

PATTERSON FUNGAI TIMBA  
versus  
PEGGIE SARUCHERA N.O.  
and  
RESERVES BANK OF ZIMBABWE  
and  
NATIONAL SOCIAL SECURITY AUTHORITY  
and  
RENAISSANCE FINANCIAL HOLDINGS LIMITED  
and  
RENAISSANCE MERCHANT BANK LIMITED

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 27 March 2013 and 20 May 2015

### **Court Application**

*T. Mpofu*, for the applicant  
*A. Mugandiwa*, for the 1<sup>st</sup> and 5<sup>th</sup> respondent  
*L. Uriri*, for the 2<sup>nd</sup> respondent

MAKONI J: The applicant mounted a court application against all respondents seeking certain declarations and consequential relief. At the time of the launch of the application the fifth respondent was under the management of a curator, the first respondent. The curatorship took effect on 2 June 2011. The applicant was well aware of this position and that the curatorship was for a limited period. The application was opposed by all the respondents. The first and the fifth respondents retained the services of Messrs Wintertons Legal Practitioners. On 11 November 2011, the first and the fifth respondents sought to have the application determined on a certificate of urgency before the expiry of the curatorship. This was opposed by the applicant and the curatorship expired before the matter was heard. The curatorship was lifted on 2 March 2012.

On 5 June 2012 the applicant advised the respondents that the matter had been set down for hearing on 21 June 2012. On the day of hearing the applicant at 0845hours served the first

and the fifth respondent's legal practitioners with a notice of withdrawal. The notice was not accompanied by a tender of wasted costs.

The issue for determination is whether the applicant should be ordered to pay the first and the fifth respondents costs of the application and if so the scale of such costs. The second respondent indicated that it will abide by the decision of the court.

Mr *Mpofu* submitted that the first respondent was cited in his official capacity. The post was removed therefore he ceases to be before the court. There is no-one to insist on costs. He referred the court to *Gariya Safairs (Pvt) Ltd v Van Wyk* 1996(2) ZLR 246 (HC). A party claims for costs because he or she is put out of pocket. Into whose pockets will the costs go if they are awarded.

As regard the fifth respondent, Mr *Mpofu* submitted that the application was not seeking any relief against it. It was not called upon to defend. It was joined as a matter of convenience. It did not put its position before the court. It did not incur any costs.

Mr *Mpofu* further submitted that the first respondent not having been sued in his personal capacity, did not meet the costs of litigation. They were met by the financial institution then under curatorship. The first respondent intends to recover money to put in his own pocket and that conduct borders on the improper and is *prima facie* criminal.

He further submitted that courts of law exist for purposes of settling concrete controversies. He referred to *Golden Huys and Neethling v Beathin* 1918 AD 426. In *casu*, once the curatorship was uplifted there was no longer a concrete controversy for the court to settle. The applicant then withdrew the proceedings. The applicant cannot be penalized for a matter which was overtaken by events. He prayed that the first respondent, in his personal capacity be ordered to pay costs on a higher scale.

Mr *Mugandiwa* contended that the relief that the applicant sought could still have been granted after the curatorship had ceased. What the applicant sought were declarations. The court could still make a decision whether the curator had discharged his obligations in terms of the Banking Act. The applicant also sought consequential relief regarding re-imbusement of fees drawn by the first respondent. This could still have been determined post – curatorship.

He further submitted that the applicant applied for a set down date three months after the curatorship had ceased. The applicant only filed the Notice Of Withdrawal on the day of hearing at 8:45hours.

He further contended that serious allegations of impropriety were made against the first respondent and he had to respond. As a result he was put out of pocket.

He also contended that the first respondent request for an urgent set down of the matter before the expiry of the curatorship. The applicant opposed the request. In examining the fundamental rules relating to awards of costs. The learned authors Hebsstein and Van Winsen in *The Civi Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed : Vol 2 p 954, stated the following:

“The award of costs in a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In learn the magistrate (or judge) a discretion,  
..... The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issued in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties.....

Even the general rule, viz that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs.”

What comes out clearly from the above text is that the award of that cost is the discretion of the court and that the court is guided by certain fundamental principles in exercising this discretion. In dealing with the issue of costs on withdrawal of proceedings specifically, AC Cilliers in the *Law of Costs*, 2<sup>nd</sup> ed p121 had this to say:

“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. In such a case it is not necessary to go into the merits**: 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 costs against him.”  
(Emphasis added)

The above position was adopted in *Germishuys v Douglas Bespoeiinsraad* 1973(3) SA 299(NC). See also *Abramacos v Abramacos* 1953(4) SA 472(SR). As was correctly pointed out by Mr *Mugandiwa*, the legal position emerging from the above is that;

- (i) A plaintiff/applicant withdrawing an action/application *ipso jure* invites upon himself the obligation to pay costs for the opposing side.
- (ii) The withdrawing party is in no better position than a losing party, his litigation being futile.
- (iii) The withdrawing party cannot call to his aid the merits of the matter in trying to avoid costs.
- (iv) Costs have to be paid up to the date of withdrawal of the matter.
- (v) The sole question to be asked is whether or not the matter has been withdrawn. If the answer is in the affirmative, then liability for payment of costs will attach.
- (vi) A withdrawing party seeking to avoid a payment of costs has to advance “very sound reasons thereof”

It is common cause that the applicant withdrew its application fifteen minutes before the hearing. In terms of the above propositions of the law, the applicant invited upon himself the obligation to pay costs of the application upto the time of withdrawal unless he can show “very sound reasons” for avoiding the costs.

The issue to be determined is whether the applicant has advanced very strong reasons for avoiding liability of costs.

In summary the applicants reasons for avoiding costs are that the curatorship ceased and there is no longer a respondent answering to the same of the first respondent. The first respondent not having been sued in his personal capacity did not meet the costs of litigation and that there was no longer a concrete controversy for the court to settle.

The question to ask is whether the reasons advanced by the applicant amount to ‘very sound reasons’ for avoiding liability for costs.

My view is that the reasons advanced by the applicant are far from meeting the criteria of ‘very sound reasons.’

#### Lapse of curatorship

When the applicant instituted the proceedings in issue, it was aware that the curatorship has lifespan. Being fully cognisant of the fact, the applicant opposed the first and the second respondent's attempt to have the matter decided on an urgent basis and during the subsistence of the curatorship. He therefore took the risks of the matter having to outlive the curatorship and cannot turnaround and seek to rely on the lapse of the curatorship.

In any event, no evidence has been placed before the court to show that the withdrawal is attribute able to the lapse of the curatorship. If that was the case, the applicant would have withdrawn the matter immediately upon the lapse of the curatorship. He did not do so but waited for a period of almost four months, after the lapse of the curatorship to file the notice of withdrawal. The applicant has not established a link between the lapse of the curatorship and the withdrawal four months down the line and a few minutes before the hearing.

Concrete dispute between the parties

The lapse of the curatorship did not render the matter incapable of being resolved. The court could still make pronouncements on the legality or otherwise of the first respondent's conduct. The court could still determine the issue relating to board of the fifth respondent. It could also still determine the issue of the consequential relief being sought by the applicant regarding re-imburement of the fees drawn by the first respondent.

No respondent answering by the name of the first respondent

The curatorship in this matter lapsed on 2 March 2012. The applicant proceeded to set the matter down when he knew very well that it had lapsed. On 5 June 2012, three months after the lapse of curatorship, the applicant clearly exhibited an intention to proceed with the matter by serving the notice of set down on the first respondent's legal practitioners. The question that begs an answer is if there was no longer a respondent answering to the first respondent, why did the applicant serve notice of set down for the first respondent to appear in court, on his legal practitioners. There is no doubt that, as a result of the service of the notice of set down, the first respondent incurred post the curatorship. His lawyers prepared for the hearing only to be served with a notice of withdrawal fifteen minutes before the hearing. The applicant could have been elected to abandon the case against the first respondent if the lapse of the curatorship rendered his case against the first respondent futile. He did not do so but instead close to withdraw the case on the eleventh hour.

The first respondent was not sued in his personal capacity.

I agree with the submission made by Mr *Mugandiwa* that the source of money that was used to meet the costs of the proceedings by the first respondent is not material to the determination of the issue at hand. The question is very simple, did the first respondent incur costs in defending this matter during and after the subsistence of the curatorship. If the answer is the positive that the end of the matter. The question of into whose pockets will the money go is not for this court to determine.

As regards the fifth respondent, no meaningful submissions were made against it. It is still in existence. It incurred costs in defending this matter. I agree with Mr *Mugandiwa* that the fact that the other respondents have abandoned their claim for costs does not disentitle the first and the fifth respondents to claim their costs. From the above analysis, it is clear that the first and the fifth respondents have managed to establish their entitlement to costs. The next issue to determine is at what scale.

This is one of the cases where I will not hesitate to exercise my discretion and awarding costs on a punitive scale. It is clear, from the facts, that the applicant was not genuine in the pursuance of a stand in the litigation process. See *Mahembe v Mahombo* 2003 (1) ZLR 14(H) at 150C. The application by the applicant was vexatious, and meant to disturb the smooth operations of the curator. It was not meant to vindicate any rights. If it was, the applicant would not have opposed the quest by the first respondent to have the case set down urgently. The applicant would also have taken steps to withdraw or abandon the matter immediately upon the curatorship. Having failed to do so and instead setting the matter down, it should not have opposed the claim for costs by the first and fifth respondents.

The first and the fifth respondent have made out a case for costs on a higher scale. In the result I will make the following order:

The applicant is to pay the first and the fifth respondent's costs on the attorney and client scale.

*Muza and Nyapadi*, applicant's legal practitioners  
*Wintertons*, 1<sup>st</sup> and 5<sup>th</sup> respondents legal practitioners  
*Dube, Manikai and Hwacha*, 2<sup>nd</sup> respondent's legal practitioners