FRANCIS CHANDIDA
And
ANTONY FARAI ADAAREVA

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 27 January2023, 15 February 2023

Opposed Application

Z.T Zvobgo, for the applicant
E.T. Moyo, for the respondent

BACHI MZAWAZI J.

[1] Applicant and the respondent have a history of arduous perennial litigation. Neither party is willing to throw in the towel. The parties had some contractual relationship of which both are at variance as to its nature. Applicant claims it was an employer employee relationship. The respondent says it was a partnership arrangement in a joint business venture operating several corporate entities. What is evident is that at one stage the respondent sued the applicant in case number HC7235/20, through the issuance of summons claiming the payment of the sum of US$25,000.00, as due and owing emanating from an agreement between them.

[2] In that case, the respondent claimed that they were once business partners who agreed to amicably part ways and the sum of US25,000.00 was the agreed severance package. The applicant who was the respondent in that matter then defaulted to meet the deadline for the payment of the said amount which had been set for April 2019 prompting a formal demand from the now respondent. It is also common cause that, subsequently applicant signed an acknowledgment of debt of the whole amount and a payment plan.

[3] The applicant's version however, is that the applicant was an employee of a Company which was not made part of the suit. He did not deny that the respondent was owed that much but states that those were employment terminal benefits and not partnership severance package. He denied personal liability, shifting it to the Company as the employer also claiming that his actions were representative undertakings. As such there was need to sue or join the employer Company.

[4] These are the facts that were disclosed in another lawsuit between the parties, in case HC5142/1, initiated by the applicant for the dismissal for want of prosecution of the respondent's summons matter in case HC7235/20. Deme J, in dismissing the application for dismissal for want of prosecution made interesting observations that there were instances where the applicant in his interaction with the respondent would act in his own and not in a representative capacity and at times there was evidence on record where he interchangeably used a plural word "we" indicating that his actions could not be safely divorced from those of the said Company.

[5] In his judgment, HH147/22, the learned judge also noted that from the evidence presented before him both the applicant and respondent earned the same salary leaning more towards the existence of a partnership than an employee, employer relationship and equality in status. He therefore, concluded that the respondent's version on the salary structures placed on record could not be disputed without rebuttal evidence being led in a trial. Further, he acknowledged the existence of an acknowledgment of debt signed by the applicant.

[6] Pursuant to that decision the applicant offered to pay and paid the amount as claimed in the summons in the local currency equivalent. After that payment which was welcomed by the respondent, applicant demanded the withdrawal of the Summons matter on the basis that there was no longer a cause of action. The respondent's response was that they can only do so if the applicant paid their legal costs as is they had incurred a considerable legal cost in both suits, therefore it will not make economic sense to pay only the capital amount claimed without the cost of suit.

[7] Once again, the parties were at logger heads on the issue of costs. Numerous letters to and from were exchanged on the issues without success. Resultantly, applicant filed this application for the dismissal of the summons action in the main matter once placed before Deme J, this time with a twist that, the cause of action has been relinquished by the payment of the claimed amount, therefore there was no need for the matter to remain in abeyance.

[8] The respondent countered that only the principal debt owning had been extinguished not the costs. As such they cannot withdraw the matter until the costs incurred had been satisfied. They in turn filed a counter suit claiming the payment of their outstanding legal costs.

[9] Applicant raises three aspects, that the respondent's cause of action no longer exists as the capital debt has been paid. Secondly, that the claim of costs is not justified as it is against the

wrong person. They maintain, respondent was employed by Lotgrain Company and it is the Company that paid him with the applicant as a facilitator. Lastly, that, there is need to close the summons case in HC7235/20 for the sake of finality to litigation. So, the respondent should either prosecute or terminate the proceedings in issue.

[10] In respect to the counterclaim, the applicant maintains that there is nothing that justifies costs as the wrong person was sued. The applicant in-reconvention ought to have claimed from the Company or joined the Company to the main suit.

[11] Further, applicant advances that since this is a novel application, and as a *sine qua non*, the court has common law inherent jurisdiction to hear any matter and pave new ground even if it's an application foreign to known procedures. In addition, they are claiming for costs at a higher scale because of the respondent's insistence on the contentious costs. In support of their averments they cited, amongst others, *Cassimjee v Minister of Finance (*455/11) [2012] ZASCA 101 (1June 2012*)* and *Sibanda & Anor v Chinemhute N.O. & Anor* HH 131/04

In, *Sibanda & Anor v Chinemhute N.O. & Anor*, MAKARAU J, (as she then was) remarked that, "…where a point of entry is hitherto non-existent for a member of the public in the form of procedure, one is inherently created in the interests of justice. This is a court of inherent jurisdiction".

In *Cassimjee v Minister of Finance*, it was noted that, "The high court has inherent power, both at common law and in terms of the Constitution (s173), to regulate its own process…".

[12] Respondent states that, the norm is, a withdrawal of a matter is accompanied by a tender of costs. They thus, are willing to withdraw but since it is at the instance of the applicant then it is only logical that they pay their costs.

[13] Further, they argue that the nature of the application brought by the applicants is *alien* and unprecedented in this jurisdiction. They advert that dismissal of action for want of prosecution was a new phenomenon introduced for the first time in civil proceedings in the new high court rules in rule 31(3), S.I.202 of 2021. It is their submission that this rule only speaks to instances where after the lapse of a period of a month of the filing of a plea by the defendant, a Plaintiff has not taken steps to prosecute their matter then an application in terms of the rule can be made. In that case, the applicant's application does not fall within the ambit

of this proviso as pleadings had been closed. In that regard, options are provided that either party can still set the matter for hearing without resorting to the drastic action for dismissal.

[14] In addition the respondent argues that, the express reference to instances when the application for dismissal for want of application by the legislature excludes any other inclusion or interpretation under common law or otherwise. The *expressio uinis exclusion alterius*, rule. They relied on *Anchor Holdings (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Anor* 2008(2) ZLR 246 at 249A and *Veritas* v *ZEC, Minister of Justice and Attorney General* SC103/20.

[15] The counter claim by the respondent, as already stated, is basically on the issue of the recovery of the legal costs on the basis that a successful litigant is entitled to costs. Citing the case of, *Manica Zimbabwe Ltd & Ors* HH95/16, respondents argue that the concession to liquidated the amount claimed in case HC7235/20 irrespective of the denial of individual liability by the applicant points to their success in that suit therefore they should get the attendant costs.

[16] Two issues arise from the above arguments.

a. Whether or not the applicant has made a case for the dismissal of the Summons case in HC7235/20?

b. Whether or not the applicant in re-in convention is entitled to costs?

[17] On the first issue, it is common cause that the applicants are seeking a dismissal of a court action. It is also not in dispute that the nature of the relief they are seeking is not captured by the rules or any given law. Rule 31(3) of the 2021 High Court rules, mentions that where a defendant has filed a plea and the plaintiff has not, after one month of the filing of such a plea, taken any further steps to prosecute the action, the defendant. May on notice to the applicant, make a court application for the dismissal of the action for want of prosecution. The rule gives the court a discretion to grant or deny the application.

[18] It is clear that this rule does not cater for dismissal of summons for lack of a cause of action. Furthermore, it is evident that there is an extant decision by this court dismissing a similar application brought under the same rule *al beit* proviso, rule 31 (1) in case HC5142/22, judgment, HH147/22. Hence, the invitation by the applicant for the court to

invoke its inherent common law jurisdiction entrenched in section 171 of the Constitution of Zimbabwe, Amendment Act, No.20 of 2013.

[19] In consideration, it is an established principle of law that this court has inherent and original jurisdiction to hear any subject matter, or matter that comes before serve for those limited by statute or any other law. It is the residual power drawn upon superior courts, in the interest of justice to provide a solution or a remedy in circumstances where there is none available or readily discernible from statute or the common law.

[20] These immense powers are also enshrined in s171 and section 176 of the Constitution Amendment, No. 20 of 2021.

Section, 171(1)(a) of the Constitution denotes, 'The High Court-has original jurisdiction over all civil and criminal matters throughout Zimbabwe.

This was well captured in S v GUMBURA SC25 Of 2021 where it was enunciated that,

"This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and can deal with all areas of law and all procedural matters involving the administration of justice".

[21] Section 176 of the Constitution goes a step further and imposes a duty on the court to utilize its inherent jurisdiction to develop the law. It states that, "The Constitutional Court, the Supreme Court, and the High court have inherent power to protect and regulate their own process and to develop common law, taking into account the interests of justice and the provision of this Constitution."

This was reiterated in verbatim in *Barbarosa De Sa v Barbarosa De Sa* SC34 of 2016.

[22] In the same vein it cannot be overstated to say that this court can regulate its own process where there is a *lacuna* and develop the law in the process. As such, against the background of the submissions that there is nothing in the rules providing for a situation where a summons case remains on the court roll perpetually when the cause of action has been settled out of court. This court is enjoined to make a finding on that aspect. If a cause of action is no longer in existence, then a party should be free to make an application for its dismissal if it matters to them. This ensures finality to litigation and lessens the burden of matters left in abeyance in courts.

[23] In that regard, what a cause of action is has been spelt out in several authorities. In *Peebles v Dairiboard Zimbabwe* (Pvt) Ltd 1999(1) ZLR 41, it was defined as a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See *Silonda v Nkomo* SC6/22 and *Medley Zimbabwe (Private) Limited* SC24/18.

[24] In the current case, the cause of action in case HC7235/20, in terms of the relief sought was;

a. Payment of the sum of US25,000which is outstanding due and owing in terms of an agreement between him (Plaintiff) and the defendant.
b. Interest thereon calculated at the prescribed rate with effect from the date of summons to the date of full and final payment both dates inclusive
c. Costs of suit.

[25] This was the remedy sought by the respondent in the main action. If the composite relief sought that gave rise to the issuance of the summons had been relinquished then it follows that there will be nothing left for the court to determine in that matter.

[26] In as much, as we agree with the applicant that the main cause of action for the payment of US$25,000. 00 has been settled. The question is, did it eliminate the whole cause of action?

[27] It is this court's considered view that whilst the discretion to grant or not costs lies with the court, the same does not seem to apply where a party unilaterally offers to settle the main claim. Once that decision to settle had been made then it follows that all the other terms had to be complied with, no picking and choosing or piece meal selection of what to settle out of court or not.

[28] This is where the applicant's argument loses weight. In comparison, at law, in this jurisdiction, which is different form that in South Africa, a withdrawal attaches a tender of costs. In this case, the respondent cannot be forced to withdraw a matter without a tender of costs from the instigators of the withdrawal. He is a successful party and costs follow the suit. See, *Hlasha Mining (PVT) Ltd v Yatakala Trading (Pvt) Ltd t/a Viking Hardware Distributors* HB03/18.

[29] In *GR v ER 2019 Nr* 46, Prinsloo J, sets out that, "the general rule, in relation to cost orders where a litigant withdraws his or her action is that the withdrawing party is liable to pay the costs of the proceedings. There must be sounds reasons why the other party should not be entitled to his or her costs. This is because the withdrawing party is in the same position as the unsuccessful litigant."

[30] *Phumza vVleleni v The Minister of Safety & Security* SAHC 483/2006. It was stated that, "This observation does not exempt the respondent from filing a notice of withdrawal, thereby avoiding to tender the wasted costs as it ought to do."

[31] Technically, though as it stands with the amount that has been already paid for the capital debt there are hardly any issues of significance compelling the set down of the matter. The triable issues as pointed out by Deme J, *supra* are no longer of consequence as the end game or game changer was the payment of levies due.

[32] However, as already analysed above, two crucial elements of the whole claim remained outstanding. Applicant has to make good of the costs since the respondent has in his correspondence only pursued the costs and not the interest.

[33] In that regard whilst it is the court's finding that in the exercise of its discretion and original jurisdiction to regulate its own process where the legislature by omission or inadvertence did not provide for an un-envisaged situation, I am of the view that a litigant to lighten the burden of unnecessary case back log on courts, wherein parties are indolent in prosecuting their case through, can make an application for dismissal of a summons where the cause of action no longer exists.

[34] Nevertheless, *in casu*, the payment of costs cannot be severed from the main claim. It was claimed for and not settled. Therefore, on that basis the application cannot succeed. The applicant cannot have their cake and it. They opted to pay the owing amount therefore they should have paid costs in light of the fact that the respondent had incurred costs in launching the matter and processing it up to the pre-trial stage, which was derailed by their dismissed application in case HC5142/21.

[35] There is no justification for punitive costs as it is the applicant who has not been gentlemanly in approach in the whole saga. They quickly settled the debt in local currency at the obtaining bank rate when the demand was in hard currency which was an added

advantage on them and after they had lost a case to dismiss the claim. They therefore were supposed to gentlemanly and silently pay the costs.

[36] As regards the counterclaim, the issue of costs has already been tabulated. The respondent is entitled to legal costs. I am however, not inclined to order costs at a higher scale.

Accordingly, it is ordered that

1. The main application is dismissed with costs
2. Applicant is ordered to pay respondent's costs in this matter as well as in case HC7235/20 after the generation of a bill of Taxation.

Zvobgo Attorneys, Applicants Legal Practitioners

Scanlen and Holderness, Respondents Legal Practitioners