Judgment No. HH-132-03
Case No. HC 1340/2002

METROPOLITAN BANK OF ZIMBABWE

Versus

ROBERTS NGUNI

And

MARION NGUNI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
HARARE 27 FEBRUARY 2002 AND 27 AUGUST 2003

C Mantsebo for the applicant
T K Hove for the respondents

Urgent Chamber Application

NDOU J: applicant instituted an urgent chamber application seeking an order against the respondents in the following terms:

"Terms of Final Order sought

That you show cause to this honourable court why a final order should not be made in the following terms –

1. The respondents, their agents, representatives, employees and/or any other persons claiming authority under them are ordered, to return forthwith, into the custody and control of the applicant, the Mercedes Benz C180 motor vehicle registration number 744-391V together with the car keys thereof.
2. The respondents shall pay the costs of this application on the legal practitioner and client scale.

Interim Order Granted

3. Pending determination of this matter the applicant is granted the following relief:
   - 3.1 That the Deputy Sheriff, Harare or his lawful Deputy be and is hereby authorised, forthwith, to take custody and possession of the Mercedes Benz C180 motor vehicle, registration number 744-391V wherever situate, from the custody and control of the respondents, or any other persons and deliver it into the custody and control of the applicant.
   - 3.2 The Zimbabwe Republic Police is ordered to give any requested assistance to the Deputy Sheriff in carrying out the terms of this order."

I caused the application to be served on the respondents. The respondents raised two points in *limine*. I do not propose to deal with details of these points save to say that they related to defects in the application, improper service and question of urgency. The applicant succumbed to the points raised and withdrew the application without simultaneously tendering costs.

This application is about the applicant's latter conduct. In short, I have to determine the issue of costs of this application. The withdrawal of the application was done after the matter had already been set down. Generally a person instituting any proceedings may, at any time before the matter has been set down, and thereafter by consent of the parties or leave of the court, withdraw the proceedings, in which event he must deliver a notice of withdrawal and may embody in the notice a consent to pay costs – *Civil Practice of the Supreme Court of South Africa*by L van Winsen, AC Cilliers and C Loots (4thEd) at p 568 and *Protea Assurance Co Ltd*v *Gamlase & Ors*1971(1) SA 460(E) at 465F-H.

As alluded to above, the question of costs is the only issue for determination and I hold the view that where an applicant withdraws an action, very sound reasons must exist why a respondent should not be entitled to his costs. In this regard, in *Davidson* v *Standard Finance Ltd* 1985(1) ZLR 173 (HC) REYNOLDS J at 175G-176C said,

> "It is trite that a successful party may be deprived of his costs in certain exceptional circumstances. In essence, however, the court will only depart from the general rule that costs follow the event where it would be fair to do so, and where the successful party has been found wanting or is at fault in some particular respect. (Ritter v *Godfrey*[1920] 2 KB 47 (CA) at 60-61); *Scheepers & Anor*v *Pate*1909 TS 353 at 359; *Pelser*v *Levy*1905 TS 466 at 469; *Mafukidze*v *Mafukidze*HH-279-84 … each party must ensure that the material facts upon which he relies are correct and accurate. It follows that, in order to be so assured, each party must pursue his inquiries with due diligence, and must not employ defective procedures. It is also required of a litigant that he acts reasonably and honestly at all stages of the suit, and is not responsible for unnecessary delays or other objectionable conduct, or this may result in him being deprived of his costs" - see also *Van der Linden*v *MiddleburgMunicipality*1911 TPD 84; *De Villiers*v *Union Government*1931 AD 206; *Gwinyayi*v *Nyaguwa* (1) ZLR 136 (SC) and *Waste Products Utilisation (Pty) Ltd*v *Wilke's and Ano*2003(2) SA 590 (W).

In *casu,* the respondents are not responsible for the premature termination of the application. There is no justification to depart from the general rule stated in the above cases. The applicant employed defective procedures and pursued the litigation without due diligence. It is trite that in such an application for the award of costs the

matter is wholly within my discretion – *Fripp* v *Gibbon & Co* 1913 AD 354; Re J (an infant) 1981 (2) SA 330 (Z) and *Levhen Products (Pty) Ltd* v *Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR) at 227 V-C. In *Fripp* v *Gibbon & Co (supra)* it was said –

> "In leaving the judge a discretion, the law contemplates 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. And if he does this, and brings this unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion" – see also *Erasmus*v *Grunow en'n ander*1980(2) SA 793 (O) and *Kerwin*v *Jones*1958(1) SA 400 (SR).

In the circumstances of this case as outlined above, I see no reason why the respondents should not be indemnified for the expense to which they have been put through having been unjustly compelled to oppose this withdrawn urgent chamber application. In the exercise of my discretion I order that the applicant pays costs of this application.

Mantsebo & Partners, applicant's legal practitioners
T K Hove & Partners, respondents' legal practitioners