

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

**2006/HPA/022**

BETWEEN:

**MUNALULA LINYATI**

AND

**HOPE FOUNDATION FOR WOMEN AND CHILDREN**

**SEPISO SIMONDA**

**ATTORNEY GENERAL**



**APPELLANT**

**1<sup>st</sup> RESPONDENT**

**2<sup>nd</sup> RESPONDENT**

**3<sup>rd</sup> RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 16<sup>th</sup> DAY OF  
NOVEMBER, 2017**

*For the Appellant : Mr C.L. Mundia SC, C.L. Mundia and Company*

*For the 1<sup>st</sup> Respondent : Mrs D. Findlay, D. Findlay and Associates*

*For the 2<sup>nd</sup> Respondent : Mr F.S Kachamba, EBM Chambers*

*For the 3<sup>rd</sup> Respondent : Mr M.M. Lukwasa, Deputy Chief State Advocate*

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

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CASES REFERRED TO:

1. *Warmingtons V McMurray* 1936 2 ALL ER 745
2. *Cavmont Capital Holdings PLC V Lewis Nathan Advocates (Suing as a firm)* SCZ No 6 of 2016

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court, 1999 edition*
3. *The Legal Practitioners Act, Chapter 30 of the Laws of Zambia*

**4. *Cordery's Law relating to Solicitors, 7<sup>th</sup> Edition by Graham J. Graham-Green, Londons Butterworths, 1981***

This is a ruling on application filed by the 1<sup>st</sup> Respondent on 2<sup>nd</sup> June, 2016, to dismiss the matter for being an abuse of court process, and for an order for security for costs made pursuant to Orders 18 Rule 19 (38), Order 23 Rule 1 of the Rules of the Supreme Court, 1999 edition, Order 40 of the High Court Rules, Chapter 27 of the Laws of Zambia, and Rule 35 (5) of the Legal Practitioner's Practice Rules, 2002 of the Legal Practitioners Act Chapter 30 of the Laws of Zambia.

Counsel relied on the affidavit filed in support of the application, and stated that the issue of representation of the Appellant in this matter is crucial, and ought to be addressed before there can be further proceedings in this matter. That exhibit 'DF1' to the affidavit in support of the application is correspondence from the Appellant's counsel, Messrs C.L. Mundia and Company to the effect that they cannot locate the Appellant. Counsel submitted that to therefore proceed without the authority of the Appellant would contravene the provisions of Order 24 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, which states that to do so would render a person guilty of contempt of court.

That additionally the provisions of Section 52 (a) of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia, and the rules thereunder would be contravened. It was also stated that at previous hearings of this matter it was indicated that a formal application would be made to state that Messrs C.L. Mundia and Company no longer represent the Appellant. Counsel's view was that in light of the prevailing circumstances, it was imperative that the issue is resolved, before any other proceedings in this matter can continue.



Counsel for the 2<sup>nd</sup> Respondent adopted the submissions made by Counsel for the 1<sup>st</sup> Respondent. Counsel for the 3<sup>rd</sup> Respondent noted that the matter has been outstanding for a long time, and also adopted the arguments advanced by Counsel for the 1<sup>st</sup> Respondent.

In response, State Counsel Mr Mundia, whilst agreeing that the matter had been outstanding for a long time, attributed this to the matter traversing from Judge to Judge, and also going to the Supreme Court on appeal. State Counsel stated that the Respondents through their advocates had commenced this action in the Subordinate Court against the 1<sup>st</sup> Appellant, Munalula Linyati and evicted him together with Simonwa Simonda's family, represented by the administrator of his estate Sepiso Simonda.

That it is on record that the matter had come before this court as an appellate case, purely to determine the appeal, but that there had been numerous applications, thereby denying the 2<sup>nd</sup> Appellant the right to be heard. With regard to the issue surrounding Munalula Linyati, State Counsel submitted that this had been addressed in the affidavit dated 30<sup>th</sup> March, 2017, and they had put it before the court that the said Munalula Linyati was a victim of a null and void process, as the Subordinate Court had no jurisdiction whatsoever to hear a matter involving property which has a certificate of title, and that this is what this court should determine on appeal.

State Counsel added that on the same day that the action was commenced in the Subordinate Court by originating process, Munalula Linyati and Simonwa Simonda's children were evicted, and that this was while there was an action pending before the High Court against the then Works and Supply Minister Golden Mandandi, and that that is how the

Attorney General comes in. That whether Munalula Linyati is a party to these proceedings is for the Subordinate Court that heard the proceedings, and not this court. State Counsel's view was that it was not for them to assist on why Munalula Linyati was a party to the proceedings, as the action was taken out by Mayowe and Company, and not Messrs D. Findlay and Associates.

Therefore under the circumstances it was totally unjustified to insinuate that State Counsel had not obtained Munalula Linyati's instructions prior to the commencement of the action, or that they were representing him without authority. It was stated that the application had no merit, and that the Supreme Court had ordered that all parties to the action must be brought before court, which they had done, so that the appeal could be heard and disposed of.

State Counsel went on to state that it was a disgrace to the profession that Messrs D. Findlay and Associates could defend this action when they are in possession of the property, after their predecessors evicted Munalula Linyati and the Simonwa family from there. State Counsel urged the court to proceed to determine the appeal as a date for the same had been set for August this year, adding that this application was intended to derail the process of justice. State Counsel also submitted that the Supreme Court had given direction, but Messrs D. Findlay and Associates deliberately wanted Munalula Linyati to be a Respondent when they had no authority to change the situation. State Counsel stated that this could only be done before the Subordinate Court, and not the appellate Court, and therefore this court must proceed to hear the appeal. Lastly that all the parties to the action should be heard on 4<sup>th</sup> August, 2017, when the appeal comes up.



Counsel for the 1<sup>st</sup> Respondent in reply noted that there is only one appellant in this action, and that this is the position even after the Supreme Court judgment, which sent back the matter for hearing. It was further submitted that the issue for determination is at whose instance is this appeal being heard? Counsel contended that this has to be heard before any proceedings can continue. That if it was State Counsel's position that the Appellant Munalula Linyati had been located, contrary to the position stated in the letter, then the position was different.

However in view of the said letter, which was exhibited as 'DF2' to the affidavit dated 2<sup>nd</sup> June, 2016, their view was that the matter cannot proceed, as this action can only be prosecuted by way of instructions, obtained from the Appellant in line with Section 52 of the Legal Practitioner's Act, and Order 24 of the High Court Rules, and by so proceeding State Counsel would be in contempt of court.

With regard to the reference to the affidavit dated 30<sup>th</sup> March, 2017, Counsel pointed to the court to note that the designation of the parties, particularly the purported 2<sup>nd</sup> Appellant, was not in line with the judgment of the Supreme Court dated 24<sup>th</sup> September, 2015, which specifies the designation of the parties who were joined to the proceedings. It was Counsel's prayer that in the interests of justice the issue relating to the representation of the Appellant be resolved.

I have considered the application. Order 18 Rule 19 (38) of the Rules of the Supreme Court, 1999 edition provides that;

***"If the Court becomes aware that the plaintiff is incapable of giving a retainer, it will strike out the action at the trial without any formal application. But if the defendant desires to question the authority to sue in the plaintiff's name, he***

***must apply to strike out the plaintiff's name at an early stage; he cannot by his defence dispute the authority, nor can he do so at the trial"***

Order 23 Rule 1 of the Rules of the Supreme Court, 1999 edition on the hand states that;

***"(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -***

***(a) that the plaintiff is ordinarily resident out of the jurisdiction, or***

***(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or***

***(c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or***

***(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just".***



Order 40 of the High Court Rules, Chapter 27 of the Laws of Zambia deals with costs, while Rule 35 (5) of Legal Practitioners Rules, 2002, Chapter 30 of the Laws of Zambia provides that;

***“35. (1) A practitioner shall-***

***(5) A practitioner shall not devise fact which will assist in advancing the client’s case and shall not draft any originating process, pleading, affidavit, witness statement or notice of appeal containing-***

***(a) any statement of fact or contention which is not supported by the client or by the brief or instruments;***

***(b) any allegation of fraud unless the practitioner has clear instruments to make such allegation and has before him or her reasonably credible material which as it stands established a prima facie case of fraud;***

***(c) in the case of an affidavit or witness statement any statement of fact other than the evidence which in substance according to the practitioner’s instruments the practitioner reasonably believes the witness would give if the evidence contained in the affidavit or witness statement were being given viva voce;***

***Provided that nothing in this paragraph shall prevent a practitioner drafting a pleading, affidavit or witness statement containing specific facts, matters or contentions included by the practitioner subject to the client’s confirmation as to accuracy”.***

The issue in contention in this matter is that in light of the fact that the Appellant in this matter cannot be located, can the appeal proceed, as Counsel in any matter, acts on the basis of instructions given by the client? It is common cause that the 1<sup>st</sup> Respondent in this matter sued the now Appellant in the Subordinate Court on 28<sup>th</sup> February, 2006, by way of Originating Notice of Motion for an order of vacant possession of Plot No 4607 Andrew Mwenya Road, and for leave to issue a warrant of distress. On the same day that the Originating Notice of Motion was filed an ex-parte summons for leave to issue a warrant of distress and writ of possession and eviction were filed, and on 10<sup>th</sup> March, 2006, the order for leave to issue the writ of possession and eviction was granted.

This resulted in the appeal before this court. While State Counsel made reference to the matter having been in the hands of various Judges of the High Court, and before the Supreme Court, and the issue of Munalula Linyati being a party to these proceedings as having been raised earlier, he did note that that is a matter for determination in the appeal. I will at the outset agree that those are issues to be determined during the appeal.

State Counsel also referred to a 1<sup>st</sup> and 2<sup>nd</sup> Appellant in this matter. The Supreme Court judgment dated 12<sup>th</sup> September, 2015, which involved an appeal against the Hon Judge C.R.F. Mchenga's ruling declining to join Sepiso Simonda, and the Attorney General as 2<sup>nd</sup> and 3<sup>rd</sup> Respondent respectively in the proceedings, on an application filed on 13<sup>th</sup> August, 2012, joined them to the proceedings. There is nowhere in that judgment where it is stated that either of the two were joined as Appellant. Page J28 of the judgment states that ***"it is for all these reasons that we are inclined to uphold the appeal on all grounds. The intended parties***



***should have been joined, and must now be joined to the proceedings in the lower court to enable the lower court deal effectively with all the matters in contention”.***

My understanding of the above statement is that the parties were joined in the capacity that they were sought to be joined, when the application was made before Hon Mr Justice C.R.F. Mchenga, which is 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. There is therefore no 2<sup>nd</sup> Appellant in these proceedings.

That being said, for me the crucial issue is whether this matter can proceed in view of the fact that the Appellant Munalula Linyati cannot be found, and therefore on that basis State Counsel is acting without instructions, which contravenes the provisions of Section 52 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia, and amounts to contempt of court as stated in Order 24 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia?

Section 52 (a) of the Legal Practitioners Act provides that;

***“No practitioner shall-***

***(a) take instructions in any case except from the party on whose behalf he is retained or some person who is the recognised agent of such party, or some servant, relation or friend authorised by the party to give such instructions; or***

Order 24 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia states that;

***“2. Any person doing any act or taking any proceeding in the name or on behalf of another person, not being lawfully authorised thereunto, and knowing himself not to be so authorised, shall be guilty of a contempt of court”.***

State Counsel in responding to the assertion that he is acting without instructions in this matter referred me to the affidavit dated 30<sup>th</sup> March, 2017. He did not elaborate on what in that affidavit he was referring me to. A perusal of the said affidavit which is an affidavit in support of an application for non- joinder of a party, and which is sworn by State Counsel himself states that Munalula Linyati was not a beneficial client to C.L. Mundia and Company, but was retained by the 2<sup>nd</sup> Appellant, Sepiso Simonda and his family. Paragraph 20 of the affidavit asks the court to join Sepiso Simonda as the 2<sup>nd</sup> Appellant, and that Munalula Linyati remains as 1<sup>st</sup> Appellant.

The said application for joinder has not been heard, and it cannot therefore be argued that Sepiso Simonda is a 2<sup>nd</sup> Appellant in this matter. Moreover the Supreme Court judgment dated 17<sup>th</sup> September, 2015 joined the said Sepiso Simonda as 2<sup>nd</sup> Respondent in the appeal, as it upheld the appeal that declined to join him as such. I have no jurisdiction to change that position. Further in light of the this position, State Counsel cannot argue as he did in this application, that Messrs D.Findaly and Associates are insisting that Sepiso Simonda is a Respondent in this matter, as the Supreme Court judgment did in fact join him as such.

I return to the question of whether State Counsel can proceed in the absence of the Appellant who it is on record that he represents. State Counsel did not deny that the letter exhibited as 'DF2' to the affidavit in support of this application is a letter authored by his firm, confirming that the Appellant Munalula Linyati cannot be found.

***Cordery's Law relating to Solicitors, 7<sup>th</sup> Edition by Graham J. Graham- Green, Londons Butterworths, 1981, at page 41 states that***



the general rule is that ***“it is optional to sue and defend in person or by solicitor.”***

In the case of **CAVMONT CAPITAL HOLDINGS PLC V LEWIS NATHAN ADVOCATES (Suing as a firm) SCZ No 6 of 2016**, the Supreme Court noted that Rule 3(2)(b) of the Legal Practitioners Rules under the Legal Practitioner’s Act, Chapter 30 of the Laws of Zambia recognizes that individuals have the right to choose which practitioner shall act for them, and at page J42 went on to state that clients give and withdraw instructions to Counsel at will, and that this is reinforced by Rule 3 (2)(b) referred to above. It was further stated in that case that the converse is also applicable, as practitioners are not tied to their clients, and they can as when they deem fit, withdraw from acting for a client, without justifying their decision.

Page 49 of ***Cordery’s Law relating to Solicitors, 7<sup>th</sup> Edition by Graham J. Graham- Green, Londons Butterworths, 1981***, states that a retainer is the foundation upon which the relationship of solicitor and client rests, and that without a retainer that relationship cannot come into being. It is further stated on that page that a retainer is a contract whereby in return for the client’s offer to employ the solicitor, the solicitor expressly or by implication undertakes to fulfil certain obligations.

As to the duration of the retainer, ***Cordery’s Law relating to Solicitors*** cited above at page 52 states that in the absence of any agreement to the contrary, the general rule is that when a client retains a solicitor, the solicitor contracts to finish the business for which he is retained, and that the rule applies to both contentious and non-contentious business. Therefore being a general rule, it has exceptions, and instances where

the retainer is terminated by either party, would be an exception to the rule.

In the case of **WARMINGTONS V MCMURRAY 1936 2 ALL ER 745**, the defendant had embarked upon a variety of investments and transactions which were likely to result in serious losses. She retained the plaintiffs generally to prosecute all such actions and proceedings as might be necessary to get her out of her difficulties. Having successfully prosecuted several matters the plaintiffs delivered a bill of costs. The defendant, while offering to meet all disbursements in arbitration proceedings which were then being prosecuted on her behalf, intimated that she could not pay anything further. The plaintiffs then discharged themselves from their retainer and delivered a second bill and brought this action upon both bills.

It was held in that case that ***"this was not a case of a solicitor retained to prosecute an action and no question of entire contract arose. The retainer here was one to prosecute a variety of matters and in such a case it was not reasonable that a solicitor should engage himself for an indefinite time without payment. In this case the solicitor could upon reasonable notice cease to act and sue for his costs."***

Thus the issue arising is whether the Appellant did instruct Messrs Christopher Mundia and Company to prosecute the appeal. The basis of the 1<sup>st</sup> Respondent arguing that Counsel has no instructions to proceed in this matter is on account of the Appellant being nowhere to be found, as there is exhibited to the affidavit in support of the application, 'DF2' which is correspondence from Messrs Christopher Mundia and Company, advocates for the Appellant to Messrs D. Findlay and



Associates. The letter is to the effect that they no longer have the Appellant's address.

Page 85 of ***Cordery's Law relating to Solicitors*** states that although it is common to employ a solicitor over an indefinite period, the retainer in each case is limited to the particular business in respect of which he is employed, and there is no such thing as a general relationship of solicitor and client of a standing and permanent character, for all occasions and for all purposes. It goes further to state that where the retainer is given for a particular transaction, the solicitor may transact only the business specified in the retainer, and that a general retainer will authorize all such matters as flow from the retainer.

In this case Messrs Christopher Mundia and Company are on record as having filed the Notice of Intention to Appeal against the judgment of the Subordinate Court on 10<sup>th</sup> April, 2006, on the Appellant's behalf. It can therefore be concluded that were retained to prosecute the appeal, and it follows that they have authority to prosecute this appeal. This is because there is no evidence on record to show that the Appellant has withdrawn his instructions from them or that they have done so.

In the affidavit in support of the application for joinder filed by State Counsel Christopher Mundia on 30<sup>th</sup> March, 2017, it is stated in paragraph 9 that the Appellant was not a beneficial client of his firm, as they were retained by the late Simonwa Simonda's family to prosecute the appeal, as the Appellant who was evicted was just staying in the servants quarter, and was not a beneficial owner of the property. Unless it can be shown that such an engagement or retainer was illegal, the assertions raised by Counsel for the 1<sup>st</sup> Respondent that Messrs

Christopher Mundia and Company have no authority to represent the Appellant cannot stand.

Issues relating to the remuneration of Counsel under the retainer are governed by the agreement that they have, and cannot be a basis of asserting lack of authority to prosecute the appeal. Therefore having not established that there was no retainer under which Messrs Christopher Mundia and Company can prosecute the appeal, or that instructions were withdrawn from the firm to so act, I find that Section 52 and Rule 35 of the Legal Practitioners Act, as well as Order 24 Rule 2 of the High Court Rules do not apply. The application on that basis will fail.

As regards the application for security for costs, the basis of the same, as shown in paragraph 5 of the affidavit in support of the application dated 2<sup>nd</sup> June, 2016 is that the 1<sup>st</sup> Respondent was awarded costs by the Supreme Court judgment dated 25<sup>th</sup> September, 2015. However they had been unable to recover the said costs from the Appellant, despite having written to the Appellant's advocates. That counsel for the Appellant had in the letter dated 15<sup>th</sup> October, 2015, exhibited as 'DF2' to the affidavit in support of the application, indicates that the Appellant's whereabouts are unknown.

The Appellant did not file an affidavit in opposition to that application.

Order 40 Rule 7 of the High Court Rules provides that;

***“The Court or a Judge may, on the application of any defendant, if it or he sees fit, require any plaintiff in any suit, either at the commencement or at any time during the progress thereof, to give security for costs to the satisfaction of the Court or a Judge, by deposit or otherwise, or to give***



***further or better security, and may require any defendant to give security, or further or better security, for the costs of any particular proceeding undertaken in his interest.”***

This Order does not specify the instances in which security for costs may ordered, but just empowers the court to do so. However Order 23 Rule 1 of the Rules of the Supreme Court, 1999 edition states that;

***“(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court -***

***(a) that the plaintiff is ordinarily resident out of the jurisdiction, or***

***(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or***

***(c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or***

***(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,***

***then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.***

***(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive."***

Order 23 deals with matters that come before the High Court by way of original jurisdiction. Order 55 Rule 7 (6) of the Rules of the Supreme Court, 1999 edition on the hand deals with appeals from lower courts and tribunals to the High Court. It states that ***"the Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just."***

The Order does not elaborate what the special circumstances are. However when one goes to Order 59 of the said Rules of the Supreme Court which deals with appeals to the Court of Appeal, they will note that Rule 10 (5) of that order provides that ***"the Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just"***.

Further Order 59/10/32 of the said Rules of the Supreme Court states that ***"Security for the costs of an appeal may be ordered where there are special circumstances which, in the opinion of the Court, render it just to order security, or on any statutory grounds. The categories of "special circumstances" are not closed. Recently security for costs orders have been made where it has been established that there would be undue delay or expense in enforcing an order for the costs of the appeal."***

***Cases decided on O.23 (which deals with security for costs in respect of actions and other proceedings at first instance)***



*provide some guidance in relation to the exercise of the Court's discretion in deciding whether to award security for the costs of an appeal; but caution must be exercised when seeking to rely on a case decided on O.23 as a basis for resisting the award of security for the costs of an appeal to the Court of Appeal. The reason is that the principles governing the award of security for costs at the Court of Appeal stage are wider and stricter than those applicable to the award of security for costs in the court below. For instance, security may not be awarded in the court below on the ground of the plaintiff's impecuniosity (unless the plaintiff is a company) but impecuniosity of the appellant is a ground for the award of security in the Court of Appeal (see para. 59/10/33). In deciding whether to award security for the costs of an appeal to the Court of Appeal, the Court takes into account the fact that the appellant has already had the issue concerned determined in the court below, and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce against the appellant any order for costs made by the Court of Appeal; but the Court retains a discretion whether to award security, and is not bound to do so in all cases where "special circumstances" are established (see further para. 59/10/39, below).*

*Security may be ordered against the appellant, whether he was plaintiff or defendant below and whether the appeal is from the High Court or an inferior court".*

Applying the above principles, the question is whether in this case there are special circumstances warranting the grant of an order for security for costs? As already seen the reason for the application is that the Appellant cannot be found. It is true that it would be unfair to allow the appeal to proceed in the absence of an order for security for costs if the Respondents were to succeed in the appeal, and would not be able to recover any costs that may be awarded. However taking into account that this is an appeal that will consider the propriety or otherwise of the decision of the court below, and that this court still retains discretion to award security for costs at this stage, I find that this is not a case where there are special circumstances warranting the grant of such an order, and the application fails on that basis.

With regard to the parties in this matter, the judgment of the Supreme Court dated 25<sup>th</sup> September, 2015, joined the appropriate parties to the proceedings, and I will therefore not consider any such application. The appeal shall come up on 19<sup>th</sup> February, 2018 at 09:00 hours. Costs shall be in the cause. Leave to appeal is granted.

**DATED THE 16<sup>th</sup> DAY OF NOVEMBER, 2017**

S. Kaunda  
**S.KAUNDA NEWA**  
**HIGH COURT JUDGE**