

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

**2017/HP/0835**



**B E T W E E N :**

SINYA MBALE  
GREEN MBOZI  
SOLOMON PHIRI  
DIONYSUIS MAKUNKA  
CHALWE PATRICK BWEUPE

**1<sup>ST</sup> PLAINTIFF**  
**2<sup>ND</sup> PLAINTIFF**  
**3<sup>RD</sup> PLAINTIFF**  
**4<sup>TH</sup> PLAINTIFF**  
**5<sup>TH</sup> PLAINTIFF**

**AND**

JAMES MATALE  
FR. JUDE McKENNA  
DEDAT MOHAMED

**1<sup>ST</sup> DEFENDANT**  
**2<sup>ND</sup> DEFENDANT**  
**3<sup>RD</sup> DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 7<sup>th</sup> day of November, 2017**

*For the Plaintiffs : Mr. B.C. Mutale, Messrs BCM Legal Practitioners*  
*For the Defendants: Mr. A. Phiri, Messrs HM Munsanje & Company*

---

**R U L I N G**

---

**Legislation Referred To:**

1. *High Court Act, Chapter 27*

This is the Plaintiff's application to restore the matter to active cause list. It is made pursuant to Order 35 Rule 1 of the High Court Rules and is supported by an Affidavit.

**Benjamin Chanda Mutale** the Plaintiff's Advocate swore an Affidavit where he states that he was unable to attend Court on 10<sup>th</sup> August, 2017 due to a road mishap. That he was incapacitated for a week as a result of the accident and that the Defendants' Advocates were aware of his circumstances. He prays to the Court to restore the matter to the active cause list.

Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, **Anthony Khetani Phiri**, filed an Affidavit in Opposition. He states that on 10<sup>th</sup> August, 2017, the Court struck out the Plaintiffs' action with costs. It ordered the Plaintiffs to pay costs before taking further steps in the proceedings. That on 14<sup>th</sup> August, 2017, he served a Court Order on the Plaintiffs' Advocates and notified them of the Defendants' costs, as shown in the exhibit marked "**AKP1**." He avers that in response to the Defendants' demand for costs, the Plaintiffs' Advocates rejected the proposal as shown in the exhibit marked "**AKP2**." The deponent avers that the Defendants caused to be filed

into Court, a bill of costs for taxation. Thus, the Plaintiffs' application to restore the action is misconceived.

At the hearing, Learned Counsel for the Plaintiffs relied on the Affidavit in Support and reiterated the reasons for his non-attendance on the material date. His prayer to the Court was for it to restore the matter to the active cause list.

Learned Counsel for the Defendants relied on the Affidavit in Opposition and submitted that the Court's Order of 10<sup>th</sup> August, 2017, was specific. The Court struck out the matter with liberty to restore subject to the Plaintiff's fulfilling two conditions. The first was for the action to be restored within fourteen days of the Order, whilst the second indulged the Plaintiffs to pay costs before taking any further steps in the proceedings.

Counsel stated that the filing of the application by the Plaintiffs was a further step in the proceedings and according to the Order of the Court, the application was not properly before it because the Plaintiffs had not paid costs. The question of costs was pending taxation and hence the application was incompetent.

Counsel further submitted that the Plaintiffs irregularly sought to restore the matter when leave had already been granted in the Order of 10<sup>th</sup> August, 2017. Counsel argued that since none of the conditions set by the Court were satisfied by the Plaintiffs, they could not rush to take any further steps. Counsel submitted that the Court's Order was still valid because it had not been set aside. He prayed to the Court to dismiss the Plaintiff's application with a further order for costs.

In rejoinder, Learned Counsel for the Plaintiffs submitted that the application before Court was competent and sanctioned by Order 35 Rule 1 of the High Court Rules. He stated that even if the Court had given liberty to restore, an application would be required to explain the reasons for restoration, hence the application before Court. Counsel submitted that for the issue of costs to be pursued through taxation, the matter had to be restored to the active cause list. Counsel stated that since the matter had come up for a status conference on 10<sup>th</sup> August, 2017, the issue of costs was restricted to that single hearing. He prayed for the matter to be restored to the active cause list.



I have anxiously considered the Affidavits filed herein and the submissions of both Learned Counsels, for which I am indebted. For the sake of clarity, my Order of 10<sup>th</sup> August, 2017 was as follows:

**"The Plaintiffs having neither appeared for the hearing of this matter nor having excused their absence from Court and having disregarded the order of this Court made on the 24<sup>th</sup> day of July, 2017 requiring them to appear in person.**

**IT IS ORDERED that this action herein BE and is hereby STRUCK OUT with liberty to restore, with costs to the Defendants, to be paid by the Plaintiffs before the Plaintiffs take any further steps in these proceedings.**

**IT IS FURTHER ORDERED that this action shall stand dismissed unless restored within 14 days from the date hereof."**

It stems from my earlier Order of 24<sup>th</sup> July, 2017, where I stated that:

**" The Plaintiffs must settle an Order for Directions in the usual format before the end of this week. I have closely considered the claims and Defence in casu and I form the view that this matter can be settled ex-curia. I therefore order the parties and their advocates to appear before me on 10<sup>th</sup> August, 2017, at 08.30 hours for a status conference. Costs are in the cause."**

My Order dated 24<sup>th</sup> July, 2017, required the Advocates and their clients to appear before me on 10<sup>th</sup> August, 2017. On the appointed date, the Defendants and their Advocates appeared, while the Plaintiffs and their Advocates failed to comply with my Order. The Plaintiffs' Advocate claimed to have been involved in a road mishap but did not exhibit a hospital sick note or police report

when it is proper course to do so. In the absence of those documents, I cannot accept that Mr. Mutale was indisposed.

This Court has a duty to protect its honour and integrity and it can only do so if its orders are respected. My Orders of 24<sup>th</sup> July and 10<sup>th</sup> August, 2017 are still in force and have not been set aside. The must be respected by the parties. As rightfully contended by Counsel for the Defendants, it was quite unnecessary to issue summons for restoration when the Order of 10<sup>th</sup> August, 2017 granted the Plaintiffs liberty to restore. Let me state that I only awarded the Defendants costs for the sitting of 10<sup>th</sup> August, 2017 and not the entire case because this matter is still under adjudication. Thus, those costs must be settled before any further steps are taken by the Plaintiffs.

Today's hearing amounted to a further step taken by the Plaintiff in defiance of the Court's Order of 10<sup>th</sup> August, 2017. As a result, I also condemn the Plaintiffs to today's costs for inconveniencing the Defendants in the face of an unequivocal Court Order. These costs must equally be paid before any further steps are taken by the Plaintiffs.

R7

Dated this 7<sup>th</sup> day of November, 2017.

*M. Mapani*

M. Mapani-Kawimbe  
**HIGH COURT JUDGE**