

ZIMBABWE ELECTRICITY TRANSMISSION
AND DISTRIBUTION COMPANY (PRIVATE) LIMITED
versus
CITY OF MASVINGO

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 9 May & 9 June 2023

COSTS, COLLECTION, COMMISSION AND INTEREST

B Mahuni, for the Plaintiff
J Mupoperi, for the Defendant

MANZUNZU J

INTRODUCTION:

On 12 August 2022 the plaintiff issued summons, as amended, against the defendant for the payment of outstanding bills of electricity in the sum of ZWL\$205 823 450.64 together with interest, collection commission and costs of suit at a higher scale.

The defendant counterclaimed in the sum of ZWL\$33 960 981.58 with interest being amount due for rates and service charges and costs of suit.

In an out of court settlement, the parties resolved the plaintiff's claim and the counter claim by the defendant. The only sticking issues in respect of the plaintiff's claim is one of interest, collection commission and costs. The defendant took the position that plaintiff is not entitled to any of these ancillary claims. At the instance of both counsels, I allowed them to file heads of argument to assist the court in the determination of the issues.

WHETHER OR THE DEFENDANT SHOULD PAY INTEREST.

The plaintiff's position is that the defendant is liable to pay interest at the rate prescribed in terms of ZESA (Miscellaneous Charges) By-Laws, Statutory Instrument 155 of 1988 from the date of summons which is 12 August 2022 to date of full payment on 5 April 2023.

The defendant's argument against interest is two pronged. The first being that the summons were prematurely issued without the defendant being put in *mora* following a breach of the acknowledgement of debt. No authority was cited in support of this argument. It remains a shallow argument devoid of persuasion.

However, the same cannot be said of the defendant's second point of argument which remains short but persuasive. The argument goes, "*....it is submitted that the Plaintiff always charges interests on its overdue accounts and the amount being claimed were inclusive of interests.*" This position is confirmed from the statements which have the following inscription, "*interest will be charged on overdue. accounts at 16.71%.*" To confirm that position, the service charges on the statement actually include interest on overdue amount.

In the wake of this, the plaintiff is not expected to enjoy interest by virtue of it being claimed in the summons. It amounts to claiming interest on interest. Any further claim for such interest must fail.

WHETHER THE DEFENDANT SHOULD PAY COSTS ON A HIGHER SCALE

The plaintiff persisted that the defendant must pay costs at a higher scale. The defendant resisted to pay any costs at all. The reason is that plaintiff did not put it in *mora* hence the summons was issued prematurely. It is a lame defence by the defendant. I say so simply because it is common cause that the defendant signed an acknowledgement of debt on 13 July 2022 in which the following undertaking was made; *“I/We understand and participate (sic) that should I/we default in paying the debt or any instalment therefore on due date, legal proceedings will be instituted against me/us for recovery of the full due together with interest and costs.”*

While it is untenable to contest an order for costs, the plaintiff says it wants the costs on a higher scale. The award of costs at a higher scale is within the discretion of the court which discretion must be exercised judiciously. The duty is on the party asking for costs at that scale to show that he/she deserves the costs at that scale.

The case of *Mahembe v Matambo HB13/03* laid down the grounds upon which the court may grant punitive costs. The court cited with approval the remarks in *Nel v Waterberg Landbouwers Kooperatie 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.”

The court further classified the grounds upon which would be justified in awarding the costs as between attorney and client as:

“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.”

While the plaintiff attempted to justify costs on a higher scale, the grounds fall short of any of the grounds stated above. The plaintiff can only be entitled to costs on an ordinary scale.

WHETHER THE DEFENDANT IS LIABLE TO PAY COLLECTION COMMISSION

The plaintiff's argument is that it is entitled to collection commission. The basis for this assertion is By-Law 70 (2) of the Law Society By-Laws 1982 which provides for the entitlement to charge collection commission by a legal practitioner instructed to collect an uncontested claim for a trade debt. Plaintiff therefore relies on the legislative provision to claim collection commission.

The defendant argued the legislative provision does not apply to the present circumstances because the debt was contested as exhibited by the filing of a plea. Furthermore, case law is clear as to when a party is entitled to collection commission. In *SEDCO v Guveya 1994 (2) ZLR 311* it was held that, "*It was not appropriate to order that collection commission be paid as well as costs... Collection commission can only be charged on moneys actually collected by the legal practitioner. Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs, but not collection commission, unless subsequent to the issue of summons the debtor has agreed to pay collection commission.* (my emphasis).

This puts an end to the dispute over collection commission.

CONCLUSION

The ancillary claims for collection commission and interest, cannot, for reasons already stated, succeed. Costs of suit can only be on the ordinary scale.

DISPOSITION

IT IS ORDERED THAT:

1. The plaintiff's claim for interest and collection commission be and is hereby dismissed.
2. The claim for costs of suit succeeds only to the extent that costs shall be recovered at the ordinary scale.

Mvingi and Mugadza, plaintiff's legal practitioners.
Saratoga Makausi Law Chambers, defendant's legal practitioners.