AUGUR INVESTMENTS OU
and
TATIANA ALESHINA
and
KENNETH R SHARPE
versus
TENDAI BITI
and
MOVEMENT FOR DEMOCRATIC CHANGE ALLIANCE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10 January, 6 March, 28 March, 29 May, 4 July & 2 August 2023

Civil Trial

T Magwaliba, for the plaintiffs
L Madhuku, for the defendants

CHITAPI J: This is a judgment on contested wasted costs incurred following failure of the trial to proceed. The plaintiffs seek wasted costs from the defendants who refuse to pay the same. I am therefore forced by the impasse to render a judgment. Courts are seldom and rarely called upon to determine and provide a fully-fledged judgement on wasted costs following a postponement of a matter. Counsel for the parties usually discuss and agree the issue of wasted costs and the court endorses their agreement as the courts order. It is nonetheless proper for parties where they disagree to seek that the court should determine a wasted costs order as I proceed to do.

By way of a brief back ground and so far as the pleadings give insight to the matter, the Plaintiff Augur Investments OU is a peregrine private company incorporated in Mauritius under the laws of that country. It is also registered in Zimbabwe as a foreign company and carries on business in Zimbabwe. The second plaintiff Tatiana Aleshina is a private individual whilst the third plaintiff Kenneth Sharpe is described as an adult male with repute as a businessman. The

first defendant Tendai Biti is an adult male and a legal practitioner whilst the second defendant Movement for Democratic Change Alliance (MDCA) is described as a *universitas*, being a juristic body with power to sue and be sued. The third defendant Newshawks is said to be a media/news company and prints a newspaper called Newshawks which allegedly published the alleged defamatory articles of and about the plaintiffs.

The plaintiff's claim against the defendants jointly and severally the one paying the other to be absolved is for defamation damages amounting to an aggregate one million united states dollars ($USD 1000 000.00) split as follows:

First plaintiff claims	USD $ 500 000.00
Second plaintiff claims	USD $ 100 000.00
Third plaintiff claims	USD $ 400 000.00
Total	USD $ 1000 000.00

The defamation alleged against the defendants is said to arise from alleged publications of comments allegedly made by the first defendant of and concerning the plaintiffs on 4 and 13 December 2020. In relation to the second defendant, the plaintiffs claimed an alleged publication of alleged defamatory comments of and concerning the plaintiff's on its twitter account on or about 4 December 2020. The first defendant suffice to say denied the claim on various basis and prayed for its dismissal with costs. Only the first defendant is involved in the trial before me on the claim. It is not necessary for purposes of this judgment to go into the details or particulars of the claim because wasted costs are claimed consequent on a failure of the trial to commence. It must be recorded therefore that in this judgment, apart from alluding to untested facts alleged by the parties in their pleadings in settings out the background facts of the matter, I make no findings expressly or by implication on the veracity or merits of the claims or defences pleaded.

In relation to the abortive trial whose arbortion, gives rise to the prayer for wasted costs, the paper trial of the matter commenced with the initial set down of the matter for trial on 10 January 2023. On this date the first respondent appeared in person and applied for a postponement of the trial so that he could secure the services of counsel of choice. The first respondent submitted that the advocate of choice whom he had intended to engage being Advocate Mapuranga had advised him that he was conflicted because he had acted for the first plaintiff in some previous

matter. He averred that since the notice of set down of trial had been served only a week back, he did not have sufficient time to engage alternative counsel. To this application Advocate Magwaliba after expressing reservations that the first defendant had not indicated as to when he could engage alternative counsel or the dates of availability of such counsel nonetheless acceded to the postponement for which no costs order was prayed for. The matter was postponed by consent to commence on 6 March 2023 through to 10 March 2023, thus a week was reserved for the trial.

On 6 March, 2023, the first defendant appeared represented by counsel Professor Madhuku. The plaintiff's representation was the same with Advocate Magwaliba still representing them. Counsel for the first defendant applied for a postponement of the trial on the basis that there was a pending application in the Supreme Court whose outcome would have a material bearing on the trajectory of the trial both from the plaintiff's and defendants' perspectives. What had happened was that this court per MANZUNZU J had dismissed the first defendants special plea taken in the current matter and further refused an application by the first defendant for leave to appeal to the Supreme Court against the dismissal aforesaid.

Advocate Magwaliba submitted that the special plea which MANZUNZU J disposed of had been filed under case No. HC 7528/20. By judgment HH 426/21 dated 20 August 2021 the special pleas were dismissed. Advocate Magwaliba further submitted that the applicants court application for leave to appeal the judgment HH 426/21 was filed under case No. 4621/21. The dismissal of the application for leave to appeal had been granted in default of appearance by the first respondent. Advocate Magwaliba agreed that leave to appeal was being sought in the Supreme Court. The issue that arose related to wasted costs. Advocate *Magwaliba* submitted that the first respondent should bear the costs of the postponement. He submitted that Advocate *Madhuku* had called him on the Friday preceding the date of todays' hearing to advise that he would apply for a postponement. Advocate Magwaliba submitted that as there was a weekend, there was no time or opportunity for counsel to undo preparations made for trial as witnesses had already been interviewed and were in attendance for the trial.

Advocate Magwaliba also submitted that the first defendant ought to have made up his mind on escalating the matter to the Supreme Court upon receipt of MANZUNZU J's judgment. Advocate Magwaliba submitted that the plaintiffs were surprised that there was no tender of costs

by the first defendant in the circumstances. Advocate *Madhuku* then submitted that the reasons for dismissal of the application for leave to appeal had not been furnished and that once furnished that would have a bearing on the incidence of payment of wasted costs. Advocate Magwaliba clarified that MANZUNZU J had granted a default judgment after ruling that there was a defective appearance when counsel from another law firm not connected with the case purported to represent the first defendant. This submission was not controverted. I however leave it at that as I am not seized with those applications. I only relate to the submissions in order that the paper trial remains clear. I reserved my decision on the wasted costs after submissions and postponed the trial commencement to 30 March through to 3 April 2023. The dates were provisional dates still to be confirmed but agreement was reached to postpone the trial to 29 May 2023.

On 29 May 2023 the trial again failed to take off. Advocate Madhuku applied for a postponement of the trial. He submitted that the first defendant had withdrawn his application for leave to appeal because it could not be dealt with by the Supreme Court in the absence of a record of proceedings which was then not available or had not been prepared for appeal. Counsel submitted that a fresh application for leave to appeal under case No. SC 274/23 had now been filed on 15 May 2023. The filing of the new application according to counsel made the postponement of the trial inevitable. The trial could not proceed because as counsel submitted the points *in limine* which are the subject of the pending Supreme Court application had a material impact on the trial in that should the points *in limine* suceed, the trial could be disposed of on those points.

Advocate Magwaliba confirmed that the plaintiffs were aware of the pending Supreme Court application. In not opposing the postponement sought counsel however prayed for an order of wasted costs. He submitted that the first defendant had withdrawn the first aborted or withdrawn application in March 2023, yet he did not file a fresh application for six weeks until 15 May 2023. Counsel further submitted that there was no prior warning of the postponement and that the first defendant had not pre-advised the court. It was counsel submission in that regard that the plaintiffs were ready for and had prepared for trial.

In reply Advocate *Madhuku* submitted that even though the court was not made aware prior to the application for the postponement that such application would be made, all parties were aware of the developments involving the withdrawal of the aborted application and the filing of the pending application would be a *causa sine quam non* of a postponement. I directed that a copy of

the Supreme Court application should be filed of record for reference. Although the first defendants counsel undertook that a copy thereof would be filed none was filed. Given the seniority of the first defendant's counsel, I can only attribute the failure to live to his promise as arising from inadvertence on his part. I have considered that I can still determine the issue raised without sight of the Supreme Court application since its existence and pendency in that court is a common cause fact between the parties I again reserved judgment on the wasted costs and postponed the trial to 4 July 2023.

On 4 July 2023 the parties again appeared before the court. The first defendants' counsel Advocate Madhuku submitted that the Supreme Court had struck off the roll application SC 274/23 whose pendency had resulted in the postponement of the trial on 29 May 2023. Counsel submitted that the Supreme Court had noted that the first defendant should have been advised to apply for rescission of the default judgment dismissing the first respondents application for leave to appeal. The first respondent had since filed an application for rescission of that judgment under case No HC 4237/23. The application had already been served on the applicants. Counsel submitted that the plaintiffs were agreed that the trial could not proceed as to do so would render the application for rescission nugatory or a brulmen. The parties were well advised to agree on the need to stay the trial pending the determination of the rescission of judgement application.

The parties were not agreed on the issue of costs. Advocate Madhuku moved for an order that costs should be reserved as had been ordered previously. Costs in the cause is an interim order to say that the decision on which party should bear the costs is deferred to a later date. The reason why I considered reserving costs of 6 March and 29 May 2023 was because I considered it advised and prudent to monitor the proceedings in the Supreme Court as the result given by that court would be a factor to consider in the exercise of the courts discretion on costs orders. When costs are reserved, they are usually determined at the end of the final hearing. However there are exceptions to the general approach that reserved costs are usually determined at the end of the hearing. The circumstances of each case are considered such as the fact that the reserved costs relate to wasted costs which arise from a postponement of the trial on the basis that there is a parallel or related process going on in another court, whose outcome impacts on the trial at hand as was the situation *in casu*.

Advocate *Magwaliba* submitted that the court should make an order of costs against the first defendant because its application in the Supreme Court had not only been struck off roll but had been found to be an incompetent application at law. The first respondent following on the result in the Supreme Court did not seek to revisit that application to remedy any shortcomings and reset it. The application was abandoned and a new and different application which was for rescission of default judgment was then filed. Advocate Magwaliba submitted that the Supreme Court case had therefore been effectively determined and would not be resuscitated. I am persuaded by this submission. The first defendant had sought the postponements on the basis that he required to be given an opportunity to have the Supreme Court application determined. Had such application been determined in his favour I would have been persuaded to consider a different costs order than ordering the first respondent to pay the reserved wasted costs of the postponements. To do so would have been inequitable because it would effectively mean that whilst the first respondent succeeded in the Supreme Court, the High Court then penalizes him with costs for seeking an opportunity to argue a related application in the Supreme Court in which he will have been successful.

A reference to Practice Direction 3/2013 is advised. It states as follows in post in relation to a matter struck off the roll:

> "Struck off the roll
> 3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.
> 4. In accordance with the decision in *Matanhire* v *Bp* Shell Marketing Services (Pvt) Ltd 2004 (2) ZLR 147(s) and *S* vs *Ncube* 1990 (2) ZLR 303 (SC) if a court issues an order that a matter is struck off the roll the effect is that such a matter is no longer before the court.
> 5. Where a matter has been struck off the roll for failure by a party to abide the rules of the court, the party will have thirty days (30) within which to rectify the defect, failing which the matter will be deemed to have been abandoned.
> Provided that a judge may on application and for good cause shown reinstate the matter on such terms as he deems fit."

It is trite that generally costs follow the event. The event here is that the first defendants application is no longer before the Supreme Court following on it being struck off the roll. The plaintiffs were all along awaiting for the outcome but there was no outcome of substance. The plaintiffs were put out of pocket by attending court only for the matter failing to proceed because of what turned out to be an invalid process meaning that it was as good as not ever having been filed. Nothing sits on nothing, see Benjamin *Lloyd Macfoy* v *United Africa* company 3 All ER

1169 a case that has widely been adopted by courts in this jurisdiction as precedent. In effect the invalidity of the process which was struck off the roll means that the court was being sold a dummy in that there was in fact no legally valid process before the Supreme Court. The next principle is that the rule that costs follow the event is not immutable nor is it a rule of thumb. The respected authors on civil practice Herbstein and Van Winsen; The civil Practice of the High Court and the Supreme Court of Appeal of south Africa, Sed vol p 954 state:

> "The award of costs in a matter is wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have came 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 the case, the conduct of the parties and any circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be four and just between the parties……"

I have noted in this that the Supreme court case having been struck off the roll postponement, the based on giving the case a chance to be determined were informed by the consideration that there was a valid application before that court. As there was none, the plaintiff cannot be out of pocket in relation to wasted costs. However in regard to wasted costs of 4 July, 2023, following a consensual postponement to allow for the determination of the application for rescission of default judgement I resolve to follow the same pattern of reserving the costs of that date until the application case No HC 42237/23 has been determined.

In the circumstances the issue of costs is disposed of as follows:

IT IS ORDERED THAT

1. The first defendant shall pay the plaintiff's wasted costs of the abortive hearings on 10 January 2023, 6 March 2023 and 29 May 2023.
2. The wasted costs of 4 July 2023 are reserved.

Scanlen &Holderness, plaintiff legal practitioners
Mbidzo Muchadehama &Makoni, first defendant legal practitioners