SMITHS SUPER TRACK (PVT) LTD
versus
ZIMBABWE ELECTRICITY TRANSMISSION
& DISTRIBUTION COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE,16 March 2017 & 22 March 2017

Opposed Matter

T K Hove, for the applicant
Ms O Chinganga, for the respondent

MATANDA-MOYO J: The applicant applied for dismissal of the respondent's claim filed under HC 2038/16 for want of prosecution. The last action on that file was on 14 March 2016 when the applicant, who is the defendant in the matter, filed its appearance to defend and requested for further particulars. Despite being served with such documents on 16 March 2016, the respondent had done nothing as at 30 June 2016 when this application was filed. On 11 July 2016 the respondent furnished the applicant with the requested further particulars. The respondent's complain is that the applicant should have sought to compel the respondent to provide such further particulars rather than resort to this application for dismissal.

On the date of hearing the parties entered into a settlement resulting in an order by consent in the following;

1) That the matter be and is hereby deferred to trial.
2) That the applicant files its plea or other answer to the summons within 10 days of granting of this order.
3) The costs of the present application to be decided on the papers with leave being granted for either party to file heads of arguments on costs alone.

Both parties did file their heads of argument in relation to costs. The applicant filed heads in support of its claim for costs against the respondents on a higher scale. Its argument is that the application for dismissal of the main matter was necessitated by the respondent's failure to supply further particulars for over three months. It is therefore the conduct of the respondents which caused this application. The applicant submitted that it incurred costs in the present application. The applicant insisted it had satisfied the requirements to be awarded costs on a higher scale.

On the other had the respondent vehemently opposes the applicant's claim for costs and on a higher claim. Instead the respondent argued that it should be paid costs on a higher scale. It is the respondent's case that the present application is not supported by any rules of this court. A prudent application receiving the respondent's opposing affidavit could have withdrawn the application. However the applicant insisted with an application that is vexatious and frivolous. The applicant in so doing was clearly abusing the court process. The respondent argued that it was never barred in terms of the rules and as such the application was malicious. The respondent referred me to order 9 r 61. The conduct of the applicant in resisting with a matter without considering the rules is reckless. Such conduct calls for censure by this court.

There is generally a presumption that the court would make an order of costs against the losing party, unless there is good reason not to. Costs normally follow the event. However the court has wide discretionary powers to depart from the above norm. In doing so the court had to consider amongst other factors the following;

a) conduct of the parties in the occurrences leading to litigation including any conduct by a party that was reckless, willful and malicious, illegal or in a bad faith.
b) the objective reasonableness of the application and defences raised by the parties.
c) whether such conduct requires an award of costs that would deter others from asserting meritless claims and defences.
d) the reasonableness of the parties and the diligence of parties and their attorneys denying the proceedings and
e) the reasonableness of the parties in pursuing settlement of disputes and various other factors. The list if not exhaustive.

The applicant conceded that he had adopted the wrong procedure. The application for dismissal for want of prosecution in a summons procedure should be used as a last resort. Obviously the applicant had sought further particulars in the main matter. Having failed to receive those further particulars on time the applicant's remedy lied in applying for an order to compel the applicant to provide the further particulars. In any case the delay by the respondent was not inordinate.

Secondly upon receiving the opposing papers from the respondent, the applicant failed to act diligently. A diligent practitioner would check the submissions by the other party and immediately take the appropriate action. Without resorting to the rules and the law the applicant continued with the proceedings by filing answering affidavit and heads of argument. It was only on the day of hearing that the applicant acted reasonably and consented to the matter being deferred to trial.

It is trite that a party in instituting proceedings must reasonably believe it has chances of succeeding. Bringing proceedings where one does not have any chances of success amounts to an abuse of court process. This is what the applicant did in this case.

I am of the view that from the conduct of the applicant and the circumstances of the case there is no reason why the court should depart from the norm that costs should follow the event. The applicant should be ordered to pay costs – see *Mahember* v *Matambo* HB 13/13 where the court stated that:

> "The general rule is that costs follow the event or put in another way success comes costs. The rationale behind this principle is that the successful litigant should be indemnified from expenses which he incurred by reason of being unjustifiably compelled to either initiate or defend litigation."

I now turn to deal with the level of costs. Is this a case where the court should grant the above costs on a higher scale. Hebstein and van Winsein *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa 5 ed vol 2* p 954 states the following;

> "The award of costs is a matter wholly within the discretion of the court, but his is a judicial discretion and must be exercised on grounds upon which an reasonable person could have come to the conclusion arrived at. In leaving the …… judge a discretion, the law contemplated that [a judicial officer] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any circumstance which may have a bearing on the question of costs and then make such order as to costs as would be fair and just between the parties…."

The order by consent by the parties effectively represents the applicant withdrawing its case. The law is clear that a party who withdrawn a case is treated in the same manner as an unsuccessful party, who should be ordered to pay costs unless there be good cause not to. No good cause exists in this matter for the applicant not to pay costs.

With regards the level of costs I am convinced that the applicant acted in bad faith in bringing this application. After reading the opposing papers the conduct of the applicant in persisting with the application can be termed "unreasonable and not diligent." The applicant realised he had no claim but persisted in bad faith. See *Sibanda* v *Nyathi & Ors* 2009 (2) ZLR 171 (H); *Fiyana* v *Moyo & Ors* 2005 (1) ZLR 302, *Chisese* v *Guvamukawa* 2002 (2) ZLR 392 (S).

Clearly the applicant abused the court in filing this frivolous and vexatious application. It lacked bona fides in the way it handled the matter. I am satisfied that this is a proper case for awarding costs on a higher scale.

Accordingly it is ordered that:

The applicant is hereby ordered to pay costs of suit on a legal practitioner – client scale.

T K Hove and Partners, applicant's legal practitioners
Messrs Chinganga & Partners, respondent's legal practitioners