

GMP TRADING (PVT) LTD
t/a GMP REAL ESTATE
versus
JINAN MINING PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 11 July 2017 & 27 September 2017

Pre-Trial Conference

Ms *E Makaka*, for the plaintiff
Ms *G. Dzitiro*, for the defendant

MUSHORE J: I notice that the defendant's legal practitioner has misrepresented that she is unaware of the reasons why the court struck the appellant's defence out at a reconvened pre-trial hearing of this matter; in circumstances where the order was given as a result of wilful non-compliance with the directions given by the court.

What took place?

The initial pre-trial conference took place on 5 July 2017. After a two hour long pre-trial conference, during which time an attempt was made to mediate a settlement between the parties; it became clear to me that there was no hope for a meeting of the minds. The pre-trial conference then became about settling a joint pre-trial conference minute. At the insistence of both parties', the parties' respective pre-trial issues were adopted and recorded on the joint pre-trial conference minute, as follows:

"Issues

- 1.1. Whether or not there was an agreement between the plaintiff and defendant regarding the amount of the valuation fee'
- 1.2. Whether or not the plaintiff should charge it fees in terms of SI 112/15.
- 1.3. Whether or not defendant is liable to pay \$102,665-75 (One Hundred and Two Thousand Sixty-Six United States Dollars and Seventy Five Cents)
- 1.4. Whether or not SI 112/15 has no legal validity.
- 1.5. Whether plaintiff is entitled to charge valuation fees for the individual components of the diamond Mining and Processing Plant.
- 1.6. Whether the schedule of evaluation fees is *ultra vires* Section 45 (4) of the Valuer's Act Chapter 27:18

1.7. Whether or not the manner in which Plaintiff has applied SI 112/15 is proper and reasonable”

The rest of the minute pertaining to discovery, witnesses etc. was formalised and recorded and agreed to by the parties. Thereafter after being requested by the parties to do so, I issued directions in terms of Order 27 r 182 (10) (c) pertaining to the preparation of the minute as agreed, its signing by the parties and the date of filing with the court. The directions were noted by the parties’ legal practitioners. The defendant’s legal practitioner offered to settle the minute and then send it *via* electronic mail to the plaintiff’s legal practitioner and then file the minute with the court by 1600 hours on 7 July 2017.

However, on 6 July 2017 I received the following letter from the plaintiff’s legal practitioner, addressed to the defendant’s legal practitioner (and copied to the court), in which letter the plaintiff’s legal practitioner was understandably expressing frustration at the defendant’s legal practitioner’s obstructiveness to co-operate in filing the joint pre-trial minute as directed.

“Letter to Mutumbwa, Mugabe & Partners

Re: GMP

The above matter refers particularly your today’s telephone conversation with our Ms Makaka.

It is with great concern that you refused to accept the joint PTC minute that was drafted by yourself and sent to us electronically for our signature when the same was returned to your offices for your signature and filing before 1200 hours as agreed yesterday at PTC before honourable Justice Mushore.

Instead you furnished us with another Joint PTC Minute wherein you changed the complexion of the 1st issue. You have added \$102, 666-75 [one hundred and two thousand six hundred and sixty six United States Dollars and seventy five cents] to the 1st issue contrary to what the parties agreed to be the issues for trial with the assistance of the Honourable Judge. Your conduct regarding this issue is seriously frowned at as it is a desperate attempt to sneak in issues that you failed to address in your pleadings.

We are thus returning forthwith the first and correct Joint PTC Minute for your signature and filing as it is a true and correct reflection of both parties’ PTC issues as it is what both parties agreed to at the PTC with the Judge’s assistance.

Should you elect to refer the matter for PTC again on this issue as you indicated in your telephone conversation be warned that we will apply for costs *debonis propriis* against you as your conduct is unethical and clear abuse of court process.

Signed

(From Musunga & Associates)”

Accordingly I convened a further pre-trial meeting on 7 July 2017 in order to address this issue. The defendant's legal practitioner was unhelpful in explaining her conduct in ignoring the directions which I had given both parties. A perusal of the pre-trial minute complained of by the plaintiff's legal practitioner, showed that the pre-trial issues altered by the defendant's legal practitioner, displayed a pernicious attempt on the part of the defendant's legal practitioner to introduce an important fact which would have assisted only the defendant. The agreed to issue 1 was "*1.1. Whether or not there was an agreement between the plaintiff and the defendant regarding the amount of the valuation fee?*"

The defendant's legal practitioner altered the issue by inserting, and thereby representing that the valuation fee had in actual fact been agreed to when she recrafted it as being "*1.1 Whether or not there was agreement between the plaintiff and the defendant regarding the amount of the valuation fee of \$102,665-75?*"

Clearly what the defendant's legal practitioner intended was to misrepresent to the trial court at some future date that at the pre-trial conference, an agreement had been struck on the actual valuation fee as being \$102,665-75, where in fact the gravamen of the dispute pertains to what the amount of the valuation fee should be.

Additionally I noted that the alteration had not been pleaded to by the defendant prior to the pre-trial conference. The bare-faced dishonesty by the legal practitioner was astonishing and was met with my spoken censure in the meeting.

Most recently, defendant's legal practitioner is giving the misleading impression in the notice of appeal, that the order appealed against was predicated upon an exception application when that was not the case as I have explained above.

I make the observation that procedural rule-making is designed to improve the administration of justice. A party should not be allowed to benefit by wilfully and dishonestly ignoring the rules to suit their own agenda.

At the end of the further hearing, the plaintiff's legal practitioner made an application in terms of Order 26 r 182 (11) (b) for the defendant's defence to be struck out and judgment entered in favour of the plaintiff as prayed in the declaration. I had no hesitation in granting that request. Accordingly I gave an order to that effect.

Musunga and Associates, plaintiff's legal practitioners
Mutumbwa & Mugabe and Partners, defendant's legal practitioner