

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2002/HP/0148

BETWEEN:

NORMA MEVLY SIMPSON

Plaintiff

AND

NATURAL VALLEY LIMITED



1st Defendant

LILLIAN MUSHOTA

2nd Defendant

(sued as Executrix of the estate of the late
Robert Ian Simpson)

STEWART MARTIN SIMPSON

3rd Defendant

Coram: Hon Lady Justice F. M. Lengalenga in chambers at Lusaka.

For the Plaintiff:

No appearance

For the 1st & 3rd Defendants:

Mrs. L. Mushota – Messrs Mushota and
Associates

For the 2nd Defendant:

Mrs. F. M. Zaloumis – Messrs Dove
Chambers

R U L I N G

Cases referred to:

- 1. LEOPOLD WALFORD (Z) LTD v UNIFREIGHT (1985) ZR 203 (SC)**
- 2. ZAMBIA REVENUE AUTHORITY v JAYESH SHAH (SCZ JUDGMENT NO. 16 OF 2001)**

This application by the defendants for an order to strike out the matter for want of prosecution is brought pursuant to Order 31, Rule 2(2) of the High Court Rules, Chapter 27 of the Laws of Zambia. It is supported by an affidavit sworn by one Frances Mwangala Zaloumis, the advocate who is seized with conduct of this matter on behalf of the 1st and 3rd defendants herein.

She deposed therein that on 20th October, 2014 when this matter came up for hearing, this court ordered the plaintiff who was in the habit of causing numerous adjournments since the commencement of the matter in 2002, to pay security for costs in the sum of fifty thousand kwacha (K50 000.00) before the next hearing but to-date the court's order has not been complied with. She deposed further that since the plaintiff had also dismissed her lawyer, the defendants have not been served with any notice of appointment of new advocates and the plaintiff has not followed up this matter since October, 2014. Senior Counsel submitted that as Counsel for the defendants they sincerely believe that the plaintiff does not intend to prosecute this matter and they, therefore apply for dismissal of the matter

for want of prosecution and that the costs of and incidental to this application be borne by the plaintiff.

I have considered the application by the defendants and the reasons advanced for seeking an order to strike out matter for want of prosecution. I am also alive to the fact that the plaintiff has not complied with this court's order to pay fifty thousand kwacha (K50 000.00) as security for costs before the matter can proceed any further. As stated by Senior Counsel, Mrs. F. M. Zaloumis the order for payment of security for costs was made on 20th October, 2014 but to-date the plaintiff has not paid the same.

In determining the defendants' application I have gone back to the stage of the proceedings prior to the court's order and particularly the proceedings of 16th April, 2014 where this court heard and determined the application for an order to set aside the order dated 9th December, 2013 by which this court adjourned this matter for judgment and ordered that the matter be restored to the active cause list for continued trial/defence. Prior to the said proceedings on 9th September, 2013, the court heard the 3rd defendant, DW2, Stewart Martin Simpson's evidence in-chief and the matter was adjourned to 2nd October, 2013 at 09:30 hours for cross-examination of the said defence witness.

Unfortunately, the court was not able to sit on 2nd October, 2013 and fresh notices of hearing were issued on 30th October, 2013 for hearing of

the matter on 9th December, 2013 but the plaintiff's Counsel and his client were not present in court for cross-examination of the defence witness. It is at this stage that the 3rd defendant's Counsel decided to close the defence case and this court gave Counsel an option to file written submissions into court and the time-line was up to 21st February, 2014. I must also point out that the plaintiff's application to set aside this court's order of 9th December, 2013 to close proceedings and adjourn the matter for judgment, was only filed on 14th March, 2014, thereby demonstrating the inertia on the plaintiff's part. After the order was set aside and the matter was re-opened for cross-examination of the last defence witness, the plaintiff and her advocate took no further steps to conduct the cross-examination. Defendants' Counsel now seek an order to strike out the matter for want of prosecution.

I will proceed to deal with the issues of striking out the matter for want of prosecution and effect of non-payment of security for costs. The rationale behind ordering security for costs is to provide a way of protecting a defendant or respondent by asking the plaintiff, applicant or petitioner to pay a certain amount of money into court as security in the event that such plaintiff, applicant or petitioner is unsuccessful in the action so that the defendant or respondent can recover the costs.

As earlier stated, the plaintiff has failed or neglected to comply with this court's order for payment of security for costs and the issue that has arisen is how this court should proceed in view of the non-compliance

especially since the matter has been heard. The question that begs an answer therefore is whether it would be fair and just to strike out or dismiss the action for want of prosecution when the matter has been heard except for cross-examination of one defence witness. I, therefore, sought guidance from the Supreme Court's decisions in the cases of **LEOPOLD WALFORD (Z) LTD v UNIFREIGHT¹** and **ZAMBIA REVENUE AUTHORITY v JAYESH SHAH²** where the Supreme Court held *inter alia* that as a general rule, regulatory or directory rules must be followed, but the effect of a breach will not always be fatal as breach of a regulatory rule is curable and that cases should be decided on their substance and merit.

In the instant case, the matter having been heard with the exception of cross-examination of one defence witness and which court can deem to have been abandoned due to the passage of time of non-compliance to pay security for costs, I am of the considered view that it would not be in the interest of justice for this court to strike out or dismiss the matter for want of prosecution in the circumstances where the matter has already been heard. I am further of the considered view that this court can merely dispense with the plaintiff's cross-examination of the 3rd defendant in the absence of the payment of security for costs and proceed to determine the matter on its merits on the evidence adduced.

In the circumstances therefore, I decline to grant the order sought by Defence Counsel and I dismiss the application but I direct that the

defaulting party, in this case being the plaintiff, bear the costs of this application.

I further accordingly direct that the defence proceedings be deemed to have been closed and that the court proceed to render a decision in this matter. I will, however, allow the plaintiff and Defence Counsel to file written submissions if they so wish and I direct that the said submissions be filed within eight weeks from the date hereof.

As I earlier condemned the plaintiff to bear the costs of this application, in default of agreement as to the costs, the same to be taxed.

DATED this ^{24th}..... day of August, 2017 at Lusaka.



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F. M. Lengalenga
JUDGE