

CRIEF INVESTMENTS (PVT) LTD  
and  
ALDAWILLA INVESTMENTS (PVT) LTD  
versus  
GRAND HOME CENTRE (PVT) LTD  
and  
TAPIWA GIVEMORE KUSASO  
and  
STEWART NYAMUSHAYA  
and  
THE REGISTRAR OF DEED  
and  
LAW SOCIETY OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 3 April 2017 & 17 January 2018

### **Costs**

*Ms F. Chinwawadzimba*, for the applicants  
*T Hove*, for the 1<sup>st</sup> respondent

MUSHORE J: The applicants in the main case number HC 6113/16 applied for rescission of judgment in terms of order 9 r 63 (1) (2) of the High Court Rules. The order that was granted in default was under case number HC 8895/12. The reasons that led to the granting of default judgment were that the applicant's legal practitioner received a notice of set down dated 9/6/16 when in actual fact the matter had been set down for the 9<sup>th</sup> of May 2016. The matter was thus heard on 9 May 2016 in the absence of applicants.

The Respondents were served with court application for rescission of judgment on 16 June 2016. The respondents filed their notice of opposition but failed to file their Heads of Argument within the prescribed time. The respondents were thus barred from filing Heads of Argument. Upon receiving the notice of set down on 28 February 2017 the respondents filed a Chamber Application seeking the court to condone their late filing of the Heads of Argument and upliftment

of the bar. The Chamber Application was dismissed for failure to follow the rules of the court; providing an unreasonable explanation for the delay, and lack of merit in case number HC 6113/16. Consequently the application for rescission of default judgment was granted in the favour of the applicants.

Judgment was reserved on the question of costs at a higher scale as prayed for by the applicants. The general rule is that costs follows the event, in other words, the successful party is usually awarded costs. The rationale for this principle is that the successful litigant should be indemnified from expenses which he/she incurred by reason of being unjustifiably compelled to either initiate or defend litigation. This rule should only be departed from when good grounds are shown to exist.

In the present case the respondents did not assert that such grounds existed. In order for a litigant to successfully claim costs on the attorney and client scale, which is punitive, he/she must show that the other party's behaviour and attitude deserved to be punished.

The awarding of costs at a higher scale is within the discretion of the Court. Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a favourable decision against a genuine complaint. The learned authors Hebblethorn and Van Walsen in *The Civil 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 is 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. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues 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...”

According to the leading authority as to attorney and client costs in South African law, *Nel v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607 where his LORDSHIP TINDAL JA stated:

“The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the courts in case considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation .”

AC Cilliers in *The Law of Costs* 2<sup>nd</sup> ed p 66, classified the grounds upon which would the court be justified in awarding the cost as between attorney and client:

- (a) Vexatious and frivolous proceedings
- (b) Dishonesty of fraud of litigant
- (c) Reckless or malicious proceedings
- (d) Litigant's deplorable attitude towards the court
- (e) Other circumstances

In essence, the cases establish a position that courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs, and not merely because the winning party requested for them. Costs should not be a deterrent factor to access to justice where future litigants with genuine matters which deserve judicial alteration. In awarding costs at a higher scale the courts should therefore exercise greater vigilance.

In the Chamber Application for condonation, the respondents filed a defective Chamber Application by failing to file it in the prescribed Form 29. In the case of *Marick Trading (Pvt) Limited and Another v Old Mutual Life Assurance Company of Zimbabwe* HH 667-15, the court observed as follows:

“An application, like summons commencing action, is the founding process by which a matter is brought to court for determination. If the application is incurably defective as it was in this case, then there cannot be anything before the court to sit over in judgment. The purported application is simply a nullity and must be struck off the roll.”

The respondents were at fault for unreasonably delaying the filing of their Heads of Argument. They received Applicant's Heads of Argument on 24 January 2017 and were expected to file theirs on or before the 7<sup>th</sup> of February 2017. Further the respondent received notice of set down on 28 February 2017, and again did not act promptly. The respondents failed to act reasonably.

This is one of the cases where the courts will not hesitate to exercise their discretion in awarding costs on a higher scale. The delays by the respondents were reckless and meant to delay the application in order to clutch at a default judgment.

For these reasons, costs are awarded at a higher scale.

*Hove Legal Practice*, applicant's legal practitioners

*Venturas and Samkange*, 1<sup>st</sup> respondent's legal practitioners

*Thondlanga & Associates*, 2<sup>nd</sup> & 3<sup>rd</sup> respondent's legal practitioners