

NYIKA SOLOMON TICHAONA
versus
WENZILAS MUNGODZA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 24 October 2019 & 8 January 2020

Opposed application

Applicant, in person
Respondent, in person

TAGU J: This is a court application for review. The facts are that the applicant and the respondent reside in Charova and Chareva villages which are under Chief Nhema in Zaka, Masvingo, respectively. The two parties are members of the same church hence worship together.

In or around November 2004 the respondent after a tip off found the applicant in a compromising position with his wife in a bush near a river bed. The respondent then accused the applicant of having an affair with his wife. The applicant felt defamed by the accusations and reported the matter to the Village Headman. The Headman after deliberations ruled that the applicant had not committed the said misconduct.

Following the Headman's ruling the respondent began to pester and hound the applicant. Due to the continued harassment by the respondent over the issue the applicant applied for and obtained a peace order and interdict against the respondent at Zaka Magistrate Court under Case No. GL 220/14. The Magistrate Court did not order either of the parties to pay costs of suit.

The respondent who was barred from visiting the applicant's home and harassing him in front of his family members then embarked on a crusade of tarnishing the applicant's image and standing in society and at church by continuing to allege that the applicant had snatched his wife, was a bogus Christian and an unethical man.

Angered by the respondent's utterances the applicant again approached the Magistrates Court and sued the respondent under Case No. GL 231/14 for defamation. The Magistrate Court this time dismissed the applicant's claim with no order as to costs.

In retaliation the respondent instituted proceedings in the Magistrate Court under Case No. GL 77/15 against the applicant claiming damages for contumelia, loss of earnings attending court and for costs incurred defending the proceedings under Case No. GL231/14. The Magistrate Court in its wisdom and discretion dismissed the respondent's claim for contumelia and loss of earnings. However, the court upheld and ordered the applicant to pay the respondent the sum of US\$500.00 being reimbursement of the costs he incurred under Case No. GL 231/14 in defending that claim.

The applicant avers in his founding affidavit that since he had had not been ordered to pay costs in Case No. GL 231/14 the court a quo erred in ordering to pay \$500.00 being costs incurred by the respondent in defending Case No. GL 231/14. Further, he submitted that there is no cause of action in civil proceedings for payment of legal costs which can be founded on failed prosecution of a matter in which the court has not ordered either party to pay costs. He said finally that he was not given the opportunity to call witnesses. Finally he averred that this is the reason why he has brought this application for review.

The relief he is seeking is couched in the following terms-

- "1. The judgment of the court *a quo* sitting at Zaka, Masvingo under Case No. GL 77/15 dated 21st August 2015 which ordered Applicant to pay US\$500.00 together with costs to Respondent, be and is hereby reviewed and set aside.
2. The Respondent be and is hereby ordered to pay the costs of this application on the legal practitioner to client Scale only if he opposes this application."

The respondent opposed the application and submitted among other things that the court allowed him to call witnesses but he did not have one at the time. That there was no need for a witness because the only material evidence which the court relied on was the judgments in cases GL 231/14 and GL 220/14 from which the matter arose.

The Court indeed had sight of the copy of the Summons issued by the respondent against the applicant in Case No. GL 77/15. The relevant portions of the Summons read as follows-

"WHEREFORE plaintiff prays for:

- a) \$2000 for contumelia damages
- b) \$1000 for loss of his time in doing his farming activities and business as a farmer.

c) \$500 for loss of money for transport, court process and legal aid during the proceeding of the referenced case.

With costs if the action is undefended as follows-

Legal Practitioner's sum	\$.....
Court fees	\$.....
Messenger's fees	\$.....
Sub Total	\$.....
Legal Practitioner Judgment Charge	\$.....
Total	\$....."

Part of the Magistrate's judgment which the applicant takes issue with reads as follows-

"No evidence was brought before the court to prove that the plaintiff suffered pecuniary loss to the tune of \$1000.00. It is not known how much the plaintiff had been realizing in the past over almost the same time that he was attending court would total \$1000.00.

For the reasons cited above the court will enter judgment for the plaintiff in the sum of \$500.00 being the costs that he incurred in defending the matter and costs since this was proven on a balance of probabilities."

A reading of the portion of the judgment that I quoted above clearly shows that items (a) and (b) on the Summons were dismissed by the Magistrate Court. The Court found item (c) to have been proved on a balance of probabilities. Further, costs incurred in respect of the Case No. GL 77/15 were also awarded but figures were not given by the Magistrate Court since, I assume were subject to taxation by the clerk of court. I say so because if one revisits part of the Magistrate's ruling it reads as follows:

"For the reasons cited above the court will enter judgment for the plaintiff in the sum of \$500.00 being the costs that he incurred in defending the matter and costs since this was proven on a balance of probabilities."(my underlining for emphasis)

The Court *a quo* therefore found the first costs in the ruling to have been proven. However, I need to comment that the applicant and the respondent, as in the present proceedings, were apparently self-actors before the court *a quo*, hence the use of the word "costs" instead of the word "expenses". The trial Magistrate also went on to use the same word "costs" instead of "expenses" as reflected by the statement "being the costs that he incurred in defending the matter and costs since it was proven on a balance of probabilities."(my underlining)

As to the other issues pertaining to failure to call witnesses I found these to be of no merit. Consequently, I found nothing untoward in the order of the court *a quo*. The applicant must pay

the \$500-00 being the expenses incurred by the respondent. For these reasons the application for review is therefore dismissed with costs.

IT IS ORDERED THAT

1. The application for review be and is hereby dismissed.
2. The applicant be and is hereby ordered to pay costs on a legal practitioner and client scale.