IN THE CONSTITUTIONAL COURT OF ZAMBIA **2022/CCZ/006**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

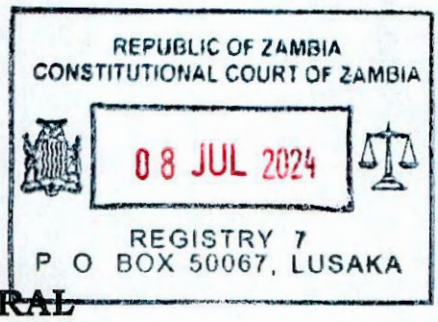
IN THE MATTER OF: **THE CONSTITUTION OF ZAMBIA, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ARTICLES 1, 1(5), 128, 173 (1) (a), (c), (g), 180 (7), 216 (c) AND 235 (b) OF THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **THE STATE PROCEEDINGS ACT, CHAPTER 71, VOLUME 6 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **SECTION 8 OF THE CONSTITUTIONAL COURT ACT, 2016**

BETWEEN:



MILINGO LUNGU **PETITIONER**

AND

THE ATTORNEY GENERAL **1st RESPONDENT**

ADMINISTRATOR GENERAL **2nd RESPONDENT**

For the Petitioner: **Mr. S. Sikota, SC of Messrs. Central Chambers together with Mr. M. Chitambala of Messrs. Lukona Chambers and Mr. J. Zimba of Messrs. Makebi Zulu Advocates**

For the 1st Respondent: **Mr. N. Mwiya, Principal State Advocate, Mr. K. Nalikebo, State Advocate at Attorney General Chambers and Mr. M. Nkunika of Messrs Simeza Sangwa & Associates**

For the 2nd Respondent: **No appearance**

Coram: M.M. Munalula, PC, A.M. Shilimi, DPC, A.M. Sitali, P. Mulonda, M.S. Mulenga, M. Musaluke, M. K. Chisunka, J.Z. Mulongoti, M.Z. Mwandenga, M.M. Kawimbe and K. Mulife JJC on the 8th July, 2024

MAJORITY RULING

Mwandenga, JC read the majority ruling of the Court.

Authorities referred to:

1. **John Sangwa v Attorney General 2021/CCZ/35**
2. **Sean Tembo (Suing as President of Patriots of Economic Progress) v The Attorney General 2018/CCZ/0007**

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act, 2016, No.2 of 2016**
2. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016**
3. **The Rules of the Supreme Court of England, 1965 (1999 Edition)**

Introduction

[1.] The petitioner originally filed the petition in this matter on

the 19th April, 2022. The respondents filed their answer and cross-petition on the 26th April, 2022. The petition was subsequently amended with leave of the Court on the 6th April, 2023. The petitioner alleges that Articles 1(3), 170(1),173(1)(a), (c) and (g),180(4)(a), (b) and(c) and (7) and 216(c) of the Constitution of Zambia (Amendment) Act, 2016, No. 2 of 2016 (the Constitution) were breached by the respondents.

[2.] This petition has had a checkered history in that the petitioner, the 1st respondent, the 2nd respondent and/or the alleged contemnor on divers occasions made all sorts of interlocutory applications. All in all, there were a total of 27 applications that were made by the parties, including the current application. 18 applications were made by the petitioner; 6 applications were made by the 1st respondent; 2 applications were made by the 2nd respondent; and 1 application was made by the alleged contemnor. In all the applications, the Court had occasion to make rulings and which rulings also in material respects in a majority of instances concerned or touched on costs of and incidental

to the applications. Regarding costs, in 10 of the applications, the Court said *"we make no order for costs"*, in one of the applications the Court said *"costs are in the cause"*, in 8 of the applications the Court said *"each party is to bear its own costs"* and yet in 7 other applications the Court was silent on the costs.

[3.] On 30th November, 2023 when the petition finally came up for hearing, the petitioner's advocates applied to have the matter adjourned *sine die* with liberty to restore on the ground that the parties had engaged each other with a view of reaching an *ex curia* settlement. This position was supported by the 1st respondent. Upon considering the application and in view of the possibility of an *ex curia* settlement, the matter was adjourned to the February Court session of 2024 for hearing and the Court indicated then that there would be no further adjournments to be allowed in this matter. On this application no order for costs was made.

[4.] The petition was cause listed for the February, 2024 Court session. It was scheduled to be heard on the 13th February,

2024. However, on the 12th February, 2024 the petitioner filed a notice of motion to discontinue the matter pursuant to Order X rule 3 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (CCR) as read together with Order 21 rule 3 of the Rules of the Supreme Court of England, 1965 (White Book) (RSC) (the application). The ground for the application was couched in this manner:

> **The Applicant desires to explore alternative ways of resolving all issues raised in this matter.**

[5.] The application is supported by a brief affidavit deposed to by the petitioner and filed into Court on the 12th February, 2024 (the affidavit in support).

[6.] The respondents did not file any court process in opposition to the application.

[7.] On the 13th February, 2024 when the petition came up for hearing, the application was made. The application was not opposed by the 1st respondent save that the 1st respondent asked for costs on account of the various applications (the interlocutory applications) that the

petitioner had made in this matter and after which the Court reserved its ruling.

[8.] This is the reserved ruling.

Affidavit evidence in support of the application

[9.] In the affidavit in support, the petitioner deposed that he commenced this matter by way of petition seeking reliefs against the respondents, including declarations of breach of Articles 216 and 173 of the Constitution. He also deposed that given the happenings in this matter it was the petitioner's considered view that this matter be taken out of court so that the parties could discuss its resolution away from Court. And that on this ground the petitioner wished to discontinue the matter.

[10.] It must however, be pointed out that the *"happenings in this matter"* referred to in the affidavit in support were not articulated or substantiated in the affidavit in support and/or in the arguments by the petitioner.

Hearing and arguments

[11.] At the hearing the 2nd respondent, was without explanation not present or represented by counsel.

[12.] The petitioner's counsel made the application. The thrust of the application, was that it was anchored on Order X rule 3 of the CCR. And that the reason for the discontinuation of this matter is that the petitioner wished to explore alternative means of resolving the dispute in this matter away from Court.

[13.] After the petitioner's counsel had made the application, it was intimated by all counsel representing the 1st respondent that they had no objection to the application.

[14.] In submitting on the same, counsel for the 1st respondent particularly Mr. Nkunika stated that the Court should take into consideration the costs that were occasioned to the 1st respondent through the interlocutory applications that had been made by the petitioner in this matter in accordance with Order X rule 3(2) of the CCR. He added that he was aware that the Court was reluctant to grant

costs and that guidance on costs was given in the case of **John Sangwa v Attorney General**[1].

[15.] In responding on the issue of costs, counsel for the petitioner Mr. Sikota, SC contended that indeed the case of **John Sangwa v Attorney General**[1] was instructive on the issue of costs in this Court, and that the 1st respondent had not given any particular reason to enable the Court to depart from the general position on costs. He pointed out that this matter raised novel constitutional issues, it was not frivolous and that to order costs in this matter would deter future intending litigants before the Court as they would fear to be condemned in costs on raising constitutional issues.

[16.] In adding to the State Counsel's submissions, Mr. Chitambala submitted that the request for costs by the 1st respondent flew in the teeth of the petitioner's application and that the request for costs was premised on the numerous interlocutory applications in this matter despite the record showing that costs for each application were

already settled by the Court. He thus prayed that the application be granted with no consideration as to costs.

[17.] In augmenting what was submitted by co-counsel, Mr. Zimba contended that the practice of Courts in our jurisdiction was to encourage parties to settle matters away from court and thereby save on judicial resources. He submitted that the petitioner, by his application, has taken a step to resolve the matter outside of Court and should therefore be commended and not condemned in costs.

[18.] Mr. Zimba prayed that this peoples' Court should make no order as to costs.

Consideration of the application

[19.] We have considered the application and the submissions tendered by counsel of the parties. The issues before us are essentially twofold:

(a) Whether the application should be granted; and

(b) Whether the petitioner should be condemned in costs if the application is granted.

[20.] It is convenient for us to begin our consideration of the first issue by taking cognizance of the fact that the CCR do have provisions for the discontinuance or withdrawal of a matter before the Court. In this regard Order X rule 3 of the CCR is the material provision and it provides as follows:

> **3. (1) A petitioner or an applicant may, at any stage before judgment, on notice to the Court and to the respondent, apply to discontinue a matter instituted under the Act.**
>
> **(2) The Court may, subject to an order regarding costs, allow the discontinuance or withdrawal of the matter.**
>
> **(3) Where the Court declines to grant an application to discontinue a matter, the Court shall give directions on the further conduct of the matter.**
>
> **(4) The parties may, with leave of the Court, record an amicable settlement reached by the parties in partial or final determination of the matter.** (Emphasis supplied)

[21.] From the oral submissions tendered by counsel for the petitioner at the hearing of this matter, it is palpably clear that the application was anchored on Order X rule 3 of the CCR despite the fact that the caption of the notice of motion for the application suggests that Order X rule 3 of the CCR should be read together with Order 21 rule 3 of the RSC. Order 21 rule 3 of the RSC, which also addresses the discontinuance of actions with leave of the Court, provides as follows:

> **3. (1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.**
>
> **(2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, rule 7.**

[22.] In this matter, as Order X rule 3 of the CCR provides for discontinuance of matters before the Court we take it that the application was indeed made pursuant to Order X rule 3 of the CCR only. And in any case, counsel for the petitioner, when making the application emphatically said and rightly so, that the application was anchored on Order X rule 3 of the CCR. Counsel made no mention of Order 21 rule 3 of the RSC at the hearing of the application. In this matter there is, therefore, absolutely no need for us to have recourse to Order 21 rule 3 of the RSC. The provisions of Order 1 rule 1 of the CCR which provide for resort to the RSC in case of default in our rules therefore do not apply.

[23.] The Court has had occasion to consider the import and meaning of Order X rule 3 of the CCR in the case of **Sean Tembo (Suing as President of Patriots of Economic Progress) v The Attorney General**[2] where the petitioner in that matter on his own volition elected to discontinue his petition and consequently applied to the Court so as to

discontinue the matter (which application was in fact opposed by the other party), this Court said:

> **It is clear from the foregoing that an application to discontinue a matter can be made at any stage of the proceedings before judgment by way of notice to the Court and the other party. The Rules do not provide for the giving of reasons. Rather, the discontinuance is subject to the discretion of the Court and an order regarding costs. It is for the court to decide whether to grant the application for discontinuance or to decline it, in which case the Court is to give direction as to how the matter is to continue under trial. The Court has discretion which is exercised on a case by case basis depending on the facts before it. However, the said discretionary power ought to be exercised judiciously and for good reason.**

[24.] This Court granted the application in the case of **Sean Tembo (Suing as President of Patriots of Economic Progress) v The Attorney General** [2] on account, *inter alia*, of the fact that the matter had not been heard substantively and that the requisite notice had been given.

[25.] After duly considering the application, we are of the firm view that there is no reason to decline the application. This is on account of the fact that in keeping with Order X rule 3 of the CCR, the petitioner on notice to the Court applied

to discontinue the matter. Further, the parties agree on the granting of an order to discontinue the matter despite the fact that counsel for the 1st respondent informed the Court that the notice of motion relating to the application had not been served on them. Service of the notice of motion appears not to have preoccupied the 1st respondent. The 1st respondent was, it appears, preoccupied with the issue of costs, which we will deal with later.

[26.] With the foregoing matters in mind, we therefore find it necessary and expedient that the application for an order to discontinue the matter be granted. However, the discontinuance of the petition does not in any way affect the cross-petition that was filed by the respondents and the notice of motion for an order for committal against Mr. Gilbert Andford Phiri that was filed by the petitioner on the 29th December, 2022. The latter proceedings were on the 16th November, 2023 adjourned to a date to be advised.

[27.] We now turn to the second issue: that of costs. In the words of Mr. Nkunika *"...the 1st Respondent does not*

oppose the application but only wishes to mention that the order that the court will make should take into consideration the costs that have been occasioned to the 1st Respondent through the various applications that have been made in the matter...."(Emphasis supplied) In essence therefore, the 1st respondent while not objecting to the application for discontinuance wanted the Court to condemn the petitioner in costs specifically on account of the various interlocutory applications that the petitioner hitherto had made in this matter. The petitioner strenuously opposed the application for costs as mentioned earlier in this ruling.

[28.] For convenience, we wish to start considering the second issue by reciting Order X rule 3 (2) of the CCR. It provides that:

> **3.(2) The Court may, subject to an order regarding costs, allow the discontinuance or withdrawal of the matter.**

[29.] The above cited provision clearly suggests that in allowing the discontinuance or withdrawal of a matter, costs have to be considered by the Court. Therefore, consideration of

the issue of costs is well founded in an application of discontinuance or withdrawal of a matter before the Court. The Court however, has the discretion to award or not to award costs when considering an application for discontinuance or withdrawal in keeping with section 30 of the Constitutional Court Act, No.8 of 2016 (CCA). Section 30 of the CCA provides that:

> **The Court has discretion to award costs in any proceedings under this Act.**

However, the Court's discretion in this regard must be exercised judiciously and with caution.

[30.] In the case of **John Sangwa v Attorney General**[1] the Court stated as follows:

> **We find, therefore, that section 30 of the CCA gives discretionary power to this Court to award costs as a safeguard to filter frivolous and vexatious litigation, among others. The discretion under section 30 of the CCA must however, be exercised judiciously and where frivolous or vexatious litigation is proved by facts presented an award of costs against an unsuccessful litigant can be ordered. This aligns with the fact that an award of costs in constitutional litigation is a**

matter, which is in the discretion of the judge or Court." (Emphasis supplied)

[31.] Further, this Court in considering the issue of costs following an application for discontinuance of a matter in the case of **Sean Tembo (Suing as President of Patriots of Economic Progress) v The Attorney General**[2] when discussing the issue of costs under Order X rule 3 (2) of the CCR stated as follows:

> **The Rule as framed does not fetter the Court's discretion in determining questions of costs. Rather, the Rule entails that the Court's discretion to grant a discontinuance is accompanied by consideration of the issue of costs. In the case of B.P. Zambia PLC v Zambia Competition Commission, Total Aviation and Export, Total Zambia Limited the Supreme Court stated, and we agree, that costs are in the discretion of the Court ...this discretion should be exercised judiciously and with caution.**

[32.] We have perused the record, and we agree with the petitioner that indeed each and every interlocutory application that was brought before us was ruled upon and the issue of costs of and incidental to the applications was

in most of the applications pronounced upon or not pronounced upon. Therefore, asking this Court to award the 1st respondent costs specifically on account of the previous applications at this stage in this matter, is akin to the 1st respondent asking the Court to review and/or reverse the orders on costs that were made on each and every interlocutory application that the petitioner, the respondents and/or the intended contemnor made. The decisions of this Court on costs in the previous applications are final. Once the Court has fully exercised its jurisdiction, its authority over the matter ceases. Further there is also a public interest consideration in bringing litigation to finality. It is imperative that parties must be alive to the fact that once an order of the Court has been made, it is by and large final and they should be able to arrange their affairs in keeping with that order.

[33.] Therefore, in the circumstances of this matter, the interlocutory applications that were made by the petitioner cannot successfully be used as the basis upon which the

petitioner should be condemned in costs on discontinuing this matter following the application.

[34.] In further considering the issue of costs, we opine that the petition on the face of it, intended to raise constitutional issues against the state (*inter alia* challenging the exercise of certain constitutional powers by the Director of Public Prosecutions) but the petitioner has now elected to discontinue the matter in the manner that is provided for by the CCR to explore an *ex curia* settlement.

[35.] In keeping with Article 118(2)(d) of the Constitution the Court is also guided by *inter alia* the principle on the need to promote alternative forms of dispute resolution. Article 118(2)(d) of the Constitution provides that:

> **In exercising judicial authority, the courts shall be guided by the following principles:**
>
> **...(d) alternative forms of dispute resolution, including traditional dispute resolution mechanism, shall be promoted subject to clause (3); ....**(Emphasis supplied)

[36.] The guiding principles set out in Article 118(2)(d) of the Constitution are couched in mandatory terms and must

therefore be followed to the hilt. The Constitution, however, does not prescribe when this principle is supposed to be applied. In our view the same can be applied at any stage, in the proceedings but before judgment. In this matter, given the fact that the parties are seemingly intent on settling this matter *ex curia,* the Court is duty bound to promote such an endeavour by encouraging the parties to do so and should therefore be slow in condemning the petitioner in costs.

[37.] With the foregoing matters, in mind we come to the ineluctable conclusion that this is not a proper case in which the Court can condemn the petitioner in costs. Each party therefore, shall bear their own costs.

A. M. SITALI
CONSTITUTIONAL COURT JUDGE

P. MULONDA
CONSTITUTIONAL COURT JUDGE

M.S. MULENGA
CONSTITUTIONAL COURT JUDGE

M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

M.Z. MWANDENGA
CONSTITUTIONAL COURT JUDGE

Munalula, PC., Shilimi, DPC., Mulongoti, JC., Kawimbe, JC., Mulife, JC., dissenting

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **The Constitutional Court Rules SI No. 37 of 2016**
3. **The Rules of the Supreme Court, 1999 Edition Volume 1 (White Book)**

Cases referred to:

1. **Bowman Lusambo v Attorney General 2023/CCZ/001**
2. **Sean Tembo v Attorney General 2018/CCZ/007**
3. **John Sangwa v Attorney General 2021/CCZ/35**

[1] We agree with the majority ruling that the petitioner should be granted leave to discontinue his petition. We however disagree with the majority on their position on costs, hence, this dissent. In doing so, we shall briefly reprise some of the pertinent facts in the petition in order to place our opinion in proper context.

[2] This matter was commenced by way of petition on 19th April, 2022. Prior to this date, the petitioner had been appearing before the Economic and Financial Crimes Court in the Subordinate Court on allegations of economic crimes. During the course of those proceedings, he decided to petition this

Court contrary to Article 128 (2) of the Constitution, which provides that:

> **(2) Subject to Article 28 (2), where a question relating to the Constitution arises in Court, the person presiding in that Court shall refer the question to the Constitutional Court.**

[3] In his petition before this Court, and after circumventing the requirements of Article 128 (2) of the Constitution, the petitioner principally claimed the violation of his constitutional rights and sought a stay of the criminal proceedings before the Economic and Financial Crimes Court in the Subordinate Court through a separate application. It was heard by a single Judge who granted the interim order.

[4] This for us presented the first challenge with the majority ruling, in that they overlooked the fact that the only way the petitioner's alleged constitutional issues if any, should have been addressed in this Court, is under Article 128 (2) of the Constitution by the Subordinate Court referring them to this Court. Only the Court before whom a person is appearing has power to refer constitutional issues to this Court once it

determines so and there is no appeal to such a ruling or determination.

[5] Furthermore, in our view, the petitioner's application for a stay was *prima facie* frivolous and vexatious and would have suffered the same fate, pronounced by the Court in the case **Bowman Lusambo v Attorney General**[1], where we emphatically stated that the Constitutional Court has no jurisdiction to stay criminal proceedings.

[6] Consequently, there is no foundation in the view expressed in the majority ruling, that the petition on the face of it raises constitutional issues against the State, *"inter alia* challenging the exercise of certain constitutional powers of the Director of Public Prosecutions".

[7] The reasons in the majority ruling, which appear to touch on the merits favouring the petitioner's case, are presumptuous and have no foundation. More so that the parties herein, never presented their arguments on the merits, entailing that there was no substantive hearing ever held. In fact, the record of proceedings shows that there is no point, at which, the Court ventured into the merits of this case by settling whether or not there was any constitutional issue raised in the petition.

[8] We have further observed that there is a proposition in the majority ruling that Article 118 (2) (d) of the Constitution on alternative forms of dispute resolution has a bearing on this matter. We wish to dispel this postulation because it stems from a narrow perspective, and tilts in favour of the petitioner's rights as opposed to all the parties. Our duty as a Court is far more reaching than what was derived by the majority on the import of Article 118 (2) (d). In our view, the Article should be read wholesomely with Article 118 (1) which provides that:

> ***(1) The judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability*** *(emphasis our own)*

[9] Put differently, doing justice is not only about hearing cases or promoting solutions without giving reasons for taking a particular course of action. Being just, in our view is about the parties or litigants who appear before Courts, being accorded equal treatment with predictable outcomes in law especially, where remedies are provided in the statute books. Certainly, advancing a reason that awarding costs would

impede *ex curia* settlement negotiations is in our view flawed at law.

[10] For these reasons, we must disagree with the majority ruling that the repercussions set in the law to ensure the orderly conduct of cases and flow of remedies can be ignored, especially where parties abandon cases. Article 118 (2) (d) of the Constitution is one of the guiding principles that should guide the exercise of judicial authority, and wherever possible, alternative forms of dispute resolution should be promoted in consonance with the legal principles that enable the full implementation of the Constitution and the law. We [full bench] did on two occasions adjourn this matter to allow the parties to engage in ex curia settlement.

[11] Article 118 (2)(d) of the Constitution does not turn on this application, neither do we view Order X Rule 3 of the Constitutional Court Rules (CCR) to be in conflict with the Constitution. As a result, we are unable to accept the majority view that we should be dissuaded by the alleged *ex curia* negotiations between the parties in making an order for costs.

[12] On the substantive discussion on costs, Order X Rule 3 of the CCR grants the Court discretion to award costs in

discontinued suits. The majority position suffices on opining that the Court has dealt with questions of costs in the cases of **Sean Tembo v Attorney General**[2] and **John Sangwa v Attorney General**[3]. We also agree that the discretionary power in allocating costs by Courts cannot be generalized and needs to be assessed in each case against its peculiar circumstances. In the case of a discontinued matter, our view is that broader consideration would be required.

[13] Suffice to state that litigation carries with it abundant obligations, which include adherence to court rules both procedural and substantive, timely preparation of numerous documents, filing of various pleadings and documents, as well as complying with the Judge's order for directions.

[14] So far, the record of proceedings shows that the parties made twenty-nine (29) applications in this matter and the Court dealt with all of them. Out of these, the Court issued eleven (11) written rulings; the parties were ordered to bear their own costs in nine (9) of these. In the remaining two (2) the Court ordered that costs would be in the cause in one while it remained silent on the issue in the other. Essentially, this entailed that the issue of costs was not resolved in all the

rulings and could therefore, be legitimately raised by the parties in the remaining two.

[15] Be that as it may, what is before us is an application for costs after the petitioner discontinued his case. This means that the petitioner who sued the respondents decided to abandon his case, and where this eventually occurs, the law is settled in terms of Order X Rule 3 of the CCR, that such action must be sanctioned by the Court subject to its decision on costs. At least speaking for ourselves, we are not convinced that the law places a duty on a litigant (respondent) to mount a strong argument for costs. Rather, it is for the Court exercising its discretionary power in a discontinued case, to decide whether it will award costs or not. For the majority to say that costs have been dealt with completely, and awarding costs is tantamount to review of the previous rulings, is ignoring the issue of costs that were in the cause and still to be considered.

[16] We are mindful that the CCR do not elaborate the factors on allocation of costs in discontinued suits. We however, recognize that Order 1 Rule 2 of the CCR enjoins us to the Rules of the Supreme Court (RSC) 1999, Edition Volume 1 (White Book) to the extent that where our Rules do not make

provision for any particular point of practice or procedure, we may resort to the White Book as we now proceed to do.

[17] The White Book provides therein, that for discontinued matters, the factors to be considered on the allocation of costs are provided in **Order 21/3 of the RSC**. More particularly, the explanatory note to the provision states that much as costs are in the discretion of the Court, in discontinued matters, the general rule is that a defendant (the respondents, herein) are entitled to costs. The exception to the general rule is only where the discontinuance of the proceedings is due to the matter having become academic.

[18] For completeness, relevant passages of the explanatory note are reproduced hereunder:

> **The Court has a wide discretion as to the terms upon which it may grant leave to a plaintiff or defendant, as the case may be, to discontinue or withdraw the whole or part of the action or counterclaim. It may impose terms as to costs, as to the bringing of a subsequent action or otherwise as it thinks just. (1) As to costs – the order should provide for the payment of the costs of the action. <u>The general rule that a defendant is entitled to costs when an action is discontinued may be departed from in a case</u>**

> **where the discontinuance of the proceedings is due to the matter having become academic... (Barretts & Baird (Wholesale) Ltd v. Institute of Professional Civil Servants, The Independent, December 9, 1988; (1988) New L.J 357). If the order gives leave to discontinue on the payment of costs, the action survives until the costs are paid ...** *(underlining for emphasis)*

[19] Applying the law to the facts of this case, it is clear that the petition before us has not become academic. Rather, it was abandoned by the petitioner who allegedly desires to engage the respondents in *ex curia* negotiations. Surely, this cannot be a basis for denying the respondents costs in the face of Order X Rule 3 of the CCR. For the power exercised therein, for the sake of emphasis lies within the discretion of the Court ONLY and can be made without taking into account any predicating factors prior to the filing of a notice of discontinuance.

[20] We have no doubt from the record of proceedings, that the petitioner put the respondents to great expense. Thus, it would be unjust, to expect the citizens of this country to bear the costs of these proceedings through the State, which is funded by taxpayers.

[21] As we stated above, the 1st respondent's prayer for costs is premised on the provision of Order X Rule 3 of the CCR on discontinuance of suits. This provision, we must emphasise, is independent of the previous applications or Rulings on costs that were made. This is because when an issue of costs arises at the point of discontinuance, the law states that it will be considered in the absence of any antecedents. This is why Order X Rule 3 of the CCR specifically empowers the Court to allow parties to discontinue their suits subject to the allocation of costs.

[22] For the foregoing, we are not drawn to the position of the majority that the Court would be attempting to review or reverse any orders on costs it has made in this case if it awarded costs at the point of discontinuance. We accordingly find this position flawed.

[23] As we conclude, we wish to reaffirm that this is a proper case where costs must be awarded against the petitioner for the discontinuance.

M.M MUNALULA (JSD)
PRESIDENT, CONSTITUTIONAL COURT

A.M SHILIMI
DEPUTY PRESIDENT, CONSTITUTIONAL COURT

J.Z MULONGOTI
CONSTITUTIONAL COURT JUDGE

M.M KAWIMBE
CONSTITUTIONAL COURT JUDGE

K. MULIFE
CONSTITUTIONAL COURT JUDGE