HB 142-16
HC 1575-14
XREF NO. HC 1576-14
XREF NO. HC 1577-14
XREF NO. HC 1578-14

WILTSHIRE EXPLOSIVES (PVT) LTD
versus
OLYMPUS GOLD ZIMBABWE LIMITED
t/a GOLDEN QUARRY MINE
and
FALCON GOLD ZIMBABWE LIMITED
t/a DALNY MINE
and
CASMYN MINING ZIMBABWE (PVT) LTD
and
OLYMPUS GOLD ZIMBABWE LIMITED
t/a OLD NIC MINE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 31 MAY 2016, 1 JUNE AND 9 JUNE 2016

Civil Trial

L. Nkomo for the plaintiff
Ms P Dube for the defendants

MATHONSI J: One can only sympathise with *Ms Dube* who appeared for the four defendants instructed by *Joel Pincus Konson and Wolhuter* legal practitioners of Bulawayo who appeared at the scene rather late with a brief which may not have disclosed that the case for the defendants had been so messed up not only through the tardiness of those tasked with the responsibility of representing the defendants but also through their arrogance as they concentrated on preventing the commencement of the trial at all costs as opposed to pleading the case for the defendants to the best of their ability, itself an arguable case indeed.

There was a discernible commitment to throw all the spanners into the works, including the jack, in an effort to avoid the trial. In the process of doing that those assigned the task of presenting a case for the defendants abdicated their duty to put together a sound case, failed to plead the defendants' case and concentrated on all the wrong things leaving the defendants' case

in tatters. With the legendary humpty dumpty having fallen off the wall and broken into several pieces it was then left for *Ms Dube* to try and put humpty dumpty together again when humpty dumpty could no longer be put together. Distraught and devoid of any sense of solution in the end, she did the only honourable thing left, to withdraw opposition to the plaintiff's claim and consent to the grant of relief in favour of the plaintiff, albeit with costs on an ordinary scale, itself a contentious issue as *Mr Nkomo* who appeared for the plaintiff would settle for nothing less than an award of costs on the scale of legal practitioner and client.

The plaintiff is a purveyor of explosives whose daily business is to buy and sell explosives and its clientele is the generality of companies and individuals engaged in mining operations. In the course of its business it supplied the four defendants separately with an assortment of explosive products for varying sums of money. When payment was not forthcoming the plaintiff sued.

In HC 1575/14 the plaintiff sued Falcon Gold Zimbabwe Limited t/a Golden Quarry for payment of the sum of $18140-00 together with interest and costs of suit in respect of goods sold and delivered to that defendant on 5 and 13 December 2013. In HC 1576/14 the plaintiff sued Falcon Gold Zimbabwe Limited t/a Dalny Mine for payment of $18600-00. In HC 1577/14 the plaintiff claimed $40450-00 against Casmyn Mining Zimbabwe (Pvt) Ltd which apparently trades as Turk Mine while in HC 1578/14 the plaintiff claimed $25056-82 from Olympus Gold Zimbabwe Limited trading as Old Nic Mine.

It so happens that the four defendants are sister companies although nothing of the sort is pleaded and they are all represented by the law firm of *Joel Pincus Konson* & *Wolhuter* who entered appearance on their behalf in respect of all the matters. They also filed a standard plea in all the matters at some stage complete with a standard error of citing the defendant as "Falcon Gold Zimbabwe Limited t/a Golden Quarry Mine" even in those matters where the defendant was something else. They later filed amendments to correct that.

The standard plea filed in respect of all the four matters reads:

"1. Defendant admits purchasing explosives and associated accessories from plaintiff for the amount stated.

2. Defendant however denies any liability to pay the amount claimed or any part thereof on the basis that during the period extending between 30th of January 2012 to the 10th of April 2013 plaintiff unlawfully, received from defendants' employee, one Richman Zvabvirepi 133 boxes of explosives stolen by the latter from defendant's stores, with a total value of between US$95 000-00 knowing such goods to have been stolen from defendant by Mr Zvabvirepi, which stolen goods plaintiff convicted to its own use as a dealer in explosives. Defendant reported the matter to the police who have since arrested and preferred charges against Jackson Saungweme director of plaintiff.
3. In the circumstances defendant has separately filed a counterclaim in these proceedings for the full value of the explosives unlawfully received by plaintiff and converted by the latter to its own use.
4. Wherefore praying for consolidation of the respective claims filed by plaintiff under case numbers HC 1575/14, HC 1576/14, HC 1577/14 and HC 1578/14 referring to its counterclaim filed of record under case number HC 1575/14, which defendant incorporates herein by reference and tendering the sum of US$7506,82 being the difference due to plaintiff's aggregate of US$102506,82 under case numbers HC 1575/14, HC 1576/14, HC 1577/14 and HC 1578/14 defendant prays that plaintiff's aggregate claims under HC1575/14, HC 1576/14, HC 1577/14 and HC 1578/14 may be dismissed with costs on the legal practitioners and client scale."

Other than the reference to the counter claim in paragraph 4 of all the pleas filed, no counter claim was filed in three of the matters. It was only filed in HC 1575/14 the case against Falcon Gold Zimbabwe Limited t/a Golden Quarry. In the counterclaim the defendant in HC 1575/14 averred that 133 boxes of explosives and associated accessories valued at $95000-00 were stolen from it by its employee Richman Zvabvirepi acting in criminal connivance with the plaintiff. It further averred that the plaintiff purchased and took delivery of the goods knowing them to have been stolen from its stores. It therefore pleaded set off.

At a pretrial conference of the parties held before a judge on 29 September 2015 the parties must have agreed to the consolidation of the four matters for purposes of trial because the following order was issued by MAKONESE J:

"IT IS ORDERED THAT:

1. The matter be and is hereby referred to trial.
2. The parties' joint pre-trial conference memorandum of issues is hereby adopted for trial.

3. The matter(s) under case number HC 1575/14, HC 1576/14, HC 1577/14 and HC 1578/14 be and are consolidated for purposes of trial."

Counsel did not address me on the implications and effects of that consolidation. I mention that because of what later transpired at the trial where the defendants took the view that they could not prosecute their counterclaim owing to the fact that it had been filed by the wrong defendant in HC 1575/14 instead of by Casmyn Mining Zimbabwe (Pvt) Ltd t/a Turk Mine, the defendant which suffered the loss at the hand of its employee Richman Zvabvirepi. Whatever the case, all the matters were placed before me for trial in terms of the court order issued at the pre-trial conference and this judgment disposes of all the four matters.

The matters were originally set down for trial before me on 8 March 2016 with the defendants being served with the notice of set down for that date almost a month earlier on 12 February 2016. A day before the date of trial the defendants' legal practitioners wrote a letter dated 7 March 2016 to the Registrar seeking a postponement of the matter for all the wrong reasons. They said;

> "RE: WILTSHIRE EXPLOSIVES (PVT) LTD V OLYMPUS GOLD ZIMBABWE (PVT) LTD t/a GOLDEN QUARRY MINE AND 3 OTHERS: CASE NO HC 1575/14, HC 1576/14, HC 1577/14 AND HC 1578/14
>
> The above matter refers.
>
> This matter has been set down before the Honourable Mathonsi J for the 8th and 9th March 2016, however, the defendants are still finalizing the internal audit report which shows that the explosives that were stolen exceed the initial US$95 000-00. The audit will be finalized within two (2) months. Furthermore defendants will also need to join other parties for purposes of their counterclaim. We are therefore kindly requesting that the matter be removed from the roll pending the finalization of the internal report."

Here is a litigant that had filed opposition to claims on the basis that it had suffered prejudice arising from pilfering. It had anchored its counterclaim on those allegations and yet an audit to prove that claim had not been commissioned or undertaken. To compound matters, it had gone to a pretrial conference just to fulfill a fixture and consented to the matter being

referred to trial when it was yet to gather evidence. So what was being referred to trial when the defendants were still to put together their case?

It has always been said that litigants should go to a pretrial conference ready for trial. In other words all the evidence must be in place with statements of witnesses having been recorded and trial documents discovered. If pretrial conferences are to serve the purpose for which they were invented which is the curtailment of proceedings, litigants must start taking them seriously and participate in them fully as provided for in the rules.

In terms of rule 181 (2) of the High Court of Zimbabwe Rules, 1971 at the pretrial conference the parties "shall" attempt to reach agreement on possible ways of expediting or curtailing the duration of the trial on a number of issues including obtaining admissions of fact and of documents, holding any inspection or examination, the exchange of reports of experts, giving further particulars, preparation of a bundle of documents for trial and so on.

Of late litigants just treat a pretrial conference as an inconvenience that has to be undertaken and do not bother to make it what it is meant to be. Otherwise how does one explain the participation in a pre-trial conference by a party that has not even put together its case. A party that is yet to conduct a crucial audit whose report is to be used at the trial. Yet a plea would have been filed for that party under very false pretences and merely to ward off the plaintiff's claim. It is dishonest and if ever there is any reason why this court finds itself increasing with an insurmountable back log of cases, that is the reason. In most of the causes awaiting trial, not only is there no real dispute, there is also a complete lack of goodwill. Most parties do not even intend to go to trial making the pleading a monumental fraud.

But then I digress. The plaintiff's legal practitioners were strongly opposed to a postponement. Perhaps because the defendant had no desire whatsoever to commence the trial the parties appeared in my chambers on 8 May 2016 with the defendants represented by *Mrs Moyo* instructed by *Joel Pincus Konson & Wolhuter*. *Mrs Moyo* advised me that a postponement was sought, not because there was an audit being undertaken, but because the parties were discussing a settlement which was disputed by *Mr Chamunorwa* for the plaintiff whose view was

that the defendants had adopted a cavalier approach to the matter. Any reason would do as long as the defendants secured a postponement.

I however acceded to the request for a postponement and directed, *inter alia*, that the matter be set down as the first one for this term. It was then set down for 31 May and 1 June 2016 with the defendants being served with the notice of set down on 12 May 2016, although they were aware that the matter would be for first one for this term from March 2016.

The inconvenience of that knowledge and the set down could not deter the defendants from taking another shot. By letter of 24 May 2016 written to the plaintiff's legal practitioners and copied to the Registrar, *Joel Pincus Konson & Wolhuter* sought another postponement.

They wrote:

> "RE: WILTSHIRE EXPLOSIVES (PVT) LTD VS FALCON GOLD ZIMBABWE: CASE NO. HC 1575/14.
>
> The above matter refers.
>
> Please be advised that Advocate Hilda Makusha-Moyo who has been instructed to deal with this matter is currently out of the country and will only be returning on the 15th July 2016 and as such the trial dates will not be suitable for the defendant. We kindly request that the matter be postponed to any available date after her return. Your assistance in this matter is greatly appreciated."

There appears to be a misconception among legal practitioners that they can accept or reject a set down date. In our jurisdiction, matters are set down by the Registrar of the court in liaison with the Judge assigned to deal with the matter. That is done in a manner that accords the parties sufficient time to prepare and to avail themselves at the trial or hearing date. It is therefore not the province of a legal practitioner to decide when a matter should be set down although the court will ordinarily accede to a genuine application for a postponement where acceptable reasons for lack of preparedness have been fully explained and the inability to proceed is not due to delaying tactics. However such an application must not only be made timeously as soon as the circumstances justifying it become known, it must also be *bona fide* and not as a result of lack of diligence. See *Myburgh Transport* v *Botha t/a SA Truck Bodies* 1991

(3) SA 310 (NSC) 315C –D; *Hughber Petroleum (Pvt) Ltd* v *Brent Oil Africa (Pty) Ltd* 2014 (1) ZLR 200(H) 205 G, 206A.

One should also add that the factor of prejudice on the other party is of primary consideration and would ordinarily constitute the dominant component of the total structure in terms of which the court will exercise its discretion in favour of the grant of a postponement, for a discretion it is when the court allows a matter that has been properly set down on notice to all concerned, to be postponed. Where the application for a postponement lacks *bona fides*, it would not be a judicious exercise of discretion to grant the postponement: *Warwick* v *Jonga* HH 747/15; *Mudzingwa* v *Mapanzure and Another* HB 109/16.

When the letter from the defendants' legal practitioners was brought to my attention and considering that they still had ample time to instruct someone else to represent them at the trial, I directed the Registrar to notify them to proceed to do so. They did that as *Ms Dube* was then briefed and did appear on the defendants' behalf when the trial commenced on 31 May 2016, surprisingly not for the conduct of the trial but to launch a formal application for a postponement, talk a display of a never-say- die attitude.

Ms Dube submitted that an application was sought for a postponement in respect of the defendants' counterclaim. She stated that the defendants had instituted summons action against one Richman Zvabvirepi and one Jackson Saungweme in HC 951/16 and had, that very morning, filed a chamber application seeking an order consolidating HC 951/16 with these four matters. Accordingly they sought a postponement *sine die* to enable them to attend to that. In fact HC 951/16 is an action instituted on 14 April 2016 by Casmyn Mining (Pvt) Ltd against those two only and only appearance to defend has been filed by both.

Significantly, neither Zvabvirepi nor Saungweme are parties in any of the four matters before me. As to how and indeed why the defendants would have wanted a matter completely divorced from the current proceedings to be consolidated with them is difficult to fathom. *Ms Dube* could only say that it is convenient to them as the evidence they would lead in that new matter, which had just been issued and had not even progressed to pretrial conference stage, is the same evidence they proposed to lead in the present matters.

An action is frivolous or vexatious in a legal sense when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation; *Rogers* v *Rogers* SC 7/08. That is exactly what the application for the second consolidation, if at all it has been made because *Ms Dube* did not refer to any case number for that doomsday application, is. Clearly the defendants are intent on tying the plaintiff down to footling court proceedings brought on spurious grounds in order to stave off the day of reckoning, even when they have long admitted taking delivery of goods worth $102246-82 from the plaintiff, a typical Zimbabwean way of doing business.

It is for the foregoing reasons that, in the exercise of my discretion, I dismissed the application for a postponement and directed that the trial commences.

The plaintiff then led evidence from Jackson Saungweme, its managing director merely confirming the four claims which were admitted by the defendants. He was cross examined by counsel for the defendants who was only putting forward the basis of the counterclaim. Thereafter the plaintiff closed its case.

It was after the plaintiff had closed its case that *Ms Dube* for the defendants moved an application for an amendment of their pleadings. She submitted that they proposed to lead evidence to the effect that the defendants are subsidiaries of a holding company knowing as New Dawn Mining (Pvt) Ltd, itself not cited in any of the proceedings. Their approach was that whatever was owed to one was owed to all of them. There was therefore a mistake in pleading their case which they wished to correct by effecting an amendment. The mistake was in submitting a counterclaim in HC 1575/14, a case involving the plaintiff and Falcon Gold Zimbabwe Limited t/a Golden Quarry. The latter company did not employ Richman Zvabvirepi who, at all times was employed by Casmyn Mining (Pvt) Ltd t/a Turk Mine. The alleged theft by that individual is the source of the counterclaim but through inattention, the counterclaim is sitting in a matter which does not involve Casmyn. The effect of the amendment would be to uplift the counterclaim from where it is and plant it in HC 1577/14.

Ms Dube urged me to exercise my discretion in favour of the defendants and grant the amendment. What the court has regards to in deciding whether to allow an amendment or not was succinctly set out in *UDC* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H) 217 C-F as:

1. Whether to grant or refuse an amendment is discretionary upon the court;
2. An amendment cannot be granted for the mere asking but some explanation must be offered therefore;
3. The applicant must show that *prima facie* the amendment has something deserving of consideration, a triable issue;
4. The modern tendency is that the court will generally grant an amendment if it facilitates the proper ventilation of the dispute between the parties;
5. The party seeking it must not be *mala fide*;
6. It must not cause an injustice to the other party which cannot be compensated by costs;
7. The amendment should not be refused simply as punishment to the applicant for neglect.
8. A mere loss of time is no reason in itself to refuse the application; and
9. If the amendment is not sought timeously some reason should be given.

See also *Commercial Union Assurance Co. Ltd* v *Waymark N.O* 1995 (2) SA 73 at 77 F – I; *Whittaker* v *Roos and Another* 1911 TPD 1092 at 1102-3; *Kingdom Merchant Bank Ltd* v *Shah and Another* HH 159/13; *Nuvert Trading (Pvt) Ltd t/a Triple Tee Footwear* v *Hwange Colliery Company* HH 791/15.

In exercising my discretion whether or not to grant the amendment I considered the above guidelines. I was mindful of the fact that although there is a discretion reposed upon me, such must be exercised judiciously. In my view, although the court will ordinarily lean in favour of granting an amendment an amendment should not result in prejudice to the other party which cannot be rectified by an order of costs.

It occurs to me that when an amendment is sought after the closure of the plaintiff's case and the plaintiff does not have an opportunity to address the amendment in evidence, no doubt the plaintiff will suffer prejudice. It would be remembered that the purpose of pleading is to inform the parties of the case they have to meet at the trial and also to identify the branch of law under which the claim has been brought: *Chifamba* v *Mutasa & others* HH 16/08.

Where a party has already met the opposing case in evidence and an amendment is then sought after that such amendment is clearly an ambush designed to deprive the opponent an opportunity to properly meet the case and ventilate. It has the effect of completely incapacitating the other party. The application for such an amendment cannot possibly pass the test. This is particularly so when the applicant for an amendment has always known the case that is being relied upon and it should have been apparent much much earlier that something was amiss with the pleading.

I am unwilling to exercise my discretion in a way that will prejudice the other party. For those reasons I refused the belated application for an amendment.

After that ruling *Ms Dube* made a further application. This time she sought that the matters be stood down to the following day to enable her to take further instructions and to prepare for the presentation of the defendant's evidence from two witnesses which had been lined up. Surprising though such request was, given that the defendants were, even at that late stage, unprepared to present their case, I granted them the indulgence.

Further surprises surfaced when the trial resumed the following day. Instead of presenting the case for the defendant, counsel demanded that I rule on the status of the counter claim given that their application for an amendment had been refused. Not a shred of authority for that novel application was cited and it was not disclosed how the court could be in a position to rule on a pleading standing on its own and not supported by evidence in the middle of a trial. Clearly I was unable to determine whether the counterclaim was meritable without the benefit of evidence and I was unwilling to take the bait.

In my view, and I ruled accordingly, whether the counterclaim was sustainable or not was dependent upon the evidence that the defendants were going to lead. I advised the parties that I

was unwilling to nail my colours on the mast before assessing all the evidence. I concluded that the counterclaim would remain as pleaded and that it was up to the defendants to lead evidence to sustain it. *Ms Dube* promptly withdrew the counterclaim and indicated that all the defendants were consenting to judgment in the main claims. So ended the sordid affair which is regrettable indeed.

The manner in which the defendants conducted themselves in this matter should not be repeated at all in this court, so is the manner in which *Joel Pincus Konson &Wolhuter* presented the case for the defendants which was shockingly tardy and left litigants, who may have had a case, unable to prosecute it through a comedy of errors that would have left the mediaval court jesters green with envy. They pleaded an unqualified admission of liability and failed to properly counterclaim. In terms of s36 of the Civil Evidence Act [Chapter 8:01] it was not even necessary to lead evidence to prove what had already been admitted. See *Wamambo* v *Municipality of Chegutu* 2012 (1) ZLR 452 (H) 458E. There is no doubt in my mind that the conduct of the defendants require the sanction of admonitory costs. They took the court down the garden path and spent a lot of time throwing obstacles in the attainment of justice only to capitulate and accept liability. There is nothing to suggest that there was any desire to defend the action. They wallowed under the misapprehension that they could continue preventing the commencement of the trial. When that failed they were left with nothing to say.

That happens when legal representation is explained in mystical terms and the legal practitioner presents himself or herself to a client as being one imbued with magical qualities to determine whether a trial takes off or not beyond the ken of mortals. When that magic, whether real or imagined fades, it does so inexplicably and leaves the client very wide open for a sucker punch. I have tossed with the idea of costs *debonis propriis* but I have decided not to award them because the belated arrival at the scene of *Ms Dube*, was able to bestow a semblance of respectability in the defendants camp which was in disarray. To her credit when she realized the defendants could not be saved, she capitulated. However the defendants still have to meet the costs on a punitive scale.

In the result, it is ordered that

1. In HC 1575/14 the defendant shall pay to the plaintiff the sum of $18140-00 together with interest at the prescribed rate from 9 July 2014 to date of payment in full.
2. In HC 1576/14 the defendant shall pay to the plaintiff the sum of $18600-00 together with interest at the prescribed rate from 9 July 2014 to date of payment in full.
3. In HC 1577/14 the defendant shall pay to the plaintiff the sum of $40450-00 together with interest at the prescribed rate from 9 July 2014 to date of payment in full.
4. In HC 1578/14 the defendant shall pay to the plaintiff the sum of $250566-82 together with interest at the prescribed rate from 9 July 2014 to date of payment in full.
5. The costs of suit shall be borne by the four defendants jointly and severally the one paying the others to be absolved on the scale of legal practitioners and client.

Joel Pincus, Konson & Wolhuter, defendants' legal practitioners
Calderwood, Bryce Hendrie & Partners, plaintiff's legal practitioners