

WATERMOUNT ESTATES PRIVATE LIMITED
versus
ONIYAS ZIDANDA GUMBO
and
KWAZISO BHOSHA
and
RAYMOND MOYO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 22 September 2022

Opposed Application

A Taruvinga, for the plaintiff
Ms R Mabwe, for the 1st defendant
Mr Ndhlovu, for the 2nd defendant
T Mpofu, for the 3rd defendant

TAGU J: On 22 September 2022, I heard the present application and after hearing submissions from the parties I made the following order:

“The matter is withdrawn and Case HC 694/22 is dismissed on account of the withdrawal.”

I have now been asked for the reasons for the said judgment. These are they.

The plaintiff issued summons against the defendants for payment of US\$5 000 000.00 (Five Million United States Dollars) or its equivalent in Zimbabwean currency at the rate prevailing on the date of payment, interest on the amount calculated at the prescribed rate from the date of summons to the date of payment in full, and costs of suit on a legal practitioner and client scale. Having been served with the above summons, the defendants excepted to the summons in terms of r 42 (2) of the High Court Rules, 2021 to the effect that the summons discloses no cause of action against the first defendant and or that the matter is *lis pendens* as the dispute relating to the directorship of the plaintiff is pending under HC 8497/18.

At the hearing of the special plea and the exception, counsel for the plaintiff sought for the postponement of the matter possibly to a date after 24 October 2022 for the sole reason that the Advocate who was to handle the matter was unable to attend. He said they sent letters advising the other colleagues hence there was no prejudice to be suffered if the matter were to be postponed.

The application to postpone the matter was strongly opposed by the defendants. Ms R Mabwe counsel for the first defendant opposed the application on two grounds, firstly, that the plaintiff adopted an attitude that postponement is for mere asking, and secondly, that it was not expedient in the interest of justice for this court and parties to wait for a whole month before hearing the matter. Mr Ndhlovu counsel for the second defendant associated himself with the position taken by counsel for the first defendant. He however, submitted that the request for postponement was made at the eleventh hour and Advocate Mubaiwa did not have a brief from Mr. Taruvinga. Advocate T Mpofu for the third defendant also associated himself with the other counsels. He however, made it clear that Advocate Mubaiwa declined the brief from Mr Taruvinga and suggested that once a matter has been set down, it must be completed. He referred the court to a letter drafted by Advocate Mubaiwa.

Having heard the submissions from counsels, the court made the following remarks in its ruling against the postponement-

“This is an application seeking postponement of this matter to some date in October 2022 which is almost a month away on the basis that the counsel of choice chosen by the Plaintiff is unavailable.

The application for postponement is strongly opposed.

Indeed I had sight of the letter written by Advocate Mubaiwa to Mr. Taruvinga. What is clear is that the Plaintiff approached or caused Advocate Mubaiwa to be briefed on this matter on the eleventh hour, that is, on the 21st of September 2022 because the name of the Advocate Plaintiff wants to represent it has not been stated. In turn Advocate Mubaiwa also notified the counsels for the Defendants of his position on the eleventh hour, that is, the 21st September 2022.

What is important to note is that as we are seated here Advocate Mubaiwa, assuming that is the only Advocate briefed, because we have not been told as to which Advocate will be available mid-October 2022, Advocate Mubaiwa declined the brief.

As submitted by counsels for the Defendants, an application for postponement is not for mere asking. Sufficient and reasonable reasons must be advanced. The one applying for a postponement must be prepared to argue the matter in the event the application is dismissed.

In this case I am not satisfied that reasonable explanation for failure to appear in Court by the briefed Advocate is reasonable. The Advocate briefed at the eleventh hour clearly indicated he declined the brief.

The only conclusion I can come to is to dismiss the application and order that the proceedings should proceed, if there is anyone to blame, it is the plaintiff for leaving the matter until the eleventh hour.

IT BE AND IS HEREBY ORDERED THAT

1. Application for postponement is dismissed.
2. The matter to proceed.
3. Costs will be in the cause.”

Counsel for the plaintiff Mr Taruvinga asked for 30 minutes adjournment to prepare for submissions on the merits of the application. On resumption he told the court that he had instructions from the plaintiff who authorized him to represent it. Further, he had been instructed to withdraw the case with tender of costs against all the three (3) defendants. That he would file Notice of Withdrawing in an hour’s time. True to his undertaking, but on 23 September 2022 Mr Taruvinga filed his Notice of Withdrawal of summons against the first, second and third defendants with an offer to pay costs.

The withdrawal was accepted by defendants save to say the plaintiff was to comply with the Rules as regards payment of costs, and that it be made clear in the Order that Case HC 694/22 is dismissed on account of the withdrawal.

I then made the following Order,

IT BE AND IS HEREBY ORDERED THAT

1. The matter stands withdrawn by Plaintiff.
2. Matter under Case HC 694/22 is dismissed on account of the withdrawal.
3. The plaintiff to pay wasted costs.

Mutuso, Taruvinga and Mhiribidi, plaintiff’s legal practitioners.
Gill, Godlonton & Gerrans, first and third defendants’ legal practitioners
Mangezi Nleya & partners, second defendant’s legal practitioners.