

IN THE HIGH COURT FOR ZAMBIA

2013/HP/0155

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



B E T W E E N :

GILRAY MUCHINDU

PLAINTIFF

AND

ZAMBIA REVENUE AUTHORITY

DEFENDANT

Before Hon. Justice Mrs. P. K. Yangailo on 20th day of December, 2016 in Chambers

For the Plaintiff:

Mr. T. Chali - Messrs. H. H. Ndhlovu & Company

For the Defendant:

Mrs. S. Banda (Legal Officer) - Zambia Revenue Authority

R U L I N G

CASE LAW REFERRED TO:

1. *Twampane Mining Co- operative Society Limited Vs E & M Storti Mining Limited - SCZ Judgment No. 20 of 2011*
2. *Pamplin Vs Fraser (No 2) [1984] 2 All ER 693*
3. *Pauls Agriculture Ltd Vs Smith and others [1993] 3 All ER 122*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Rules of the Supreme Court, White Book 1999 Edition*
2. *The High Court Act Chapter 27 of the Laws of Zambia*

This is an application made *viva voce* by the Defendant for an Order for Stay of Proceedings pending payment of costs. The application was made on 6th December, 2016, when the matter came up for commencement of trial. It is submitted by the Defendant that on

the 21st April, 2016, when this matter came up for hearing before my elder brother, Justice M. M. Kondolo, the Court made an Order to the effect that the Plaintiff should pay costs to the Defendant before the matter proceeds. It was further submitted by the Defendant that, on several occasions, the Defendant wrote to the Plaintiff's Advocates requesting the Plaintiff to pay costs and the only response received was a request for a breakdown of costs and proof of expenditure. That the breakdown of costs and proof of expenditure, as shown by the Defendant's witness who flew from Ndola to Lusaka to attend the hearing on 21st April, 2016, was availed to the Plaintiff, but to date the Plaintiff has not paid the costs as Ordered by the Court.

The Plaintiff opposed the application and submitted that the Defendant was misinterpreting costs with refunds. It was the Plaintiff's submission that the Defendant's Advocate being in-house Counsel was not entitled to costs according to the Legal Practitioners' Act, as that is tantamount to professional misconduct as the resources used by in-house Counsel to attend Court and matters before Court are resources of a non-practitioner. That the Defendant was only entitled to a refund and not costs. According to Counsel for the Plaintiff, **Order 58** of the **White Book** is very categorical on the procedure to be followed if costs are not agreed and that the only recourse available to the Defendant was Taxation. Mr. Chali, Counsel for the Plaintiff, further submitted that, the Defendant was even out of time as they should have proceeded to

Taxation within three months from the date of the Order of costs in issue. He added that this application by the Defendant was an attempt to delay this matter. The Plaintiff also submitted that this matter having been re-allocated to this Court, meant that the matter was starting *de novo*, thus this Court had power to Order that the matter proceeds either as the parties attempt taxation or to lift the Order of Costs that was made. He thus prayed accordingly.

In reply, the Defendant submitted that there was no professional misconduct on the part of the Defendant as the costs demanded were rightly awarded to the Defendant by the Court. It was also submitted that the Plaintiff has never objected to the demand for costs, thus the Plaintiff's argument that the application is time barred, cannot be sustained as time within which to take the matter for taxation, if need be, will only start running when the Plaintiff indicates to the Defendant, that he is not agreeable to costs being demanded by the Defendant. The Defendant further submitted that, it was not the Defendant's intention to delay the prosecution of this matter as the Court Record will confirm that all previous adjournments in this matter were at the instance of the Plaintiff, due to their non-appearance at scheduled dates of hearing. That the non-response by the Plaintiff to the Defendant's demand for costs is a clear indication that the Plaintiff does not want to make progress in this matter. On the issue raised by the Plaintiff that this matter starts *de novo* by virtue of being re-allocated to this Court, the Defendant submitted that **Section 9** of the **High Court**

Act states that this is a Court of Record and that all High Court Judges have the same powers. That the Court having made an Order and being a Court of Record, there is no way that this Court can set aside the earlier Order made by Justice M. M. Kondolo, just because the matter has been re-allocated to another Court. The Defendant reiterated its prayer that, this Court should see to it that the costs are paid before the matter could proceed further and that the proceedings be stayed pending taxation, in the event that the Plaintiff insists that the costs be taxed as Orders of the Court must be obeyed.

I have considered the application by the Defendant to Stay Proceedings pending payment of costs, as well as the arguments advanced by both learned counsel.

There are four issues identified that this Court will require to determine in this interlocutory application and these are: -

1. Whether or not a re-allocation of this matter to this Court, means that the case starts *de novo*;
2. Whether or not the Defendant is entitled to the costs awarded by the Court;
3. Whether or not the Defendant's application is time barred; and
4. Whether or not the proceedings in this matter should be stayed pending taxation of the costs.

Having considered the submissions made by both parties herein through their respective Learned Counsel, I will address these issues in the order that they appear above.

The first issue to be determined is whether or not a re-allocation of this matter to this Court, means that the case starts *de novo*. The Record will show that when this matter came up for hearing before my elder brother Justice M. M. Kondolo on 21st April 2016, the Court condemned the Plaintiff herein in costs for that day, which costs, the Court ordered, to be paid before the next sitting. The matter was then adjourned to 23rd August, 2016 at 10:00 hours for trial. On 23rd May 2016, Justice M. M. Kondolo sent this Record to the Judge-in-Charge for re-allocation, following his elevation to the Court of Appeal. The Record was then re-allocated to this Court. The Plaintiff has argued that the re-allocation of the matter to this Court means that the case is considered to have started *de novo* and contends that this Court has powers to Order that the matter proceeds, as the parties attempt taxation of the costs awarded or to lift the Order that was made by Justice M. M. Kondolo. The Defendant argued that this Court is a Court of Record and that all High Court Judges have the same powers, thus there is no way that this Court could lift the Order on costs just because of this matter being re-allocated to this Court. The Defendant referred this Court to **Section 9** of the **High Court Act**. The cited section relates to Jurisdiction and law applicable in the High Court. It provides that:-

9. (1) The Court shall be a Superior Court of Record, and, in addition to any other jurisdiction conferred by the

Constitution and by this or any other written law, shall, within the limits and subject as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England.

- (2) **The jurisdiction vested in the Court shall include the judicial hearing and determination of matters in difference, the administration or control of property or persons, and the power to appoint or control guardians of infants and their estates, and also keepers of the persons and estates of idiots, lunatics and such as, being of unsound mind, are unable to govern themselves and their estates.**

It is the considered view of this Court that all Judges of the High Court have and exercise, in all respects, equal power and authority and jurisdiction. Thus, where a matter has been re-allocated from one High Court Judge to another, that Court will continue and complete the proceedings of the case as if it had heard the case from its inception, including enforcement of Orders made in all preliminary issues that were raised. It will also make any Orders that it deems fit for the enforcement of Orders made by the previous Court. What this Court cannot do is to set aside Orders made by a Court of equal jurisdiction. My view is fortified by **Section 4** of the **High Court Act** which provides that: -

4. **Subject to any express statutory provision to the contrary. all the Judges shall have and may exercise, in all respects, equal power, authority and jurisdiction, and, subject as aforesaid, any Judge may exercise all or any part of the jurisdiction by**

this Act or otherwise vested in the Court, and, for such purpose, shall be and form a Court.

My view is further fortified by **Section 17A (1)** of the **High Court Act** which provides that: -

17A. (1) *Where the presiding Judge is, on account of illness, death, relinquishment or cesser of jurisdiction or any other similar cause, unable to deliver a judgment already prepared by him, then the Chief Justice may direct that another Judge of the High Court shall deliver in open court the judgment prepared by the presiding Judge and shall, thereafter, complete the proceedings of the case as if he had himself heard and determined the case: provided that the judgment shall be dated and signed by the Judge at the time of delivering it...*

The **High Court Act** in **Section 26** further provides for effect of order of transfer of a matter from Court to Court. It provides that: -

26. *Every order of transfer made under this Part shall operate as a stay of proceedings before the court or Judge from which or from whom the proceedings are to be transferred in any cause or matter to which such order is applicable, and the process and proceedings in every such cause or matter, and an attested copy of all entries in the books of the court from which transfer is made shall, where necessary, be transmitted to the court or Judge to which or to whom the same shall be transferred, and such cause or matter shall be continued, heard and determined by such court or Judge. (emphasis mine)*

Accordingly, this Court is on firm grounds to continue to hear and determine this matter, including ensuring that Orders made prior to the re-allocation of this matter to this Court are complied with.

The second issue for determination is whether or not the Defendant is entitled to the costs awarded by the Court. As stated above, my elder brother Justice M. M. Kondolo made an Order that the costs incurred on 21st April, 2016 be borne by the Plaintiff and paid to the Defendant before the next hearing date (emphasis mine). The Plaintiff has argued that the Defendant was misinterpreting costs with refunds. Mr. Chali, Advocate for the Plaintiff submits that the Defendant's Advocate, being in-house Counsel was not entitled to costs according to the Legal Practitioners' Act, as that is tantamount to professional misconduct, as the resources used by in-house Counsel to attend Court and matters before Court are resources of a non-practitioner. That accordingly, the Defendant was only entitled to a refund and not costs. He referred this Court to **Order 58** of the **White Book**, which he submitted was very categorical on the procedure to be followed if costs are not agreed and that the only recourse available to the Defendant was Taxation.

Order 58 of the **White Book**, which Mr. Chali referred this Court to is irrelevant to the application before this Court as the said cited provision relates to Appeals from Masters, Registrars, Referees and Judges. The provision that relates to costs in the **White Book** is **Order 62**. The Plaintiff's Counsel Mr. Chali did not refer this Court

to the specific provisions in the Legal Practitioners' Act which provides that in-house counsel is not entitled to recover costs. Having said that, this Court is of the considered view that the Court presided over by my elder brother Justice M. M. Kondolo was empowered to give an order for costs or any order that it deemed fit. The Court was clothed with the jurisdiction to make rulings on costs, where a party specifically pleaded for it. The Plaintiff never showed dissatisfaction of the said Order. If at all, the Plaintiff was dissatisfied with this Order, he would have taken steps to appeal the said Order. Having not taken any such steps, the Defendant is deemed to be entitled to the costs so awarded. Indeed the Order made on 21st April, 2016 by my elder brother Justice M. M. Kondolo awarded costs to the Defendant, which costs the Court ordered to be paid before the next sitting. It is my firm view that the Defendant is entitled to these costs awarded to it and these must be paid before the matter proceeds, as so ordered.

The third issue for determination is whether or not the Defendant's application is time barred. The Plaintiff argued that the Defendant was out of time as they should have proceeded to Taxation within three months from the date of the Order of 21st April 2016. In response, the Defendant argued that the Plaintiff has never objected to the demand for costs, thus the Plaintiff's argument that the application is time barred, cannot be sustained as time within which to take the matter for taxation, if need be, will only start running when the Plaintiff indicates to the Defendant, that he is not

agreeable to costs being demanded by the Defendant. The Defendant further submitted that as at 21st September, 2016, the parties were still communicating on settlement of the awarded costs.

I am alive to the fact that an application for taxation should be brought before Court within a specific time. **Order 62 Rule 29 (1)** of the **Rules of the Supreme Court** specifically provides that an application should be brought within three months from the date of Judgment or Order. Clearly, the Defendant herein did not make its application within the requisite three months. The question is, what is the implication of the delay? **Order 62 Rule 29 (2)** of the **Rules of the Supreme Court** provides as follows: -

"...It is essential that the requirements of r.29 are strictly followed. Failure to comply will result in a penalty and possibly return the bill to the bottom of the queue..." (emphasis mine)

I find as a fact that the Defendant herein failed to comply with the above cited Order. The fact that the parties engaged in discussions with regards the payment of costs did not prevent the Defendant from complying with the rules of Court. In the case of **Twampane Mining Co- operative Society Limited Vs E & M Storti Mining Limited⁽¹⁾** the Court held that: -

"To use ex curia settlements discussions as an excuse for failure to comply with the rules of Court is to do so at one's peril."

Therefore, I find that the Defendant's argument that the time to proceed with taxation starts running from the time that the costs are disputed by the aggrieved party such as the Plaintiff in this matter, is unsustainable. The time ought to be determined from the date of the Order. Accordingly the delay by the Defendant in this matter was nearly seven months. In the case of **Pamplin Vs Fraser (No 2)**⁽²⁾ the Court held that: -

“The consequence of failure to give notice to proceed to taxation after a year’s delay was not that the taxation would be set aside for irregularity but that the matter fell to be dealt with under Order 62, r 7(5)d, under which, in order to avoid prejudice to other parties, a nominal or other sum for costs could be allowed or the whole bill disallowed and the costs awarded to the other parties”

Further the Court in the case of **Pauls Agriculture Ltd Vs Smith and others**⁽³⁾ stated as follows: -

“The taxing master had jurisdiction to ‘fine’ a successful party by disallowing costs under RSC Order 62, r 28(4)(b)(ii) where the delay in lodging a bill for taxation had been inordinate or inexcusable or had been shown to be prejudicial to the unsuccessful party...”

In these circumstances I find that the Defendant’s delay is inordinate. The only reason advanced by the Defendant for the delay is the fact that the parties had engaged in discussions after the Order. This did not justify the Defendant’s disregard of the rules of the Court. The Courts have an important duty to ensure that the rules presenting times within which steps must be taken are adhered to strictly. I refer to the already cited case of

Twampane Mining Co- operative Society Limited Vs E and M Storti Mining Limited⁽¹⁾.

However, failure to comply with **Order 62** of the **Rules of the Supreme Court** does not completely bar the Defendant from pursuing its costs as argued by the Plaintiff. **Order 62 Rule 28 (4)** provides that: -

"Where a party entitled to costs -

- (a) fails without good reason to commence or conduct proceedings for the taxation of those costs in accordance with this Order or any direction, or***
- (b) delays lodging a bill of costs for taxation, the taxing officer may -***
 - (i) disallow all or part of the costs of taxation that he would otherwise have awarded that party; and***
 - (ii) after taking into account all the circumstances (including any prejudice suffered by any other party as a result of such failure or delay, as the case may be, and any additional interest payable under section 17 of the Judgments Act 1838 because of the failure or delay), allow the party so entitled less than the amount he would otherwise have allowed on taxation of the bill or wholly disallow the costs."***

I am of the considered view that the consequence of failure by the Defendant to proceed to taxation after seven months delay is not that the taxation could not proceed, but that the matter should be dealt with under Order 62 Rule 28 (4) cited above.

The fourth and final issue for determination is whether or not the proceedings in this matter should be stayed pending taxation of the costs in issue. The Plaintiff argued that the Defendant's application to stay the proceedings pending payment of costs was a ploy to delay the proceedings in this matter. The Court issued an Order and where the Court makes an Order, a party is required to comply with the Order. Obedience to Orders of the Court is the foundation on which judicial authority is founded. A Court will not treat lightly a party that ignore or flout Orders of the Court unless the failure to obey is due to extraneous circumstances.

Therefore, I am of the considered view that the Order that the Defendant seeks is not final in nature or effect, but is temporary with the proviso that if the costs are not paid, the Plaintiff may not proceed with the main action. It can hardly be said that the granting of the Order to Stay the Proceedings in the main action, pending the payment of the costs incurred and awarded on 21st April 2016, is meant to delay these proceedings. There must be a fair balance of competing rights of litigants. On the one hand, the Plaintiff wants to proceed with his action despite the costs already incurred and on the other hand, the Defendant having obtained an Order for Costs in its favour, which the Plaintiff is avoiding to pay, has the right not to be dragged to Court by a litigant who may not be in a position to pay costs incurred for whatever reason. I opine that it will not be unfair to stay the proceedings in the main action pending payment of the costs awarded on 21st April, 2016. In any

case, the Plaintiff has not shown sufficient and convincing reasons for me not to stay the proceedings pending payment of the costs. My view is further fortified by **Order 40 (8)** of the **High Court Rules**, which empowers this Court to stay proceedings until costs are paid.

Consequently, the application by the Defendant is hereby granted as prayed. The proceedings in the main trial under case number 2013/HP/0155 are stayed pending payment of all the unpaid costs incurred on 21st April, 2016 and awarded to the Defendant. I also order that the parties herein proceed for taxation in default of agreement.

Leave to Appeal is granted.

Dated the 20th Day of December, 2016.



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P. K. Yangailo
HIGH COURT JUDGE