

SMALLAXE MERCHANTS LTD

Versus

HWANGE COAL GASIFICATION COMPANY (PVT) LTD

PHILCOOL INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 30 March 2023 & 6 April 2023

Failure to give security for costs determined by the Registrar

J. Ndubiwa, for the applicant
T. Chinyoka, for the first respondent

DUBE-BANDA J:

[1] This is an urgent application. This application was first set down for 20 March 2023. At the commencement of the hearing on 20 March Mr. *Chinyoka* for the first respondent made an application for a postponement. Counsel submitted that the first respondent was served with a notice of set down without a copy of the chamber application, and requested that the matter be postponed to enable the first respondent to prepare and file a notice of opposition. The request for a postponement was not opposed, it was granted and the matter was then postponed to 30 March 2023 at 14:30 hours.

[2] At the commencement of the hearing on 30 March 2023 at 14:30 hours Mr. *Ndubiwa* for the applicant informed the court that the parties appeared earlier in the day before the Registrar of the High Court for a hearing regarding security of costs. And that the applicant had been ordered to give security in the amount of USD\$30 000.00 for this urgent application. Counsel applied, citing r 75 (3) of the High Court Rules, 2021 (Rules), that the application be stayed pending the applicant giving security as determined by the Registrar. After it was brought to his attention that the rule relied on was not available to a litigant from whom security was demanded but only available to the party making the demand, Counsel made a turn and applied in terms r 75 (4) of the Rules that the matter be struck off the roll with costs on a party and party scale.

[3] For a proper contextualization of the basis upon which the issue of security of costs arose, it is pertinent to highlight that the applicant is a *perigrinus*. In the founding affidavit the

deponent avers that the applicant is a company duly incorporated in terms of the laws of Zambia. It carries on business as a coal merchant at Plot number 8501 off Mumbwa Road, Lusaka, Zambia. It is on the basis of the applicant's status as a *peregrinus* that the question of costs arose and determined by the Registrar.

[4] The Registrar had jurisdiction to hear the matter regarding security of costs. It is so because the matter did not turn on whether or not the applicant was required to furnish security for the costs of litigation. It revolved on the amount to be given as security. In terms of r 75 (2) of the Rules if the contest turns only on the amount of security to be given the matter is determined by the Registrar, and his or her decision is final. In this case the issue of security was properly determined by the Registrar in line with r 75 (2) of the Rules because the contest turned only on the amount of security to be given.

[5] The uncontested facts of this matter are that at 10 O'clock on 30 March 2023 the parties appeared before the Registrar for a hearing regarding the amount of security of costs to be given. And at 11 O'clock the Registrar handed down his determination, which reads as follows:

Determination

1. The plaintiff should deposit with the Registrar security in the sum of USD90 000.00 split as follows.
 - a. USD\$30 000.00 for HC (UCA) 30/23
 - b. USD\$60000.00 for HC (SUMM) 260/23
2. The amount in (a) above should be deposited today 30 March 2023 by 14:00 hours whilst the amount in (b) should be deposited within ten (10) days of the date of determination.

[6] The security of USD\$30 000.00 relates to this urgent application, while the amount of USD\$60 000 00 is for the summons action pending between the parties. At the commencement of this hearing at 14:30 it turned out that the applicant had not provided the security for this application as determined by the Registrar.

[7] It became clear to the parties that this matter may not be heard without compliance with the determination of the Registrar. It is in this context that Mr. *Ndubiwa* sought that this matter be struck off the roll. In support of the application that the matter be struck off the roll, Counsel submitted that he had advised the applicant of the determination regarding the issue of security.

And that the applicant requested for some time to comply with the determination by remitting the payment to the Registrar. Counsel argued that in terms of r 75 (4) of the Rules this court has a discretion whether to dismiss the matter, strike it off the roll or make any such order as to it may seem fit. Counsel submitted further that the failure to give security as determined by the Registrar meant that this matter was not properly before court and the appropriate course of action was to strike it off the roll with costs on a party and party scale.

[8] Mr. *Chinyoka* opposed the application to have the matter struck off the roll, and made a counter oral application that it be dismissed in terms of r 75 (4) of the Rules. Counsel argued that in this case, striking the matter off the roll is not available to the applicant. Counsel referred to r 60 (19) of the Rules in support of this contention, which rule deals with striking off the roll of urgent applications. Counsel argued further that the applicant has not complied with the determination of the Registrar and its application must be dismissed with costs on a legal practitioner and client scale.

[9] Rule 75 (4) of the Rules speaks to the consequences of the failure to give security, it says:

The judge or court may, if security is not given within a reasonable time, on application dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem fit.

[10] The Registrar directed that security for this application should be given at the date and time provided in the determination, i.e., 30 March 2023 by 14:00 hours. At the hearing of this matter at 14:30 hours security had not been given. The time determined by the Registrar to give security had come and gone, i.e., it had expired and no extension has been sought by the applicant and granted by the Registrar. Whether it is competent for the Registrar to grant an extension to give security or not I cannot say. It is an issue that the parties did not address in their submissions.

[11] The issue whether the application should be dismissed, or struck off the roll or the court makes such order as it deems fit remains in the discretion of the court, the discretion cannot be exercised arbitrarily, but judicially. The empowering rule says “if security is not given within a reasonable time”, however, I take the view that in this matter the Registrar determined the “reasonable time” by prescribing the date and time on which security had to be given. The time-line determined by the Registrar has not been complied with, therefore security was not been given within a reasonable time.

[12] Mr. *Ndubiwa* explained the reasons which caused the applicant to fail to meet the timeline determined by the Registrar, however Counsel did not say that an extension had been sought from the Registrar. I take the view that if applicant had issues regarding the compliance with the determination, such issues should have in the first instance been brought to the attention of the Registrar. This court cannot in the first instance start to vary the determination by the Registrar, worst still after the timeline determined by the Registrar had expired.

[13] Where a matter has been struck off the roll for failure by a party to abide by the rules of the court, the party will have thirty days within which to rectify the defect, failing which the matter will be deemed to have been abandoned. See: r 66 of the High Court Rules, 2021; *Bindura Municipality v Mugogo* SC 484/14. Acceding to Mr. *Ndubiwa's* request that this matter be struck off the roll will be tantamount to varying the determination of the Registrar by extending the period on which security had to be given. It will be tantamount to saying to the applicant you can give security within thirty days of the date of this order, and then set this matter down for a hearing. The Registrar has in terms of the law determined the matter, i.e., the date and time security had to be given. His determination has not been set aside on appeal or review. That date and time has come and gone; it has expired. By striking off this matter from the role and giving the applicant leeway to give security and set down this matter outside the timeline determined by the Registrar this court will be as a court of first instance varying the determination of the Registrar. Such is impermissible. Whether the timeline is extended or varied is an issue that in the first instance must be determined by the Registrar, and it cannot be determined by this court sitting as a court of first instance.

[14] The determination of the Registrar is extant. Security had to be given on 30 March 2023 by 14:00. The determination has not been varied by the Registrar, or set aside by this court on appeal or review. At the hearing of this matter by 14:30 security had not been given. This court cannot through the back-door as it were vary the timeline in which security had to be given. Rule 75(4) of the Rules permits this court to dismiss a matter for failure to give security. See: *REMO Investment Brokers (Pvt) Ltd v Interfin Securities (Pvt) Ltd* (SC 2 of 2015, Civil Application SC 157 of 2014) [2014] ZWSC 2 (13 November 2014). Mr. *Chinyoka* argued that the applicant had not complied with the determination of the Registrar and its application must be dismissed. I agree. It is for these reasons that this application cannot be struck off the roll, it must be dismissed.

[15] It was submitted on behalf of the first respondent that the applicant ought to be liable for the costs on a legal practitioner and client scale. Basically, there are two principles in awarding costs. The first is the basic rule that the court within its discretion determines costs. The second rule is that costs are generally awarded to a successful litigant who is indemnified for the costs incurred as a consequence of litigating. And this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I intend awarding costs in favour of the first respondent. However, the first respondent has sought costs on a legal practitioner and client scale against the applicant. To mulct a litigant with punitive costs requires a proper explanation grounded in our law. None exists in this case. I therefore intend awarding costs on a party and party scale against the applicant.

In the result, it is ordered as follows:

This application be and is hereby dismissed with costs.

Mashayamombe & Co. Attorneys, applicant's legal practitioners
Zinyengere Rupapa, 2nd respondent's legal practitioners