

JOSEPH SIBANDA
and
WEDGEWALL INVESTMENTS (PRIVATE) LIMITED
versus
MAKONDE INDUSTRIES PRIVATE LIMITED
(In Liquidation)
and
GLEN MOOR TRADING LIMITED
and
MARTIN DRIVE PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 11 May 2015 and 7 September 2016

Chamber Application for Leave to Appeal

H Mutasa, for the applicant
No appearance for the defendants

CHIGUMBA J: It is trite that an application for leave to appeal against an order of costs only is not lightly granted for the reason that costs are a matter of judicial discretion and that it is in the interests of justice that where the merits of an issue have been determined finality should be regarded as having been reached. An application was brought before me in chambers, for leave to appeal against the order for costs of suit on a legal practitioner client scale made in case number HH 292-15 on 2 March 2015, before the hearing of the matter commenced. The application for leave to appeal was dismissed in chambers on 11 May 2015. Leave to appeal was denied on the basis that the appeal had no prospects of success. I was of the view that it is trite that costs are always at the discretion of the court. On 12 July 2016, a letter was addressed to the Registrar of the High Court by Messrs Gill Godlonton & Gerrans, who represent the appellant in

SC 302-15. In the letter, it was advised that the reasons why leave to appeal had been denied on 11 May 2015 were required by the Supreme Court. The applicant had sought leave to appeal against the order of costs, from the Supreme Court, by way of a chamber application, after such leave had been denied, in chambers, by myself. It would appear that the Supreme Court requires more detailed reasons why leave to appeal was denied. These are they.

The dispute between these parties is summarized in HH 292-15. I do not propose to repeat what was said in that judgment, except to state that the application which was before the court in that case was dismissed on the basis that it was entirely devoid of merit. The basis on which the application for leave to appeal was sought was that the parties appeared before me for a hearing of the matter in case number HC 10934-13. They sought a postponement of the matter to 11;15 that day, on the basis that their legal practitioner of choice, Advocate *Thabani Mpofo*, was seized with a matter before the Supreme Court at 930am the same day. The application for postponement was opposed. After hearing submissions by both parties, the application to adjourn the matter to 11;15 that day was not acceded to. The matter was postponed to 4 March 2015, and an order for costs of suit on a legal practitioner client scale made. The contention that the order for punitive costs was improperly granted because parties had previously been advised of Advocate *Mpofo's* unavailability and of the intention to seek a postponement did not find favour with the court at that time or when leave to appeal was sought.

An application for leave to appeal in the circumstances of this case is brought in terms of s 43(2) (c) (ii) of the *High Court Act [Chapter 7:06]* which provides that;-

“43 Right of appeal from High Court in civil cases

- (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
- (2) No appeal shall lie—
 - (a) from an order allowing an extension of time for appealing from a judgment;
 - (b) from an order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action;
 - (c) from—
 - (i) an order of the High Court or any judge thereof made with the consent of the parties; or
 - (ii) an order as to costs only which by law is left to the discretion of the court, without the leave of the High Court or of the judge who made the order or, if that has been refused, without the leave of a judge of the Supreme Court;”

Judicial discretion is the power of the court to take some step, grant a remedy, or admit evidence or not, as it thinks fit. See *Oxford Dictionary of Law, Quick Reference*¹. Many rules of procedure and evidence are in discretionary form or provide some element of discretion. Section 43 (2) (c) (ii) is the basis on which this court is imbued with the discretion to determine the question of costs. It provides that no appeal shall lie from an order as to costs only which by law is left to the discretion of the court, without the leave of that court. The application for leave to appeal was brought at the instance of the second respondent, Glen Moor Trading Limited. In the founding affidavit, the order for costs which was granted on 2 March 2015 was appealed against, on the basis that on 27 February 2015, the respondents had been advised through a letter that Advocate *Mpofu* was otherwise engaged in the Supreme Court. The respondents did not question the authenticity of Advocate *Mpofu*'s prior engagement. They opposed the application for a postponement when they appeared before the court on 2 March 2015. It was averred that this opposition was contrary to the impression which they had given to the Legal Practitioners representing the applicant. The applicant took the view that it had taken reasonable steps to avoid wasted costs by prior notification of the intention to seek a postponement. The reason why the applicants needed the expertise of Advocate *Mpofu* in particular were that the matter was complex, and that he had been counsel of record from the inception of the matter.

It is common cause that the matter had been set down as number 2 on the continuous roll. The applicant averred that the appeal had good prospects of success. It sought leave to prosecute the appeal on that basis. The grounds of appeal were that:-

1. The court *a quo* erred at law in concluding that the circumstances in which the appellants sought a brief adjournment of the matter were such as to warrant an award of costs against them. The court's conclusion was so unreasonable that no reasonable court applying its mind to the facts of the case could have made such an order.

¹ 8th ed, Jonathan Law p347

2. The court *a quo* erred in law when it issued an order for costs on a punitive scale. That order was so unreasonable in the circumstances that no reasonable court applying its mind to the facts of the case could have made such an order.

The issues which arose for determination were twofold. Firstly, whether the appeal against the order of costs had good prospects of success. Put differently, did the court misdirect itself when it made the order for costs such as to warrant interference with its exercise of discretion? The second issue that arose for determination was whether the grounds of appeal had any merit such that they were likely to succeed. Put differently, did the court take leave of its senses in awarding punitive costs in the circumstances of the case. Let us examine what the law says about the discretion of the court in making an order for costs.

An award of costs is entirely at the discretion of the court: See *Graham v Odendaal*²; *Kruger Brothers & Wassermen v Ruskin*³ and *Rautenbach v Symington*⁴. Costs are awarded on a party and party scale, in the ordinary scheme of things. Where the court is of the view that there is some justification for an award of costs on a higher scale, it is at liberty to award such costs, usually as some sort of punishment for undesirable conduct. It has been held that the principles governing an application for leave to appeal where the only issue to be determined on appeal is the question of costs are well established.

“They are:

1. that such leave is not lightly granted for the reason that costs is a matter of judicial discretion and that it is in the interests of justice that where the merits of an issue have been determined finality should be regarded as having been reached;
2. that the court will not grant leave in respect of ‘dead’ or moot issues unless there is a matter of principle involved, the costs involved are not insubstantial and there are reasonable prospects of success on appeal” (see *Tsosane & Others v Minister of Prisons* [1982 \(3\) SA 1075](#) (C) at 1076E-1077B; see also *W v S and Others* (2) [1998 \(1\) SA 499](#) (N) at 502.

² 1971 [2] SA 611 [AD]

³ 1918 AD 63

⁴ 1995 [5] SA 583 [O]

The application for postponement of that matter was opposed. The court was persuaded that no prior arrangement had been made by the parties to stand the matter down to 11:15. If there had been such a prior arrangement, then there would not have been such spirited opposition to the proposal to stand down the matter in order to allow Mr Mpofu to make his way from the Supreme Court. In fact the argument advanced was that the wasted costs of that day's appearance were being sought for the exact reason that, had it been communicated in advance that a postponement of the matter would be sought, it would not have been necessary for counsel to appear at his own client's expense, that morning. The court was further, of the view that had the letter in which a postponement was sought been addressed to the Registrar, it would have been simple enough for the court itself to allow a postponement to enable counsel of choice to attend.

In my view, the merits of the matter have been conclusively determined, and not appealed against. It is in the interests of justice that there be finality in litigation. I am not persuaded, in any event, that the grounds upon which leave to appeal the costs order establish a reasonable prospect that another court may come to a different conclusion or that there is any prospect that the discretionary costs order is likely to be altered on appeal. It follows therefore that leave to appeal against the order of costs, must be refused.

Messrs Gill, Godlonton & Gerrans, applicant's legal practitioners
Messrs Coghlan, Welsh & Guest, respondents' legal practitioners