HC 2759/03

CBZ NOMINES (PRIVATE) LIMITED
versus
CLIMAX INVESTMENTS (PRIVATE) LIMITED
and

NATIONAL ASSET MANAGEMENT
and
THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 28 April, 9, 21 and 4 June 2003

Mr *F. Girach* for the Applicant
Mr *A de Bourbon* for the 1st and 2nd Respondents
Mr *A. Dururu* for the 3rd Respondent

MAKARAU J: On 23 April 2003, the applicant filed an urgent chamber application with this court, seeking the issuance of a provisional order calling upon the respondents to show cause why the purported sale of the assets of the applicant by the third respondent should not be declared null and void and set aside. As interim relief, the applicant prayed that the first and second respondents be restrained from entering the business premises of the applicant or from taking over possession or otherwise dealing with the assets of the applicant or interfering in the business of the applicant.

The facts giving rise to this application are as follows:
On 4 March 2003, the third respondent wrote to the Chairman of the first respondent. This was apparently in response to a letter written to him by the Chairman of the first respondent but which letter has not been attached to the papers before me. Part of the letter written by the third respondent to the Chairman of the first respondent reads:

> "Reference is made to the above subject matter and to your letter dated 21 October 2002. You will be aware that, the Reserve Bank of Zimbabwe through Climax Investments (Private) Limited, paid Z$4,9 billion to the Commercial Bank of Zimbabwe to pay off the creditors and clean the CBZ's balance sheet. In line with the understanding of the loan agreement between yourselves and RBZ, please proceed to acquire the residual book debts and assets of CBZ Nominees as a going concern.

I expect to receive regular progress reports on the matter until transfer is finalised."

Pursuant to the instructions given him by the third respondent, the Chairman of the first respondent wrote to the applicant on 30 March 2003 as follows:

"I refer to a payment that we made to the Commercial Bank of Zimbabwe Limited (CBZ) in January 2001 in the amount of $Z4,9 billion in respect of the settlement of the CBZ nominees debt in their books. As a matter of course, the assets exchanged with the settlement of debt should now be surrendered to Climax Investments (Private) Limited (Climax) as at 23 January 2001. It is accordingly necessary, that you contact the various debtors informing them of these changes by way of a letter advising of the cession of your rights in favour of Climax. A specimen letter is attached for ease of reference."

A meeting was subsequently called and held between the applicant's and the first respondent's Boards of Directors, at which the applicant sought an explanation as to how its assets had been acquired and the modalities of the proposed take over. The issue was not resolved at the meeting, resulting in the applicant filing this urgent chamber application.

In the body of the application, the applicant protested at the letter by the Chairman of the first respondent of 30 March 2003. It also denied liability for the debt to the first respondent and further queried the right of the third respondent to sell its assets. It averred that it has a clear right to the interdict being sought because it is not owned by any of the respondents and that the third respondent does not have any authority to dispose of its assets as he is not a director of the applicant.

The application was opposed.

In their opposing affidavit, the respondents contended that the acquisition of the applicant's assets was lawful, as the entire shareholding in the applicant is held by the third respondent. In his capacity as the sole shareholder, the third respondent has every right to deal with the shares of the applicant, it was further contended.

The application was set down for hearing before me on 28 April 2003. When the matter was called up, counsel for the applicant produced a letter signed by the third respondent, dated 24 April 2003, part of which reads:

"I would like to make reference to my letter of 4th March 2003 regarding the above. I have had further consultations with the Directors of CBZ Nominees and the Reserve Bank of Zimbabwe.

> I have now taken the decision to reverse the acquisition of the residual book debts and assets of CBZ Nominees as I had indicated. The letter is therefore withdrawn."

In view of that development, the hearing of the application was postponed sine die, to give the parties a chance to review their respective positions. The question of costs was reserved.

On 9 May, 2003, the parties re-appeared before me. During the hearing, the applicant indicated that it was not proceeding with the application. Counsel for the applicant indicated that the applicant was relying on an indication by the first and second respondents given prior to the hearing, that the two respondents would not go against the wishes of the third respondent. Counsel however submitted that the applicant was not withdrawing the application before the court but wished to have the application disposed of on the basis of the undertaking by the first and second respondents. Regarding costs, he submitted that each party should bear its own.

The first and second respondents confirmed that they will not go against the wishes of the respondent but denied that the matter had been settled as submitted by counsel for the applicant. Counsel for the two respondents further submitted that the applicant should bear the first and second respondents' costs, as it should not have brought the application in the first instance.

The third respondent stood by his letter of 24 April 2003 and did not pray for costs against any of the parties. He did not offer to pay any costs and none of the parties sought an order of costs against him.

The issue that falls for my determination is whether or not the applicant should bear the first and second respondents' costs in the circumstances. Before I determine that issue, there is one procedural issue that has dogged my mind. It is the disposition of the application before me. The applicant maintains that it is not withdrawing the application but is not proceeding with it either. In my view, it is highly desirable that any permanent discontinuance of an application by the applicant be deemed a withdrawal of that application. Permanent discontinuance of an application by an applicant in circumstances where the respondents will not press for the prosecution of the application has, the same effect as a withdrawal. This is procedurally necessary for the administration of court records on the part of the court, so that the record of such an application is not kept live in circumstances where none of the parties

will pursue it.

As indicated above, the issue that I have to determine is whether the applicant is liable to meet the first and second respondents' costs. The applicant is not seeking costs in the matter.

It is common cause that the raison *d'e^tre* for the main application fell away by reason of the withdrawal by the third respondent of his instruction to the first respondent to proceed to acquire the residual debts and assets of the applicant. In the circumstances, it is unnecessary that I proceed to determine the merits of the application.

The law of costs is made up of the general rule that costs follow the cause, and, the basic rule that costs are awarded in the discretion of the court.[1] In the case of *Cats v Cats* 1959 (4) SA 375 (CPD) at 379, it was held that generally, a judgment for costs involves a decision on the merits of the matter as a claim for costs cannot stand alone. In the application before me, the merits of the matter remain unknown. However, as an exception to the general rule spelt out in the *Cats*' case (*supra*), the practice of the courts appears to me to have been to take into account the merits of the matter, albeit in a summary and speculative fashion, to arrive at an appropriate award of costs in a case such as the one before me where it is unnecessary to determine the merits of the matter.[2] Both counsel appear to agree with this position as they proceeded to summarily argue about the merits of the matter in assisting me to determine an appropriate apportionment of costs in the matter.

The first and second respondents have argued that the applicant should bear their costs as it should not have brought the application in the first instance. With respect, I cannot agree. Whilst not determining the merits of the application, it appears to me that the applicant was perfectly within its rights to approach the court to protest at what it viewed as an unauthorised dispossession of its assets by the respondents. The letter from the third respondent to the first respondent instructing it to take over the residual book debts and assets of the applicant did not specify how the take over would be effected and whether or not shareholding in the applicant was exchanging hands as well. This gave rise to the admittedly mistaken

[1] See Cilliers: *The Law of Costs,* p 7.
[2] *Tsosane v Minister of Prisons* 1982 (2) SA 55.

belief on the part of the first respondents that it had purchased the entire shareholding of the third respondent in the applicant. Similarly, while the letter from the third respondent instructing the first respondent to take over the assets of the applicant stood, in my view, the first and second respondents were also entitled to oppose the application by the applicant, seeking to restrain them from carrying out the instructions of the third respondent. On the basis of the facts before me, each party was in my view entitled to appear before this court to protect its position. I am in this regard, viewing the conduct of the parties in approaching this court rather than determining the merits of the application. I find that there was an arguable issue for both parties to present to court in which the relief sought or some other competent relief may have been granted. In such circumstances, I see no justification for mulcting the applicant with an award of costs.

Counsel for the first and second respondents has forcefully argued that the applicant approached this court on the wrong footing, that of trying to distance itself from the third respondents. I am inclined to agree with counsel in this regard. Counsel proceeded to argue that because the applicant approached the court on this wrong footing, it should not have filed the application in the first instance. With respect, I do not agree with this further submission. While the applicant may have been wrong in seeking to distance itself from the third respondent, the issue to be determined by the court had the application proceeded, would have been the legality of the take over of the applicant's business and assets by the first respondent. The merits of that issue are now impossible to determine in the advent of the withdrawal of the entire transaction by the third respondent and in the absence of an affidavit by the third respondent explaining what he meant by his instructions to the first respondent in the first place. But, that is not to say that the applicant would not have been successful in arguing that the third respondent had acted unprocedurally and outside the provisions of the Companies Act as a shareholder, in seeking to dispose of the assets of the applicant.

For the above reasons, I make the following order:

1. The applicant's application is deemed to have been withdrawn.
2. Each party is to bear its own costs.

Musunga & Associates, applicant's legal practitioners

Gill Godlonton & Gerrans, first and second respondents
Civil Division of the Attorney General's Office, third respondent's legal practitioners