

DR ELIZABETH S MAPHOSA

Versus

SCOTFIN LIMITED

And

THE SHERIFF OF ZIMBABWE N.O

And

BULWAYO REAL ESTATE (PVT)

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1 APRIL 2004

G Nyoni for applicant
T Ndlovu for respondent

Urgent Chamber Application

NDOU J: The applicant, in essence, instituted these proceedings to stay execution of a judgment of this court granted on 1 April 2003 in HC-500-00. The applicant does not challenge the judgment on the merits. After a notice of opposition was filed a settlement was reached between applicant and the first respondent. The application was withdrawn without, simultaneously tendering costs.

The parties made submissions on this outstanding issue of costs. This judgment is about the question of costs. In *casu*, the withdrawal of the application was done after the matter had already been set down. In fact the settlement was only reached after initial submissions to me by both parties. Generally, a person instituting any proceedings may, at anytime before the matter has been set down and thereafter by consent of the parties or leave of the court, withdraw the proceedings, in which event he must deliver a notice of withdrawal and may embody in the notice a consent

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to pay costs – *Civil Practice of the Supreme Court of South Africa* by L van Winsen, AC Cilliers and C Loots (4th Ed) at page 568; *Protea Assurance Co Ltd v Gamlase & Ors* 1971 (1) SA 460 (E) and 465 and *Metropolitan Bank of Zimbabwe v Roberts Nguni & Ano* HH-132-03 at page 2 of the cyclostyled judgment. In my view where an applicant withdraws an application, very sound reasons must exist why a respondent should not be entitled to his costs. A successful party may be deprived of his costs in exceptional circumstances. In essence the court will only depart from the general rule that costs follow the event where it would be fair to do so and where the successful party has been found wanting or is at fault in some particular respect – *Davidson v Standard Finance Ltd* 1985 (1) ZLR 173 (HC) at 175G-176C; *Rilter v Godfrey* [1920] 2 KB 47 (CA) at 60-1; *Mafukidze v Mafukidze* HH-279-84; *Gwinyai v Nyaguwa* 1982 (1) ZLR 136 (SC); *Waste Products Utilisation (Pty) Ltd v Wilke's and Ano* 2003 (2) SA 590 (W) and *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC).

In this case the applicant does not dispute indebtedness to the first respondent. All she says is that she was not aware of the outstanding amount owed after her tractor was taken from her and sold by the first respondent. She did not find out resulting in her house being attached to liquidate the outstanding amount due. The house was due to be auctioned by 27 February 2004 by the third respondent acting on the instructions of the second respondent. The applicant became aware of the attachment on 9 February 2004. She did not approach the first respondent to find out the outstanding balance. Instead, on 13 February 2004, she approached this court under a certificate of urgency. When the first respondent filed opposing papers she agreed that she was still indebted to the first respondent resulting in the withdrawal

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that I have alluded to above. She paid \$2 000 000,00 towards the liquidation of the outstanding capital amount as part of the settlement. Had she first inquired with due diligence, she would not have launched these proceedings. In my view, the first respondent is not responsible for the premature termination of the application. The award of costs in this matter is wholly within my discretion – *Levhen Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR) at 227 V-C; *Re J (an infant)* 1981 (2) SA 330 (Z); *Kerwin v Jones* 1958 (1) SA 400 (SR) and *Fripp v Gibbon & Co* 1913 AD 354.

In *casu*, I see no reason why the first respondent should not be indemnified for the expense to which it has been put through having been unjustly compelled to oppose this withdrawn urgent application. In the exercise of the discretion bestowed upon me I order that the applicant pays the costs of this application.

Majoko & Majoko, applicant's legal practitioners
Cheda & Partners, first respondent's legal practitioners