

BARBRA CHIDZIVA
and
ALBERTINA CHIDZIVA
and
PATRICIA CHIDZIVA
and
ROSELINE CHIDZIVA
and
MARGARET CHIDZIVA
and
INNOCENT CHIDZIVA
and
ALBERT CHIDZIVA
and
SYDNEY CHIDZIVA
and
SOLOMON CHIDZIVA
and
CLIFFORD SAIMON CHIDZIVA
versus
ESTATE LATE MELCHOIR CHIDZIVA DR1034/23
and
MUNESHKUMAR B. NAROTAM NO
and
MASTER OF THE HIGH COURT OF ZIMBABWE N.O
and
TRUSTEES OF THE TIME BEING OF THE CHIDZIVA FAMILY TRUST
and
STEWART KWARAMBA N.O IN HIS CAPACITY AS THE TRUSTEE
OF THE TIME BEING OF CHIDZIVA FAMILY TRUST
and
CHIDZIVA HOLDINGS (PVT) LTD
and
EVELYN CHIDZIVA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 18 March & 4 June 2025

Opposed Matter-Costs

K T Mawaya, for the Applicants
K Mangwiro, for the 2nd Respondent
N Chiramba, for the 4th - 6th Respondents.
No appearance for the 1st, 3rd and 7th Respondents

MAXWELL J: At the hearing of this matter, the Applicants sought to withdraw the application tendering costs on a party to party scale. In the application, Applicants were seeking for leave to convert application proceedings into action proceedings. Prior to the hearing of the matter, Applicants had engaged the Respondents. Fourth to sixth Respondents were agreeable to the withdrawal of the application with costs on a party-to-party scale. Second Respondent acknowledged the withdrawal but insisted on costs on a higher scale. During the hearing, the second Respondent submitted that the Applicants are to pay costs on a higher scale due to the fact that there were too many faults on the application, which were pointed out in the Opposing Affidavit filed on the 23 February 2024. He submitted that parties who were not involved in the main matter under case number HCH 3032/23 were cited in the present proceedings, which increased costs unnecessarily. He further submitted that the main matter was dismissed by the Registrar and the Applicants failed to re-enroll it, but they still insisted on setting down the interlocutory matter. Second Respondent also submitted that a letter was issued by the Registrar in January 2025 advising Applicants to take action, failing which the matter would be dismissed. They did not take heed of the Registrar's letter, and the main matter was subsequently dismissed. He further averred that, considering that the main matter was dismissed by the Registrar, the Applicants should not have set down the matter, and costs would have been saved. He further submitted that Barbra Chidziva took the oath deposing to the Founding Affidavit but the signature on the same affidavit is by Barbra Muyangwa. He also pointed out that in the main matter, the affidavit was signed under Barbra Chidziva. He averred that, amongst all the warnings which were not heeded, the push to proceed should attract costs on a higher scale.

In response, Mr *Mawaya*, for the Applicants submitted that his actions could not be classified as dishonest conduct. He referred the court to the exchange of letters between the parties and submitted that there was nothing frivolous in trying to find each other. He further submitted that HCH 3023/23 is the main matter, and the present matter is interlocutory, to try and resolve the main matter. He also averred that there was no need for costs on a higher scale because he is the one who had informed the second Respondent's Legal Practitioner about the hearing date meaning to say that the Respondent's Legal Practitioner had not diarized the hearing date. He referred the court to the matter of *Mahembe v Matambo* 2003(1) ZLR 150, where it was stated that a genuine application made to try and assist the court does not warrant costs on a higher scale.

ANALYSIS

AC Cilliers in *The Law of Costs* second ed p 66, classified the grounds upon which the court would be justified in awarding the costs as between attorney and client: These are

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

MUSHORE J in the matter of *Criff Investments (Pvt) Ltd & Anor v Grand Home Centre (Pvt) Ltd & Ors* HH 12/18 stated 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 attention. In awarding costs at a higher scale, the courts should therefore exercise greater vigilance”.

In *casu*, the second Respondent requested costs on a higher scale due to the fact that there were so many faults in the application which were drawn to the Applicants' attention, but the Applicants proceeded with setting the matter down without attending to the issues raised. I am inclined to grant the second Respondent's prayer for costs on a higher scale.

Moreover, a litigant who deliberately attempts to mislead the court is self-evidently *mala fide*. More than 100 years ago, Innes CJ (as he then was) stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See *Orr v Solomon* 1907 TS 281. Since then, this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest, or *mala fides* (bad faith); vexatious conduct; and conduct that amounts to an abuse of the process of the court. See *Public Protector v South African Reserve Bank* [2019] ZACC. For the Applicants to insist on setting down the matter for hearing, well knowing that the main matter under case number HCH3032/23 had been dismissed by the Registrar, is vexatious conduct with a view to misleading the court. There was no need to proceed with the present interlocutory matter as the main matter was no longer before the court. In *Rodgers v Rogers and Anor* 2008 (1) ZLR 330 MALABA JA (as he then was) referred to the definition of frivolous and vexatious in *S v Cooper and Anor* 1977 (3) SA 475 at 476 D where BISHOOF J said:

“the word ‘frivolous’ in its ordinary and natural meaning connotes an action characterized by lack of seriousness”.

In *casu*, Applicant`s actions show a lack of seriousness. In the case of *Mahembe v Matambo* (supra) CHEDA J (as he then was) commenting on costs on a higher scale held:

“Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a judicial decision against a genuine complainant. It is therefore essential that the court only awards such costs in situations where it is clear that the losing litigant was not genuine in pursuance of a stand in litigation ...”

I find that, Applicants were not genuine in insisting on proceeding to set the matter down despite all the faults in their Application which had been pointed out to them. They also failed to justify why costs should not be awarded in favour of the second Respondent on a higher scale.

In any event, as stated by my sister, Honourable MUSHORE J in the case of *Criff Investments (Pvt) Ltd & Anor v Grand Home Centre (Pvt) Ltd & Ors* (supra),

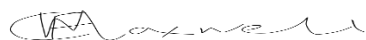
“The awarding of costs at a higher scale is within the discretion of the Court. Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a favourable decision against a genuine complaint. The learned authors Hebshtein and Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed: Vol 2 p 954, put it thus:

“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...”

Basing on these sentiments, I am of the view that, it would be fair and just to award costs on a higher scale. There would not have been any wasted costs if the Applicant had allowed the matter to be dismissed by the Registrar. An order for Applicant to pay costs on a punitive scale meets the justice of the case.

DISPOSITION

Accordingly, the Application stands withdrawn. Applicants be and are hereby ordered to pay costs on a higher scale to the second Respondent and on party-to-party scale to the fourth to sixth Respondents, jointly and severally, the one paying and the others to be absolved.

A handwritten signature in black ink, appearing to read 'M B Narotam', with a stylized flourish at the end.

T K Hove and Partners, Applicants' legal practitioners
M B Narotam & Associates, second Respondent legal practitioners