

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



2017/HP/1376

**IN THE MATTER OF: ORDER 54 RULES 1, 2, AND 4 OF THE RULES OF
THE SUPREME COURT OF ENGLAND, 1999
EDITION**

**IN THE MATTER OF: PART III OF THE CONSTITUTION OF ZAMBIA
CHAPTER 1 OF THE LAWS OF ZAMBIA FOR THE
PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL**

**IN THE MATTER OF: ARTICLES 13, 15, AND 18 OF THE CONSTITUTION
OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 33 OF THE CRIMINAL PROCEDURE CODE
CHAPTER 88 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: AN APPLICATION FOR A WRIT OF HABEAS
CORPUS AD SUBJICIENDUM**

BETWEEN:

INNOCENT SITALI

APPLICANT

AND

THE ATTORNEY GENERAL

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25th DAY OF
OCTOBER, 2017**

For the Applicant : Ms M. Mushipe, Mushipe and Associates

*For the Respondent : Ms J. Mazyulanyika, State Advocate, Attorney General's
Chambers*

R U L I N G

CASES REFERRED TO:

1. ***George Balamon V Aidan Gaffney 1971 ZR 29***
2. ***Re Puta 1973 ZR 133***
3. ***Re Thomas James Cain 1974 ZR 71***
4. ***Sharma B.J V The Attorney General 1978 ZR 163***
5. ***John Chisata and Faustinos Lombe V Attorney General 1981 ZR 35***
6. ***Edward Jack Shamwana V The Attorney General 1981 ZR 261***
7. ***Attorney General V Million Juma 1984 ZR 1***

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court, 1999 edition***

This is a ruling on an application made by the Applicant for an order for costs, following the abatement of an application for leave to issue a writ of habeas corpus, after the Applicant was released from incarceration. Counsel for the Applicant had applied that the Applicant be granted costs.

Counsel for the Respondent objected to the application for costs as the affidavit filed in opposition to the application for leave to issue the writ of habeas corpus shows that when the application was made, the Applicant was already in the custody of the Zambia Army, and not the Attorney General, and they asked that they be allowed to submit on the issue of costs. Counsel for the Applicant requested to respond to the submissions that would be filed by the Respondent.

In the submissions filed by the Respondent on 27th September, 2017 it was stated that the Applicant was initially detained at Kabwe Police Station, and was later transferred to Ridgeway Police Post. He then through Counsel applied for leave to issue the writ of habeas corpus ad subjiciendum, and an order that the Applicant be released. That when the matter came up on 30th August 2017, Counsel for the Respondent informed the court that the application had been overtaken by events, as

the Applicant had been released from police custody into the custody of the Zambia Army, as he is a Staff Sergeant under the Infantry Brigade. However Counsel for the Applicant had requested for an adjournment to enable her obtain instructions from her client, and the matter was adjourned.

That when the matter came up on 8th September, 2017, Counsel for the Applicant had asked for another adjournment, which was granted, and the matter came up on 21st September, when Counsel for the Applicant applied for costs. That their arguments in opposition to the application for costs was based on five grounds.

The first was that the application abated once the Applicant was released, and the Respondent could not be ordered to bring a body that was no longer in its' custody. Thus as the application was not heard on its merits, the Applicant could not be said to be a successful party. Reference was made to Order XL Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that costs shall abide the event, entailing that they are only considered once proceedings have actually taken place. Therefore if there have been no proceedings, costs cannot be awarded, and in this case as the habeas corpus application was not heard, each party should bear their own costs.

That secondly even if the application had been heard on its merits, the writ of habeas corpus ad subjiciendum, as stipulated in Order 54 of the Rules of the Supreme Court, is merely to present an applicant before the court so that the legality of their detention may be examined, and it is not meant to punish the detainer. Thus if costs are awarded, then the Respondent will be punished, which will contravene the provisions of Order 54 of the Rules of the Supreme Court.

The third ground of opposition was that the Applicant has no entitlements whatsoever in habeas corpus proceedings as stated by the 19th Century Jurist A.V. Dicey, who stated that **“declare no principle and define no rights, but are for practical purposes....guaranteeing individual liberty.”** That Order 54/1/6 of the Rules of the Supreme Court, 1999 edition states that costs in a habeas corpus application, are in the discretion of the court.

The fourth ground of opposition was that Order XL Rule 6 of the High Court Rules, Chapter 27 of the Laws of Zambia grants the court wide discretionary powers when exercising its jurisdiction with regard to the award of costs. That Order 62/2/9 of the Rules of the Supreme Court, 1999 edition however provides that the court should exercise the discretion reasonably and judicially. That in this case it would not be reasonable to award costs, as no allegations of unreasonableness, impropriety or malafides had been alleged to warrant an order of costs to be made against the Respondent.

The last ground of opposition was that the practice of courts when dealing with habeas corpus applications is to avoid making orders as to costs, regardless of whether the application has succeeded or not. The cases of **RE PUTA 1973 ZR 133** and **RE THOMAS JAMES CAIN 1974 ZR 71** were relied on, stating that while the applications in both cases were successful, no costs were awarded. Other cases relied on were **JOHN CHISATA AND FAUSTINOS LOMBE V ATTORNEY GENERAL 1981 ZR 35** where despite the Supreme Court ordering discharge of the applicants, no considerations were made on costs, and the cases of **THE ATTORNEY GENERAL V MILLION JUMA 1984 ZR 1**, **EDWARD JACK SHAMWANA V THE ATTORNEY GENERAL 1981 ZR 261** and **JOHN CHISATA AND FAUSTINOS LOMBE V ATTORNEY GENERAL 1981 ZR**

35 where the habeas corpus applications were dismissed, and no orders as to costs were made.

Reference was also made to the case of **SHARMA B.J V THE ATTORNEY GENERAL 1978 ZR 163** where the application was dismissed, and the Supreme Court made no order as to costs. The submission was that the above cases have outlined that the court's practice during habeas corpus proceedings is to focus exclusively on the legitimacy of the Applicant's incarceration, and that the **JOHN CHISATA AND FAUSTINOS LOMBE V ATTORNEY GENERAL 1981 ZR 35** case declared that "*a writ of habeas corpus is not one that attracts or is intended to attract damages.*" It was submitted that while the case dealt with compensatory damages, the principles elucidated also applied to the costs. The court was urged not to make an order for costs, as doing so would be contrary to the rules of natural justice and reason.

The Applicant in response submitted that Order 40 Rules 1 and 6 provides for costs which include the expenses of summoning witnesses and parties, photocopying documents among others, and that costs are granted at the court's discretion. That the Respondent had argued that the habeas corpus application was not heard on its merits, in that the application abated when the Applicant was released, and the Respondent was not ordered to bring the body, as it was no longer in police custody.

It was further submitted that based on this, the Respondent had placed reliance on Order 40 Rule 6 of the High Court Rules, and had argued that costs can only be awarded when a matter has been heard. However their submission was that the Applicant was arrested and detained for a prolonged period of time, thereby infringing his constitutional right. That the habeas corpus application was made to safeguard his rights.

It was submitted that the application for habeas corpus was prepared, filed into court and served on the Respondent, and therefore expenses were incurred, and the argument that as the application was not heard, the costs should fall where they lie, entailing that each party bears their own costs was misplaced.

Further in the submissions, it was argued that the Respondent had argued that even if the application had been heard, it would have been merely to determine the legality of the Applicant's detention, and not to punish the detainer, but it was their submission that expenses were incurred. That the Respondent chose not to take the Applicant to court in accordance with the law, and only took him to court when the application was made. That this resulted in costs being incurred.

The case of **GEORGE BALAMON V AIDAN GAFFNEY 1971 ZR 29** was referred to, arguing that the court had taken the position that costs would be awarded as a result of a party's conduct resulting in unnecessary expenses being incurred by the other party. On the argument that an applicant is not entitled to costs in habeas corpus proceedings, reference was made to Order 54/1/8 of the Rules of the Supreme Court which provides that costs are in the court's discretion. Therefore notwithstanding the Respondent's arguments, the court has discretion based on the above provision to award costs or not.

It was also submitted that in the cases cited by the Respondent, no costs were awarded as no applications for the same were made, and the court exercised its discretion not to grant the same. In this case however, the Applicant had specifically asked for costs as a result of the Respondent's failure to adhere to the law, and considering the circumstances of the case, it would be judicious to award the Applicant costs in this matter.

The case of **JOHN CHISATA AND FAUSTINOS LOMBE V ATTORNEY GENERAL 1981 ZR 35** was submitted as not being applicable to this matter, and it was prayed that the Applicant be awarded costs.

I have considered the application. The Applicant relying on the provisions of Order 40 Rules 1 and 6 argued that he is entitled to costs even if the application for leave to issue the writ of habeas corpus abated, following his release from custody. The basis for the application was that even if the application was not heard on its merits, costs were incurred in filing the application, as the Applicant was prompted to make the application as the Respondent had acted outside the law, by detaining him for a prolonged period of time.

In opposing that application, the Respondent argued that the application had abated as the Applicant had been released from custody, and the Respondent could not be ordered to bring the body. Therefore as no application was heard, the costs should fall where they lie, that is each party shall bear their own costs. Further that the object of the issue of the writ of habeas corpus ad subjiciendum is to enquire into the legality of the detention of the Applicant, and it is therefore a procedural remedy, and to award costs in such cases, would be to punish the detainer, and thereby contravene Order 54 of the Rules of the Supreme Court, 1999 edition.

Order 40 of the High Court Rules, Chapter 27 of the Laws of Zambia provides for what is included as costs. It states that;

“Under the denomination of costs is included the whole of the expenses necessarily incurred by either party on account of any cause or matter, and in enforcing the decree or order made therein, such as the expenses of summoning and of the

attendance of the parties and witnesses, and of procuring copies of documents, the fees of court, or the remuneration of referees or mediator.”

Rule 6 of the said Order 40 provides that the Court or the Judge has discretion to award costs in any proceedings. It states that;

“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:

Provided that the Court shall not order the successful party in a suit to pay to the unsuccessful party the costs of the whole suit; although the Court may order the successful party, notwithstanding his success in the suit, to pay the costs of any particular proceeding therein.”

With regard to costs in habeas corpus proceedings Order 54/1/8 of the Rules of the Supreme Court, 1999 edition provides that they are in the discretion of the Court, and either the applicant or the respondent may be ordered to pay them. In my view costs may be awarded in habeas corpus proceedings depending on the circumstances of the case. For example in the case of ***ATTORNEY GENERAL V MILLION JUMA 1984 ZR 1***, the Supreme Court after having found that the grounds of detention were in English which the Respondent did not understand, but were explained to him in the language that he understood, thereby

curing the defect, the appeal was allowed and the court made no order as to costs.

As to whether costs can be awarded where the matter has been not been heard, the Respondent argued that no hearing took place as the application was overtaken, in that the Applicant was released from custody. The general rule is that costs shall abide the event, and therefore where there has been no hearing, there is no successful party so to speak that is entitled to costs. However the argument by the Applicant was that the matter was not heard as the Respondent only released the Applicant after the application was filed, which was prompted by undue delay to take him to court. That as a result of the prolonged detention the application had been filed, which had resulted in costs being incurred.

The affidavit in opposition to the application for leave to issue the writ of habeas corpus ad subjiciendum, does not show any malafide on the part of the Respondent in this matter, as he was transferred from the police to the Army as he is an army officer in the process of his detention, accounting for his delayed detention. Therefore the circumstances of the matter are such that there is no basis upon which the costs can be awarded. I accordingly find that this is not a proper case for the grant of costs, and I order that each party shall bear their own costs. Leave to appeal is granted.

DATED THE 25th DAY OF OCTOBER, 2017

 S.Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE