MOONRISE BUSINESS TRANSACTIONS (PRIVATE) LIMITED
T/A MOONRISE MOTOR SPARES
versus
SHUMAYAC AGENCIES (PRIVATE) LIMITED
and
SHERIFF OF THE HIGH COURT
and
SWIFT DEBT COLLECTORS (PVT) LTD

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 15 & 22 June 2023

Opposed Application

Adv *E Mubaiwa*, for the applicant
Mr *TJ Chivanga*, for the 1st respondent
Mr *J Makanda*, for the 2nd respondent
Mr *K Mabaudi*, for the 3rd respondent

DEME J: The applicant approached this court seeking leave to withdraw admissions made at the pre-trial conference of the matter under case number HC 2548/19 (hereinafter called "the main matter"). The applicant also prayed for consequential relief to the effect that the admissions be struck out of the record. The applicant also tendered costs for the present application on an ordinary scale. At the pre-trial conference of the main matter, the applicant made the following admissions:

> "1. Plaintiff admitted that there was no unlawfulness in the seizure and attachment of goods conducted by the 2nd Defendant.
> 2. Plaintiff admitted that it willingly chose not to collect the goods from the 3rd Defendant (sic) storage.
> 3. Plaintiff admitted that, apart from the report dated 24th of October 2018 there is no other evidence proving that the 3rd Defendant damaged the goods in question.
> 4. Plaintiff admitted that, the claimant in the interpleader under case number HC 12155/15 was represented by Mr Hamadziripi, who is both a shareholder and a director in the Moonrise Business Transactions (Pvt) Ltd and Extreme Corner Investments (Pvt) Ltd."

In the main matter, the applicant sued the respondents claiming for damages which arose as a result of the attachment of the goods which belonged to the applicant. According to the applicant, its former legal practitioner, Mr Mugomeza, made the admissions at the

round table meeting and the pre-trial conference without its authority. The applicant was not represented at these two meetings. The former legal practitioner, by way of supporting affidavit, averred that he was pressured by legal practitioners of the other parties in the main matter to make such admissions. According to Mr Mugomeza, the legal practitioners concerned advised him that they were going to seek an order for costs *de bonis propriis* against him if he did not yield to their demands. It is the applicant's averment that it discovered the admissions concerned when it was preparing for trial of the main matter.

It is the applicant's case that the admissions sought to be withdrawn are outside the pleadings. The applicant also submitted that the prejudice likely to be suffered by the respondents has been cured by the tender of costs on an ordinary scale. On the contrary, the respondents argued that the admissions sought to be withdrawn are not outside the circumference of the pleadings. They further contended that the withdrawal of the admissions concerned will require them to revisit their pleadings. The respondents also submitted that if leave to withdraw the admissions is to be granted, the applicant must be ordered to bear costs of the application on an attorney and client scale in order to cure the financial prejudice suffered by their clients in prosecuting their defences in the main matter. The respondents also argued that the events leading to the making of the admissions do not reflect the *bona fide* mistake and hence the present application must be dismissed on that basis. The respondents further argued that the legal practitioner had lawful authority to make such admissions and hence the present application is a ploy to abuse court process.

The applicant raised some points *in limine* against the respondents. It is the applicant's case that the first respondent's deponent to the opposing affidavit had no lawful authority from the first respondent as there was no resolution authorising the deponent to make such averments. The applicant also affirmed that the deponent for the second respondent's opposing affidavit had no authority from the Sheriff to depose to the opposing affidavit. Alternatively, the applicant also argued that the deponent to the second respondent's opposing affidavit did not state necessary averments which may clothe her with the authority to depose to the opposing affidavit. With respect to the third respondent, the applicant submitted that the deponent to the third respondent's opposing affidavit had no authority to depose to the affidavit as the resolution attached does not give the deponent specific powers to prosecute the third respondent's defence in this matter.

The first respondent's counsel, Mr *Chivanga*, argued that the resolution can be produced at any time. However, the first respondent did not seek leave to tender the resolution. There is no resolution attached to the first respondent's opposing affidavit despite the fact that the deponent to the affidavit mentioned the resolution in the opening paragraph of the affidavit. The appropriate paragraph is as follows:

> "I Minas Hapsis do hereby take oath and state that I am a director of the Applicant's (sic) and I am duly authorised to depose to this affidavit by virtue of a resolution."

Thus, this court, under such circumstances, cannot mero *motu* grant condonation where the same has not been sought. My view is fortified by the case of The *President of Zimbabwe Robert Gabriel Mugabe N.O. and Ors* v *Morgan Richard Tsvangirai*[1], where the court postulated that:

> "I am aware that r 4C (now Rule7) of the High Court Rules authorises the High Court to depart from its own Rules. Thus, if the Prime Minister had admitted his failure to comply with r 18 and had sought condonation for such failure to comply with r 18 of the High Court Rules, the court *a quo* could, if it was so persuaded, have granted condonation for such failure to comply with r 18 of the High Court Rules. It, however, is a misdirection for the court to condone a departure from the High Court Rules in the absence of an application for such condonation. In *casu*, the Prime Minister contended that he did not need such condonation because r 18 of the High Court Rules was superfluous or invalid. Where a litigant adopts such a stance condonation cannot be granted by the court *mero motu*."

Consequently, the first respondent was not properly before the court on that basis. The matter, resultantly, proceeded as unopposed against the first respondent on that footing.

With respect to the second respondent, the counsel for the second respondent, Mr *Makanda*, correctly argued that the deponent to the second respondent's opposing affidavit had authority to depose to the affidavit by virtue of being the head of the second respondent. The deponent did not require authority of any other official from the second respondent as she is the most senior official at the second respondent's workplace. Consequently, the point *in limine* against the second respondent lacks merits and is resultantly dismissed.

[1] SC21/17.

The third respondent's counsel, Mr *Mabaudi*, argued that the resolution attached is so broad to include the power to depose to the affidavits for purposes of prosecuting matters before the courts. Mr *Mabaudi* referred the court to the appropriate provision of the resolution which provides as follows:

> "That Swift Debt Collectors (Private) Limited, trading as Ruby Auctions, has entered into litigation against Moonrise Business Transactions (Private) Limited, trading as Moonrise Motor Spares;
>
> That Swift Debt Collectors (Private) Limited has appointed ROSECHAURANCE ZHOU to be the representative of the company in this matter.
>
> And ROSECHAURANCE ZHOU
> Be and is hereby authorised and empowered to represent the company, depose to any affidavits that are needed to sign all the necessary papers and to consult with legal practitioners……."

Further, the third respondent's counsel argued that the present application is an offshoot of the main matter and hence there was no need of obtaining the fresh board resolution authorising the deponent to depose to such affidavit. I do agree with this reasoning. The present application is an interlocutory application and hence expecting the third respondent's deponent to produce a separate board resolution for that purpose would be unnecessary. In the result the point *in limine* concerned stands dismissed.

The issue that arises for determination is whether the applicant ought to be granted leave to withdraw the admissions made and under what conditions should leave to withdraw admissions be made.

The present application is made in terms of r 50(8) of the High Court Rules, 2021 published in SI 202 of 2021 (hereinafter called "the High Court Rules") which provides as follows:

> "The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."

Further, the party seeking to withdraw the admissions may bear extra costs if it is clear that the application for withdrawal of admissions includes unnecessary facts or documents. Reference is made to the provisions of r 50(9) of the High Court Rules which provides as follows:

> "If a notice to admit includes unnecessary facts or documents, the extra costs occasioned thereby shall be borne by the party giving such notice."

What is apparent is an attitude of lassitude by the applicant in prosecuting its claim against the respondents in this matter who happen to be the defendants in the main matter. It is not clear why the applicant's representative failed to attend the meetings of the round table meeting and the pre-trial conference. Soon after such meetings, a diligent litigant would be reasonably expected to request for feedback from the legal practitioner who attended the two meetings. Such failure to ask for feedback amounts to negligence. Certainly, if the applicant had requested for feedback at the earliest opportunity available, the present application would have been avoided. Thus, the present application was needlessly instituted as a result of the applicant's laxity.

Consequently, the present application must not escape punitive costs. Costs on ordinary scale will encourage sloppiness among litigants. Additionally, costs on an ordinary scale will not cure the financial prejudice suffered by the other parties in defending the present application which ought to have been prevented if the applicant had acted assiduously.

The issue of costs is the matter which is within the discretion of the court. Textual authorities and case law have dealt with the issue of costs in a variety of ways. Hebstein and Van Winsen[2], have this to say, in relation to costs:

> "The award of costs in a matter is wholly with the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in this case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties…"

In *casu*, the circumstances of this case justifies an appropriate order of punitive costs to discourage the attitude of carelessness by litigants in approaching the court. The conduct of the applicant by failing to take practical steps in avoiding this litigation warrants an

[2] *Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5th Ed, Vol 2 p954*

applicable order of costs. Further, the applicant's behaviour has resulted in the delay for the finalisation of the main matter.

A.C. Cilliers[3], postulated that the following issues are key for the consideration of costs on a higher scale:

> "(a) Vexations and frivolous proceedings
> (b) Dishonesty or fraud of litigant
> (c) Reckless or malicious proceedings
> (d) Litigant's deplorable attitude towards the court
> (e) Other circumstances."

In *casu*, the present application amounts to reckless proceedings as it was preventable. By failing to ensure that it was represented at the pre-trial conference, the applicant demonstrated a deplorable attitude towards this court. In terms of the Proviso to Rule 49(8) of the High Court Rules, parties to the proceedings must physically attend the pre-trial conference. The subrule provides as follows:

> "The registrar, acting on the instructions of a judge, may at any time on reasonable notice notify the parties to an action to appear before a judge in chambers, who need not be the judge presiding at the trial, on a date and at a time specified in the notice, for a pre-trial conference or a further pre-trial conference, as the case may be, with the object of reaching agreement on or settling the matters referred to in subrule (2), and the judge may at the same time give directions as to the persons who shall attend and the documents to be furnished or exchanged at such conference:
> Provided that all the parties to the action shall physically attend the pre-trial conference held before a judge."

In its founding affidavit, the applicant did not explain why it failed to attend the pre-trial conference. In the absence of the explanation, the likely conclusion that may be reached under such circumstances is that the applicant had no appetite in prosecuting its main matter. This, in my view, is a clear sign of irresponsibility by the applicant which must not escape an order of punitive costs.

Further in the case of *Nel* v *Waterberg Landbouwerkers Kooperative Vereeniging*[4], the following was stated in relation to costs on an attorney and client scale:

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[3] *The Law of Costs, 2nd ed, p66*

[4] 1946 AD 597 at 607

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action from the conduct of the losing party , the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but it is not chargeable in the party and party bill. See *Hearle and McEwan* v *Mithcell's Executor* (1922 TPD 192), Therefore in a particular case the Court will try to ensure , as far as it can, that the successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party…"

In *casu*, the second and third respondents will be put out of pocket if this court makes an order of costs on an ordinary scale. The second and third respondents unnecessarily incurred expenses as a result of the applicant's recklessness. The first respondent who is not properly before the court will not be entitled to costs. In my view, costs on an ordinary scale are not reasonably sufficient under the circumstances.

In the result, it is ordered as follows:

(a) Leave to withdraw admissions made by applicant, in its capacity as plaintiff, at pre-trial conference and paragraphs 1, 2, 3 and 4 of Clause B headed *Admissions Sought and Made* of the Joint Pre-Trial Conference Minute filed in case number HC 2548/19 be and is hereby granted.

(b) Consequently, it is ordered that the contents of para(s) 1, 2, 3 and 4 of Clause B headed *Admissions Sought and Made* of the Joint Pre-trial Conference Minute filed in case number HC 2548/19 be and are hereby struck out of the record.

(c) Applicant shall pay second and third respondents costs on an attorney and client scale.

Chinawa Law Chambers, applicant's legal practitioners
Scanlen and Holderness, first respondent's legal practitioners
Kantor and Immermen, second respondent's legal practitioners
Hove and Associates, third respondent's legal practitioners