**IN THE HIGH COURT FOR ZAMBIA** **2010/HP/A. 23**
**AT THE LUSAKA PRINCIPAL REGISTRY**
(Civil Appellate Jurisdiction)

**BETWEEN:**

**MOSES LUNGU** **APPELLANT**

**AND**

**NKHOSI BREWERIES LTD** **RESPONDENT**

**BEFORE The Honourable Mrs. Justice J. K. Kabuka in Open Court the 13th day of October, 2011.**

**For the Appellant:** **In Person**

**For the Respondent:** **Mr. Tembo, Messrs. Tembo, Ngulube Associates**

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**JUDGMENT**

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**Cases referred to:**

1. Lukama and others vs.LINTCO of Zambia SCJ 8/1988
2. Bank of Zambia vs. Caroline Anderson and Anderson (1993) SJ 41 (SC)
3. Matale James Kabwe vs. Mulungushi investments Limited. Appeal no. 90/1996
4. Collet vs. Van Zyl Brothers Limited (1966) ZR 65 (CA)
5. Mutale vs. Zambia Consolidated Coppermines (1993 – 1994) ZR 94 (SC)

6. Scherer vs. Counting Investments Limited (1986) 1 WLR 615 at 621



**Legislation referred to:**

High Court Rules Cap. 27 Order 47 Rule. 20

The Judgments Act Cap. 81 S.2

This appeal by the Appellant is against a decision of a Subordinate Court which dismissed his application for review of a judgment delivered by another magistrate, who had since left the Judiciary.

The background to the matter is that the Appellant who was also the plaintiff in the court below, had issued a Default Writ of Summons from the Subordinate Court at Lusaka on 16th December, 2005. In it he claimed payment of an agreed sum of K4, 000, 000 from the Respondent company which was the defendant, for maintenance services provided at its Kafue Brewery Plant. He also claimed for extra jobs undertaken, at a cost of K1, 450, 000 and K36, 000 daily transport expenses incurred for a period of 15 days amounting to K540, 000. This brought the total claim to K5, 990, 000. The writ was also endorsed with court fees in the sum of K16, 500 and costs for K20, 000.

After effecting service and filing an affidavit to that effect into court, the Appellant applied for entry of judgment in default of defence. This was granted and a notice of judgment dated 12th January 2006, issued by the court. The following day, on the 13th day of January 2006, the Respondent



applied for stay of execution pending application to set aside the default judgment and the court granted the order accordingly on 17th January, 2006. When the application for setting aside judgment came up for hearing, on 7th February, 2006 there was no attendance on the part of the Respondent upon which the court discharged the ex-parte order.

On 17th July, 2006 the Appellant proceeded to issue a writ of fieri facias for the sum claimed including court fees and costs. The following day 18th July, 2006 the Respondent's advocates applied to have execution of the fi. fa. stayed, pending hearing of the application to set aside the default judgment. This order was granted on 20th July, 2006. On 22nd November, 2006 the application to set aside judgment was granted. Consequently, Notices of hearing were issued for 28th December, 2006. There was no attendance on the part of the Respondent on the latter date and as no explanation had been communicated to the court, the trial magistrate proceeded to hear evidence from the

Appellant and entered judgment in his favour, as in the writ claimed.

Following this development the Respondent caused a sum of K1.2 Million to be paid into court. However, Notices of Hearing on the balance were issued for 23rd January, 2011 and later to 27th March, 2007. On this latter date there was again, no attendance on the part of the Respondent. The court heard the Appellant and entered judgment in his favour.



On the 23rd of April 2007, the Respondent's advocates applied for review of the judgment aforesaid, pursuant to Order 38 of the Subordinate Court Civil Procedure Rules (SCCPR). They also obtained an ex-parte Order for stay of execution pending hearing of their said application on 10th July, 2007. When the matter came up as scheduled, the court granted the order for review sought, after which it ordered trial to continue. The Respondent gave its evidence in defence by calling two witnesses and closed its case.

Judgment was delivered on 11th November 2007, in favour of the Appellant. The court further ordered each party to bear own costs of the action. Aggrieved with the said order, the Appellant applied for review of the judgment to award him costs and interest.

At the hearing of the application, the magistrate who heard the matter had since resigned his position and the application was instead heard by a different magistrate. In its affidavit in opposition, the Respondent contended the application for review under 0.38 was premised on grounds of fresh evidence that had come to the attention of the Applicant, after the decision. There being no such evidence, the application under the said order was misconceived. That the judgment debt had since been paid by the Respondent and if the Appellant was dissatisfied with any aspect of the judgment, the right course to pursue the matter, was by way of appeal.



In dismissing the application for review, the magistrate who heard the same observed that the trial court's order was clear that "each party was to bear own costs." The court went further to state that "costs were meant to pay counsel and not lay persons." For the said reasons, the court concluded by noting, the application was frivolous and vexations.

The Appellant now appeals against the said order on the following grounds:

1. *The Learned magistrate erred both in law and fact in that she relied on the order of the previous magistrate.*

2. *The Appellant herein relies on the first judgment which was delivered on the 6th of April, 2007.*

At the hearing of the appeal, Learned Counsel for the Respondent and the Appellant who was prosecuting the appeal in person, opted to rely wholly on written submissions.

In his written submissions which were rolled up with arguments, the Appellant tried to give the background of the proceedings which in
substance, is as earlier herein highlighted. This was in apparent justification of his claims for interest and costs. He concluded by stating:



> *"It is my submission therefore, that the plaintiff is entitled to be paid costs and interest as prayed in his default Writ of Summons of 16th December, 2005.*
>
> *It is my prayer to this honourable court that judgment of 6th April, 2007 be upheld."*

In response, Learned counsel for Respondent submitted on ground one, that: the court below cannot be said to have erred both in Law and fact for relying on the order of the previous

magistrate; which dismissed the claim for review of the decision for each party to bear own costs. In this regard, this court was invited to take judicial notice of the fact that, where a magistrate presiding over a matter has been transferred to another District and another magistrate takes over conduct of the matter. This other magistrate does not have to commence proceedings *de novo* unless compelled by law, under the circumstances, to do so.

On ground two, the argument was that the judgment of 6th April 2007, sought to be relied on by the Appellant, was set aside on 10th July, 2007. The matter was subsequently heard on the merits and judgment granted in favour of the Appellant. The Court below also ordered each party to bear
own costs and the Respondent had already paid the Appellant his dues as ordered by the court below. The Appellant cannot now seek to enjoy the



fruits of a judgment that is not in existence and the said proposition has no legal support.

The court was urged to dismiss the appeal.

I have perused the record from the court below, considered the submissions from both the Appellant and Respondent's counsel in the context of the grounds of appeal and within the purview of

Order 47 of the High Court Rules, providing for Appeals from the subordinate Courts. Generally, this order provides for how the High Court must deal with such appeals. In particular, Rule 20 thereof specifically empowers the court to identify the real question in controversy giving rise to the appeal. It is to be assumed in this regard, particularly considering Rule 21, that the intention of the framers was to enhance the general supervisory role of the High Court over the Subordinate courts, as well as to advance the ends of justice for unrepresented Appellants who might not be able to articulate their cases clearly. The submissions of learned Counsel for the Respondent, have clearly brought out the latter aspect.

Order 47 rules 20 and 21 read as follows:

> **“20. The court may from time to time, make any order necessary for determining the real question in controversy in the appeal …….and generally, shall**



> **have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as a court of first instance, and may rehear the whole case, or may remit it to the court below to be reheard,**

**or to be otherwise dealt with as the court directs".**

**"21. The court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other orders as the case may require, including any order as to costs. These powers may be exercised by the court, notwithstanding that the appellant may have asked that part of a decision may be reversed or varied, and also be exercised in favour of all or any of the Respondent or parties, although such Respondents or parties may not have appealed from or complained of the decision."**

In line with this order and the rules referred to, I find the source of the grievance are the issues of interest and costs and the real questions in controversy in this appeal can be stated as follows:



1. *Whether interest on a judgment debt is payable even where it was not specifically claimed in the Writ, Default Writ or such other originating process.*

2. *Whether a successful litigant who is acting in person, can be denied his costs of prosecuting or defending the action, in the absence of any malafides on his part in the conduct of the matter.*

In **Lukama and others vs. LINTCO of Zambia SCJ 8/1988 (1)** the discretionary power of the court to grant interest generally, was considered.

The Judgments Act Cap. 81 of the Laws of Zambia, as amended, also states under S.2 that:

> **"Every judgment, order, or decree of the High Court or of a Subordinate Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the Court which shall not exceed the current Lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied and such interest may be levied**

**under a writ of execution on such judgment, order or decree".**

In terms of the said section as amended, interest is now payable on judgment debts at current bank lending rate from the date of the judgment to the date of payment. The Legal Position is accordingly that, interest on judgments is due, by virtue of the Judgments Act, whether or not claimed for by the litigant in the writ. The endorsement in the Default Writ issued by the Appellant in the court below discloses the Appellant did not claim interest, contrary to his submissions on appeal, herein. Hence, I am not here dealing with interest before judgment, but rather interest after judgment. The two are separate and distinct. As held in the case of **Bank of Zambia vs. Caroline Anderson and Anderson (2):**

*"..... when a judgment of the court is given, any principal and*

*interest merge into the judgment debt.....*

*interest after judgment on a judgment debt is entirely separate*

*from interest awarded in the judgment."*

The first ground of appeal thus succeeds. The Appellant will have his interest on the judgment debt at current bank lending rate from the 6th of November, 2007 to the date the judgment debt was paid by the Respondent.

On the second ground relating to costs, although the award of costs is in the discretion of the court. The general rule is that a successful party should not be deprived of his costs unless his conduct in the course of the proceedings merits the court's displeasure; or unless his success is more apparent than real, for instance where only nominal damages are awarded: **Mutale vs. Zambia consolidated Coppermines Limited (3)**. In the earlier case of **Collet Van Zyl Brothers Ltd (4)** the court of Appeal held:

> "*The award of costs in an action is at the discretion of a trial judge, such discretion to be exercised judicially".*

> "*A trial judge, in exercise of his discretion, should, as a matter of principle, view the litigation as a whole and see what was the substantial result. Where he does not do so, the Court of Appeal is entitled to review the exercise of his discretion".*

The principles governing the award of costs were summarized by Budley LJ, in the case of **Scherer vs. Counting Investments limited (5)** where he stated:

*"The normal rule is that costs follow the event. The party who seems to have unjustifiably brought another party before the*



*court or given another party cause to obtain his rights, is required to recompense that other party in costs, but; the*
*Judge has unlimited discretion to make what order as to costs he considers that the justice of the case requires. Consequently, a successful party has a reasonable expectation of obtaining an order to be paid the costs by the opposing party but has no right to such an order for it depends upon the exercise of the court's discretion".*

This holding was adopted by our Supreme Court in the case of **Matale James Kabwe vs. Mulungushi Investments Limited (6).**

It is also trite Law that in our jurisdiction the legal position is that, a successful Litigant acting in person is generally entitled to costs; and where such costs are awarded, they are limited to out of pocket expenses and disbursements actually incurred; in prosecuting or defending the action. Such costs do not include

“profit costs” which are only chargeable by a Legal Practitioner for professional services rendered to a litigant. This is the distinction that the trial magistrate overlooked when she dismissed the Appellant’s application for review, on that account.

The record shows, there were numerous sittings all occasioned by non attendance on the part of the Respondent or default in taking



necessary action within the period prescribed by Law. Consequently, there was procrastination in concluding the matter, this entailed monetary expenses for the numerous court attendances, at least by the Appellant. The Appellant having ultimately wholly succeeded on his claim was a successful litigant who is justified to claim payment for costs incurred in prosecuting his case.

For the reasons given, I find the order for each party to bear own costs of the action, made by the court below; was not judicially exercised, in the circumstances of this case; and is hereby set aside. In place thereof, I order that the Appellant recovers his costs reasonably incurred in prosecuting his claim in the court below. The Appellant will also have his costs of this appeal. Such costs are to be agreed or taxed in default of agreement.

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**J. K. KABUKA**
**JUDGE**