JUNGLE SISTERS (PRIVATE) LIMITED
versus
GOLD COAST (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 5 & 20 March 2025

Opposed Court Application

T Mubemi, for the applicant
H Nkomo, for the respondent

[1] DEMBURE J: This matter was placed before me as a court application to compel transfer of an immovable property into the applicant's name. On 5 March 2025, the court issued an *ex tempore* judgment the operative part of which read as follows:

> "The application be and is hereby dismissed with costs on a legal practitioner and client scale."

On 10 March 2025, the applicant's legal practitioners requested the written reasons for the court's decision. What follows are the full written reasons thereof.

BACKGROUND

[2] The applicant is Jungle Sisters (Private) Limited a company incorporated in terms of the laws of Zimbabwe. The respondent is Gold Coast (Private) Limited a company incorporated in terms of the laws of Zimbabwe.

[3] The applicant purchased a certain piece of land known as stand 1051 Marlborough Township with a running sewer line. This made the land inaccessible for the applicant to develop it. The City of Harare subsequently offered the applicant another stand number 3030 which had to be subdivided and consolidated with stand 1051 to create stand 3031.

[4] It was, however, later discovered that the City of Harare had made an error as stand 3030 Marlborough Township was not owned by the Council but by a company known as Residential Suburbs (Private) Limited now Dawn Properties (Private) Limited. The City of Harare acknowledged this error in 2009. Following an action instituted in this court in Case

No. HC 462/15, the City of Harare entered into a deed of settlement with Residential Suburbs (Private) Limited on 1 March 2016. In terms of this deed of settlement, the City of Harare agreed to compensate the company which now holds its rights in the property in the name of its subsidiary, the respondent, by transferring a certain piece of land called the Remainder of stand 802 Glen Lorne Township of Lot 41 Glen Lorne measuring 5050 square metres. The said property was transferred into the respondent's name under Deed of Transfer No. 2571/2018 on 10 May 2018. In turn, the respondent would transfer stand 3030 Marlborough Township into the applicant's name.

[5] On 17 September 2024, this application was filed. The applicant averred that the respondent had neglected its obligation to transfer the said property into its name. The applicant sought the following relief:

> "(a) The application to compel transfer of Stand 3030 Marlborough Township measuring 6 716 Square Meters in extent situate in the district of Salisbury and all ancillary ownership documents be and is hereby granted.
> (b) The Respondent is to allow the Applicant to appoint a Conveyancer to transfer to the Applicant Stand 3030 Marlborough Township.
> (c) That the Respondent submits to the Applicant's Conveyancers, the Certificate of Registered Title 1528/48, the original permit, 2 x diagrams from the Survey General's office and all other ancillary ownership documents relevant for the purposes of transferring title from the Respondent to the Applicant within seven (7) calendar days of the granting of this order.
> (d) That the Respondent provides the Applicant with a valid Capital Gains Tax Certificate after paying all capital gains taxes due as shall be requested by ZIMRA, within fourteen (14) calendar days of the granting of this order, failure of which it shall be held in contempt.
> (e) The Respondent to pay for all costs associated in the obtaining of rates clearance from City of Harare and provision of a valid Rates Clearance Certificate to the Applicant required for transfer within seven (7) calendar days of submission of the Capital Gains Tax Clearance Certificate to the appointed Conveyancers.
> (f) The respondent shall sign and return all paperwork required by the appointed Conveyancers for the purpose of facilitation of transfer of Stand 3030 Marlborough Township measuring 6 716 Square Meters in extent to the Applicant within seven (7) Calander days from the date that the Respondent is provided with such documentation by the appointed Conveyancer, failure of which it shall be held in contempt.
> (g) The Respondent pay the Applicant's costs on a legal practitioner and own client scale."

[6] The respondent opposed the application. The respondent raised two points *in limine* that the founding affidavit was fatally defective and that there were material disputes of facts incapable of resolution on the papers. On the merits, the respondent contended that the

transfer process had already commenced through the duly appointed conveyancer, Mr L. M. Mhishi. It was also averred that the applicant undertook to apply for a new subdivision permit after the previous one was erroneously issued at its own costs. It was further stated that the applicant managed to get a proper subdivision permit in August 2023. It was also pleaded that the respondent's conveyancers requested the valuation of the piece of land for the purposes of the transfer. It contended that the valuation report was furnished in September 2023 and upon receiving the same an invoice for the transfer fees was raised and the applicant was duly advised of the same.

[7] The respondent also submitted that the applicant did not pay the conveyancing fees. The respondent further stated that it issued a board resolution for the transfer on 1 September 2023. Its duly authorised representative went on to sign the transfer papers from its side namely the power of attorney to pass transfer and the declaration by the transferor on 24 June 2024. It was also asserted that the applicant had not attended to the signing of the transfer papers and payment of the conveyancing fees. Instead, it had rushed to the court when there was no cause of action.

[8] At the hearing, Mr *Mubemi* submitted that the matter is now moot and cannot be argued. He conceded that the application may be dismissed but he argued there should be no order as to costs. It is trite that the fact that a matter is moot is not an absolute bar for the court to decide the matter where the interests of justice so require. The court may still hear a moot case for the purpose of determining the party liable to pay costs. See *Ndewere v President of Zimbabwe & Ors* SC 57/22 at p 16 where MAKONI JA had this to say:

> "However, the fact that a matter is moot is not an absolute bar for the court to decide an appeal where the interests of justice so require. An analysis of decisions in which Zimbabwean Courts proceeded to determine matters despite the fact that they had become moot exposes the application of the foregoing principles. In the case of ***Stevenson v Minister of Local Government & Ors*** **2002 (1) ZLR 498 (S)** at p 501F – G, the court heard a matter that was moot for the purpose of determining the party liable to pay costs. Sandura JA held as follows:
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> > "In the circumstances, the learned judge in the court *a quo* should have dealt with the issues raised in the appellant's application. However, it is pertinent to note that after the appeal in this matter had been noted, mayoral and council elections for Harare were held in March 2002. It follows, therefore, that the reason for the appellant's application <u>has now fallen away</u>.

> Nevertheless, a determination of the issues raised in the application is essential for the purpose of determining which party should pay the costs of the application in the court *a quo*…." [*my emphasis.*]"

[9] The only issue that arose for determination in this moot case was that of costs which the court in the interests of justice proceeded to deal with. Mr *Mubemi* argued that the matter should be dismissed for the reason of mootness but with no order as to costs or that each party bears its own costs. This position was strenuously opposed by counsel for the respondent, who argued that this is a matter where the applicant must bear the costs which must be on a legal practitioner and client scale.

ISSUE FOR DETERMINATION

[10] The only issue I had to determine was whether or not the applicant should pay the costs of this application and if so, at what scale.

SUBMISSIONS FOR THE APPLICANT

[11] Mr *Mubemi* submitted that there should be no order as to costs. He argued that a reading of the record would show that from the inception of this application, the respondent was preventing the applicant's enjoyment of its rights when it admitted that the property was supposed to be transferred. From 2018 there have been communications up to the time this application was filed which show that the applicant has always been eager to protect its rights. The delay to effect transfer from 2018 to 2024 had not been explained in a reasonable manner by the respondent.

[12] It was further submitted that the respondent in its papers openly admits the obligation but does not tender a reasonable explanation. The steps taken are steps taken after this application to compel transfer had been lodged. If this was a situation where the respondent had honoured its obligations the applicant would not have sought a compelling order. On these premises, the applicant has already been put out of pocket due to the reluctance of the respondent who only exhibited willingness to deliver upon being sued. The applicant is in court because the respondent did not honour its obligation. Despite enquiries on progress taken the respondent only responded in January 2025. I hasten to say that during his address, Mr *Mubemi* would stray into giving evidence from the bar which is unacceptable.

[13] Mr *Mubemi* also argued that there was negligent conduct on the part of the respondent. He further submitted that it would have been more suitable for the applicant to seek costs against the respondent. It is just and equitable that the applicant has to be indemnified for its costs by the respondent. To absolve its losses the applicant prays that there be no order as to costs or each party bears its own costs.

SUBMISSIONS FOR THE RESPONDENT

[14] On the other hand, Mr *Nkomo* submitted that the applicant must pay the costs on a punitive scale of attorney and client scale. He argued that the transfer papers were signed by the respondent on 24 June 2024. There are minutes of the board meeting of the respondent which passed a resolution to facilitate the transfer on 1 September 2023 at p 75. At pp 77-80 are the transfer documents dated 24 June 2024 already signed by the respondent. These are the special power of attorney to pass transfer and declaration by the person disposing of the property respectively. The respondent had always wanted to transfer the property.

[15] Mr *Nkomo* further argued that what should entertain the court is why it had to convene this court session and this is in the draft order. The applicant wants the transfer of the property in question. The next leg of the enquiry is why one has to come to court. The applicant must allege in its papers that the property is mine and the respondent is refusing to effect the transfer. The emails demonstrate action. There is nowhere in the founding affidavit where it is said they refused. There is no cause of action. These proceedings are a waste of the court's time and unwarranted.

[16] It was also argued that everything the applicant wants has been discharged. Conveyancing is not an event but a process. Mr *Nkomo* further submitted that in para 6 of the opposing affidavit, the respondent details every step they took to transfer the property. They sat as a board, and instructed lawyers to draft the papers and the transfer documents are attached to the affidavit. The conveyancers drafted all the transfer documents and raised an invoice. The applicant had an obligation to pay conveyancing fees but has not paid them. He questioned how the applicant came to court to obtain transfer where it had not discharged its obligations.

[17] Mr *Nkomo* further argued that despite the issues being put in the opposing affidavit the applicant persisted with the application that they want transfer. They have been told there

is no need for these proceedings. The transfer documents and invoice were drafted before this application was filed. The court is being used to play a supervisory role in the conveyancing. Over and above the transfer fees there are other fees payable by the applicant such as ZIMRA taxes and stamp duties. The applicant comes to court before even discharging his obligations. The costs on an attorney-client scale are appropriate as the respondent has been made to suffer unwarranted costs. Mr *Nkomo* also bemoaned the fact that he had to prepare for a full hearing of all arguments in issue and was not even informed before that the applicant would not be pursuing this application.

THE LAW ON COSTS

[18] The general principle is that costs shall follow the cause. This means that the successful party is usually awarded costs to cover their expenses and this rule is only departed from when good grounds are shown. This legal position was confirmed in *Mahembe v Matambo* HB 13/13 where the court held that:

> "The general rule is that costs follow the event or put in another way success comes costs. The rationale behind 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."

See also *Mbatha v Ncube and Another* SC 109/22 at p 13.

[19] The issue of costs is within the discretion of the court. Further, costs on a legal practitioner and client scale are only granted in exceptional circumstances where the conduct of the other party or circumstances of the matter warrant such an order of punitive costs. In *Crief Investments (Pvt) Ltd & Anor v Grand Home Centre & Ors* HH 12/18 MUSHORE J restated the legal position on the issue of costs as follows:

> "The learned authors Hebstein and Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed: Vol 2 p 954, stated the following:
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> > "The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issued 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..."
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> According to the leading authority as to attorney and client costs in South African law, *Nel v Waterberg Landbouwers Ko-operative Vereeninging* 1946 AD 597 at 607 where his LORDSHIP TINDAL JA stated:

> "The true explanation of awards of attorney and client costs not authorized 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 courts in case considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation ."

AC Cilliers in The Law of Costs 2nd ed p 66, classified the grounds upon which the court would be justified in awarding the costs as between attorney and client:
(a) Vexatious and frivolous proceedings
(b) Dishonesty or fraud of litigant
(c) Reckless or malicious proceedings
(d) Litigant's deplorable attitude towards the court (e) Other circumstances
In essence, the cases establish a position that courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs, and not merely because the winning party requested for them. Costs should not be a deterrent factor to access to justice where future litigants with genuine matters which deserve judicial alteration. In awarding costs at a higher scale the courts should therefore exercise greater vigilance." [My emphasis]

ANALYSIS AND DETERMINATION

[20] Applying the above principles, I did not find any special circumstances or reasons to depart from the general principle that costs follow the cause. I further found that costs on a legal practitioner and client scale were warranted against the applicant.

[21] Firstly, it is pertinent that I highlight that the conduct of the applicant's legal practitioner was quite disturbing and deplorable. Mr *Mubemi* knew he was not proceeding with the case on full arguments. He did not inform the court in advance or the other party of the developments outside the record which had terminated the controversy or made the matter moot. Mr *Nkomo* lamented the fact that he was not informed and had come prepared for full arguments on the matter. It is trite that legal practitioners despite executing the mandate of their client are officers of the court. They owe a duty of respect to the court and its processes. Their paramount duty is to the court and the administration of justice. See *Bush v Grain Marketing Board & Ors* HH 326/17.

[22] Where there are any circumstances or events which have occurred which make it no longer necessary to pursue a matter which has been set down for hearing they ought to inform the court in advance of the hearing. The judge before hearing any matter has to prepare thoroughly for such a matter by not only considering the record but undertaking the

necessary research to be able to answer any questions of law arising. There is no hide-and-seek game when it comes to court processes. Even the other party must be informed in advance of the hearing of any changed circumstances which may militate against the matter proceeding for full arguments. In *casu*, the applicant's counsel ought to have duly informed the court and the legal practitioner for the respondent of their decision not to insist on full arguments in this matter. He did not do so. This conduct, in my view, also made the respondent suffer further unwarranted costs of preparation for full arguments or a full hearing on the matter. A legal practitioner owes a duty to fellow legal practitioners to be honest and candid. See *Base Minerals Zimbabwe (Pvt) Ltd & Anor v Chiroswa Minerals (Pvt) Ltd & Ors* HH 21/16.

[23] Further, the record shows the email communications the parties exchanged over the years. There is no indication in the founding affidavit that the respondent ever refused to have the property transferred into the applicant's name. Rather, the communications attached to both the applicant and the respondent's papers show that the parties were communicating on the conveyancing process and at one time had a disagreement over who should appoint the conveyancer. The applicant's legal practitioners confirmed in an email on 8 November 2022 at p 42 that the costs associated with the transfer of the stand and the proposed subdivision of the main stand would be borne by the applicant. It is also clear from the record that one of the reasons for the delays in the transfer has been the need for a new subdivision permit which process was to be undertaken by the applicant at its own costs. The applicant managed to get a proper sub-division permit in August 2023. This was confirmed as common cause in the applicant's answering affidavit. See para 1 at p 86 of the record.

[24] The minutes of a meeting of the respondent's board of directors held on 1 September 2023 at p 75 showed that the respondent resolved to have the property transferred to the applicant. The transfer documents including the power of attorney and declaration by the seller were all signed by the respondent on 24 June 2024. See the documents thereof at p 77-81 of the record. The applicant did not seriously challenge these documents. They show that the process of the conveyancing commenced well before this application was lodged on 17 September 2024.

[25] It is also common cause that the applicant did not pay the conveyancing fees due or tender payment of the same even in this application. There was also no payment or the tender of payment of the other tax obligations which the applicant had accepted were payable from its end for the transfer to be registered. It was not disputed that from the practice of conveyancing, conveyancing is a process not an event. It involves the ZIMRA process for assessment of the tax payable and there is no dispute that there was even a valuation of the property done in 2023 for the transfer purposes. The conveyancer had already been appointed and the respondent also signed the transfer papers before this application was made. Yet in the draft order, the applicant still sought an order to allow it to appoint a conveyancer and for the respondent to sign all transfer papers. Clearly, the relief sought given the developments that the conveyancing had started in earnest simply made this application an abuse of court process. Most of what was sought had been discharged already. This application was not warranted.

[26] The evidence is clear that the conveyancing process had commenced and was underway when this application was filed. I agree with Mr *Nkomo* that the applicant sought to use the court to supervise the conveyancing process. The court cannot be abused to that extent. A legal practitioner owes a duty to the court not to be complicit in instituting proceedings which amount to abuse of the court process. See *Ndlovu v Murandu* 199 (2) ZLR 341 (H) at 350-351. It is also trite that a litigant is generally bound by the conduct of his legal practitioner after all it is his own choice of a legal representative. See *Apostolic Faith Mission in Zimbabwe v Murefu* SC 28/03.

[27] This is a case, where the conduct of the applicant in filing and persisting with an unwarranted application to the hearing stage can be termed unreasonable and not diligent. The applicant ought to have been aware that the process of conveyancing having commenced could not seek an order for the appointment of a conveyancer and the signing of transfer documents. In para 9 of its answering affidavit, the applicant admitted that a conveyancer was appointed by the respondent for the transfer in issue. This fact was accepted as being common cause. Surprisingly, the applicant in this application still sought an order to appoint a conveyancer for the same transfer whom it acknowledged was already

appointed. The application was filed and persisted with to the hearing date in bad faith and constituted an abuse of court process.

[28] Applying the principles outlined in *Crief Investments & Anor v Grand Home Centre & Ors supra*, the above conduct would constitute exceptional circumstances warranting an order for punitive costs. I do not agree with Mr *Mubemi* that the present application is what pushed the respondent to act. The documents placed before me including the transfer documents signed by the respondent and the various correspondences submitted clearly show that the respondent took action to comply with its obligation to transfer the property well before this application was even filed. This application was completely unwarranted and caused the respondent to suffer unnecessary legal costs.

DISPOSITION

[29] I found no good reason to depart from the general principle that costs shall follow the event. These proceedings ought not to have been filed. In the totality of the evidence before me, it is the respondent who had been made to suffer unwarranted litigation expenses for a process simply meant to push the court to supervise the conveyancing process. The respondent must be reimbursed for having been put out of pocket unnecessarily. An order that the applicant pay the legal costs on a legal practitioner and client scale was proper and just in the circumstances.

[30] It was for these reasons that the court entered the judgment as stated above.

DEMBURE J: ……..

V S Nyangulu & Associates, applicant's legal practitioners
Mhishi Nkomo Legal Practice, respondent's legal practitioners