MANICA ZIMBABWE LTD
versus
GRINDSBERG INVESTMENTS (PVT) LTD
and
BOLLORE AFRICA LOGISTICS ZIMBABWE (PVT) LTD
and
THE HONOURABLE MINISTER OF INDUSTRY AND COMMERCE N.O.
and
THE HONOURABLE MINISTER OF AGRICULTURE MECHANISATION AND IRRIGATION DEVELOPMENT N.O.
and
THE COMMISSION GENERAL OF THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 23, 24 September 2015 and 3 February 2016

Urgent Application

R .Goba, for the applicant
D. Tivadar, for the 1st respondent

DUBE J: This is an application for costs. At the hearing of this matter, the applicant withdrew its urgent application without an offer of costs. The first respondent requested the court for an order of costs resulting in the question of costs was reserved pending the filing of heads of argument on the subject by both parties. The first respondent, seeks an order of costs on the legal practitioner client scale alternatively costs on the legal practitioner-client scale *de bonis propriis*.

The brief background to this application is as follows. The applicant provides a container depot for the storage, detention, unpacking and examination of containers or the contents of containers or for the delivery of importers of contents of containers after the contents have been duly entered. The applicant is a licensed container depot. The second respondent was cited as an interested party having arranged transport of the consignment of sugar which forms the subject matter of this application. The third and fourth respondents are the minsters responsible for issuing permits and licences for importation of goods into the country. The fifth respondent is the Commissioner General of the Zimbabwe Revenue

Authority, the authority responsible for the administration of the Customs and Excise Act [*Chapter 23:02*].

Between March and October 2014 the applicant received containers containing sugar and other goods belonging to the first respondent. The rest of the goods were cleared leaving containers of sugar. The first respondent was required to obtain a licence and permit from the third and fourth respondents, pay import duty to the fifth respondent and clear the goods and pay the applicant's storage and handling charges. The applicant averred that the first respondent had failed to obtain the necessary licence and permit to allow the importation of the sugar held by the applicant. The applicant submitted that the first respondent's licence from the third respondent for the importation of the sugar into Zimbabwe was to expire on 24 September 2005. It contended that sugar is a perishable and its value was continuing to deteriorate as each day passed. On 15 September 2015 the applicant filed an urgent chamber application seeking an order to compel the first respondent to pay for licences, permits and import duty to the third to fifth respondents to enable the first respondent to clear and remove sugar stored at the applicant's premises. In the event of the first respondent's failure to do so, the applicant sought an order compelling the third and fourth respondents to grant to the applicant the necessary permits and licences entitling the applicant to import the sugar into Zimbabwe, sell the sugar and pay the fifth respondent out of the proceeds of the sale and recover its storage costs..

The court initially declined to deal with the application on the basis that it was not urgent and only agreed to entertain the application after an appeal by the applicant. At the hearing, the court commenced hearing a preliminary point on the urgency of the matter. The applicant withdrew the application midstream after the first respondent disclosed that it had a licence and a permit for the importation of the sugar and had paid the fifth respondent for the clearance of the sugar. The applicant did not make a tender of costs.

The first respondent asks for costs on the basis that the matter was never urgent and hence the court's decision not to treat it as not urgent, the matter only having been set down after the applicant had pleaded with the court for a hearing. The first respondent maintained that the matter was not urgent and was devoid of any merit leading to a withdrawal by the applicants. The first respondent avers that the import licence it holds had not expired and it was not consulted to ascertain the status of goods before the urgent application was made. That otherwise the application ought not to have been filed.

The applicant defends this application. The applicant took a point *in limine*. It takes issue with the first respondent's failure to file heads of argument by the date appointed by the court. The applicant argued that the first respondent having breached the order of the court ought to have sought condonation of its breach. The applicant urged the court, to expunge the first respondent's heads of argument from the record for failure to make an application for condonation. The applicant maintains that ultimately, there is no application for costs before the court. The applicant seeks costs on the basis that it was successful in this application.

On the merits, the applicant took issue with the respondent's failure to advise it and the court of the fact that it had since paid the duty and licences concerned when the application was set down for hearing. The applicant further contended that the reason why the applicant withdrew its application is because it had been successful and that a court order was no longer necessary. The court was urged to take the view that the applicant was successful in this application. On the issue of costs, the applicant submitted that there is no rule of law that a party withdrawing an application pays the other side's costs .The applicant contended that if a party withdraws an application because the other party complied with the order sought, then it is successful and can recover its costs. The applicant submitted that the first respondent has failed to justify a claim for either costs on a higher scale or costs *de bonis propriis*. The applicant prays for an order of costs on the ordinary scale against the first respondent.

The order of the court was not obeyed. The first respondent requested and was ordered to file its heads of argument by 30 September 2015 and only did so on 12 October 2015. The filing of the heads was not subject to the filing of the notice of withdrawal was filed. The first respondent's explanation in its heads that it did not file heads on time because the applicant had not filed a formal notice of withdrawal therefore has no basis as no such pronouncement was made by the court. The respondent is indeed in breach of the court's order and has fallen foul of the rules. The first respondent has not applied for condonation of the late filing of the heads of argument. A party who fails to comply with an order of the court to file heads of argument within a stipulated date is expected to apply for condonation of the late filing of the heads of argument. The respondent has failed to ask for condonation of the late filing of its heads of argument and in the end, there is no explanation for the delay in filing the heads of argument. The respondent was advised that the applicant was taking issue with the late filing and advised to seek condonation. The respondent has done nothing. It is difficult for the court to condone the late filing without having been asked to do so by the offending party. This error is fatal to its application. The heads of argument are not properly

before the court. The respondent's heads are expunched from the record. The effect of this on the applicant's request for costs made at the hearing is simply that there is no argument on the costs requested.

I am still required to consider the question of costs. Any costs, of whatever nature are not merely for the asking and require to be justified. The approach to take in determining the issue of costs was discussed in *Nhari* v *Public Service Commission* 1998 (1) ZLR 574 (HC) at p583. The court quoted the following except from *Fripp* v *Gibbon & Co* 1913 AD 353 per De Velliers JP as follows,

> "Questions of costs are always important and sometimes difficult and complex to determine, and in leaving the magistrate discretion, the law contemplates that he should take into consideration the circumstances of each case, the conduct of the parties and any other circumstances ….. and if he does this and brings his judgment to bear upon the matter and does not do so capriciously or upon a wrong principle I know of no right on the part of a court of a court of appeal to interfere with the honest exercise of his discretion".

Another case in point is Kruger *Bros and Wasserman* v *Ruskin* 1918 AD 63 @ 69 where the court said the following:

> "The rule of our law is that all costs unless expressly enacted are in the discretion of the judge. His discretion must be judicially exercised but it cannot be challenged taken alone and apart from the main order without his permission".

A court assessing the question of costs is required to take into account all the relevant factors. The subject of costs is always in the discretion of the court. The court has a discretion in considering whether any costs are payable to any party. If it decides to make an award of costs, it is usually guided by the general rule that the unsuccessful party pays the costs of the successful party. The court's discretion is required to be exercised judicially. The court will not allow costs that have been unreasonably incurred. The court also has to be satisfied that the costs sought are payable by one party to another.

The court must, in determining which party to award costs to and the appropriate scale of costs to impose have regard to,

a) the conduct of the parties before and during the proceedings,
b) whether a party has been wholly or partly successful in his case
c) whether the other party has offered to settle the matter
d) any other pertinent circumstances. Costs are not merely there for the asking.

With regards costs following a withdrawal, the general rule is that a party may withdraw any proceedings before they have been set down and where he does so after set

down of the matter, he may do so with the consent of the other side or with the leave of the court. He is expected to file formal a notice of withdrawal and make a tender of costs. In no consent to pay costs is embodied in the notice of withdrawal, the other side may apply to court for an order of costs. See The *Civil Practice of the Superior Courts of South Africa* 5th ed at p 749, *Moodley* v *Moodley*, [2009] ZAFSHC 61, *Protea Assurance Co Ltd* v *Gamlase and Ors* 1971(1) SA 460. The author AC Cilliers in *The Law of Costs* , 2nd ed on p 121 states as follows on withdrawals.,

"Where a litigant withdraws an action or in effect withdraws it, very strong reasons must exist.... why a defendant or respondent should not be entitled to his costs. A plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because after all his claim or application is futile and the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. ....there is a crucial difference between the position of an applicant settling his case on the merits and then asking the court 's ruling on costs and the position of an applicant withdrawing his claim and thereafter attempting to avoid an order of cost as against him'' See also *Protea Assurance Co Ltd* v *Gamlase and Ors(supra)* where the court relied on the case of *Germishuys* v *Douglas Besproeiingsraad* 1973 (3)SA299, for the proposition that it is only in exceptional circumstances that a party that has been put out of pocket by having to oppose a matter will be denied all the costs.

My understanding of the correct legal position is that where a party withdraws his application or action, he is expected to make a tender of costs. It is only in exceptional circumstances that a respondent will be deprived of costs. A party withdrawing an action or application may only be entitled to costs where 'very strong reasons' have been shown to exist. Where a party has been wholly or partly successful in its claim, this fact may constitute very good reasons for an entitlement to costs. The respondent may also be deprived of costs because of his conduct or fault on his part.

The conduct of the applicant in this case was above board. I have not been able to find fault with the applicant's conduct in this application. When this matter was placed before me, I ruled that the matter was not urgent. The fact that the court initially refused to entertain the matter does not favour the first respondent. The applicant cannot be penalised for having its application declined on the first occasion when one has regard to the circumstances of this case.

The application was subsequently set down following an appeal from the applicant. Once the court decided to set down the matter for hearing, the issue of the urgency of the matter remained in abeyance. At the hearing of the matter the first respondent challenged the urgency of the matter and it was entitled to do so. The matter was withdrawn in the midst of submissions on the urgency of the matter. The court did not get to pronounce itself on the urgency of the matter as the court was not fully addressed on the subject and the application was aborted midway and no ruling made. The first respondent cannot be entitled to costs simply on the basis that the court had initially declined to entertain the application.

Although the court found that the matter was not urgent, this in no way means that the applicants had no cause of action against the first respondent. The applicant was holding its sugar and the first respondent was not clearing it or facilitating that process. When the application was lodged, the respondent had not paid for clearance of the sugar. The applicant was entitled to compel the first respondent to clear the sugar and by a certain date.

The withdrawal of the application was done after the matter was set down for hearing. It emerged during argument, that the first respondent had since paid the monies required as duty to clear the sugar. The first respondent, it also emerged, had a permit and licence from the third and fourth respondent to enable it to clear the sugar and collect it from the applicants depot. The applicant made its application on 15 September 2015 seeking an order against the first respondent to "effect all such payment as is required to clear and to remove" its sugar held at the applicant's depot. The first respondent effected these payments on 18 September 2015. The court set down the application for hearing on 23 September 2015. The first respondent was not open with the court only advising the court of its payment to the fifth respondent on the second day of the hearing. The first respondent ought to have disclosed this progress at the onset of the hearing. There is no explanation why the first respondent only informed the court and the other parties so late of this crucial development. Had it done so earlier, this would have obviated the need for the hearing. It appears to me that the payment was prompted and made in response to the application. The discovery that money had been paid to the fifth respondent to clear the sugar led the applicant to withdraw its application. It would have been potentially abusive conduct for the applicant to proceed with an application that served no purpose. I am of the view that the applicant is not liable for the untimely termination of the application. There is no suggestion that the applicant abused court process. The applicant used the procedures permitted by the rules of court to facilitate the pursuit of the truth .The applicant achieved its objective of trying to compel the first respondent to pay

up its licenses and permits and duty so that the sugar could be removed from its depot. In that regard, the applicant was the successful party. The respondent on the other had been clearly at fault for failing to disclose developments that were taking place timeously.

The applicant was the successful party and that fact in my view constitutes 'very good reason' for depriving the first respondent of its costs. The applicant is entitled to the costs of this application. The applicant has been put out of pocket by having to compel the respondent to clear its sugar .The first respondent has been unable to justify its claim for costs. Costs follow the event. The applicants have asked for costs on the ordinary scale.

In the result it is ordered as follows,

The application is dismissed.

The first respondent is to pay the costs of this application.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Venturas&Samkange,1st respondent's legal practitioners