

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2016/HPC/0163



BETWEEN:

LYNDA MATAKA

PLAINTIFF

AND

AM PROJECT ENGINEERING LIMITED

DEFENDANT

Before the Honourable Justice Irene Zeko Mbewe in Chambers

For the Plaintiff:

*Mrs. Sichone of Theotis Mataka & Sampa Legal
Practitioners*

For the Defendant:

Mr. Mwansa of Messrs Mosha & Company

RULING

Cases Referred to:

Re Gibson's Settlement Trust [1981] 1 Ch 179

Legislation Referred to:

High Court Rules, Cap 27 of the Laws of Zambia

This is a Ruling on the Defendant's application for costs incidental to the Plaintiff's withdrawal of this matter.

The brief facts leading to this application are that the Plaintiff commenced an action against the Defendant by way of Writ of Summons filed on 20th April 2016 claiming for the following:

1. *Refund of the sum of ZMW34, 700.00 being the purchase price of the faulty generator sold by the Defendant to the Plaintiff;*
2. *Special damages for the cost of repairs of the generator in the sum ZMW1, 566.00 and US\$220.4, the cost of securing an alternative generator in the sum of ZMW16, 350.00;*
3. *Interest on the amounts aforesaid at the current Bank lending rate;*
4. *Any other relief which the court may deem fit; and*
5. *Costs.*

When the matter came up for hearing on 2nd August, 2017 Mrs. Sichone Counsel for the Plaintiff intimated that her client was withdrawing the matter as it had been settled in full and that a Notice would be filed to that effect.

In response, Mr. Mwansa Counsel for the Defendant submits that this action has undergone a myriad of applications since commencement. That the Defendant made an application for

dismissal for want of prosecution dated 3rd November, 2016 in which it sought the Plaintiff to either withdraw the matter or proceed with trial. Counsel went on to state that the Plaintiff only decided to withdraw the matter four months after the Defendant's application for dismissal was filed. Counsel contends that his client has incurred costs which would have been avoided had the Plaintiff taken action four months ago when the Defendant's application was made. Based on the foregoing, the Defendant prays for costs incidental to the withdrawal of this action subject to payment of costs.

In reply to Mr. Mwansa's submission, Counsel for the Plaintiff Mrs. Sichone submits that the record shows that the Plaintiff's affidavit in opposition to the application for dismissal for want of prosecution filed on 26th November 2016 indicates that there is no inordinate delay. That as the record shows, the parties have been pursuing an ex curia settlement and as such object to the issue of costs.

I have carefully considered both Counsel's submissions and rival arguments.

Order XL Rule 6 of the High Court Rules Chapter 27 of the Laws of Zambia provides that:

“6. The cost of every suit or matter and of each particular proceeding therein shall be in the discretion of the Court or a Judge; and the Court or a Judge shall have full power to award and apportion costs, in any manner it or he may deem just, and, in the absence of any express direction by the Court or a Judge, costs shall abide the event of the suit or proceeding:”

The foregoing provisions are instructive on the issue of determining how costs are incurred by a party in any matter. It is trite that the award of costs is in the discretion of the Court.

The question for determination in this application is whether the Defendant is entitled to costs as prayed following the Plaintiff's discontinuance of the matter.

Counsel for the Defendant in making this application on behalf of the Defendant prays for “costs incidental to” which expression has been considered mainly in relation to legal costs. The term denotes a relevant connection between costs and the withdrawal. Lord

Megarry VC in **Re Gibson's Settlement Trust [1981] 1 Ch 179**, commenting on the issue of the phrase "incidental to" said:

"I find great difficulty in seeing on what basis it can be said that the addition of these words drives out the right to antecedent costs. The words seem to me to be words of extension rather than words of restriction. The litigant is to have the costs of the proceedings and also the costs incidental to the proceedings. This phrase cannot mean that the costs of the proceedings are to be included only if they are also incidental to them."

A perusal of the record shows that there have been a number of applications in this matter and parties had also indicated that they engaged in talks for possible ex curia settlement. However, I concur with Counsel for the Defendant that this matter would have been determined or withdrawn earlier had the Plaintiff taken prompt action following the Defendant's application for dismissal. **Order XVII Rule 1 of the High Court Rules** provides to the effect that:

"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 Registrar 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 or a Judge 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 or a Judge to obtain the order.....”

Based on the foregoing, I grant the Defendant’s application for costs incidental to the withdrawal herein and order that the same be taxed in default of agreement.

Leave to appeal is granted.

Delivered this 28th day of August, 2017.



**HON IRENE ZEKO MBEWE
HIGH COURT JUDGE.**