

KINGDOM BANK LIMITED
versus
RIGER HOLDINGS (PVT) LTD
and
EUGENE GLANNARD ROBINSON
and
RAINOR ROBINSON
and
GRAVIN VAN PLATEN
and
ANTHONY AFRED ROBINSON
and
R A LONGSTAFF (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 16, 19 January and 4 February 2015

Civil

F. Siyakurima, for the plaintiff
C. Kuhuni, for the defendants

MATANDA-MOYO J: The plaintiff issued summons against the defendants jointly and severally, the one paying the others to be absolved, for the following relief:-

“a) **Claim 1**

- i) \$64 828-67 being capital
- ii) \$267-48 being bank charges
- iii) Interest on the sum of \$64 828-67 at the rate of 4.85% per month above the prevailing Libor with effect from 1 March 2010 to date of full and final payment.

b) **Claim 2**

- i) \$158 432-79 being capital
- ii) \$29 270-70 being interest
- iii) \$385-97 being bank charges

- iv) Interest on the sum of \$158 432-79 at the rate of 4.85% per month above the prevailing Libor with effect from the 1st of December 2012 to date of full and final payment.
- c) Costs of suit on a legal practitioner and client scale and collection commission as provided for under the Law Society of Zimbabwe By-Laws (1982).”

On the date of hearing after listening to opening statements by both counsels, I realised that the issues could be narrowed down to only one, that is the level of costs payable. The parties consented to that. As a result consent judgment was issued in the following:-

- “1. That judgment in favour of the plaintiff be and is hereby granted against 1st, 3rd, 4th, 5th and 6th defendants jointly and severally the one paying the other to be absolved for payment of \$386 000-00.
2. 1st, 3rd, 4th and 6th defendants shall pay to the plaintiff the sum of US\$50 000-00 on or before 26 January 2015. The balance of \$336 000-00 shall be paid on or before the 30th April 2015.
3. A certain piece of land situate in the District of Salisbury called Stand 63 Beverly East of Beverley Estate measuring 4 684 square metres held under Deed of Transfer number 8615/05 dated 18 December 1995 be and is hereby declared specially executable only in the event of the defendant’s default and the plaintiff’s legal practitioners shall attend to the conveyancing thereof.”

The plaintiff insisted that it should be paid costs on a higher scale. The plaintiff argued that there is no basis for making it pay legal costs incurred unnecessarily. The defendants used unwarranted dilatory tactics to delay finalisation of this matter thus prejudicing the plaintiff of its monies which were legally due, and, thereby prolonging matter, causing the plaintiff to further incur unnecessary legal costs. On the date of hearing the defendants applied for a postponement to allow some application for consolidation to be determined by this court. The applicant argued that the application for consolidation was designed to delay the finalisation of the matter further. Such tactics showed that the defendants were not serious about settling the matter.

Looking at the defendant’s plea, it is clear that the plea did not disclose a defence. The issue of payment of costs on a higher scale was never put in issue. The plaintiff also

argued that in terms of clause 10 of the various agreements signed with the defendants, the plaintiff is entitled to costs on a higher scale.

Counsel for the defendants strongly opposed the granting of costs on a higher scale. He denied that the defendants played for time. He attributed the delay to reaching a settlement on the plaintiff's counsel whom he accused of not having been co-operative during the proceedings and negotiations. He alleged it was the plaintiff's counsel who refused to meet with the defendants to finalise issues.

As a general rule the losing party pays the costs of the winning party. Usually such level of costs are on a party to party scale. However, there are situations where the courts are called upon to order punitive costs against litigants for various reasons, for example where parties like in this instance agree that such costs would be payable. See *Mcpherson v Teuwan & Anor* (2012) ZAGP JHC 18.

I have perused the various agreements signed between the parties and observed that indeed under clause 10, it is provided that in case of default:-

“Kingdom shall take other legal actions as it may in its absolute discretion decide, the costs of which the company shall be liable on a legal practitioner and own client scale, including, for the avoidance of doubt, any collection commission that maybe charged and any other costs of recovery of the due and payable amount.”

The above paragraph gives the plaintiff the discretion of deciding when to take legal action and it gives the plaintiff the right to recover costs on a legal practitioner and own client scale.

A plethora of cases have held that the court has a discretion to, even in the face of an agreement, refuse to sanction such an agreement. See *Neyhoff v York Timber Ltd* 1981 (4) SA 666 T at 684 A - H.

In arriving at my decision, I have considered the purpose of punitive costs which amongst others are deterring frivolous litigation, encouraging parties to settle wherever possible and discouraging institution and continuation of hopeless cases and defences.

The defendants have failed to provide any basis for me to disregard the agreement between the parties. That agreement provided that in the event of the plaintiff approaching the court in the case of default by the defendants, the plaintiff would be entitled to costs on a higher scale.

From the onset this was a matter which should have been settled earlier. However, the defendants decided to buy time by advancing hopeless defences. The matter failed to proceed to trial when the matter was initially set down on 3 June 2014 due to one excuse or the other by the defendants. Such postponements of course caused prejudice on the plaintiff and inconvenience to the court. The court has no option but to show its displeasure by awarding costs on a higher scale.

The defendant has failed to show that the plaintiff's counsel caused the delays in finalising the matter.

In the result, it is ordered as follows:-

The first, third, fourth, fifth and sixth defendants jointly and severally the one paying the other to be absolved, be and are hereby ordered to pay the plaintiff's costs on a client-attorney scale.

Sawyer & Mkushi, Plaintiff's Legal Practitioners
C. Kuhuni Attorneys, Defendants' Legal Practitioners