

NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND
versus
NEW AGE ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 14 November 2016 & 19 July 2017

Pre- trial conference

T.Pasirayi, for the plaintiff
N. M. Weilsmer, for the defendant

This is a matter in which a pre-trial conference was held between the two parties

The main dispute between the parties was settled but the bone of contention between the parties was the question of costs.

It was submitted on behalf of the plaintiffs that the parties had settled their main dispute and accordingly it was proposed that each party should bear its own costs.

The defendants disagreed and insisted that the plaintiffs should file its notice of withdrawal and tender wasted costs as the plaintiffs should not have persisted with the pre-trial conference in light of the fact that the Trial Action had not been settled.

I invited both parties to submit written submissions or Heads of Argument on their positions and I would then make my ruling.

Plaintiffs Submissions

In heads of argument filed on behalf of the plaintiff it was submitted that there were sound and compelling reasons justifying that this court should exercise its discretion and order each party to bear its own costs.

Alternatively the defendants contended that should the court be inclined awarding costs against the plaintiff then such costs should be awarded on the ordinary scale up to the point that plaintiff filed their reply to the request For further particulars as, thereafter, the

defendants should have been aware that the dispute between the parties had been settled by a new lease agreement.

The plaintiffs alleged that this new lease agreement had not been drawn to the attention of the plaintiff's legal practitioners and the new managing agents resulting in the continuation of the litigation.

In their heads of argument the plaintiffs confirm that at the time this action commenced the plaintiffs Managing Agents, in respect of the leased property, were Dawn Property Consultancy (Private)

The plaintiffs submitted that between August 2013 to January 2016 nothing happened with the litigation.

In January 2016, Dawn Property Consultancy handed over the management of the property to New Managing Agents, Namely, Knight Frank

It is alleged that the aforesaid new Managing Agents tried to directly engage with the defendant but they were "advised" to do so only through defendants legal representatives.

The plaintiffs in para 10 of their Heads of Argument aver that

"The delay in the resumption was due to the fact that the New Managing agents were still waiting for information and the complete file of the matter from the previous Managing Agents ... subsequent to that all other pleadings were filed on this matter leading to the directive to meet prior to a pre-trial conference."

The plaintiffs then submitted that the parties met on the 11th of October, 2016 in terms of a pre-trial conference directive of the High Court and it was at that meeting that the defendant produced an "addendum" Showing that the parties had resolved the matter in July 2015 by agreeing to a new lease agreement.

The plaintiffs position is that it was at that meeting that the matter was "settled" and this rendered the matter finalised.

The plaintiff submitted that a written request to discontinue with the pre-trial conference on the basis that each party pay its own costs was made to the defendants but this was rejected.

Defendants Submissions

In Heads of Argument submitted for and on behalf of the defendant it was contended that, in fact, there had been "no settlement" between the parties.

The defendants further averred that the "Addendum" referred by the parties made no reference to the action that had been instituted by the plaintiff. In its Heads, (see paragraphs

9-12) propounded reasons why it was of the view that plaintiff's action could not be sustained, and hence, was not completed.

The defendant also accepted averments contained in para 4 to 8 of the plaintiffs Heads of Argument but further gave its own detailed background as regards the communication which took place between the parties.

The defendants insisted that the blame for the plaintiffs legal practitioners not being aware of the "addendum" should not be blamed on the defendant but clearly lied with its previous Managing Agents and thus ultimately with the plaintiff.

COURT'S RULING

Without further ado or much ado this court is of the view that defendants cannot be held accountable for the plaintiffs previous Managing's Agent failure to draw to the plaintiffs legal practitioners' attention about the existence of the "Addendum" and or failure to withdraw the pending litigation between the parties. This court takes Judicial Notice of the serious admission made by the plaintiff, in para 10 of plaintiffs Heads of Argument, as the basis upon which the plaintiff should be held accountable for failure to place a *moratorium* in the court action.

This court also takes the view, in agreement with the defendants' submissions, that that the continuance of the parties' proceedings to hold a pre-trial Conference Meeting and ultimately the pre-trial supports the defendants' contention that the pending litigation between the parties "had not been settled"

Taking into account the circumstances of this case it is my finding, in agreement with submissions made on behalf the defendant that, the plaintiff, at the pre-trial Conference, withdrew the present action.

On the issue of costs the general rule is that costs follow the event or put in another way success carries costs. See the case of *Muhwati v Zimbabwe Newspapers (1980) LTD And Another* 1988 ZLR 158 HC) In the case of *Mahembe v Mahembe* case no HB 13/13 it was held that;

"The rationale for this principle is that successful litigant should be indemnified from the expenses which He incurred by reason of being unjustifiably compelled to either initiate or defend litigation, The rule only be departed from where good grounds are shown to exist"

This court is in agreement with the submission that in terms of the rules of court a pre-trial conference Judge cannot make an order of an award of costs as against the Parties

unless there is an agreement between the parties or special circumstances exist such as would empower the judge to make such an order.

In accordance with the directive given by this court and having had regard to submissions made by the parties, in their Heads of Argument, this court finds that good grounds exist for it to make such an order as would meet the justice of this case.

Accordingly it is hereby ordered that the plaintiff files its Notice of Withdrawal with an undertaking to pay all the defendants costs.

Gill Godlonton and Gerrans, plaintiff's legal practitioners.
Wintertons, defendant's legal practitioners