

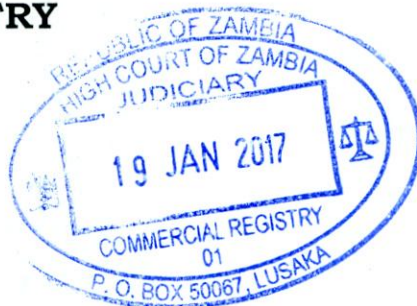
**IN THE HIGH COURT FOR ZAMBIA**

**2011/HPC/0650**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Commercial Registry)*



**BETWEEN:**

**PULSE FINANCIAL SERVICES LIMITED**

**PLAINTIFF**

**AND**

**JOSEPH BANDA**

**DEFENDANT**

*Before the Honourable Justice B.G. Lungu on the 17<sup>th</sup> day of January, 2017 in Chambers.*

*For the Plaintiffs : Ms. L Shula and Ms. S Kalima  
Messrs. J & M Advocates*

*For the Defendants: No Attendance*

---

## **R U L I N G**

---

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

This is a composite application by the Plaintiff. In the first leg, the Plaintiff seeks an order for leave to discontinue the cause of action with no order as to costs pursuant to Order XVII of the High Court Rules (HCR) as read with Order 21 Rule 5 of the Rules of the Supreme Court (RSC) 1999 edition, the White Book.

In the second leg, the Plaintiff seeks an order to dismiss the Defendant's Counterclaim for want of prosecution pursuant to Order 3 Rule 2 HCR.

The applications were heard on 17<sup>th</sup> January, 2017 in the absence of the Defendant. I proceeded to hear the applications because I was satisfied that there was no opposition by the Defendant. My satisfaction was premised upon the Affidavit of Service on file, sworn by Chileshe Mwasha, to evidence service on the Defendant on 18<sup>th</sup> November 2016 of the notice of hearing and documents relating to the application. Further, the Defendant neither filed any documents in opposition, nor did he attend the hearing.

I will begin by considering the application for an order to dismiss the Defendant's Counterclaim for want of prosecution.

The brief background to this cause is that by Writ of Summons taken out on 3<sup>rd</sup> November, 2011, the Plaintiff instituted proceedings against the Defendant. The Plaintiff's claim was for, *inter alia*, the sum of K19,435,666.69 being the balance of a loan advanced to the Defendant by the Plaintiff and an order for delivery up and possession of a Mitsubishi Canter Registration Number ABM 501 pledged as collateral for the loan amount by the Defendant.

On 19<sup>th</sup> November, 2011 the Defendant filed its Defence and the Counterclaim that is subject to this application. The Counterclaim was for, *inter alia*, damages for breach of trust and fraudulent sale of Toyota Camry ABK 58882 and damages for loss of use of the vehicle which was said to be a utility vehicle. In turn, the Plaintiff filed its Defence to the Counterclaim on 20<sup>th</sup> December 2011. The Orders for Directions were issued by the Court on 20<sup>th</sup> December 2011. The Orders for Directions disclose that pleadings were



scheduled to close on 27<sup>th</sup> February, 2012. A status conference was held on 19<sup>th</sup> March 2012, where it was placed on record by counsel representing both parties, that the parties were desirous of settling the matter amicably or by Mediation. Consequently, a Consent Order to refer the matter to mediation was signed and issued by the Court on 21<sup>st</sup> March, 2012.

To date the parties have failed to settle the matter amicably or by Court Annexed Mediation. In addition, neither party has taken steps to fully comply with or apply to amend the Orders for Directions of 20<sup>th</sup> December, 2011. As it stands, there are no bundles of pleadings, bundle of documents, witness statements, or skeleton arguments on the record. More particularly, the Defendant's Counterclaim has been inactive since 2012, a period in excess of four years.

At the hearing of this leg of the composite application, counsel for the Plaintiff, Ms L. Shula relied on the Summons, Affidavit and Skeleton Arguments filed in support of the application filed on 18 July 2016. I have thoroughly read and considered the supporting documents, albeit I will not reproduce their gist for the simple reason that they interface with the background of the case as outlined in this Ruling. The pertinent fact is that there has been blatant inactivity in so far as progressing or prosecuting the Defendant's Counterclaim is concerned.

I must at this point draw attention to **Rule 10 (10) of the High Court Amendment Rules, 2012** which sanctions a party to an action to, if sixty days elapses without any progress after the action is filed, apply to dismiss the action. In the case at hand it is clear that more than sixty days have elapsed without any progress after the filing of the Defendant's Counterclaim.



In view of the inordinate delay by the Defendant in progressing its Counterclaim, I find that this is an appropriate case in which to dismiss the Defendants Counterclaim for want of prosecution. Accordingly, the Defendant's Counterclaim stands dismissed.

As regards the Plaintiff's application for leave to discontinue its cause of action with no order as to costs, I find that the procedure for discontinuance of suits in the High Court is expressly and unequivocally provided for under Order XVII of the High Court Rules. This being the case, I will not seek recourse to the White Book, reason being that section 10 of the High Court makes reliance on the practice and procedure contained in the White Book a default reference where our own rules are insufficient.

Order XVII Rule 1 of the High Court Rules states:

***"If, before the date fixed for the hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his alleged claim, he shall give notice in writing of discontinuance or withdrawal to the Registrar and to every defendant as to whom he desires to discontinue or withdraw. ...Such discontinuance or withdrawal shall not be a defence to any subsequent suit."***  
{Court emphasis}

My interpretation of this front of Order XVII Rule 1 is that a Plaintiff is at liberty to discontinue its cause of action at any time before the date fixed for trial provided the relevant notice of discontinuance or withdrawal is filed as prescribed. The Order does not require the Plaintiff to seek leave at this stage.

Order XVII Rule 1 also provides:

**"If, in any other case, the plaintiff desires to discontinue any suit or to withdraw any part of his alleged claim, or if a defendant desires to discontinue or withdraw his counter-claim or any part thereof, such discontinuance or withdrawal may, in the discretion of the Court or a Judge, be allowed on such terms as to costs and as to any subsequent suit and otherwise as to the Court or a Judge may seem just.."** {Court emphasis}

It is evident from this latter part of Order XVII Rule 1 that leave of court is required **"in any other case"**. The term "other", in my considered view, can only be referring to discontinuances other than those sought before the date fixed for trial. In essence, whereas leave is not required if a Plaintiff seeks to discontinue before the date fixed for trial, leave is required if the Plaintiff seeks to discontinue after the date fixed for trial. In the latter circumstance, where leave is required, the Court may exercise its discretion to grant leave with such terms as to costs as the Court deems just.

The issue of costs, in so far as it relates to a notice of discontinuance, is also addressed in Order XVII Rule 1 of the High Court Rules, which provides:

***"After the receipt of such notice, such defendant shall not be entitled to any further costs, with respect to the matter so discontinued or withdrawn, than those incurred up to the receipt of such notice, unless the Court or a Judge shall otherwise order; and such defendant may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice"***



The captioned provision directly speaks to the award of costs where a cause is discontinued by notice. My reading of Order XVII rule 1 is that: (i) the Defendant is not entitled to costs incurred after receipt of the notice of discontinuance unless otherwise ordered by the Court; (ii) A Defendant has the right to apply, *ex parte*, for an order against the Plaintiff for costs incurred before receipt of the notice of discontinuance.

*In casu*, the record shows that trial dates were yet to be fixed. This being the case, the Plaintiff is at liberty to discontinue its action in accordance with Order XVII Rule 1 of the High Court Rules without seeking leave.

In the event that the Defendant is aggrieved with respect to any costs incurred before receipt of a notice of discontinuance, he will be at liberty to make an application for costs as prescribed. Consequently, the issue of costs will be determined by the Court in the event that the Defendant applies for such costs.

In conclusion, having considered all the facts and law before me, I am of the settled mind that this application is improperly before me and must, as it now does, fail.

Leave to appeal is granted.

**DELIVERED at Lusaka this 19<sup>th</sup> day of January, 2017**

-----  
**B.G. LUNGU**  
**JUDGE**