ANTARES ZIMBABWE (PVT) LTD
versus
ANDREW THOMPSON TRUST & INVESTMENT COMPANY (PVT) LTD
and
MORDAVE INVESTMENT COMPANY (PVT) LTD
and
GWANDEX (PVT) LTD
and
CARSAN INVESTMENT COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 2 January 2018 & 07 November 2018

Chamber application for upliftment of bar

C. Dube for the applicant
K.J. Arnott, for the respondent

HUNGWE J: This is an application for the upliftment of the bar operating against the applicant in HC 5817/15. The events leading up to the present application are set out in the founding affidavit filed on behalf of the applicant sworn to by Raymond Maxime Smithlock who deposed as follows:

> "2.1 Following the upholding of the applicant's exception filed in Case Number HC 5817/15 ("Main Action") Respondents' filed their Amended Declaration. At the same hearing, this Honourable Court dismissed the Applicant's special plea to refer this dispute between the parties top binding arbitration, and the applicant seeks to appeal against the dismissal of its special plea but requires leave of this Honourable Court to do so. The required application for leave has been filed, and has been referred for hearing of the opposed roll. The application currently awaits a date for the hearing.
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> 2.2 It is my understanding that the special plea to refer the dispute to binding arbitration challenged the jurisdiction of the Honourable Court in the main action. As such, it seems entirely obvious to me that the filing of further pleadings in the main action should await the outcome of the appeal issue.
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> 2.3. Despite the as yet undetermined jurisdiction issue, the Respondents have insisted that applicant file its plea on the merits of the Amended Declaration. In response to the mounting pressure, applicant (1st defendant in the main action) filed its second special pleas on 12 October 2016, which was served on first respondent's legal practitioners on the same day. A copy of the Special Pleas is filed of record in the main action. In addition, by letter dated 18 October 2016 Applicant's legal practitioners advised Respondent's legal practitioners that the second plea had been filed and requested consent to have the special plea set down for hearing in accordance with the rules. A copy of the letter marked "A" is attached.

> By letter dated 26 October 2016, Respondents' legal practitioner replied to Annexure "A" attacking the nature and content of the second special plead and threatening to bar the applicant. A copy of the letter marked "B" is attached. First respondent proceeded to file a Notice of Intention to bar on 27 October 2016. Applicant's legal practitioners advised Respondents' legal practitioner by letter dated 31 October 2016 that the filing of first Respondent's Intention to bar applicant was unfortunate, illegal, unprocedural and un professional. A copy of the letter marked "C" is attached. In the penultimate paragraph of annexure "C" Applicant indicated its intention to seek costs *de bonis propris* against Respondent's Legal Practitioner should they persist in ignoring the second Special Plea. Notwithstanding the contents of Annexure "C", First Defendant proceeded to bar Applicant on 27 October 2016, in terms of Order 12 Rule 81 of the High Court Rules, (1971) on the expiry of the dies provided in the Notice. A copy is annexed hereto marked "D".
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> 2.5. Meanwhile, applicant had taken steps to have the Special Application for Leave to appeal set down in terms of the rules. A copy of the Notice of set down filed of record on 26 October 2016 in respect of the application for leave to appeal is attached marked "E". Applicant awaits allocation of a date for the hearing of the leave application from the Registrar.
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> 2.6. Clearly because of the unreasonable conduct of First Respondent, and its lawyers, the main cause had become convoluted. It would have made sense for the first respondent to await determination of applicant's leave application. This determination will put matters in perspective. A complex picture has emerged. If the leave application is granted, the process involving the filing of the Bar and barring applicant will be total waste of time and resources. It is for this reason that costs *de bonis propriis* are being sought against first respondent's legal practitioners of record. "

The above quoted paragraphs aptly capture the gist of the application which applicant made in terms of order 12 r 84 (1) of the High Court Rules, 1971 ("the Rules").

The respondents, through an opposing affidavit by its Legal Practitioner, filed opposing papers in which the following appears. He opposed the upliftment of the bar in case No. HC5817/15 and the prayer for costs against him *de bonis propriis* on the basis that he had properly placed a bar against the applicant in HC 5817/15. He then went on to give a history of the main matter which led to the barring of the applicant. He argued that the application lacked merit and is aimed at frustrating the processes of this court. He averred that applicant had, in his founding affidavit, painted an incorrect picture of the events leading to the present application by making selective disclosure of the correspondence and documentation which he said was more voluminous than the applicant would have this court believe. He then sets out the chronology of events leading to the present application citing and attaching the necessary correspondences as proof of his averments.

The respondent makes the point that an application for the upliftment of the bar has to address not only the circumstances in which the bar was imposed but also the merits of the defendant's proposed defence in the main action. As such, the respondent contends that the

application for the upliftment of the bar cannot succeed. He points out that instead of addressing the merits of its defence in the main action the applicant seeks to rely on the fact that it has sought leave to appeal an interlocutory matter. Because the applicant has not yet appealed TAGU J's judgment. There is no appeal currently outstanding against TAGU J's interlocutory decision.

The cumulative effect of the respondent's contention in respect of the position taken by the applicant is that an application for leave to appeal on an interlocutory decision does not automatically stay the entire action.

What emerges from the papers filed by respondents in opposition is this. The applicant's legal practitioners believed that because they had filed a special plea, the respondents were not entitled to file further pleadings until that special plea was disposed of. On the other hand the respondents contended that there was nothing in applicant's way to prevent the respondent from filing further pleadings. Put differently, the respondents' legal practitioners did not agree with the views expressed by the applicant's legal practitioners regarding the propriety of filing further pleadings by the respondents in the face of the application for leave to appeal the interlocutory decision of TAGU J. There was a stalemate so to speak. To break the stalemate the respondents barred the applicant. Arising from that, applicant now seeks the upliftment of the bar with costs being born personally by the respondents' legal practitioner.

Both parties filed their heads of argument in respect of the application for upliftment of the bar. In my view once the stalemate was reached the proper procedure was for either party, especially the respondents' legal practitioners, to approach a judge by way of a chamber application to seek directions as to what the correct step ought to have been. That way, not only costs would have been saved but the convolution of these matters would have been avoided. Presently, the applicant seeks removal of the bar on the basis that respondents have unreasonably resorted to the raising of the bar when the filing of further pleadings had been expressly put in issue after applicant filed a special plea. That special plea challenged the court's jurisdiction, according to the applicant. Pending its determination, respondents were not entitled to demand that applicant plead or face barring. When applicant's legal practitioners addressed correspondence to respondents' legal practitioners indicating that the demand had no legal basis, the bar was raised. It is trite that a failure to deliver any pleading within the time stipulated in the Rules of Court exposes the defaulter to certain penalties. The defaulter may be barred from delivering the pleading and the default may result in judgment being granted

against the defaulter. A party who has been barred from pleading may apply to court for a removal of the bar. The non-defaulting party is usually approached to agree to the removal of bar as envisaged in the rules. Generally, a refusal to agree to the removal of a bar will not lead to an award of costs against the party refusing, but an unreasonable opposition to an application for removal of a bar will affect the order for costs. Even if the court holds that the non-defaulting party was justified in refusing to agree to the removal of the bar, it does not follow that that party will be awarded the costs of opposition to an application for removal. In *Schafer v Memel Municipality* 1933 OPD 173 it was stated that:

> "If the court comes to the conclusion that the facts placed before it are not such as could reasonably have affected its discretion in granting the indulgence, then the respondent may either have to bear his own costs or be ordered to pay the costs caused by his unnecessary and ill-advised opposition. To appear to oppose substantially with a view to increasing or obtaining costs from the applicant will not be allowed."

In *Flashchart* v *Von Kuehne* 1932 SWA 6 a similar point of view was adopted where it was said:

> "[T]he Courts have laid down that usually the respondent in an application of this nature is entitled to come to the Court ….to see that the applicant is put on terms …Where, however it is so perfectly clear and obvious that the application must be granted and possibly where the applicant himself has asked for certain terms which are obviously reasonable… the Court might not consider the respondent justified in appearing in Court."

Each case however is to be decided on its own merits. The court always has the discretion on whether to grant the indulgence sought. As I have pointed out, clearly the parties' legal practitioners were not agreed as to the next step to be taken in pleadings. The respondents' legal practitioners unreasonably persisted in demanding delivery of pleadings even in the face of a special plea having been filed. In my view, on that basis the applicant is entitled to the grant of the removal of the bar.

Unfortunately when I granted the order for costs, I inadvertently made an order *de bonis propr*is, which was never my intention. I believed at the time that in order to advance the parties various cases, it was appropriate to remove the bar operating against the applicant with an order for costs, but not to be borne by Mr *Arnott* personally. Consequently it was for the above reasons that I granted the order sought by the applicant with costs.

Dube Manikai & Hwacha, applicant's legal practitioners
Kevin Arnott Esq, 1st respondent's legal practitioners