

ALPHA MEDIA HOLDINGS (PVT) LTD
versus
GLOBEFLOWER HOLDINGS (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 19 December 2016

Civil Trial

M Mahlangu, for the plaintiff
Defendant in default of appearance at trial

TSANGA J: On 15 December 2016, I granted the plaintiff's claim in the following terms:

- a) Payment by the defendant to the plaintiff of the sum \$247 000-00.
- b) Interest on the said sum at the legal rate of 5% per annum with effect from 28 February 2010 to the date of payment in full.
- c) Costs of suit including travelling costs incurred by the plaintiff's witness.

As this was in the absence of the defendant's appearance at the trial, I indicated that I would give the full reasons for hearing the plaintiff and granting the decision as prayed. Some history to the matter is in order. I first heard this trial matter on 12 October 2015. Owing to an appeal by the defendant, Globeflower (Private) Limited, on a preliminary point which related to the dismissal of its counterclaim on the basis of prescription, the continuation of the trial on the substantive issues was put in abeyance pending the outcome of the appeal. However, the appeal lapsed on account of the defendant's failure to comply with the Supreme Court rules.

The trial was accordingly reset down for continuation and finalisation on 21 and 22 July 2016. However, the parties having been notified of these dates, the plaintiff's counsel sought a postponement in advance by way of letter written on 16 May, advising that the

plaintiff's witness would not be available on those dates due to a prior international commitment from which he could not withdraw. They sought a date in September 2016.

The matter was re-set down for 20 and 21 October 2016. Notices regarding this set down were received by both parties on 12 July 2016. On 20 October when the matter was scheduled to kick off, Mr J Chidyausiku, who appeared for the defendant, sought a postponement of the hearing. The reason he advanced was that Mr Magwaliba, the advocate handling the matter was unable to attend on that day or the following day because he was "already committed". The plaintiff's witness had flown in from South Africa and had been ready to proceed. However, the request for postponement to a date to be advised was acceded to by the plaintiff's counsel on account of the fact that the previous postponement had been at their behest. The defendant agreed to tender wasted costs for the day. Whilst I granted the postponement to a date to be advised, at the same time I expressed my displeasure to the defendant's counsel at his failure to make alternative arrangements and his unpreparedness to handle the matter. Furthermore, the postponement was only being sought on the actual day of the trial.

New notices of set down were subsequently sent out for the hearing of the matter on 15 and 16 December 2016. The defendant's practitioners received and signed for their notice of set down on 29 November 2016 whilst the plaintiff's received theirs on 2 December 2016. On 15 December 2016, the plaintiff and his counsel Mr *Mahlangu* appeared for the hearing of the matter. In the defendant's stead was Ms Chinwawadzimba, an advocate, who intimated that she was not there for purposes of proceeding with the hearing but merely to advise the court that the defendant was seeking a postponement. The primary reason advanced for the quest for yet another postponement, again centred on Mr Magwaliba's unavailability. He was said to be out of the country. She also stated that since he was away, the file could not be retrieved from his office. As with the last time, the application was being made on the actual day of the hearing, with no prior indication having been brought to the court's attention that postponement would be sought.

The plaintiff's counsel, Mr *Mahlangu* vehemently resisted the quest for yet another postponement on several grounds. He argued that ample time had been provided regarding the continuation of the trial to enable defendant's counsel to have made alternative arrangements. He highlighted that the plaintiff's lawyers had had themselves to make alternative arrangements as the advocate they had briefed, Mr Mpofu, was unavailable. They had therefore had to dispense with his appearance due to his unavailability on the court dates

in question. Furthermore, Mr *Mahlangu* argued that the plaintiff's witness had yet again travelled all the way from South Africa and would be greatly inconvenienced by yet another postponement. Additionally, Mr *Mahlangu* expressed the view that in reality the defendant had no real defence to the matter and that this was a matter which could in reality have been pursued through summary judgment or even a stated case. Ms Chinwawadzimba reiterated her emissary role and the limit of her mandate. She could not comment on whether the matter was one that could have proceeded by way of a stated case as she had no knowledge of the heart of the matter.

It is in the court's discretion whether or not to grant an application for postponement. A court reaches its decision once it has directed its mind to all the facts and relevant principles. As stated in the case of *Midkwe Minerals (Pvt) Ltd v Kwekwe Consol Gold Mines (Pvt) Ltd & Ors* 2013 (2) ZLR 197 (S):

"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.... to appear before the Court totally unprepared and totally ignorant of the merits of the case in my view smacks of negligence on the part of the legal practitioner".

In *Apex Holdings (Pvt) Ltd v Venetian Blind Specialists Ltd* SC 33/15 the Supreme Court further emphasised that a party seeking postponement must show that there is good cause for the postponement or that there is a likelihood of prejudice if the court refuses the indulgence being sought since a court should be slow to refuse an application where the reasons for the applicant's inability to proceed have been fully explained. Nonetheless, an application for postponement will only be granted where it is appropriate to do so, such as where the circumstances were not foreseen.

In the case of *Greyventein v Neethling* 1952 (1) SA 463 (C) at 466 A-D, the principles for considering an application for a postponement were laid down as follows:

- (a) the application for a postponement must be made timeously,
- (b) it must not be occasioned by circumstances which should have been foreseen when the matter was set down,
- (c) the other party should not suffer prejudice which may not be alleviated by a cost order and by safe guards regarding payment.

This application for postponement was certainly not made timeously and certainly no evidence was placed before me before hand or on the day in question in support of the claim

of Mr Magwaliba's unavailability on the dates of the trial. If indeed defendant's counsel was not available due to the need to travel out of the country, this was a circumstance which was foreseen and ought to have been communicated to both the plaintiff and the court in advance. As stated, apart from seeking postponement on account of Mr Magwaliba's non-availability, Ms Chinwawadzimba professed that she was entirely unfamiliar with the case. Thus she was not in a position to assist the court in the event of the application for postponement being refused and the trial proceeding. In view of her limited mandate, she did not speak to the defendant's capability to meet an appropriate order of costs which would deal with the prejudice or potential prejudice that the plaintiff would suffer from yet another postponement. The indications from correspondence shown to me by the plaintiff were that there were already issues with previous costs not yet having been settled. With the plaintiff's witness, Mr Trevor Ncube having again travelled all the way from South Africa, I thus had to weigh very seriously the prejudice that would be occasioned by yet another postponement. I refused the postponement and ordered that the matter would proceed with the plaintiff. Unlike the plaintiff's representative, the defendant's representative, Dr Gono, has notably never shown up at any of the postponements, seemingly taking it for granted that postponements are there for the asking. This in itself may be pointer towards what Mr *Mahlangu* said was a lack of a serious defence. As her mandate for appearance had been merely to seek a postponement, Ms Chinwawadzimba excused herself upon the refusal of a further postponement. She was not in a position to represent the defendant. The defendant was thus in default at the continuation of the trial.

I heard evidence in support of the plaintiff's claim. Mr Trevor Ncube, the chairperson of Alpha Media Holdings, and, a shareholder therein, gave evidence on the plaintiff's behalf. The synopsis of his evidence rested on the written agreement of sale of shares which was entered into by the parties on 19 November 2009. His evidence was that the defendant, whose principal shareholder is Dr Gideon Gono, bought from the plaintiff 20 000 shares being the entire share capital in a company called Pitrace Investments (Private) Limited which was owned by the plaintiff for the price of US\$ 675 000-00. The defendant had only paid US\$428 000-00, leaving a balance of US\$247 000-00. He told the court that he and Dr Gono know each other very well. Despite an acknowledgement by Dr Gono to pay the balance, this has not been paid.

He also emphasised that what was sold as captured in the agreement between the parties, were the shares in Pitrace which owned shares in a company called Tunatimore

Printers Private Limited (Tunatmore). He explained that it was Pitrace's holding of shares in Tunatmore that the defendant was interested in hence the full acquisition of Pitrace. He produced to the court a copy of the share certificate of 5 000 shares that Pitrace owns in Tunatmore. He emphasised that there had been no misrepresentation regarding the shares owned in Tunatmore and pointed to the clause in the agreement regarding warranties and exclusions. The agreement of sale openly alluded to a dispute at the time of purchase between Pitrace and Tunatmore concerning shares. With this having been captured in the written agreement, he said the defendant was therefore aware of the dispute.

He also drew the court's attention to the payment provisions in the agreement indicating that the defendant had paid three instalments leaving a balance of US\$247 000-00. He also told the court that the defendant through Dr Gono, had expressed a desire to settle the matter out of court but in reality he had done nothing towards achieving this end. He also emphasised that not once had the plaintiff been told by Dr Gono that he had issues with the agreement or that he was unhappy with the asset he had paid for. He said it was only when the plaintiff approached court and process had been issued, that allegations were raised by the defendant's representative, regarding what the defendant had been sold. His evidence was that the plaintiff still holds the papers regarding the company sold but that they had written to Dr Gono offering him all the papers for him to appoint directors to protect his 25% share in Tunatmore. He has not taken up the offer. Mr Ncube also stressed that the plaintiff's other shareholders want the matter resolved. He highlighted that he has had to incur travel costs to attend the trials, which have been aborted twice, and, that he should be compensated for these costs.

Having heard his evidence on behalf of the plaintiff, I was satisfied that he had laid out a basis for supporting his claim. I accordingly granted the order as prayed for in the following terms, incorporating the amendment regarding what was sought in terms of costs:

- a) Payment by the defendant to the plaintiff of the sum \$247 000-00.
- b) Interest on the said sum at the legal rate of 5% per annum with effect from 28 February 2010 to the date of payment in full.
- c) Costs of suit including travelling costs incurred by the plaintiff's witness.

Gill Godlonton and Gerrans, plaintiff's legal practitioners