ISAAC TIGERE TICHAREVA
versus
MANGENJE BROTHERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 14 October 2021 & 30 June 2022

Opposed Court Application

S Chatsanga, for the applicant
E Jera, for the respondent

CHITAPI J: The applicant is the executive dative of the Estate Late Kennedy Mangenje whose estate is registered as DR MRE No. 329/18 under the direction of the Additional Master of the High Court, Mutare. The deceased Kennedy Mangenje owned a 25% shareholdings in the respondent. The 25% shareholding aforesaid would in law devolve to the deceased's estate. The applicant would therefore have *locus standi* to take whatever lawful measures as he considers necessary to safeguard the interests of the estate in the company. The company was or is still a family concern. It was founded by three brothers namely, the deceased whose executor is applicant, Charles Mangenje, also deceased and Godwin Mangenje.

The applicant in the course of the administration of the estate aforesaid for reasons which are not necessary to discuss because of the manner in which this application was ended filed an application for the provisional liquidation of the respondent company. On 17 June 2020, TAGU J granted an order for the provisional order of winding up of the respondent company and further granted an order for the appointment of a provisional liquidator. The learned judge endorsed the choice of one Knowledge Mumanyi as provisional liquidator in terms of s 274(1) as read with s 221(2)(a) – (g) of the Companies Act *[Chapter 24:03*]. The respondent's directors and some beneficiaries of the deceased estate being people with interest in the subject matter of the litigation opposed the application for confirmation of the provisional order of the winding up of the respondent.

It is common cause that the provisional order of TAGU J was returned to court for argument on its confirmation or discharge on 14 October 2021 before me. The applicant filed a notice of withdrawal with a tender of costs on 7 October 2021. The notice of withdrawal was only served on the respondent's legal practitioners on 11 October 2021. On the eve of the hearing on 13 October 2021, the applicant's legal practitioners wrote and filed a letter addressed to the Registrar. The letter states:

> "**Attention**: Mr Justice Chitapi's Clerk
>
> RE: **ISAAC TIGERE TICHAREVA v MANGENJE BROTHERS (PVT) LTD**
>
> The above matter refers which has been set down for 14th October 2021.
>
> We advise that the applicant has since withdrawn this matter and tendered costs on an ordinary scale. See a copy attached hereto.
>
> We believe this matter was set down before the withdrawal notice came to the attention of the Registrar.
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> Since the matter was withdrawn, we do not see the reason to appear in court as doing so will unnecessarily attract further costs against the parties. We believe the matter stands withdrawn accordingly, meaning the matter is no longer before the court.
>
> It is against this background that we write to advise of the withdrawal and that the matter need not be heard."

The respondent's legal practitioners by letter dated 13 October 2021 advised the applicant's legal practitioners that they were instructed to argue on the issue of costs because the tender of costs on the ordinary scale as incorporated in the notice of withdrawal was not acceptable to the respondent. The hearing proceeded on 14 October,2021 as scheduled. I heard submissions on the issue of costs during which the respondent prayed that costs should be granted on the legal practitioner and client scale.

Mr *Jera* for the respondent submitted that punitive costs on the legal practitioner client scale were justified because the applicant filed an application which was fatal from the on set since the applicant relied upon a repealed law. He further submitted that in the face of the obvious fatality, the applicant after being served with the opposing affidavit even filed an answering affidavit instead of withdrawing the fatal application at that stage. The applicant did not set down the application. It was in fact the respondent which did so and that in order to escape an order of punitive costs the applicant then withdrew the application. Mr Chetsanga

submitted that there was no justification for an order of costs on a scale other than the ordinary scale.

In respect to the materiality of the background facts to the application for an order of punitive costs consequent upon the withdrawal of the application, it is common cause that the applicant relied upon provisions of the repealed Companies Act [*Chapter 24:03*] when he obtained a provisional winding up against the respondent order before TAGU J on 17 June 2020. It is common cause that the Companies Act, [*Chapter 24:03*] was repealed by the Companies Act other Business Entities Act, [*Chapter 21:31*]. The latter Act came into force on 13 February 2020. The application before TAGU J was filed on 18 February 2020 and the learned judge granted the provisional order on 17 June 2020. Following on the repeal aforesaid, applications for winding up and liquidation of companies remained provided for under the Insolvency Act, [*Chapter 6:07*].

Consequent upon the granting of the application for the provisional order, the applicant was not in a hurry to further the obtaining of a final order or the confirmation of the provisional order. Following on the filing of the respondent's opposition to the confirmation aforesaid on 14 September and 15 September 2020, the applicant did not do anything further. The respondent filed heads of argument on 3 November 2020 and followed that up with a set down of the application. The applicant was not moved to act on its application. The applicant only acted upon being served with a notice of set down. Its response was to withdraw the application with a tender of costs on the party and party scale.

The respondents understandably considered that the applicant's application was vexatious and that the applicant had no *bona fide* intention to seek the final relief. In the case of *Dongo* v *Joy Tindra Natverial Nack and 5 Ors* SC 55/20 at para 18, GWAUNZA DCJ stated as follows in relation to the approach of the court to considering whether or not to grant a punitive costs order:

> **"[18] Whether or not costs on an attorney-client scale were justified in the circumstances**
>
> The appellant correctly contends that courts do not lightly order punitive costs against a litigant unless it is clear that such litigant exhibited a lack of seriousness in pursuing his or her case …."

In para 19 of the same judgment, the learned judge stated as follows:

> [19] It is settled law that costs are at the discretion of the court. The award can only be set aside where the discretion was not exercised judiciously. It is also settled that costs on a higher scale are granted in exceptional circumstances. The grounds upon which the court would be justified to make an award for costs on the legal practitioner and client scale include dishonest or malicious conduct and vexatious, reckless or frivolous proceedings by and on the part of the litigant concerned. See *Mahembe* v *Matombo* 2003(1) ZLR 148(H) where the court made reference *to Rubin L Law of Costs in South Africa Juta & Co* (1949)." See also *John Dhokotera* v *Zimbabwe Revenue Authority* HH 301-21.

In casu and following the guidance given in the case authorities cited, I consider that *in casu* costs on the legal and client scale are justified. The conduct of the applicant post the grant of the provisional order of winding up the respondent showed a clear lack of seriousness in pursuing the case. It was left to the respondent to further the litigation only for the applicant to withdraw the application on the eve of hearing. The applicant's attention had been drawn to the error which had occurred in the granting of the provisional order as a non-existent or repealed law was used as a basis to obtain the order. There was ample time for the applicant's legal practitioner to carry out the necessary research and acquaint with the current law. It was in my view unacceptable for the applicant to continue to cling to a provisional order which clearly was granted in error and to take advantage of its effect even after the error had been pointed out to the applicant's legal practitioner by the respondent's legal practitioner. In fact, the conduct of the applicant's counsel was deserving of censure and he was lucky that costs were not sought *de bonis propriis* as these could arguably have been justified. The applicant *in casu* did not argue that the actions of his legal practitioners in the form of being ignorant or unaware of the change in the law which was relied upon and an order erroneously sought and granted should not be visited upon him. In consequence, the applicant must be held to be bound by the conduct of his legal practitioner.

I accordingly make the following order:

1. The application be and is hereby withdrawn by the applicant.
2. The applicant shall pay the costs of the application on the legal practitioner and client scale.

Chatsanga & Partners, applicant's legal practitioners
Moyo & Jera, respondent's legal practitioners