ELIOT ROGERS
versus
PUWAYI CHIUTSI

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 1, 18 & 25 September 2014, 4 November 2014 & 5 March 2015

Pre-trial conference

T. Biti & R. Muchirewesi, for plaintiff
Adv. L. Uriri, for defendant

MAFUSIRE J: But for the letter from the registrar of this court asking for the reasons for my "judgment" because an appeal had been noted, I did not intend to write any judgment in this matter. I find it quite strange that an appeal has in fact been noted. I was the presiding judge over the pre-trial conference that stretched over five sittings. The parties, with me as umpire, finally reached agreement on the substantive issues, save that of costs. The last sitting was on 4 November 2014. On that day I issued the following order:

1. Judgment in the sum of US$70 000-00 (seventy thousand dollars) plus interest at the legal rate from the 10th of September 2013, be and is hereby granted in favour of the plaintiff.

2. By consent of the parties, the Judge dealing with the defendant's application for review against the decision of the Taxing Master of the 12th September 2014 shall:-

   (a) If upon the upholding of the Taxing Master's decision, grant judgment in favour of the plaintiff which judgment shall take into account legitimate disbursements made by the defendant that include payment of capital gains tax and payment for the rates clearance certificate.

   (b) If upon setting aside the Taxing Master's ruling, the matter shall be referred to the Taxing Master for taxation of the defendant's bill of costs. Pursuant to taxation, the plaintiff shall make a chamber application for judgment in terms of Rule 55 of the High Court Rules in respect of any amount still due to him if any.

3. The defendant shall pay costs of suit calculated on a scale as between attorney and client.

The background to that order or directive is a sad commentary on the legal profession. It is this. At all relevant times the defendant was a registered and practising legal practitioner and therefore an officer of the court. The plaintiff was his client. On 23 April 2014 the plaintiff issued out a summons against the defendant claiming a capital amount in the sum of US$116 000. The money was the balance of the proceeds of the sale of a property the transfer of which had been handled by the defendant. The plaintiff alleged that the defendant had converted the money to his own use. In the alternative the plaintiff claimed a capital amount of US$70 000 and prayed for an order that the defendant's bill of costs, which purported to account for the balance of the sale proceeds, be referred for taxation.

The details of the plaintiff's claim were quite straightforward. Much of the facts seemed common cause. Through an estate agent the plaintiff had sold an immovable property. It had been part of the estate of his deceased parents. The total sale proceeds had amounted to US$266 000. The defendant had been instructed to attend to the transfer. The purchase price had been transferred to his trust account. Inexplicably, the transfer had taken a year to be registered. Afterwards the defendant had only remitted US$150 000. The sum of $116 000 had remained outstanding. The plaintiff pressed for it. In late September 2013 or early October 2013 the defendant rendered three bills of costs. The first, dated 19 March 2013 was in the sum for $25 179-25. The second, dated 27 September 2013 was for $10 847-38. The last, with no discernible date on it, but with an amount of $47 028-83 was said to be the summary of all the legal work done by the defendant and to comprise the total amount due by the plaintiff.

The plaintiff maintained that the defendant had repeatedly acknowledged owing him the sum of $70 000 which he claimed he had invested in an interest bearing account with a bank but was now being evasive about remitting it. So the plaintiff's position was that the full amount due by the defendant was $116 000 but that if the defendant thought that he was entitled to a fee of +$47 000 odd, then he had to tax his bills. However, the plaintiff insisted on immediate payment of the $70 000 over which there was no contest.

In his plea, the defendant denied being indebted to the plaintiff in the sum of $116 000. He claimed that $47 000.83 was due to him by way of fees for professional services rendered. On the sum of $70 000 the defendant stated that on the plaintiff's authority, he had invested the amount. The investor had undertaken to settle the money upon the sale of his diamonds through the Minerals Marketing Authority of Zimbabwe. However, the sales had been stalled owing to the depressed world diamond market.

In his replication, the plaintiff denied that he had given the defendant any instructions other than simply to attend to the transfer of the property. He challenged the defendant's attorney-client bills which he said were only submitted belatedly as he pressed for his money. He also maintained that the defendant could not saddle him with conveyancing costs when they would have been paid by the purchaser. He argued that even if the plaintiff was due an attorney and client fee, the amount that he had claimed and withheld was grossly excessive and completely unreasonable.

On the amount of $70 000 the plaintiff denied that he had instructed the defendant to invest it in the manner alleged, or at all, and that even if he would have given such instructions it would have been on the basis that the investment would be restricted to normal banking channels, not in diamond deals.

The plaintiff filed a detailed summary of evidence. He disclosed the protracted efforts he had made to recover his money. One significant aspect was that at one stage, the defendant implied that he had invested the $70 000 with a certain commercial bank. However, subsequent correspondence revealed that he had handed over the money to some diamond dealer. The correspondence also revealed how the parties' relationship had soured badly and had subsequently degenerated into crude threats. The plaintiff had reported the defendant to the Law Society of Zimbabwe. The defendant had on several occasions threatened the plaintiff with legal action. One of the several letters by the defendant which the plaintiff quoted read like this:

> "I have taken action against you. Your rights are not more important than mine, your money is not more important than my name which you are dragging through the mud as you please. You have been abusing me continuously circulating false and defamatory statements that I have acted unprofessionally to various persons without restraint, and despite numerous warnings. If you do not withdraw these malicious and reckless statements I am suing you and we will see who will be embarrassed in the end, I will sue you to your last penny. Withdraw your reckless statements now. I will not be intimidated by your threats of action against me."

In his own summary of evidence, the defendant said he would testify that when he had received the purchase price from the estate agent he had released a significant portion of it to the plaintiff **without the consent of the purchaser** who he said had **insisted** that the funds be released only upon the registration of transfer. I found this rather disturbing. Legal practitioners should not behave like that.

The defendant also said in his summary that the plaintiff had given him authority to invest the funds for best return as he himself would deem necessary; that when the transfer had been completed the investor still had diamonds to sell; that the diamonds had initially been sold in Harare, but that, because of poor prices, had later been sold in Dubai, and that all the relevant documentation had been provided to the plaintiff's legal practitioners.

The first of the pre-trial conference sittings was on 1 September 2014. The defendant represented himself. At my specific enquiry, the defendant maintained that the plaintiff had signed an investment agreement with him. Of course the plaintiff disputed that. Although he had filed his draft issues and synopsis of evidence the defendant had not yet discovered. So the document appeared nowhere amongst his papers. Needless to say it was not on the plaintiff's discovery affidavit.

There was no dispute on the question of the defendant's liability on the sum of $70 000. All that he had pleaded for was time to pay. He said the diamonds had since been sold. The disbursement of the funds was imminent. The plaintiff expressed extreme bitterness over the defendant's conduct. Among other things, there had been numerous but broken promises to remit this particular amount. In the end, and following the defendant's undertaking, I issued the following directive by consent:

1. That the defendant undertakes to pay the plaintiff immediately US$70 000-00 together with interest thereon at the prescribed rate from 10 September 2013 to the date of payment.

2 That the defendant shall submit for taxation immediately his bills of costs copies of which are attached to the plaintiff's summons.

3. That the parties may file a Deed of Settlement to deal with both the main and ancillary issues, including the issue of costs of suit and the scale thereof.

4. That in the event that any issue remains outstanding the P.T.C. would resume on 18 September 2014 at 9.30 am.

There were several off-the-cuff exchanges over a number of issues. One such was my advice to the defendant to seek legal representation.

The second sitting of the pre-trial conference was on 18 September 2014. The defendant was now represented by Mr *Uriri*. Mr *Biti*, for the plaintiff, informed the hearing that the defendant had defaulted on the payment of the sum of $70 000. He advised that the parties had attended the taxation of the defendant's bills of costs on 12 September 2014. The

taxing officer had ruled that the attendances reflected on those bills were classically conveyancing attendances that were regulated by statute. As such the taxing officer had declined to tax them and had ruled that the defendant could recover his fees in terms of the relevant statute. In light of that Mr *Biti* pressed for judgment to be entered for the plaintiff in the full amount of the summons.

In response, Mr *Uriri* said that he had been unaware that the taxing officer had already issued his ruling since he had been advised that such ruling had been reserved. Consequently he had no instructions on that point. On the sum of $70 000 the defendant offered a payment plan. He would pay $30 000 on or before 30 September 2014 and the balance of $40 000 on or before 31 October 2014. Given that the disbursement of the proceeds of the sale of the diamonds was imminent the payment plan was just something out of caution. Very reluctantly the plaintiff accepted it. The matter was stood down to the afternoon at 16:00 hours to enable the parties to prepare a Deed of Settlement.

At 16:00 hours the parties came back. There was no Deed of Settlement yet. But an arrangement had been reached between the parties through their counsel. However, Mr *Uriri* advised that the defendant was contesting the decision of the taxing officer as he felt that the attendances on his bills had nothing to do with conveyancing. The pre-trail conference was adjourned to 25 September 2014.

On 25 September 2014 the parties still had no Deed of Settlement. Mr *Uriri* advised that the Deed would now be on the sum of $70 000 only. In five days' time the defendant would be filing an application for the review of the taxing officers' decision. It was finally agreed before me that the Deed of Settlement would be filed by not later than close of business on 3 November 2014, failing which the pre-trial conference would be reconvened for the conclusion of the matter.

The fifth and last sitting of the pre-trial conference was on 4 November 2014. There had been very little progress. No Deed of Settlement had been signed. Of the $70 000 the defendant had received only $10 000. Mr *Uriri* advised that the time frames could not be met. The defendant himself advised that the payment that he had promised had depended on him getting the diamond proceeds. They had not been disbursed yet. He had now issued a writ against the diamond dealer. He had also made interim measures to meet his commitments to the plaintiff. Mr *Uriri* said if he failed to pay by 30 November 2014 the defendant would be prepared to consent to judgment in terms of Order 8 of the Rules of this Court.

On the bills of costs, Mr *Uriri* advised that the application for review had since been filed but that the plaintiff was opposing it. The parties were now waiting for the determination of that application.

Perhaps not unexpectedly, the plaintiff's attitude had stiffened. Mr *Biti* recalled the defendant's previous string of broken promises, some of them in front of me. He said there was no need to subject the plaintiff to any further pain. He pointed out that I had issued several directives, all of them on the basis of the defendant's own promises. He submitted that it was a proper matter for me to enter judgment in terms of Order 26 r 182(11) for the full amount of $116 000 as claimed by the plaintiff in the summons. Mr *Biti's* argument was that the application for review did not suspend the order of the taxing officer. Therefore, apart from the $70 000 over which there was no contest, I could also enter judgment for the rest of the claim because the defendant's bills had been dishonoured by the taxing officer. He then asked for costs on the attorney and client scale.

After several exchanges the parties resolved that they would await the determination of the review application in respect of the defendant's bills. They also undertook to agree that the judge who would deal with the application for review could straightaway enter judgment in favour of the plaintiff in the sum of $48 000, less any legitimate disbursements, in the event that he or she upheld the decision of the taxing officer. In the event that the judge set aside the decision of the taxing officer, then the defendant's bills would go back for taxation. The plaintiff would then apply through the chamber book for judgment on any amount due to him, if any.

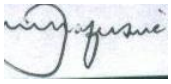
In the end I considered that there was nothing for me to refer to trial. The plaintiff was merely playing for more time. It was completely unacceptable that he wished to continue that play before me. I had previously issued several directives at his instance. He had failed to comply. Rule 182(11) reads:

> "(11) A judge may dismiss a party's claim or strike out his defence or make an order as may be appropriate if-
>
> (a) the party fails to comply with directions given by a judge in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4); and
>
> (b) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order."

Thus a judge conducting a pre-trial conference in terms of Order 26 has powers, *inter alia*, to strike out a party's defence. There are three pre-conditions. The first is that the judge must have given directions in terms of any of the four preceding subrules specified. The second pre-condition is that a party must have failed to comply with any of those directions. Pre-condition three is that the other party has to make an application for the striking out of the defence, either orally at the pre-trial conference or through the chamber book. I was satisfied that all the three pre-conditions had been met.

In the end I entered judgment for the plaintiff in the amount of $70 000 which was never in dispute right from onset. As to costs, even if I were to disregard the plaintiff's conduct as depicted by the pleadings, including the synopses of evidence, what he exhibited in front of me was practically the same thing that the plaintiff had complained about in those pleadings. The defendant was just stringing everyone along. He seemed completely oblivious of his position as a legal practitioner and an officer of the court. Therefore I saw no reason why the plaintiff had to remain out of pocket as far as costs were concerned. That is how the order of 4 November 2014 came about.

5 March 2015



Tendai Biti Law, plaintiff's legal practitioners
P. Chiutsi Legal Practitioners, defendant's legal practitioners