

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO.117/2012

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

AZIM TICKLAY

(Suing as Chairman of the intercity Bus Station Association and on behalf of all the other members of the Association) **1ST APPELLANT**

ALEX CHULE

(Suing as secretary of the Intercity Bus station Association and on behalf of all the other members of the Association) **2ND APPELLANT**

CHRISTON VWALIKA

(Suing as Treasures of the Intercity Bus Station Association and on Behalf of all the other members of The Association) **3RD APPELLANT**

AND

ROAD TRANSPORT AND SAFETY AGENCY

1ST RESPONDENT

INTERCAPE MAINLINER (ZAMBIA) LIMITED

2ND RESPONDENT

Coram Hamaundu, Mutuna and Chinyama, JJS

On 20th October 2016

For the Appellants : N/A

For the 1st Respondent : Mr. J.M. Banda of A.M. Wood & Company.

For the 2nd Respondent : Mr. M.S Chisenga and Mr. N. Siamoondo of Corpus Legal Practitioners.

J U D G M E N T

Mutuna, JS, delivered the Judgment of the court.

Cases referred to:

- 1) *YB and F Transport Limited vs. Supersonic Motors Ltd (2000) ZR 22*
- 2) *Emmanuel Mutale vs Zambia Consolidated Copper Mines (1994) S.J. 67 (SC)*
- 3) *Zana Enterprises Limited and 20 others vs. National Pension Scheme Authority and Liberty Properties Limited SCZ/8/128/2013*

Legislation referred to:

- 1) *Supreme Court Rules, Chapter 25 of the Laws of Zambia*

Other works referred to:

- 1) *Rules of the Supreme Court 1999 Edition (Whitebook)*

There are two motions presented by the two Respondents. They seek an order for payment of costs after the Appellants discontinued the appeal.

The brief background leading to the motions is that the Appellants had sued the Respondents in the High Court. A preliminary issue was raised which led to the High Court Judge dismissing the Appellant's case in the High Court. The Appellants were aggrieved by the decision and appealed to this court on 13th August 2012. Subsequently, on 15th October 2012 the Appellants

lodged the record of appeal and on 20th September 2014 filed heads of argument in support of the appeal. This court set down the hearing of the appeal in the April 2015 Ndola sessions and issued a cause list to that effect. After the First Respondent realized that the matter would come up on appeal, it filed a notice of intention to raise preliminary issue on 22nd May 2015 and served the process to that effect upon the Appellants. On 28th May 2015, the Appellants filed a notice of withdrawal of appeal.

This is what has prompted the two motions before us.

The parties have filed heads of argument in support and opposition. The Respondents have anchored their arguments on Rules 63(3) and 77 of the Supreme Court Rules arguing that the said rules empower us to exercise our discretion to award costs. Reliance was also made on the cases of ***YB and F Transport Limited -vs- Supersonic Motors Limited***¹ and ***Emmanuel Mutale -vs- Zambia Consolidated Coppermines***². These two cases restate the principle that costs shall follow the event. In the *viva voce* arguments they also referred to the case of ***Zana Enterprises***

Limited and 20 others vs. National Pension Scheme Authority and Liberty Properties Limited³.

The gist of the arguments by the Appellants is that Rule 63(1) allows a party to discontinue an appeal by lodging a notice of withdrawal before the appeal is called up. Further that Rule 63(3) gives this court discretion to apportion costs and that the same are not awarded as a matter of right. They are, therefore urging us to exercise our discretion and order each party to bear their costs in accordance with Rule 77 especially that the Appellants were prompted to withdraw the appeal because it was overtaken by events.

We have considered the affidavit evidence and arguments by counsel.

Rule 63(1) allows a party to withdraw an appeal by filing a notice to that effect, while Sub-rule (2) makes provision for the parties to the appeal consenting to the withdrawal. Absent such consent, the appeal remains on the cause list for purposes of determination of the issue of costs or any other outstanding issues.

Rules 77 gives this court discretion to make an order as to costs. These rules in our opinion do not specifically address the issue before us.

We have therefore resorted to the **White book** which is specific on the issue of cost[§] in respect of withdrawn or discontinued actions in Order 62. It states under Order 62(3) as follows:

"where a party by notice in writing and without leave discontinues an action or counterclaim or withdraws any particular claim made by him as against any party, that other party shall be entitled to his costs of the action or counterclaim or his costs occasioned by the claim withdrawal, as the case may be, incurred to the time of receipt of the notice of discontinuance or withdrawal".

It is, our considered view, that since the Appellants did not seek the leave of this court or consent of the other parties to withdraw the appeal, they are liable to pay costs incurred by the Respondents. This is the position we take especially that the appeal had reached an advanced stage and as such the Respondents have incurred costs. We therefore, order that the Appellants do pay to the

Respondents, costs of the withdrawn appeal incurred up to the stage of the withdrawal. We further condemn the Appellants to costs of this application.



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E. M. HAMAUNDU
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE