ZHOU HAIXI
and
WENZHOU ENTERPRISES [PRIVATE] LIMITED
versus
CHEN SHAOLIANG
and
CHEN XIANDONG
and
CHIEF MINING COMMISSIONER
and
REGISTRAR OF COMPANIES
and
FIDELITY PRINTERS AND REFINERIES [PRIVATE] LIMITED
and
COMMERCIAL BANK OF ZMBABWE LIMITED
and
OFFICER COMMANDING CID MINERALS [ZIMBABWE]
and
OFFICER IN CHARGE CID MINERALS [ZRP CHINHOYI]
and
COMMISSIONER GENERAL POLICE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 & 21 September 2015; 21 October 2015; 5, 18 & 30 November 2015; 4 December 2015

Interlocutory application – leave to appeal

Adv. L. Uriri, with him *Adv. D. Sanhanga*, for the plaintiffs
J. Samukange, for the 1st and 2nd defendants
No appearance for defendants 3, 4, 5 and 6

MAFUSIRE J: These are two interlocutory judgments in one. The judgments are on the two interlocutory applications by the first and second defendants ["***the defendants***"], on the one hand, and the first plaintiff, on the other.

The defendants' interlocutory application was for leave to appeal to the Supreme Court. I had dismissed their application for a stay of the trial *sine die* pending the conclusion of certain criminal proceedings in the magistrates' court. The proceedings were said to be on

the same issues and concerning the same parties. The reason for the request for a stay was that it was intended to produce the full record of proceedings from the magistrate's court in terms of s 12[2] of Civil Evidence Act, [*Chapter 8:01*]. It was said if the defendants were denied the chance to produce that record, then they would be severely prejudiced in the conduct of their defence in the civil case. It was also said that the civil trial would be unfair to them if it went ahead without that record.

I decided that the reasons for the request for a stay were unreasonable. So I dismissed the application. Now the defendants wanted my leave to enable them to appeal to the Supreme Court. That was the one application.

The other interlocutory application was by the first plaintiff. He wanted an order declaring that the second defendant was in ***wilful*** default on the two days that the trial had attempted to begin. As a matter of fact, she had been in default. But Mr *Samukange*, for the defendants, said the default had not been ***wilful***. He said the second defendant had not come to court on his specific advice. He had anticipated that the application for a stay of proceedings would succeed. The matter would then be postponed. It would have been inexpedient and exceedingly costly for the second defendant to have had to fly all the way from far away China, not only by herself, but also with her two young children, only to sit through a mere legal argument on an application for a stay of proceedings which, in all likelihood, would be granted. The matter would then be postponed indefinitely.

Seeing that Mr *Uriri*, for the plaintiffs, would not compromise, Mr *Samukange* sought an order that the second defendant's non-attendance on the two days in question be excused retrospectively.

It is important to place the twin applications above in their proper context. The start of these proceedings was a near charade.

The trial in this matter was set to begin on 15 September 2015. But it did not begin on that date. It also did not begin on the other four subsequent days to which, by special arrangement, it had been postponed. Mr *Uriri* blamed Mr *Samukange* for the lack of progress. Among other things, neither he nor any of his clients would turn up at scheduled meetings. In court or in my Chambers, one of the reasons for the numerous postponements was the need to secure the services of a Chinese interpreter. I was advised that none of the parties spoke a word of English. And there was only one certified Chinese interpreter who served both the courts and the government.

On 5 November 2015, at the instance of both sides, but especially the plaintiffs, I endorsed on the record that the trial in the matter would begin without fail, with or without the parties' counsel of choice. The agreed dates were 18 November 2015 till 24 November 2015. These dates were especially arranged to suit Mr *Samukange's* diary. So all other activities lined up for those days were blocked out of my diary. But come the 18 November 2015, the parties resorted to guerrilla tactics. They would spring at each other, one surprise after another. That put paid to any hopes of the trial ever beginning in earnest.

First to spring an ambush was Mr *Samukange*. The day before, I had been shown a copy of an urgent letter by him to Mr *Ranchhod*, the legal practitioner of record for the plaintiffs. In the letter Mr *Samukange* was demanding security for costs against the first plaintiff in the sum of US$55 000. It was alleged the first plaintiff had all along been in the country on a work permit which had since expired. It was argued that as a *peregrinus* who was suing in our courts, the first plaintiff had to pay the defendants' security for costs. But manifestly, this issue was now being brought up so late in the day.

In court on the following day, Mr *Samukange* persisted, but with the amount reduced to US$20 000. The plaintiffs offered US$10 000 through a bond of security by Hussein Ranchhod & Company, the plaintiffs' legal practitioners of record. In addition, two vehicles were also tendered. The defendants did not accept. There was much haggling. Eventually I settled the issue by directing security for costs at US$15 000 through a bond by the attorneys, plus the two vehicles.

Next to spring a surprise was the plaintiff. Mr *Uriri* applied to amend an aspect of the plaintiffs' claims as set out in the summons and declaration. The plaintiffs claimed several declaratory orders and several interdicts, coupled with a claim for payment of a sum of money. The main relief sought was an order that the first plaintiff be declared, following an alleged sale agreement, the sole shareholder and director in the second plaintiff, a private company duly registered in Zimbabwe. The amendment sought by Mr *Uriri* was to show that the first plaintiff's shareholding in the second plaintiff was partly through himself directly and partly through a nominee.

Mr *Samukange* was vehemently opposed to the proposed amendment. He argued that no prior notice or warning of the intended amendment had been given to him. At the very least, the defendants were entitled to a written notice. He was not prepared to advance any

argument on the proposed amendment until he was given the written notice. He would then get his clients' instructions and file his response. So he wanted the matter postponed.

I considered that the plaintiffs' intended amendment was largely cosmetic. There was no alteration to the substance of the claim. The main claim was for an order that the first plaintiff was now the "owner" of the second plaintiff. The effect of the amendment was simply to show that the share certificates of the first plaintiff's sole shareholding as aforesaid were held partly by himself personally and partly through a nominee.

In terms of Order 20 r 132 of the Rules of this court, the court, or a judge, may at any stage of the proceedings allow a party to alter or amend its pleadings. The alteration should be on such terms as may be just and for the purpose of determining the real question in controversy between the parties. The general rule is that an amendment of a pleading will always be allowed unless the application is *mala fide*, or unless it causes an injustice or prejudice to the other party which may not be compensated by an order of costs; *Commercial Union Assurance Co Ltd* v *Waymark NO*[1]; *UDC Ltd* v *Shamva Flora (Pvt) Ltd*[2] and *Machawira* v *PG Industries [Private] Limited*[3].

I saw no prejudice to the defendants which would be caused by the intended amendment. I saw no injustice either. So I granted the amendment.

After my ruling on Mr *Uriri's* application for amendment Mr *Samukange* immediately launched the application for a stay of the proceedings.

It appears that the tussle between the first plaintiff and the defendants over the second plaintiff had been running for a protracted period. It had had many twists and turns. Briefly, the first defendant and the first plaintiff had made a deal back in China. The deal would be implemented and consummated in Zimbabwe. There was disagreement over what the nature of the deal was. That was part of what I would be trying. But in Zimbabwe, the deal had gone sour. At one time the first defendant, at the instance of the first plaintiff, had been arrested and convicted in the magistrate's court. However, the conviction had subsequently been overturned on appeal. The defendants had then turned the tables against the first plaintiff and had caused his arrest. The plaintiff was now on trial.

[1] 1995 (2) SA 73
[2] 2000 (2) ZLR 210 (H)
[3] HH 5872/14

I was advised that the criminal trial was now in the defence case, an application for discharge at the close of the state case having failed, and a review in respect thereto also having failed.

For the stay application, Mr *Samukange* submitted that in the interests of justice and fairness, the defendants were entitled to utilise the provisions of s 12[2] of the Civil Evidence Act by simply procuring the complete record of proceedings from the magistrate's court and producing it before me. That record would contain all the relevant documents that had been tendered, including those that the defendants had allegedly surrendered to the police during the investigation of the case. The record would contain all the evidence of the witnesses, including that of the accused person himself, i.e. the first plaintiff. He had been cross-examined. The defendants would want to exploit in cross-examination before me, any such contradictions or falsehoods as may be discerned from the criminal trial record. In support, Mr *Samukange* cited s 69 (2) of the Constitution. It says

> "In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law."

I considered that Mr *Samukange's* reference to, and reliance on, the Constitution was a red herring. The same rights to a fair and speedy trial that the defendants claimed, equally accrued to the plaintiffs as well. Besides, it was not the defendants that were on trial in the magistrates' court. It was the first plaintiff. The defendants were mere complainants. Yet the first plaintiff was keen to proceed with the civil trial. The defendants seemed not so keen. They assumed there would be some tactical advantage in their defence if the record of proceedings in the magistrate's court was produced. In my view, that was not a sufficient basis to delay the civil trial. Among other things, there was no telling when the criminal trial would conclude. There was no reason why the civil proceedings should be held hostage by those criminal proceedings which were happening in another court.

Mr *Samukange's* reliance on s 12[2] of the Civil Evidence Act was also a red herring. The section reads:

> "A copy of or extract from a public document which is proved to be a true copy or extract or which purports to be signed and certified as a true copy or extract by the official who has custody of the original, shall be admissible in evidence on its production by any person and shall be *prima facie* proof of the facts stated therein."

Given that the section permits the production of copies or extracts of documents, there was no reason why the defendants could not get these from the magistrate's court for the purposes of production in the civil trial.

It seems to me Mr *Samukange* misconstrued the meaning and purport of the section. In my view, the effect of that section is, *inter alia*, to dispense with need to call all manner of public officials, for example, a clerk of court or registrar, to come and have records in their custody produced through them. When produced, such records and their contents will be part of the overall evidence the judicial officer will consider for his decision.

What made Mr *Samukange's* reason for wanting a stay of the proceedings all the more difficult to understand was the absence of an explanation how and why the mere production of the record of proceedings could, somehow, dispense with the need to assemble all such witnesses as may have testified in the criminal trial, to do the same in the civil trial. That section does not have that effect. This view, in my view, is fortified by s 28 of the same Act. It says:

> "**28 Evidence in previous legal proceedings**
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> [1] Where a person has previously –
>
> [a] given evidence; or
>
> [b] made an affidavit that was produced in evidence;
>
> in any legal proceedings, whether civil or criminal, and he has died or cannot be found or compelled to give evidence or for some other good and sufficient cause cannot reasonably be called to give evidence in or make an affidavit for the purposes of any subsequent civil proceedings, a document which purports to be –
>
> [i] a transcript of his evidence or a copy of his affidavit, as the case may be, in the former legal proceedings; and
>
> [ii] certified by the official having custody of the record of the former legal proceedings as a true transcript or copy of the affidavit, as the case may be,
>
> shall be admissible on its production by any person as evidence of the fact stated therein."

Thus, the need to dispense with the witnesses as may have testified in previous legal proceedings is afforded only in those limited special circumstances as are specified in this section. Otherwise, witnesses in previous or parallel criminal proceedings would still need be called again in related civil proceedings. Therefore, if the reason why Mr *Samukange* wanted

a stay of the proceedings was ***not*** because he would be unable to call any or all such of the witnesses as had testified, or would be testifying, in the criminal trial in the magistrate's court – and he never said that that was the reason – then the mere tactical advantage, if any, that he may have perceived for the defendants in the civil trial by the mere production of the record of proceedings in the magistrate's court, was woefully inadequate to hold up the civil trial.

Mr *Samukange* was not relying on s 31 of the Civil Evidence Act either. It says that, where it is necessary to prove a previous criminal conviction in civil proceedings, the fact that a person was so convicted by any court or military court in Zimbabwe or elsewhere, shall be admissible in evidence **for the purpose of such proof**. The section does not say the conviction in the previous criminal proceedings shall be proof of any of the issues that may be before the civil trial. In other words, assuming that the first plaintiff herein was convicted in the criminal proceedings in the magistrates' court, in the civil trial before me, Mr *Samukange* would not just stand up, hand up the transcription of the proceedings or judgment of the magistrate's court, and urge that they be taken as proof that the first plaintiff was not the 100% owner of the second plaintiff. A full blown civil trial was still necessary, with all the relevant witnesses having to be called, whether or not they might have testified in the criminal trial.

The law on stay of civil proceedings pending the conclusion of related criminal proceedings was laid down in the two cases of *MacFarlane v Sengweni NO & Anor*[4] and *Munyuki* v *City of Gweru*[5]. In *MacFarlane* the Supreme Court [per GUBBAY CJ] said[6]:

> "Although there is no fixed rule of law in either South Africa or England, the usual practice of the courts in those countries is that if it is shown that the civil proceedings are likely to prejudice defendant **in related criminal proceedings**, the court has a discretion to order a stay until the criminal proceedings have been concluded." [my emphasis]

In *Munyuki*, the same learned Chief Justice held that there is no immutable rule that once a criminal prosecution concerning the same or related matter is pending against a person, any civil proceedings must be stayed until the criminal proceedings have been concluded. The correct position is that the court has a discretion to stay the civil proceedings

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[4] 1995 [1] ZLR 384 [S]
[5] 1998 [1] ZLR 182 [S]
[6] At p 388B - C

if the defendant is able to satisfy the court that it is likely that **he will suffer prejudice in the pending criminal proceedings**. [my emphasis]

In casu, the defendants' situation was different. Firstly, they were not the ones on trial in the criminal proceedings in the magistrate's court. It was the first plaintiff. Secondly, the prejudice referred to in *MacFarlane* and *Munyuki* was in relation to the criminal proceedings where there might exist the danger of self-incrimination if the accused should testify in the related civil proceedings that may be running parallel to the criminal proceedings. In this case, nothing that the defendants might say in the civil proceedings before me would have any material bearing on their situation as complainants in the criminal proceedings. At any rate, that was ***not*** Mr *Samukange's* point, in spite of his reliance on *Munyuki*. His point was only that it would be unfair in some way if the defendants were compelled to proceed with the civil trial without the complete record of proceedings from the magistrate court. I did not think it would be unfair.

Another reason why Mr *Samukange's* application for a stay of proceedings was difficult to appreciate was that, he was not being specific on what exactly he wanted from the record of proceedings from the magistrate's court. Contrary to his submission that certain documents previously in the custody and possession of the defendants had been taken away by the police and had never been returned, the discovery affidavit filed on their behalf did not say that there were any such documents. In terms of Order 24 r 161, where a party has been called upon to effect discovery of the documents to be used at the trial, he is required to specify, on oath, such documents, among other things, which he or his agent had but has not now in his possession, at the date of the discovery affidavit.

Furthermore, in their discovery affidavits, the defendants did not list the record of proceedings in the magistrate's court. In terms of r 163, a document not disclosed upon discovery may not be produced at trial without the leave of the court. No such leave was sought. At any rate, practically none of the documents on the defendants' discovery schedule would be difficult to procure and produce. They included formal or public documents like a certificate of incorporation; memorandum and articles of association; an investment licence; a deportation warrant; court orders; charge sheets; and the like.

Ultimately, Mr *Samukange*, in his submissions, literally betrayed the motive behind his wanting a stay of proceedings. This became even more apparent in his application for the second defendant's default to be excused. I shall deal with the excusal application later.

Throughout, Mr *Samukange* was complaining that this matter had been fast-tracked to trial; that it seemed to have jumped the queue or to have been preferred ahead of several others, including one in which he was personally involved, and that, as such, the defendants had just been bundled into the trial without having had sufficient time to prepare. Mr *Samukange* said he was taking up the issue with the registrar.

Mr *Samukange's* grievance that the case had been fast-tracked to court was strange. If such a complaint was genuine, he had had ample time to raise it. The notice of set down for the trial on 15 September 2015 had been served on 17 August 2015. No such grievance had been raised. The parties had exchanged correspondence on a number of issues. No such grievance had been raised. As shown above, the trial was stood down or adjourned on numerous occasions. No such grievance was raised. At any rate, and in my view, such a complaint was frivolous. There are many litigants who would gladly seize the opportunity to have their cases heard as early as possible. If there had been a delay in bringing the case to court, perhaps that would have been a true basis for invoking s 69[2] of the Constitution. But ironically, Mr *Samukange* was invoking the section, actually ***to delay*** the trial.

Having taken all the above factors into account, albeit without that much detail as in this judgment, I dismissed, *ex tempore*, the application for stay. But before proceeding any further, given what had just transpired, I enquired of counsel whether there was any other preliminary house-keeping issue that required to be dealt with before the trial could begin in earnest. Both counsel said there was none. So the trial began. Mr *Uriri* had just started to give his opening statement, but unfortunately, it was now late in the day. The proceedings were adjourned to the following day.

On the following day a new surprise awaited. Mr *Uriri* had to defer to Mr *Samukange* who had sprung to his feet. He said he was applying for leave to appeal to the Supreme Court against my decision the previous day to dismiss his application for stay. He argued that another court might come to a different conclusion that indeed the defendants could well be prejudiced in the conduct of their defence in the civil trial if they were denied the chance to produce the record of proceedings in the magistrates' court. He argued that the defendants had very strong prospects of success on appeal.

When it was his turn to respond, Mr *Uriri* also had a surprise of his own up his sleeve. He disclosed that the second defendant was not in court. She was in default. It had been the same case the day before. Could she be called up three times so that it could be formally

recorded that she was in default? Her defence would have to be struck off and a default judgment entered against her.

Thereafter, there was a brief moment of uncontrolled interjections, Mr *Samukange* trying to explain why the second defendant had not been in court, and Mr *Uriri* insisting that she be called three times as a prelude to being declared being in default. In the end, I directed that we would conclude the application for leave to appeal first and then deal with the second defendant's absence afterwards.

Mr *Uriri* was vehemently opposed to the application for leave to appeal. He saw no prospects of success. He relied on a number of cases, including *S* v *Mutasa*[7] which Mr *Samukange*, before him, had also relied on. The case laid down the test for an application for leave to appeal. At p 9B – C of the judgment, the Supreme Court [per DUMBUTSHENA CJ] said:

> "In my opinion, the test to be applied when considering an application for leave to appeal under Rule 19[8] of the Rules of the Supreme Court is whether the application has a reasonable prospect of success on appeal. If he has, then leave to appeal should be granted. If he has not, then leave to appeal should be refused."

After the parties' submissions, I stood down the application for leave to appeal and proceeded to deal with Mr *Uriri's* application to have the second defendant declared to be in wilful default. As said before in this judgment, Mr *Samukange* explained how he had anticipated that his application for stay of proceedings would succeed and how he had therefor advised the second defendant not to come to Zimbabwe until such time that she would be advised that the trial was about to begin in earnest. In the end, it became yet another application by Mr *Samukange* for an order to have the second defendant's absence on the two days in question excused retrospectively.

After both counsel's oral submissions I directed that they should submit written heads of argument in which they would be free to supplement the facts and to attaché any relevant documents so that I would have all the information at my disposal before passing judgment. That was done. There was not much further detail in the written submissions. On 30 November 2015 I dismissed the application for leave to appeal with costs. I granted the request to have the second defendant's absence on the two days in question excused retrospectively. However, I ordered that the second defendant should pay any wasted costs as

[7] 1988 [2] ZLR 4 [SC]

might have been occasioned by her absence, and the resultant application for her excusal. I then directed, after consultations with the parties' counsel, and seeing that the third term for 2015 had come to an end, that the matter would be placed on my continuous roll for 2016 as matter number one.

My reason for dismissing the application for leave to appeal was that the defendants had no prospects of success on appeal. My reasons for that were the same as those that I had given in the dismissal of the application for stay. I still found the grounds for seeking a stay to be grossly unreasonable. It was evident that, for some strange reason, the defendants, or their counsel, or both, were not keen to proceed with the trial. As Mr *Uriri* put it, the application for stay was made *mala fide*. The defendants were employing every trick in the book to scuttle the trial. He had a point. One only had to look at the chronicle of the events from 15 September 2015 when I thought we had all been ready to get on with the trial, to 19 November 2015 when I was being asked to give a ruling on the twin interlocutory applications.

With regards the application for excusal of the second defendant, the only commendable aspect about Mr *Samukange's* conduct was that, at least, he had been candid enough to explain that the second defendant was absent on his account. The second defendant had not come to court because he had advised her not to. But that was a serious and intolerable miscalculation. He had been presumptuous. He seemed to have elevated his status as counsel to the same level as the court. A postponement is granted by the court, not by counsel. Irrespective of the validity and strength of one's reasons for wanting a postponement, a party should come to court always prepared that the postponement might be refused. There are a number of cases on the point. In *Midkwe Minerals [Private] Limited* v *Kwekwe Consolidated Gold Mines [Private] Limited & Ors*[8] the Supreme Court said [per ZIYAMBI JA]:

> "The conduct of the appellant's legal practitioners exhibit disdain and disrespect for the Court which had travelled to Bulawayo from Harare to hear the appeal, only to be told at the hearing that the appellant wanted the appeal to be postponed *sine die*.
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> The grant or otherwise of a postponement is in the discretion of the court. A party seeking the grant of a postponement or other indulgence at the hearing must come prepared for a grant or refusal of its request. A legal practitioner must be prepared, in the event of a refusal by the court to grant a postponement, to proceed with the hearing if so ordered."

[8] SC 54/13; 2013 [2] ZLR 197 [S]

The Constitutional Court of South Africa had said the same thing in *National Police Service Union* v *Minister of Safety and Security*[9], a case quoted with approval by the Supreme Court [per GOWORA JA] in the recent case of *Apex Holdings [Private] Limited* v *Venetian Blinds Specialist Limited*[10]. At p 1112C – F of its judgment, the Constitutional Court of South Africa said:

> "The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court. Such a postponement will not be granted unless this court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement between the parties……………
>
> The interests of the other litigants and the convenience of the court are also important. The record and heads have been read by five judges variously, months or weeks before the appeal date. The fact that this case was placed on the roll meant that another case had to wait for the following term and if a postponement is granted this consequence will extend into succeeding terms."

The above observations apply with equal force to this matter. Each time that the matter was set down, the continuous roll was cleared of other matters for three or four days as it was anticipated that the trial would last that long. In the end, it proved to be so wasteful.

Mr *Samukange's* conduct was unacceptable. At no stage did he inform the court that the second defendant was not in court. This only came to light when Mr *Uriri* raised it. That was disdainful and disrespectful of the court.

However, in spite of Mr *Samukange's* regrettable conduct, I decided it would be manifestly unjust to hold the second defendant to be in wilful default. It was not her fault that she was not in court. She had relied on the advice of her counsel. As stated by the Supreme Court in *Zimbabwe Banking Corporation* v *Masendeke*[11], wilful default occurs where a party, with full knowledge of the set down date and the attendant risk of a default, takes a decision to refrain from appearing.

But even though I excused the second defendant from her default on the two days in question, I was not prepared to do the same with regards to costs. She had to pay for the sins of her counsel. He was her choice. In a way, she had benefited from his decision. She had

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[9] 2000 [4] SA 1110 [CC], at 1112C - F

[10] SC 33/15

[11] 1995{2}ZLR400{X}

been saved the inconvenience and cost of travel from China to Zimbabwe. But it was her matter, not that of her counsel. It was she that was in default, not her counsel. I felt I should not be overly concerned with the personal interactions between a litigant and her counsel. It was for that reason that I ordered that she had to pay any such costs as might have been occasioned by her absence on the two days in question.

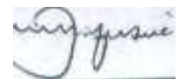
DISPOSITION

1 The application for leave to appeal to the Supreme Court is hereby dismissed with costs.

2 The application to excuse, in retrospect, the second defendant's attendance at court for trial on 18 and 19 November 2015 is hereby granted, but the second defendant shall pay any such costs as might have been occasioned by her default.

3 This matter shall be set down as matter number one on the continuous roll during the week beginning 11 January 2016.

4 December 2015



Hussein Ranchhod & Company, legal practitioners for the plaintiffs
Venturas & Samukange, legal practitioners for the first and second defendants