ELLAH MURINGAYI
versus
BERTHA BEREJENA N.O.

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 November 2016 & 23 November 2016

Pre -Trial Conference

K Chisekerere, for the plaintiff
A Nyamupfukudza, for the defendant

CHITAPI J: I dismissed the plaintiff's claim with costs and indicated that my reasons for doing so would be given in due course. These are they.

The plaintiff issued summons against the defendant in her capacity as executor dative in the estate of the late Titus George Berejena. The plaintiff and the defendant executed a sale agreement in respect of a property called 23 Britania Road Southerton Harare which property is described as stand 8631 Salisbury Township for the purchase price of US$50 000-00 with the plaintiff as buyer and the defendant as purchaser. The agreement was executed on 5 March, 2015. The defendant paid a deposit of US$30 000-00 but defaulted on payment of the balance of US$20 000-00. The defendant on account of the plaintiff's failure to pay the balance cancelled the sale agreement. When the plaintiff claimed the refund of the US$30 000-00, the defendant failed to pay it. The plaintiff then instituted this action through issue of summons on 8 June 2016.

The defendant filed a plea in which she did not deny that the refund was due. She however averred that she could only refund the money upon the repurchase of the property by an alternative buyer because she no longer had the deposit, having distributed it to the beneficiaries of the Estate. She also pleaded that the plaintiff should bear the liability for payment of agent's

commission in the sum of US$2 500-00. She accordingly tendered payment of the sum of US$27 500-00 on resale of the property.

The pleadings were subsequently closed and discovery effected by the plaintiff on 15 September 2016, on which date the plaintiff also filed a notice of application for set down of the matter for pre-trial conference. By notice dated 23 September, 2016 the Registrar issued a directive to the parties to hold a round table discussion to try and agree on possible ways of settling the matter and or curtailing the duration of trial. The parties attention was drawn to r 182 (2) of the High Court Rules so that they deal with matters listed in the said rule.

The pre-trial conference was set down before me for 19 October, 2016. On that date the plaintiff appeared with her legal practitioner Ms *P Mutimudye*. The defendant appeared with her legal practitioner Mr *Nyamupfukuda.* The parties indicated to me that they had met in round table negotiations as directed in the Registrar's letter. The legal practitioners indicated further that there were a few sticking points still to be wrapped up. One of the issues was that the plaintiff was not agreeable to pay the agents' commission of US$2 500-00 and wanted her full refund of the US$30 000-00. The plaintiff was alleged to be frustrating potential buyers and it was reported that one prospective purchaser had withdrawn an offer to purchase the property owing to the squabbling between the plaintiff and defendant. I asked the parties whether there was room for further negotiations and parties agreed that with good faith on their part, further negotiations could yield a settlement.

I advised the parties that from the pleadings and what they had submitted to me, there was no dispute to refer to trial because the agreement of sale attached to the declaration and which was cancelled clearly provided answers to the issue of agents' commission. It was payable by the seller. The defendant's counsel then submitted that in his view, the purchaser should pay the commission because she breached the agreement. I then suggested to the parties that they consider ring fencing the issue of commission and that the plaintiff allows the property to be resold without hindrance, accept the offered US$27 500-00 and have the disputed $2 500-00 paid into the Trust Account of one of the legal practitioners pending further negotiations. It had been reported that the plaintiff in any event was not averse to payment of the agents' commission. She however indicated that the estate agent had not claimed the commission and that in the absence of such a claim, the defendant would be unjustly enriched by withholding the money on the

pretext that it was intended for agent's commission yet the agent did not seek to recover any commission. I suggested to the parties that they engage the estate agent and attempt a settlement of the matter as these were clearly issues non suited for a trial except to satisfy the parties' egos.

On the above understanding and directives, I asked the parties to indicate how much time they required to try and resolve the matter. The parties suggested a week or two. I then asked counsel if they were available on 4 November, 2016 at 9:00am. They checked their diaries and confirmed their availability. I made it clear to counsel that 4 November 2016 was the last date on which I was available to deal with pre-trial conferences in the morning because I was scheduled to preside over the bail court with effect from 7 November 2016 for the whole of November. The bail court sits every day of the week commencing at 9:00am. The pre-trial conference was then postponed to today 4 November 2016 by consent of the parties.

At the rescheduled time of the pre-trial conference my attention was drawn by the registrar to a letter dated 28 October 2016 written by the plaintiff's legal practitioner. It was addressed to the Defendant's legal practitioner. Its contents are as follows:

> "RE: ELLAH MURINGAYI VS BERTHA BEREJENA NO. CASE NUMBER HC 5783/16
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> We refer to the above matter and advise that the writer will be attending the law society summer school from the 3rd November to the 6th November 2016 in Nyanga.
>
> Therefore the writer will not be able to attend the Pre-Trial Conference which was postponed to the 4th of November 2016 at 9:00 am before honourable Justice Chitapi. The writer will instruct another lawyer to appear on her behalf and apply for the postponement of the matter to any date available after the 6th of November 2016.
>
> Yours faithfully
>
> DANZIGER & PARTNERS
> Cc The Registrar of the High Court of Zimbabwe, Harare (Honourable Justice Chitapi's Clerk)"

I directed the registrar to usher the parties into chambers. Mr *Chisekerere* introduced himself and immediately submitted that he was only a stand in counsel on behalf of the plaintiffs' counsel. He further submitted that he was only in attendance as a follow up on the letter which had been written by the plaintiff's counsel and that his brief was to apply for the postponement of the pre-trial conference to any date after 6 November, 2016. Mr *Nyamupfukudza*, for the defendant then introduced himself and the defendant. He submitted that

whilst he understood Mr *Chisekerere's* dilemma in that he had no instructions to deal with the matter in substance, he found it unacceptable that the plaintiff's counsel would have consented to a date when it was clear that she would not be available.

I asked Mr *Chisekerere* whether he considered that the reason he sought to rely upon to justify a postponement being that the plaintiff's counsel was attending the Law Society Summer School was a justifiable reason for a legal practitioner to absent himself or herself from a court hearing scheduled with such legal practitioner's consent. I also asked him to address me on why he did not get a full brief to represent the plaintiff in the pre-trial proceedings. Mr *Chisekerere* did not make any meaningful submission. He did not even have the file on the matter. It appears that he was acting under the impression that applying for a postponement was a matter of the giving and not an application for which he needed to be prepared for a decision denying the postponement where after the matter had to proceed. By not anticipating that the application for postponement could be refused and being prepared to then deal with the consequences of such refusal Mr *Chisekerere* was ill advised to take the issue for granted.

On 19 October, 2016 when the pre-trial conference was first held before me, I acted in terms of order 26 r 182 (10) of the High Court Rules 1971 and gave directions on the matters on which the parties were not agreed. I gave a further directive in the form of a postponement of the pre-trial conference to an agreed to date by the parties.

There are certain matters which arise from the way this matter has been handled which require comment or intervention.

1. It should always be borne in mind by legal practitioners and litigants that an application for postponement is not just made as a matter of course whereby the court or judge is expected to act like a robot and just grant it. Where a litigant applies for a postponement, he will in fact be seeking the indulgence of the court and a court will not grant the indulgence unless it is satisfied that it is in the interests of justice to grant the indulgence. See *National Police Services Union & Ors* v *Minister of Safety & Security & Ors* 2000 (4) SA 1110 (CC).
2. The decision whether or not to grant a postponement involves the exercise of a judicial discretion. As with any exercise of judicial discretion, it must be exercised judiciously. It is a discretion which should not be exercised, capriciously or upon a wrong principle.

Good and fair reasons should exist to justify the judicious exercise of the discretion. See *R* v *Zackey* 1945 AD 505; *Joshua* v *Joshua* 1961 (1) SA 4455 SW (A)

3. *In Apex Holdings (Pvt) Ltd* v *Venetian Blinds Specialists Ltd* SC 33/2015, the Supreme Court in a judgment by GOWORA JA with the concurrence of JAs GWAUNZA and GUVAVA stated;

> "An application for the postponement of a matter which has been set down for hearing is in the nature of an indulgence sought, the grant of which is in the discretion of the judge or court before which it is made. The applicant must therefore 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."

The learned judge referred to the South African cases of *Mc Carthy Retail Ltd* v *Short Distance Carriers* CC 2001(3) SA 482 (SCA); *Centiougo AG* v *Firestone SA (Pty) Ltd* 1969 (3) SA 318 and *National Police Service Union* v *Minister of Safety & Security (supra)*. It is therefore clear that a request for a postponement is not just for the giving. It is an application in which the person seeking the indulgences of the said relief should demonstrate good cause why a postponement should be granted.

4. The plaintiff's counsel appears in all the circumstances to have laboured under the impression that a court or judge will always grant a postponement once sought. This attitude in my view is wrong. A court or judge seized with a matter is not there to just postpone it but to dispose of it. Whilst the fact that parties may both be disposed that a matter be postponed, this is only one of several factors which are considered in determining whether to indulge a request for a postponement. Parties must appreciate that once they have placed themselves before the court, they play in terms of the rules and procedures of that court.

5. The convenience of the court is equally an important factor to consider whether or not to grant an application for a postponement. This is why the authorities provide that if a party intends to apply for a postponement such application should be made timeously. It is unacceptable for a party to leave the court or judge to read through a case file and prepare for a case, only for the party to turn up on the date of hearing to seek a postponement in circumstances where the application could have been made in advance thus putting the court or judge on alert that the matter may not proceed.

6. In my judgment, as a general rule, a court should be slow to turn down or dismiss an application for a postponement in circumstances where the party seeking the indulgence of the postponement is *bona fide* and, had made a timeous application at the earliest opportunity after the reason which makes a postponement necessary has occurred and demonstrates that his explanation is reasonable.

In this matter I postponed the pre-trial conference on 19 October, 2016. There was sufficient period between that date and 3 November, 2016 when the plaintiff's legal practitioner was due to depart for Inyanga to attend the Law Society Summer School for counsel to have arranged with the counsel for the defendant to deal with the matters which I had directed they be dealt with. There was also sufficient time for the plaintiff's counsel to have briefed the chosen stand in counsel fully on the matters which needed to be dealt with at the pre-trial conference. The plaintiff's counsel did not bother to place the stand in counsel into the picture of the case but simply proceeded on the basis of "Just appear before the judge on my behalf. Tell the judge that I am attending the Law Society Summer School and apply for the pre-trial conference to be postponed to any date after 6 November, 2016. I will be back by then." Such attitude by counsel shows a disrespect if not an abuse of the court process. Counsel must always be mindful of their duties to the court as sworn officers of this court.

After noting that Mr *Chisekerere* was at sea on the matter as he did not even have the file on the matter, I also noted that he had come alone without the plaintiff. I asked him where the plaintiff was. His response was that he did not know but that he believed that the plaintiff had been advised by her legal practitioner not to bother to come to court since the matter was going to be postponed. The plaintiff was therefore in wilful default. A pre-trial conference is not a process for legal practitioners but for the parties and where represented, with their legal practitioners and they meet alone or with the judge. Where the judge requires to consult with counsel only, he acts in terms of r 183. The plaintiff not being present, it meant that I could not interrogate the matter with Mr *Chisekerere* standing in for the plaintiff's counsel. This was a simple matter in which Mr *Chisekerere* could have been put into the picture. He should have been fully briefed to report back on the parties deliberations as directed by the judge.

Although the non-availability of counsel has been held not to be a good ground upon which to grant a postponement where the other party is objecting see *D' Anos* v *Heylon Court (Pty) Ltd* 1950 (1) SA 324 C at 335-336 where TOMSON J stated:

> "….. the non-availability of counsel cannot be allowed to thwart the bringing before the court of the matter in issue. In all but the rarest of cases suitable counsel will be available. This is not the convenience of counsel; it is the reasonable convenience of the parties- and by that I mean both parties- and the requirement of getting through the court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom if indeed ever be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties",

This fact coupled with the default of the plaintiff which was said to be deliberate put paid to the *bona fides* and the reasonableness of the explanation for a postponement. I was left with no choice taking into account all the circumstances of the case and the attitude of the defendant to the postponement to dismiss the plaintiff's claim with costs and I granted the order which I did.

Before I sign off my reasons for the order which I made, I draw attention to two matters. The first matter has to do with reminding legal practitioners and litigants that pre-trial conference procedures are an integral part of action procedure and a failure to comply with the procedure and directives relative thereto is fatal to a defaulting party's case or defence. I can do no better than repeat the instructive pronouncement of the Supreme Court in *ZETDC* v *Ruvinga* 2013 (1) ZLR 510 (S) at 514 E-G where ZIYAMBI JA with the concurrence of GARWE JA and OMERJEE AJA stated:

> "It may be noted that the purposes of the pre-trial conference is to attempt to reach settlement between the parties and, where this is not possible, to identify issues for trial with a view to curtaining the proceedings. This is the reason why the presence of both the parties and their legal practitioners are required thereat. Where a legal practitioner attends a pre-trial conference set by a judge without his client, he must have the client's instructions to take decisions on its behalf. The pre-trial conference is not a formality. It is an essential part of the proceedings and the judge will have put aside other work and studied the pleadings, in order to prepare for the conference. It is therefore disrespectful in the extreme to wait until the time scheduled for the conference to advise the court that the parties are unable to attend. *In casu* the legal practitioner who appeared on behalf of the appellant had no knowledge of the appellant's case, was not prepared to argue it and was there only to seek a postponement. In such circumstances, it cannot be said that the appellant was represented at the pre-trial conference."

In that case brought on appeal by the defendant a judge had directed that the parties and their legal practitioners should convene a roundtable of their own. With the concurrence of the

legal practitioners for the parties, the matter had been postponed to an agreed date for the second pre-trial conference. The appellant (as defendant) defaulted at the pre-trial conference. The defendant's defence was struck out after its legal practitioner was unable to proffer a reasonable excuse for the failure by the defendant to send a representative to attend the pre-trial conference.

The facts described above are similar to the situation I had to deal with save that the defaulting party was the plaintiff. No reasonable or acceptable explanation was given for the plaintiff's default. Mr *Chisekerere* had no instructions on either the explanation for the default or to progress the matter. In such a scenario, the justice of the case dictated that the plaintiff's pleadings be dismissed and her claim was thus dismissed with costs.

The second matter which I draw attention to is the tendency by legal practitioners to brief another legal practitioner for purposes of applying for a postponement. It is a gamble to accept such a brief because if the application for postponement is refused, the matter has to proceed. Therefore to avoid having egg in the face and looking stupid before the court, judge and indeed the client, a legal practitioner should not just agree to stand in for another for purposes of only applying for a postponement without further ado. He should prepare to proceed with the case if the postponement is refused. Of course the circumstances of each case will be taken into account. I would however imagine that where a matter is not partly heard and is uncomplicated, a pre-trial conference being one such example, a stand in legal practitioner must be prepared to proceed with the matter if an application for postponement is refused.

Coupled with the above is a warning to the parties and legal practitioners that they bear in mind always that whether a postponement is granted is a discretion reposed in the court or judge and therefore the decision to postpone a matter properly set down is that of the court or judge. A mere agreement of the parties to a postponement of a matter properly set down does not automatically secure a postponement nor bind the court.

Last but not least counsel should bear in mind the remarks of the *South African Constitutional Court in Shilubana & Ors* v *Nwamitwa* 2007 (5) SA 620 CC at 625 para 15.

> "(15) At the hearing counsel admitted that he was unprepared to present his clients' case, should the application for postponement be denied. He appeared to presume that the application would be granted – a presumption one makes at the peril of one's client. In *National Police Service Union*, it was stated:

> 'Ordinarily … if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives … must appear and be ready to assist the court both in regard to the application for the postponement itself and if the application is refused, the consequences that would follow.'"

Lastly I should point out that I asked Mr *Chisekerere* on whether the Law Society Summer School was an event on the High Court Calendar such that the court should take judicial notice of absence of legal practitioners to attend it. Mr *Chisekerere* submitted that the event was very important because if a legal practitioner attends it, he or she is credited with 12 points being the minimum number of points required as proof that a legal practitioner has engaged in continuous legal training during the year preceding the next registration since the Law Society will not issue a practicing certificate to a legal practitioner who has not attended continuous legal training in the preceding year and been credited with minimum number of points. Having been a senior legal practitioner and member of the Law Society not too long ago, I asked Mr *Chisekerere* whether the summer school which I still remember and miss as an event where apart from the presentations, legal practitioners take time to cool off, was the only training event for which a legal practitioner could be credited with points, he said that courses and seminars were conducted by the Law Society throughout the year. Under the circumstances, the plaintiff's legal practitioner's explanation for her absence could not have passed for a good cause to default court.

I also knew the Law Society for good reason to accept granting an extension to a legal practitioner to obtain the requisite points in the year that a practising certificate is sought. I am not sure whether this practice still obtains. I however instruct that a copy of this judgment is availed to the Secretary of the Law Society so that legal practitioners may take heed of this court's view of the adequacy or otherwise of a legal practitioner's attendance at summer school as an excuse for defaulting court and seeking a postponement. For the avoidance of doubt, this court recognizes the importance of the event in the legal practitioners' calendar but notes that it is up to legal practitioners with court engagements to give court attendance priority above the summer school aforesaid.

1. The above therefore are the reasons which I promised to hand down for the order of the dismissal of the plaintiff's claim with costs which I made at the pre-trial conference on 4 November, 2016 in chambers.

2. The registrar should avail a copy of these reasons for judgment on the Secretary of the Law Society without charge.

Danziger & Partners, plaintiff's legal practitioner
Nyamupfukudza & Partners, defendant's legal practitioners