HATCLIFFE COMMUNITY CHURCH
versus
NORTHSIDE COMMUNITY CHURCH
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 23 November 2021 & 12 October 2022

Contested Bill of Costs – Referral in terms of Rule 72 (25) of the High Court Rules, 2021

Mr D. Kanokanga, for the plaintiff
Mr B.K. Mataruka, for the 1st defendant

MUSITHU J:

Background

This matter came by way of referral from the taxing officer in terms of Rule 75(25) of the High Court Rules 2021 (the rules), on 23 November 2021. It was pursuant to a disagreement between the parties over the inclusion of certain items in the plaintiff's bill of costs that was placed before the taxing officer for taxation. The parties are embroiled in an ownership dispute concerning a church in the suburb of Hatcliffe, Harare. The matter was ripe for trial that was set to commence before me on 12 July 2021.

On the day of the commencement of the trial, the first defendant's counsel, without any prior notice to the plaintiff's counsel and the court, applied to have the matter postponed *sine die*. The reason given for that request was that in the morning of the same day, the first defendant had filed a court application to amend its plea. Mr *Kanokanga* appearing for the plaintiff was understandably perturbed by the turn of events. The first respondent's conduct was clearly unacceptable because when the parties counsel appeared before me for a case management meeting prior the said date, they had made undertakings that the trial would definitely commence on the agreed day.

Mr *Kanokanga* submitted that in the event of the matter being postponed, the first defendant be ordered to bear wasted costs on a legal practitioner and client scale. Mr *Mataruka* appearing for the first defendant, could not dispute that an adverse order of costs at the level

sought was warranted given the circumstances under which the application for the postponement was made. Having considered the circumstances of the matter, I granted the following order;

> "1. Matter is hereby postponed *sine die*.
> 2. The first defendant shall pay the plaintiff's costs of the day on a legal practitioner and client scale"

The parties failed to reach agreement on the amount of costs payable, and the plaintiff prepared its bill of costs for taxation. The bill of costs was set down for taxation on 14 October 2021. Before their appearance at taxation, the parties counsel had exchanged correspondence in which they differed on the meaning of the words "costs of the day". The plaintiff construed the phrase to mean all costs that were reasonably incurred in preparation for the trial. On the other hand, the first defendant was of the view that such costs were only confined to events that occurred on the day of the hearing.

The parties attended taxation on 14 October 2021 as scheduled, and they made brief submissions to the taxing officer on their understanding of the expression "costs of the day". After the hearing, the taxing officer took the view that the dispute required a determination by a judge in chambers in terms of r 72(25). The taxation proceedings were accordingly adjourned to allow for a determination of that issue as aforesaid. The taxing officer further directed the parties to file detailed submissions in support of their respective positions.

Rule 72(25) states as follows:

> "(25) The taxing officer may, without filing any formal documents, submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for the legal practitioners who appeared at the taxation to appear before the judge respecting such point."

The submissions attached to the referral were quite detailed and for that reason I dispensed with the need for counsel to appear before me for further addresses. The referral from the taxing officer was accompanied by a memorandum in which the following observations was made.

> "According to R.F Subbiah a Taxation of Legal Costs in Africa at Page 123, wasted costs are those costs which result from a situation whereby services rendered and costs incurred are no longer of use to a party, or useless to continuation of an action.
> Thus, from the above only costs that have been rendered useless must be allowed in the bill. The challenge is that the bill consists of all the work that was done in preparation of the trial, all the work cannot be regarded as useless as some of it can still be used when the matter has been reset down for hearing. Our view is that such work cannot be taxed at this stage though we stand guided…"

The Analysis

F.J. Roos in the book 'Taxation of Costs in the Superior Courts of South Africa'[1], said the following about wasted costs:

> "In deciding what are wasted costs due to a postponement, the test is whether the costs in question have become useless and unnecessary by reason of the postponement….."

The same author also opines that costs of the day include wasted attendance in court by attorneys and counsel and witnesses[2]. In *Carlis* v *Hay*[3], an authority cited by both parties in their submissions, INNES CJ had the following to say about costs of the day:

> "I take it that when a party obtains a postponement and is ordered to pay the costs of the day, he is liable to pay those extra costs which are caused by such postponement…"

The court also stated that costs of the day did not include the expenses of the plaintiff's witnesses, if the plaintiff's case had been closed since such expenses incurred in respect of the witnesses became costs in the cause. Also not included is the full trial fee of the plaintiff's attorney, but only such fee as the attorney would be entitled to charge on the day of the resumed hearing.

In giving context to the phrase "costs of the day" it is of course necessary to consider those items in the bill of costs that the first defendant found objectionable. In its submissions, the first defendant made specific reference to items 1 to 48 and items 52 to 72 of the itemised bill. It does not appear to have any gripe with items 49 to 51, which are the attendances for the day the parties appeared in court. Items 1 to 44 deal with attendances that occurred between 9 June 2021 and 7 July 2021. They cover attendances such as the drafting of correspondence and perusing of documents and other communication. Those attendances are remotely connected to the events of 12 July 2021. In respect of the attendances that occurred post the date of the hearing, whether or not the costs claimed are allowable will dependent on whether such attendances were triggered by the postponement of the matter. Regrettably, the plaintiff's submissions were not clear as to what the various communication post 12 July 2021 was really about.

Items 45 to 48 warrant some attention. These relate to attendances towards preparation for the trial. These occurred between 8 and 10 July 2021. Items 45 and 46 pertained to zoom

[1] First Edition at p 68
[2] At p 74
[3] 1903 TS 317 at p 318

meetings with BUZ and IW in preparation for the trial. It is not clear what these acronyms stand for, and whether these attendances were with witnesses to the plaintiff's case or not. Item 47 was a physical meeting with client. Item 48 pertained to preparation for trial by counsel. It included research on case law authority, going through pleadings and taking notes for the trial.

Engagements with witnesses for purposes of preparing for trial are not uncommon on the eve of the trial. It may be necessary for counsel to go through the witness statements with those witnesses prior to the hearing, to determine if they still have the same recollection of events relative to their statements. When the matter gets postponed indefinitely, then such costs become wasted as they are no longer of use to that party. It would be different if the matter got postponed to a date which is not far off from the date of the postponement, in which event such costs cannot be deemed to have become useless or unnecessary. This is because further engagements with the same witnesses would not be necessary within such a short space of time.[4] The witnesses would still have a solid recollection of events.

The consideration is however different in my view, with respect to item 48. As already noted, it relates to the preparation for trial by counsel. Can these costs be said to have become useless and unnecessary by reason of the postponement? Legal practitioners are experts in their field of work. All the effort that was applied towards preparation for trial does not go to waste. It will still be put to use when the trial resumes, especially as such preparation is by an expert in the field of law. Such costs cannot be said to have become useless and unnecessary. They certainly would not fall within the ambit of costs of the day for as long as the trial is going to resume at some point.

In its submissions, the plaintiff referred to two local judgments and one South African judgment to justify the attendances in its bill of costs.[5] I have gone through the authorities and found them distinguishable from the present case. In the *Zimbabwe Banking Corporation Ltd v Trust Finance Limited & Ano* case, a hearing took place before the learned judge on 27 July 2005. The ruling was delivered on 4 August 2005, and the defendant was awarded the "costs of this date's hearing and should properly bear the defendant's said costs on the higher scale". The party against whom the order of costs was made challenged the taxing officer's decision to allow costs reflected in items 1 to 11 and 17 to 24 of the bill of costs, on the basis that these

[4] *O'Reilly v Lakofski* (1933W.L.D., 145)
[5] *Zimbabwe Banking Corporation Limited v Trust Finance Limited & Ano* HH 130/06; *Kika v Malaba & 3 Ors* HH 297/21 and *Anton Herbert Taute NO v Gert Petrus Johannes Heymans* Unreported Free State High Court case No. 6032/08

were incurred before and after 27 July 2005. The argument was that these were not within the contemplation of the judge when the ruling of 4 August 2005 was made. MAVANGIRA J (as she then was), made the following pertinent observations:

> "……..in my perusal of items 1 to 11 on the bill of costs, it appears that all the items claimed were in preparation of the hearing of 27 July 2005, particularly as the argument before the court when the applicant sought a postponement was whether or not a contested provisional sentence matter could be set down on, and or postponed to the unopposed or the opposed roll.
>
> With regards to items 18 to 24, although Mr *Matinenga* had no instructions to concede in relation to them, he was not in a position to make any submission justifying why they should not have been allowed. A ruling having been handed down, the 1st respondent's legal practitioners necessarily had to make inquiries with a view to uplifting a copy, I have no hesitation therefore in finding that the Assistant Taxing Officer was justified in allowing these items as well."[6] (Underlining for emphasis)

The above views were expressed in the context of a hearing that had taken place. The court noted that the items on the bill of costs were consequent upon and incidental to the applicant's application for a postponement, which application the court heard on 27 July 2005 leading to the ruling on 4 August 2005. The court was therefore correct in my view that such costs were allowable. The parties had prepared for a hearing which took place on 27 July 2005. The services rendered and costs incurred in connection with that hearing were no longer of use to any party after the court made a ruling on 4 August 2005.

The same can be said of the costs consequent upon the said ruling. It is for that reason that the court found that after the ruling had been handed down, counsel obviously had to make enquiries and uplift a copy of such ruling. In the present matter, the only hearing before the court was in connection with the postponement of the matter for reasons already stated. The parties did not have to prepare for such hearing, and neither were they required to address the court on the merits of the main matter. The plaintiff's counsel did not know that an application for a postponement would be made. He had no need to have prepared for such an application and he was genuinely taken by surprise when that application was made.

In the *Kika v Malaba* judgment, the question of costs was considered in the context of a withdrawal of an application before the court. The applicant tendered wasted costs in the notice of withdrawal. The court stated that wasted costs were all those costs reasonably incurred in preparation for the case. Since the matter had been withdrawn, it was not necessary for the court to itemise which attendances constituted wasted costs in the circumstances. The parties

[6] At pages 6 and 7 of the judgment.

in whose favour the order of costs was made would need to justify those attendances that fell within the ambit of wasted costs. The South African case of Anton *Herbert Taute NO* was a review of a taxation following the taxing master's decision to disallow some amounts from the fees that were charged for various items. Unfortunately the operative part of the order that gave rise to the taxation of the bill of costs was captured in Afrikaans, although the rest of the text is in English. The court proceeded to deal with the items of the bill of costs that were disputed, and remitted certain items to the taxing officer with the necessary directions. I must say that the plaintiff's submissions herein were not very helpful, as they did not address the relevance of this case authority to the issue before the court.

In *Koenigsberg* v *Transvaal Government*[7], it was held that where a case was postponed without hearing on the day of the trial and the applicant was ordered to pay costs caused by the postponement, the taxing officer must only allow such costs as constituted wasted costs caused by the postponement. Such costs must be a direct result of the postponement of the matter on the particular day. It must be demonstrated that had it not been for the postponement, such costs would not have been incurred. I therefore agree with the first defendant's submission that all the attendances listed under items 1 to 44 are clearly unrelated to the postponement of the matter on 12 July 2021. These attendances were made in the normal cause of progressing the matter towards trial. Their fate will be determined at the conclusion of the trial. They are costs in the cause.

Items 45 and 47 should only be allowed to the extent that they relate to preparatory work involving the witnesses that would have been required to attend and give their testimony at the trial. Such costs can be deemed to have been rendered useless by reason of the fact that such preparatory work would have to be redone on account of the lengthy postponement of the matter. The same however cannot be said of the preparation for trial by the legal practitioner for reasons already stated.

As regards the post 12 July 2021 attendances, it is only in respect of those attendances that would not have been necessary but for the postponement. The plaintiff must be able to demonstrate to the taxing officer that such attendances were a direct result of the postponement of the matter on 12 July 2021.

[7] (1904 T.S., 576)

Disposition

Resultantly it is ordered that:

1. The attendances in respect of items 1 to 44 of the bill of costs, being unrelated to the postponement of the matter on 12 July 2021, must be disallowed.
2. The attendances in respect of items 45 and 47 of the bill of costs should only be allowed to the extent that they relate to preparatory work involving the witnesses that were required to attend court and give their testimony at the trial.
3. The attendances in respect of item 48 of the bill of costs, being preparatory work by counsel, have not been rendered useless in the continuation of the trial and must be disallowed.
4. In respect of attendances that occurred after the postponement of the matter on 12 July 2021, only those extra costs that were incurred as a direct result of the postponement of the matter shall be allowed.
5. There shall be no order as to costs.

Kanokanga & Partners, legal practitioners for the plaintiff
Gill, Godlonton & Gerrans, legal practitioners for the first defendant