

**MICHAEL MAHEMBE**

**Versus**

**CLEVER MATAMBO**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 11 OCTOBER 2002 & 30 JANUARY 2003

*Nyarota* for the applicant  
Respondent in default

**CHEDA J:** Applicant applied for and was granted a provisional order against respondent which application was subsequently opposed by respondent. Applicant and respondent's brother one Cleopas Chamunorwa Matambo entered into an agreement of sale for a bar, bottle store, grocery shop, grinding mill and a butchery thereafter referred to as "the property". When applicant went to take occupation he found that respondent had locked the property thus preventing him from entering and doing business. In anticipation of occupation, applicant had purchased a lot of merchandise amongst which were perishables.

Attempts to have the respondent open the property failed resulting in applicant seeking alternative storage. Applicant then filed an urgent chamber application with this court, which was granted on 4 February 2002. Respondent filed opposing papers. The basis of the opposition was that his brother Cleopas Matambo (who is not part of these proceedings) had been threatened to sell the property to applicant and also that he had no authority to sell the said property as it belonged to the family. Necessary papers were filed by both parties and the matter was then ready for hearing. Respondent however, did not file his heads of argument and also failed to appear on the day of the hearing which had been set down for confirmation of the provisional

order.

Applicant prayed for the confirmation of the provisional order which I duly confirmed and reserved judgment on the question of costs as applicant was asking for costs at a higher scale. The general rule is that costs follow the event or put in another way success carries costs. The rationale for this principle is that the successful litigant should be indemnified from expenses which he incurred by reason of being unjustifiably compelled to either initiate or defend litigation. This rule should only be departed from where good grounds are shown to exist.

In the present case respondent in his opposing affidavit did not aver that such grounds existed. I am however, constrained to examine the question of costs at a higher scale as prayed for by applicant. My understanding of this general rule is that it refers to costs at an ordinary scale, that is, party to party costs. Therefore, in order for a litigant to successfully claim costs at between attorney and client scale, which is punitive, he must show that the other party deserves to be punished for its behaviour.

The court has a discretion in awarding costs at any scale provided that the party so applying proves to the court that he indeed so deserves the costs at that scale. The leading authority as to attorney and client costs in South African law which our courts have followed is the celebrated case of *Nel v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607 where his Lordship TINDALL JA stated,

“The true explanation of awards of attorney and client costs not authorised 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 court in a particular case considers it just, by means of such an order, to ensure more effectively than it can do by means of a judgment for party to party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation.”

Our courts will not resort to this drastic award lightly due to the fact that a person has a right to obtain judicial decision against a genuine complaint. It is

therefore essential that the courts will award such costs in situations where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation process Rubin L in the *Law of Costs in South Africa* Juta & Co 1949 at p 190 classified the grounds upon which would be justified in awarding the costs as between attorney and client:

1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings
2. Malicious conduct
3. Vexatious proceedings
4. Reckless proceedings
5. Frivolous proceedings

In the present case, applicant had a valid contract with respondent's brother, full payment had been made and transfer had been effected to applicant. Despite all this knowledge, respondent who was not even party to that agreement went further to oppose his application when he had in his possession documentary proof that applicant was entitled to "the property". All the material averments in his affidavits were false. This in my view is a brazen abuse of our legal system which our courts should not condone. In order to show its disapproval the court must order appropriate costs against him.

I therefore, find that respondent acted in a vexatious manner and he had an intention to do so. Respondent's conduct justifies applicant's prayer for costs at a higher scale and I accordingly order that respondent pays costs at a punitive scale.

*Messrs Wilmot & Bennet* applicant's legal practitioners