited for the respondent to file an application for default judgment.

On the merits the respondent submitted that the applicant's explanation for the failure to act is not sensible. That the Minister acted in a dilatory manner. It submitted that the parties only agreed to a postponement of the filing of the notice of opposition to the 22nd of November 2016 and there was no request for an extension of the deadline. It argued that the fact that negotiations are taking place does not suspend the operation of the rules. Respondent argued that the applicant failed to proffer an appropriate and reasonable explanation for the failure to file the notice of opposition on time. It maintained that a compounded interest rate of 8% was agreed to between the parties. If the applicant insists on paying interest at 5% in terms of the Act, this has constitutional implications. The applicant has no valid defense to the taking of the 3%. The respondent has a right in terms of s 57 of the Constitution not to have their possessions seized by taking away the respondent's money in terms of the original loan and interest earned. The respondent submitted in addition, that Section 68 (1) of the Constitution was also violated in that the applicant conducted itself impartially in the discharge of its administrative functions in that it has the power to decide whether or not to pay debts it incurred.

The applicant in response to the preliminary points submitted that the application was brought in terms of the correct rule.

Rule 233(3) reads as follows,

> "respondent who has failed to file a notice of opposition and opposing affidavit in terms of rule (1) shall be barred."

Rule 233 (3) provides that a party who has failed to file a notice of opposition within the stipulated times shall be barred. The rule provides for an automatic bar. This rule applies to application procedures.

Rules 83 and 84 provide as follows:

> "**Effect of bar**
> "83. *Effect of bar*
> While a bar is in operation-
> (a) the registrar shall not accept for filing any pleading or other document from the party barred; and
> (b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit;
> except for the purpose of applying for the removal of the bar:
> [Rule substituted by S.I. 33 of 1996]
> 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 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."

In *GMB* v *Muchero* 2008 (1) ZLR 216 (5), a case involving a party barred for failure to file heads of argument in an application, our own Supreme Court endorsed the adoption of r 84 as a mechanism for removing a bar in application proceedings. See also the cases of, *David Whitehead Textiles Limited* v *Jyotsanagen Kala*, HH 442/15,*Obadia Giya* v *Robitiger t/a Triangle Tyres* HH 59/16, *Mfaro Moyo* v *Minister of Energy and Power Development and Anor* HH 313/15. Order 12 is titled ''Procedure for barring'. The title of the Order is generally worded and the Order is not exclusive to action proceedings. Rules 80 and 81 provide a procedure for the placing of a bar in trial proceedings. Rules 83 and 84 deal with the effect of a bar generally and its removal. Rules 83 and 84 are couched in general terms and are of general application. Rule 84 (1) (a) permits a party who has been barred for any reason in an action or suit to make a chamber application for upliftment of bar of the action or suit concerned. The *Blacks Dictionary, 10th Edition* defines a legal suit as any proceeding by a party against another in a court of law. The definition of 'suit' includes both actions and applications. Reference to 'suit' in rr 83 and 84 implies that the rules apply to both applications and actions. I am also fortified in my position by the fact that this is the only procedure in the rules that provides for the removal of a bar. The inescapable conclusion is that r 84 provides a mechanism for upliftment of bars in both action

and application proceedings. A party who has been barred for failure to file a notice of opposition in terms of r 233 (3) is entitled to apply for upliftment of the bar under r 84 (1) (a) and (b).

Rule 84 (1) (a) permits a party who has been barred to apply for removal of a bar the moment he realizes that he has been barred. In the *GMB case (supra)* at p 219 the court held as follows,

> "It is clear from rr 83, 84, 233 and 239 of the High Court rules 1971 that once a party is barred, the matter is treated as unopposed unless a party so barred makes an application before the court for the upliftment of the bar. It is also clear that in making the application to uplift the bar, the party that has been barred can either file a chamber application (not court) to uplift the bar or where this has not been done make an oral application at the hearing."

A party, who is barred, may not appear personally or by his legal practitioner in any subsequent proceedings in the action or suit except for purposes of applying for removal of the bar imposed on him. He may not appear at the hearing and make any submissions on the merits of the matter. Where the party so barred is not able to immediately make an application for upliftment of bar, he may apply for a postponement of the matter to enable him to apply for upliftment of the bar either orally or in writing by way of chamber application. The other party may not insist that the matter be treated as unopposed unless there are no indications that the party barred does not wish to make an application to uplift the bar.

The purpose of r84 is to allow the party barred to make good the bar by making an application for upliftment of the bar before the matter proceeds any further. The rule permits a party barred to make an application to remove the bar at any time and before the other party applies for default judgment. Once a party has been barred, the only procedure open to him at that stage is to apply for upliftment of the bar either orally or by way of chamber application. The rules do not suggest that the party barred ought to wait for his opponent to apply for default judgment first before he applies for removal of the bar operating against him. Such an approach would have the effect of making the procedure for upliftment of bar redundant. If the party barred fails to take any corrective action timeously and is beaten to it by an opponent who applies for default judgment before he applies for upliftment of bar, he can only wait to apply to rescind the default judgment. Where default judgment has been obtained, it becomes unnecessary for the party barred to make a separate application for upliftment of bar. The party so barred is able to explain his default in the application for rescission of the default judgment, the purpose of rescission of judgment being to explain the default and to rescind the judgment. Where default

judgment is obtained for failure to file a notice of opposition, a litigant need not make a separate application for upliftment of bar. Therefore it is my view that this application is not premature. The applicant has acted in accordance with the provisions of r84 which permits him to make an application such as this. The applicant was not required to wait for the respondent to apply for default judgment first before making an application for removal of the bar.

Turning to the application before me, the factors to be considered in an application to uplift a bar were laid down in *Kodzwa* v *Secretary for Health and Anor* 1999 (1) ZLR 213. See also *Mazvimbakupa* v *City of Harare* HH 92/95. The factors include and are not exclusive to the following factors,

1. the degree of noncompliance and the explanation for it,
2. the prospects of success,
3. the importance of the case,
4. the respondent's interest in the finality of his judgement,
5. the convenience to the court and
6. The avoidance of unnecessary delays in the administration of justice.

These factors to be taken into account are to be considered cumulatively.

In *Chimpondah and Anor Muvami* 2007 (2) ZLR 236, *the* court advocated a lenient approach in applications of this nature. The court stated as follows,

> "It is my further view that when considering an application for condonation for late observance of a rule of procedure before default judgment is given in the matter, the court should lean towards the granting rather than refusing such application. I am however not suggesting that prior to judgment condonation should be granted for mere asking. The applicant still has to satisfy the court that there is good cause to excuse the negligence and grant indulgence."

An applicant who seeks to have a bar removed is required to give an adequate and reasonable explanation for his failure to comply with the rules. An application of this nature can fail simply on the basis that there is no acceptable explanation for the failure to comply with the rules. A litigant who is barred is required to file an application for removal of the bar as soon as he becomes aware that he has fallen foul of the rules. Prospects of success in a matter such as this though important are not the deciding factor. The approach of the courts is that no matter the prospects of the matter, if an applicant fails completely to explain the delay or the delay is unreasonable and it is shown that there was a flagrant breach of the rules, the application should

not be granted, See *PE Bosman Transport Works and Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794.

The respondent filed its application for a declaratory order on 25 October 2016 and it was served on the applicant on 26 October 2016. The applicant had 10 days within which to file his notice of opposition and was required to have done so by 18 November 2016.An extension of the period within which to file a notice of opposition was agreed to up to 18 November and further extended up to 22 November 2016.There is no proof there was a further extension after this. The respondent's legal practitioners wrote to the Registrar on 5 December indicating that the applicant was now barred. The applicant only filed this application on 20 December 2016, a delay of 20 working days. I do not find the delay to be inordinate.

The explanation for the delay is that the parties were engaging so as to reach an out of court settlement. The dates when meetings took place are given and all the steps taken by the applicant during the relevant period are laid bare in the founding affidavit up to the time the Minister wrote to the Registrar. It is clear from his explanation that the Minister labored under the mistaken belief that he had an agreement to extend the negotiations and suspend the filing of opposing papers. The Minister then says that he was unable to engage the respondent after this because of preparations for the national budget which kept him busy. The Minister has adequately accounted for the delay.

This is a debt that belongs to another institution, the Reserve Bank. It seems to me reasonable that the Minister would want to have paper trails of the debt so that he would assume an informed a position. The Minister asserts that he is a very busy person and has other duties in addition to his ordinary duties. He says that he was engaged in preparations for the national budget. This fact was not disputed. It was not denied that the time for negotiations was initially extended with consent of both parties. It appears to me that the respondent has opposed this application out of annoyance because it says that the applicant purportedly wrote to the Registrar for extension of time without its assent when previously the extension was with its agreement. There is nothing untoward about parties engaging each other with a view to settling a matter out of court or agreeing to suspend or depart from the rules. It is encouraged and reasonable to try and settle a matter out of court in a bid to curtail proceedings. The explanation for the delay in filing a notice of opposition is reasonable in the circumstances of the case. I am not satisfied that

there was a flagrant abstention from the rules. This case is distinguishable from one where an applicant simply sits back and ignores an application.

The fact that a matter is of national importance does not exempt a party from satisfying the requirements of an application of this nature. Such a matter ought not to be treated differently from all other matters. The fact that a matter is of national importance makes it even more onerous on the part of an applicant to explain his conduct. He must show that he treated the matter with the urgency associated with a matter of such interest. He may not simply sit back and claim that the matter is of national interest and expect that he will be condoned for failing to comply with the rules. This is a matter of national importance and the Minister has treated it as such. As soon the Minister was served with the application, he immediately engaged the respondent and seemed to be seriously pursing that goal to the extent of being personally involved. When he realized that the respondent was not acceding to the suggestion of a further suspension of the period within which to file a notice of opposition he launched the application. The fact that the applicant has lodged this application for upliftment of bar without any probing and well before the respondent has applied for default judgment against it has a bearing on the *bona fides* of the applicant in this application. It is evident that the applicant is seriously pursuing this matter and desires to have his day in court. The applicant has adequately justified the upliftment of bar.

The Minister asserted that the debt has been cleared in full whilst the respondent states otherwise. Whilst it may seem that there are disputes of fact because of the different positions assumed, that is not the position. The dispute related to the interest payable can be resolved on the basis of the papers filed. Once the dispute over interest rates payable and how much has been paid so far has been resolved, it should be easy to come up with amounts the applicant was required to pay.

This dispute centres on the interest rate payable on the debt. The respondent claims compounded interest at 8% per annum from the date of contraction of the debt in 1998. The applicant maintains that only simple interest is claimable. There is no evidence of an agreement over this interest rate. No cogent reason has been advanced why the interest rate payable should be compounded interest. Section 3 (d) provides that an interest rate of 5% per annum shall be payable on a debt assumed by the Government from the date the debt was contracted. That is the law. Even if one considers that there is a contradiction in that the schedule to the Act specifies an

interest rate of 8%, the schedule does not state that the interest is to be compounded. The applicant's position is arguable.

There is no evidence to indicate that the applicant acknowledged the debt. The negotiations that took place between the parties were on a without prejudice basis. The plaintiff claims that it has extinguished the debt. Each party has a different formula for reaching its conclusion because of the different approaches to the interest rates applicable at different times. Once a ruling has been made on the interest rate applicable it will be easy to reconcile the figures and come up with the correct position. The question of the interest rate payable has a bearing on the constitutional issues raised. In the absence of an agreement regarding the interest rate payable or its status, it is difficult to say that the respondent's constitutional rights are being infringed.

The initial debt was for $20 793 926.93 and the respondent claims $42 648 378.76. The interest claimed is more than 20 million dollars. The understanding was that the debt stood at $49 645.655, and 2 as at 31 May 2014. If the applicant paid 76.1 million dollars in treasury bills which were equivalent to 53, 3 million dollars, then it appears that the debt was cleared. The debt allegedly now stands at 89 million dollars which is 4 times more than the capital debt. The respondent contends that the *induplum* rule was not breached because the interest was being compounded. Then, if the interest chargeable is simple interest as contended by the applicant, then it appears the rule has been breached. The i*nduplum* rule is simple. It states that once the interest charged on a debt is equal to the capital amount, interest ceases to accrue.

The resolution of the constitutional issues raised will have a bearing on all other debts assumed. This litigation is of national importance. The application by the respondent raises important constitutional and legal issues that cannot be rubbished but need to be followed up and a pronouncement made. This matter involves precious public monies. We are seized with an economy beset by poor performance. This court cannot allow the respondent to bar the applicant from proceedings involving such huge sums of monies in a case where there is doubt regarding the exact amount of monies owed .It is not prudent to burden the fiscus with payment of monies that may otherwise not be due to the respondent. It is not desirable in cases involving public monies to dispose of such matters on the grounds of technicalities. Technicalities are a tool meant to aid justice. Litigation should not be treated as a game. Every litigant should be afforded an opportunity to have his matter fully determined free from improper technicalities. The court's

primary duty is to dispense justice between the parties. The rules of court are required to help secure justice and not frustrate it. Rules should not be rigidly and strictly applied. Technicalities should be avoided if they hamper the cause of justice and result in grave injustice. An abundance of caution is warranted. Every litigant should be afforded an opportunity to have his matter properly determined on the merits unless it is difficult to achieve that goal. Parties are dissuaded from relying on mere technicalities where a case cries out for determination on the merits. The taxpayer demands careful consideration of matters involving the public purse from the courts. The courts should avoid obtuse deliberation of matters. It is important that both parties have their day in court. The interests of justice demand that the issues raised by either party be fully ventilated in the main application. The applicant has shown good cause for the order sought and I have decided in the exercise of my discretion to retain the application on the roll.

The applicant is accordingly entitled to the following order,

1. The delay by the applicant in filing a notice of opposition under HC 10864/16 be and is hereby condoned.
2. The bar operating against the applicant under HC 10864/16 is hereby uplifted.
3. The applicant be and is hereby granted leave to file a notice of opposition within 10 days of becoming aware of this order.
4. There is no order as to costs.

Civil Division of Attorney General's Office, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners