

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

2014/HP/A.047

(Civil Jurisdiction)

BETWEEN

KITCHENWARE INDUSTRIES LIMITED

APPELLANT

AND

JAMES MUSHANGA

RESPONDENT

***Before: Hon. Judge B.M.M. Mung'omba on this 10th day of
December, 2014.***

For the Appellant: Mr. N. Ng'andu of Messrs Shamwana & Co

For the Respondent: In Person

JUDGMENT

Statutes Referred To:

1. The Subordinate Court Act Cap. 28; O. XIII

Cases Referred To:

**1. *DBZ & Anor vs. Sunvest Limited and Anor (1995-1997) ZR
187.***

**2. *BP Zambia PLC vs. Interland & Motors Ltd (2001) ZR 37 at
42***

**3. *David Mwanza vs Finance Building Society (2010) Z.R.
299 Vol. 3.***

This is an appeal against the ruling dated 26th July, 2013 delivered by the Court below. The brief facts of the case are that on 31st December, 2012, the Respondent, who was the Plaintiff in the lower Court, took out Default Writ of Summons under Cause No. 2012/CRMP/1305 claiming K14, 088.00 being unpaid debt for services rendered.

Before the matter could proceed to trial, the Appellant, who was the Defendant in the Court below, sought to strike out the default writ for irregularity. By the ruling of Honorable Mikalile dated 19th June, 2013, the Default writ under Cause No. 2012/CRMP/1305 was struck out for irregularity. The irregularity being that the Respondent did not sue in his personal names as sole trader.

After the said default writ was struck out, the Respondent, on the same date of the ruling referred to above, 19th June, 2013, commenced another action under Cause No. 2013/CRMP/0686 claiming the same unpaid debt of K14, 088.00.

The Appellant then applied by way of summons to stay proceedings pending the discontinuance of Cause No. 2012/CRMP/1305 and payment of costs pursuant to **Order XIII of the Subordinate Court Rules of the Subordinate Court Act Chapter 28** of the Laws of Zambia. This provision enacts:

“1. If, before the date fixed for the hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his alleged claim, he shall give notice in writing of discontinuance or withdrawal to the clerk of the court and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice, such defendant shall not be entitled to any further costs, with respect to the matter so discontinued or withdrawn, than those incurred up to the receipt of such notice unless the court shall otherwise order; and such

defendant **may** apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit. If, in any other case, the plaintiff desires to discontinue any suit or to withdraw any part of his alleged claim, or if a defendant desires to discontinue or withdraw his counter-claim or any part thereof, such discontinuance or withdrawal may, in the discretion of the court, be allowed on such terms as to costs and as to any subsequent suit and otherwise as to the court may seem just. Discontinuance of suit.

2. *If any subsequent suit shall be brought before payment of the costs of a discontinued suit, for the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid”.*

This application was heard on 26th July, 2013 before Honorable Wishimanga resulting in the following ruling:

“Having heard Counsel and the Plaintiff on an application to stay proceedings pending discontinuance of Cause No. 2012/CRMP/1305 and payment of costs; Order XIII rule 2 of the Subordinate Court rules states that “if any subsequent suit shall be brought before payment of the costs of a discontinued suit for the same or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid”. This does not apply to a case that has been struck out for irregularity but where the Plaintiff has applied for a discontinuance of the matter and decides to sue again on the same matter. If he has not paid costs of the first case then the court on an application to stay proceedings until the costs are paid shall be granted.

However, having perused through the record 2012/CRMP/1305 before Hon. Mikalile, the case was struck out for irregularity by the court and not by the Plaintiff and I also note the costs were not awarded to either party.

Therefore it means that the Plaintiff was not to pay costs for the Cause that was before court in the premises this application is dismissed and parties to bear their own costs”.

Being dissatisfied with the above ruling, the Appellant now appeals to this Court advancing two grounds:

- 1. That the Learned Magistrate erred in law and in fact when she refused to stay proceedings pending the discontinuance of cause number 2012/CRMP/1305 as the two actions are in respect of the same cause of action.*
- 2. That the Learned Magistrate misdirected herself in law and in fact when she held that the Respondent was not to pay for the costs for Cause number 2012/CRMP/1305 before commencing cause number 2013/CRMP/ 0686.*

When I heard this appeal on 28th October, 2014, Mr. Ng’andu, Counsel for the Appellant proposed to argue the appeal by way of written heads of arguments. The Respondent, who appeared in person, offered no objection. I accordingly so ordered and adjourned the matter to 3rd December, 2014 for judgment.

On 31st October, 2014, the Appellant filed into Court its written submissions. In support of ground one of appeal, it was submitted that the Ruling of Honorable Mikalile on 19th June 2013, did not dismiss the process under Cause No. 2012/CRMP/1305 but that it was merely struck. On the meaning of ‘strike’ and ‘dismiss’ Counsel referred to the Black’s Law Dictionary, 9th Edition, 2009. At page 1559, this authority defines ‘strike’ as meaning ‘to expunge, as from a record.’ Dismissal on the other hand, is taken to mean ‘Termination of an action or claim without further hearing, especially before the trial of the issues involved.’

On this authority, Counsel contended that the effect of striking out the Default Writ of Summons under cause number 2012/CRMP/1305 was simply to expunge the aforementioned document from the record. It did not defeat the action in its entirety, as there was no bar to the Respondent in filing an amended default writ of summons in his own name, in the manner under 2013/CRMP/686.

The Appellant argues that because the Respondent's claim under 2012/CRMP/1305 was not dismissed, the action has not been terminated without any further hearing. According to Counsel, when cause number 2013/CRMP/686 was commenced based on the same subject matter as 2012/CRMP/1305, it has created a situation of two actions arising out of the same subject matter and before two Courts of equal jurisdiction. On this point, Counsel drew my attention to Section 7 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia.

Counsel further drew my attention to the Supreme Court decision in the case of ***Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceutical limited (1995 - 1997) Z.R. 187.*** ⁽¹⁾ In this case, the Court disapproved parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter.

He also referred the Court to case of ***BP Zambia PLC vs. Interland and Motors Ltd (2001) Z.R. 37*** ⁽²⁾ at 42 where it was stated that:

"A party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if

a party managed to get conflicting decisions or decisions which undermined each other from two or more different judges over the same subject matter.”

According to Counsel, the situation which has been created by the Respondent is therefore open to abuse and manipulation by the Respondent, to the prejudice of the Appellant. In Counsel's view, the Respondent cannot seek to pursue his claim under 2013/CRMP /686, when 2012/CRMP/1305 is still on the active cause list, as there is a real likelihood that the administration of justice would be brought into disrepute.

Further, it was submitted that if the Respondent seeks to pursue his claim under 2013/CRMP/686, the Respondent is empowered under Order VIII of the Subordinate Court Rules, Chapter 28 of the Laws of Zambia, to discontinue his suit against the Appellant under 2012/CRMP/1305.

According to the Appellant, the Respondent cannot have two bites of the same cherry, which is costly not only to the Appellant but more importantly, the Court, which will have to hear the Respondent's claim against the Appellant. Without finality being brought to the proceedings of 2012/CRMP/1305, it was only fair and just for the Court below under 2013/CRMP/686, to have stayed proceedings pending the discontinuance by the Respondent with his claim under 2012/CRMP/1305, Counsel submitted.

On ground two, Counsel stated that where proceedings are discontinued or withdrawn pursuant to Order VIII Rule 1 of the Subordinate Court Rules, a Defendant is entitled to costs incurred before the receipt of such notice and of attending the Court to obtain the order for costs unless the Court directs otherwise.

In this case, though the Appellant was not awarded costs when the default writ of summons under 2012/CRMP /1305 was struck out and not dismissed, Counsel argues that the costs which will be payable to the Appellant, arise only when the Respondent has discontinued proceedings under 2012/CRMP/1305 to bring finality to those proceedings before continuing with those under 2013/CRMP/686.

He contends that learned Magistrate therefore misdirected herself in law and in fact when she held that the Respondent was not to pay for the costs for cause number 2012/CRMP/1305 before commencing cause number 2013/CRMP /686, as the basis of the costs, was not the application to strike out the default writ of summons under 2012/CRMP/1305 but rather the discontinuance or withdrawal of those proceedings.

The Respondent also filed his written submissions which I have taken into account in arriving at my decision in this appeal.

I have seriously considered the issues raised and argued in this appeal. I have also referred to the submissions by Counsel and the authorities cited therein.

The Appellant has strongly argued in ground one of the appeal that the learned Magistrate erred in law and in fact when she refused to stay proceedings pending the discontinuance of cause number 2012/CRMP/1305 as Cause No. 2012/CRMP/1305 was struck out for irregularity and not dismissed. The Respondent on the other hand has argued that he commenced another action on the advice of the lower Court. He actually commenced the second action on the same date when the matter had being struck out of the active cause list.

In my view, as a layman, the Respondent is not expected to be conversant with the niceties of legal argument arising in this case; whether the matter was struck out or dismissed. When this matter was heard by Honorable Wishimanga, the Respondent stated that he was strongly advised by the other Court to commence a fresh action and add his name as a sole trader. The record of the lower Court does not show that this evidence was challenged by Counsel.

Indeed, as a layman, who was unrepresented, the Respondent took the lower Court's advice as normal procedure and no wonder he commenced the cause No. 2013/CRMP/686 on the same date, 19th June, 2013, when Cause No. 2012/CRMP/1305 was struck out. Under the circumstances of this case, I find plausible the reasons advanced by the Respondent for commencing another case on the same facts as the earlier cause that was struck out for irregularity.

The authority of ***Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceutical Limited (1995 . 1997) ZR 187*** ⁽¹⁾ and ***BP Zambia PLC vs. Interland and Motors ltd (2001) ZR 37*** ⁽²⁾ as cited by Counsel are not relevant to the facts and circumstances of the present case. I say so because there is, in this case, neither a multiplicity of procedures and proceedings over the same subject matter nor was the Respondent trying to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts.

I further disagree with the arguments by Mr. Ng'andu that by proceeding to hear this matter under Cause No. 2013/CRMP/0686, the Respondent will have two bites of the same cherry. This is a misleading argument because the earlier Cause was not and has not been determined on the merit. In fact, it is yet to be determined on the merit

by the lower Court. Similarly, it is misleading for Counsel to argue; on the one hand that Cause No. 2012/CRMP/1305 is still on the active cause list, while on the other hand he agrees that the said Cause was struck out of the cause list.

On the basis of what I have stated regarding ground one, I cannot fault the learned Magistrate when she refused to stay proceedings under Cause No. 2012/CRMP/1305. I dismiss ground one for being unmeritorious.

As regard ground two, the Appellant has contended that learned Magistrate misdirected herself in law and in fact when she held that the Respondent was not to pay for the costs for Cause No. 2012/CRMP/1305 before commencing cause number 2013/CRMP/0686.

I have noted that in refusing to award costs, the lower Court in its ruling dated 26th July, 2013, reasoned that Order VIII rule 2 'does not apply to a case that has been struck out for irregularity. But where the Plaintiff has applied for a discontinuance of the matter and decides to sue again on the same matter. If he has not paid costs of the first case then the court on an application to stay proceedings until the costs are paid shall be granted'. This is correct.

The lower Court proceeded to state that 'having perused through Cause No. 2012/CRMP/1305 that was before Hon. Mikalile, the case was struck out for irregularity by the Court and not by the Plaintiff. She also noted that the costs were not awarded to either party. The lower Court then concluded that it means that the Plaintiff was not to pay costs for the Cause that was before Court.

I entirely agree with the lower Court.

It is trite law that costs are in the discretion of the court. And the provision of law being invoked by the Appellant clearly gives the Court discretion in as far as costs of every suit or matter and of each particular proceeding is concerned.

In fact, Counsel for the Appellant has submitted that ‘the costs which the Appellant is seeking would arise only when the Respondent has discontinued proceedings under 2012/CRMP/1305. So, as I have earlier stated in this judgment, the Respondent was advised to commence fresh action and make sure that his names were included on the default writ. As a layman, who was unrepresented, he did just that. Therefore, there was no discontinuance to warrant an award of costs.

I have also gleaned the provisions of Order 62 (3) (2) of the Supreme Court (white Book) which provides that:

“No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.”

In the case of **David Mwanza vs Finance Building Society (2010) Vol. 3 Z.R. 299 Vol 3**, ⁽³⁾ Judge Mutuna on the question of a party recovering costs said the following:

“In the current case, there was no order by the Court under Cause Number 2009/HPC/0291 awarding the Defendant costs because the undisputed facts are that the action was discontinued prior to an order to that effect being made. Further, there being no order as to costs, there was no determination made as to how much costs the Plaintiff should pay the Defendant by way of compensating it in costs under the

cause. I therefore, find that the Defendant is not entitled to recover from the Plaintiff the sum of K16,079,226.03 as costs under the cause."

In light of the above I find and hold that the argument that the Respondent must be compelled to pay costs is not tenable.

Ground two of this appeal is therefore misconceived and I accordingly dismiss it.

On the demands of justice, I hold that the Courts have always had powers to allow determination of matters on the merit as opposed to short circuiting proceedings on frivolous technicalities such as in the present matter. I find that there is no prejudice that would be occasioned to the Appellant in allowing this matter to be tried on the merit under Cause No. 2013/CRMP/0686.

For the foregoing reasons, I find no merit in this appeal which is intended, in my considered view, to circumvent justice in this matter. I dismiss it with cost to the Respondent.

Further, I order that the matter be expeditiously heard on merit by the lower Court.

Appeal dismissed.

Dated at Lusaka this 10th day of December, 2014

Hon. Judge B.M.M. Mung'omba
HIGH COURT

