IN THE HIGH COURT FOR ZAMBIA 2016/HP/0731

AT THE PRINCIPAL REGISTRY

LUSAKA

(Civil Jurisdiction)

BETWEEN:

DOUGLAS PHIRI PLAINTIFF

AND

RADIAN STORES LIMITED 1ST DEFENDANT

GOLDMAN INSURANCE LIMITED 2ND DEFENDANT

BEFORE HONOURABLE LADY JUSTICE M. CHANDA THIS 29TH DAY OF MAY, 2020

APPEARANCES:

FOR THE PLAINTIFF	:	MR N.K DINDI OF DINDI & COMPANY
FOR THE 1ST DEFENDANT	:	NO APPEARANCE
FOR THE 2ND DEFENDANT	:	MR L MWAMBA OF SIMEZA, SANGWA & ASSOCIATES

RULING

LEGISLATION REFERRED TO:

1. WHITE BOOK 1999 EDITION
2. HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA

CASES AND BOOKS REFERRED TO:

1. ENGLISH CASE OF KENSINGTON INCOME TAX V COMMISSIONERS, EXP PRINCES EDMOND DE POLIGNAC (1917) I KB 486
2. ROBERT SIMEZA (SUING IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF ANDREW HDJIPETROU) MOTEL ENTERPRISES LIMITED (T/A ANDREWS MOTEL) MARIANTHY NOBLE YOLANDE HADJIPETROU V

ELIZABETH MZYECHE (SUING AS THE MOTHER AND GUARDIAN AD LITEM OF MINOR BENEFICIARIES) (2011) VOL 3 Z R 290

3. Y.B AND TRANSPORT LIMITED V SUPERSONIC MOTORS LIMITED 2000 Z R 22

4. GENERAL NURSING COUNCIL OF ZAMBIA V ING'UTU MILAMBO MBANGWETA (2008) Z R 105

5. TWAMPANE MINING CO-OPERATIVE SOCIETY LIMITED V E AND M STORTI MINING LIMITED (2011) VOL 3 Z R 67

6. MILCAP PUBLISHING GROUP AB V CORANTO CORP PTY LIMITED (1995) FCA 591

7. LOCKER GROUP PTY LIMITED V HEA AUSTRALIA PTY LIMITED (2015) VSC 752

This matter came up by way of an application by the 1st defendant to set aside the order of discontinuance for irregularity pursuant to *Order 2 Rule 1 (I) of the White Book 1999 Edition* and *Order 17 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia.* Counsel for the plaintiff filed an affidavit in opposition to the defendant's application.

The brief background to the application is that this matter came up for trial on 1st August, 2017 but only counsel for the plaintiff was before Court. Counsel for the plaintiff proceeded to make an application to discontinue the entire action on the ground that the plaintiff had instructed him to do so on the 1st May, 2017. Counsel for the plaintiff went on to inform the Court that the plaintiff had agreed to be paid a sum of K30, 000 by the 1st defendant and advised that the costs of the action would be borne by the 1st defendant.

Premised on the application sought by counsel for the plaintiff, the Court granted the order for the matter to be discontinued and the legal costs incurred to be settled by the 1st defendant to be taxed in default of agreement.

When the matter came up for *inter parte* hearing on 11th June, 2018 both counsel for the plaintiff and 1st defendant were before Court. Both parties relied on their respective affidavits as well as skeleton arguments to support and oppose the application.

The 1st defendant's affidavit was deposed to by **Kuppuswami Murali**, the Executive Director in the 1st defendant company. The gist of the affidavit evidence was that the application for discontinuance of the plaintiff's action was irregular on account that no prior notice was ever filed into Court. The deponent averred that counsel for the plaintiff deliberately misled the Court that the 1st defendant had agreed to bear the costs of the action. That as evinced by exhibits marked as **KM1** and **KM6** in the 1st defendant's affidavit, the plaintiff's counsel was infact well aware that the 1st defendant had agreed to pay the plaintiff the sum of K30, 000 in full and final settlement of his claims and each party was to bear its own costs.

Counsel for the 1st defendant stated in Court by way of augmentation that the application to set aside order for discontinuance was anchored on two grounds namely: -

1. That it was an abuse of Court process; and
2. That the order was irregularly obtained.

With regard to the first ground, the attention of the Court was drawn to *Order 18 Rule 19(18) of the White Book* which define what amounts to an abuse of Court process. It was submitted that according to the above cited order, an abuse of Court process would occur when the legal process has not been used bona fide. Counsel for the 1st defendant argued that the order for discontinuance was inappropriately obtained in that counsel for the plaintiff misled the Court into believing that the parties had agreed that the costs of the action would be settled by the 1st defendant when infact not. It was contended that had the plaintiff's advocate not misrepresented the facts to the Court, the order for discontinuance that condemned the 1st defendant in costs would not have been made by the Court. The **English case of Kensington Income Tax v Commissioners, exp Princes Edmond de Polignac**[1] was cited in aid of counsel's submission. In that case Warrington L.S held that:

> **"It is perfectly well settled that a person who makes an ex-parte application to the Court- that is to say, in the absence of the person who will be affected by that which is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deposed of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it".**

Counsel asserted in the matter before me, that the plaintiff having appeared in the absence of the 1st defendant, was under a duty to make the fullest possible disclosure. It was further asserted that the plaintiff ought to have disclosed to the Court that there was no agreement that the 1st defendant would pay the costs of the action. The Court was implored not to allow the plaintiff to enjoy an order that was obtained in concealment of the true facts and thus wrongly obtained.

On the issue of irregularity, counsel submitted that the order of discontinuance ought to be set aside as it was processed contrary to the provisions of *Order 17 Rule 1 of the High Court Rules, Chapter 27 of the laws of Zambia.* It was asserted that according to *Order 17 Rule 1*, in order to discontinue an action, the party must file a notice of discontinuance before any date filed for hearing. Counsel contended that the procedure adopted by the plaintiff of simply making an application for discontinuance on the date of hearing was irregular.

It was also submitted that the order was irregular and not in keeping with the afore cited *Order 17 Rule 1* because a party could not discontinue his own action and condemn the party he had dragged to Court in costs.

On the premise that the order of discontinuance was in contravention of *Order 17 Rule 1* as afore shown, the 1st defendant sought the indulgence of this Court to set it aside and order the

plaintiff to file the requisite notice of discontinuance pursuant to the legal provisions.

In opposing the application, counsel for the plaintiff relied on his affidavit and submitted that there was nothing irregular about the plaintiff through counsel to apply to Court to discontinue the case.

It was further submitted that the Court exercised its discretion and inherent jurisdiction to proceed to order that the matter be discontinued as per the plaintiff's request.

Counsel for the plaintiff went on to submit that the 1st defendant did not attend Court on the 1st of the August, 2017 without advancing any reasons. It was contended that the 1st defendant through counsel was aware of the date of hearing but chose not to appear despite the Court having issued a notice of hearing for the 1st of August, 2017 and which notice of hearing was served on the 1st defendant's advocates on the 29th day of May, 2017 vide exhibit NKD1 produced in the plaintiff's affidavit in opposition.

In support of counsel's argument, the Court was referred to the case of **Robert Simeza (suing in his capacity as Executor of the Estate of Andrew Hdjipetrou) Motel Enterprises Limited (T/A Andrews Motel) Marianthy Noble Yolande Hadjipetrou v Elizabeth Mzyeche (suing as the mother and guardian Ad Litem of minor beneficiaries)**[2] wherein the Supreme Court held *inter alia* that:

(1) "No procedural injustice is occasioned when a party who is aware of proceedings does not turn up."

It was counsel's submission that in the present case the 1st defendant knew or ought to have known that the plaintiff would on 1st August, 2017 apply to Court to discontinue the case but disregarded the opportunity of appearing and participating in the hearing. Thus the 1st defendant was bound by the decision passed by the Court.

Counsel further submitted that *Order 17 Rule 1* did not apply to the cause before Court. According to the plaintiff's counsel the said order covered cases were the plaintiff without engaging the defendant in any discourse or negotiations decides to withdraw the matter on account of there being no hope of success.

Counsel stated that the instructions to discontinue the action were communicated to by the plaintiff by letter dated 15th April 2017 after he had personally engaged the 1st defendant to settle the matter *ex-curia*. Counsel took the view that in light of the procedure adopted by his client, there was no need to resort to the provisions of *Order 17 (1) of the High Court Rules* since the matter was already scheduled for hearing on the 1st August, 2017.

In response to whether a plaintiff who discontinued his own action was entitled to costs, counsel submitted that the law that governed the issue of costs between parties who had been notified to appear before Court was Order *40 Rule 6 of the High Court Rules* and not *Order 17 Rule 1* as canvassed by the 1st defendant.

Counsel further submitted that *Order 40 Rule 6 of the High Court Rules* stipulates that the costs of each particular suit or matter shall be in the discretion of the Court or Judge and the Court or Judge shall have the full power to award and apportion costs in any manner it or he may deem fit.

The order further states that in the absence of an express direction by the Court or Judge costs shall abide the event of the suit or proceedings.

In support of this proposition counsel relied on the leading case of **Y.B and Transport Limited v Supersonic Motors Limited**[3] where the Supreme Court stated as follows: -

> **"The general principle is that costs follow the event, in other words a successful party should normally not be deprived of costs unless the successful party did something wrong in the action or in the conduct of it."**

Counsel argued that in the same vein his client was successful in his claim for damages for personal injury when the defendants agreed to pay him K30,000.00 in full and final settlement of the matter. He stated that the plaintiff having emerged as a successful party was entitled to be awarded costs by the Court.

Counsel also cited the case of **General Nursing Council of Zambia v Ing'utu Milambo Mbangweta**[4] where it was stated thus:

> **"It is trite law that costs are awarded in the discretion of the Court such discretion is however to be exercised judiciously. Costs usually follow the event. In awarding costs, the Court has to consider the particular circumstances of the case. In this matter negligence was proven against the respondent. Therefore, the order granting her costs is set aside. Instead the respondent is condemned to costs both in the lower Court below and in the Supreme Court."**

It was counsel's contention that the plaintiff clearly spelt out in exhibit NKD2 produced in the plaintiff's affidavit in opposition that the costs of the action were to be borne by the defendant.

In closing counsel submitted that the Court made the order for costs judiciously and could not be faulted. Counsel accordingly prayed for the 1st defendant's application to be dismissed for lack of merit as they chose to stay away when the matter came up for hearing.

In reply, counsel for the 1st defendant stated that the plaintiff's submission that his client was bound by the order for discontinuance because of their non-attendance at the hearing, was based on a misapprehension of the application by the 1st defendant. Counsel argued that the gist of the application before Court was the incorrect procedure employed by the plaintiff in obtaining an order for discontinuance that condemned the 1st defendant in costs, as such the issue of non-attendance at the hearing was immaterial. Counsel went on to assert that the critical issue advanced by the 1st defendant was the non-adherence to the procedural rules of the Court by the plaintiff. The Court's attention was directed to the

holding in **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**[5] in which Muyovwe J.S stated thus:

> **"...we cannot overemphasize the importance of adhering to Rules of Court as this intended to ensure that matters are heard in an orderly and expeditious manner. Allowing this appeal would be tantamount to us encouraging laxity and non-observance of rules by practitioners and litigants in general. We repeat what we said in Nkhuwa v Lusaka Tyre Service Limited that those who chose to ignore Rules of Court will do so at their own peril."**

Counsel submitted that it was of critical importance that parties adhere to the rules of Court so that matters could be heard in an orderly and expeditious manner. It was pointed out that had the plaintiff filed a notice of discontinuance as required by *Order 17 Rule 1 of the High Court Rules*, there would have been no need for the current proceedings and the matter would have been disposed of in an orderly and expeditious manner.

In further reply to the plaintiff's submission that the Court was exercising its inherent jurisdiction and discretion when it accepted the plaintiff's application for discontinuance of the matter, counsel for the 1st defendant contended that for the Court to exercise such inherent powers it ought to be moved appropriately. It was argued that the Court had rules in place on how it should be moved whenever a party wished to invoke its discretion. It was reiterated that the 1st defendant was therefore within its rights to object to the procedure adopted by the plaintiff and that the Court would be on

firm ground to set aside the order which was obtained in abrogation of its rules.

As regard the submission by the plaintiff on the applicability of *Order 40 Rule 6* to the present case, the reply advanced by the 1st defendant was that the order was cited out of context as it did not in any way provide for the discontinuance of actions. Counsel argued that *Order 40 Rule 6* only applied in instances where the matter or application had gone to fruition after the Court rendered a ruling or judgment.

Counsel equally submitted that the plaintiff's argument to the effect that he was successful when the 1st defendant agreed to pay him the K30,000.00 was misplaced. He argued that the matter was settled *ex-curia* without any admission of liability on the part of the 1st defendant. Counsel stated that according to *Order 17 Rule 1* the plaintiff having applied to discontinue the action, the 1st defendant could not be ordered to pay the costs.

I have considered the skeleton arguments and oral arguments as well as all issues raised by the parties in this application. There are two issues advanced in this application. The first being whether or not the non-attendance by the 1st defendant could justify the abuse of the Court process committed by the plaintiff in connection with the issue of costs. The second is the appropriateness of the procedure employed by the plaintiff in obtaining the order for discontinuance that condemned the 1st defendant in costs.

Counsel for the 1st defendant has raised an important point that at the time of seeking to discontinue the action, the plaintiff's counsel was infact aware that there was no agreement between the parties that the 1st defendant was to bear the costs of the action but he opted to mislead the Court. In responding to this submission, counsel for the plaintiff did not address the issue of his obligation to make the fullest possible disclosure of all material facts within his knowledge to the Court. He simply insisted that the 1st defendant was bound by the Court's order and that because of their non-attendance during the hearing no procedural injustice was occasioned to them.

It is apparent from the 1st defendant's affidavit evidence in particular exhibit "**KM3**" that as far back as 6th July, 2017 the plaintiff's advocates were aware that no agreement had been reached by the parties for the settlement of costs. This notwithstanding, the plaintiff's counsel did not discharge his duty to bring this fact to the Court's attention when the application to discontinue the action was made. If such a fact had been properly disclosed to this Court, the order for discontinuance that condemned the 1st defendant in costs would not have been made.

In **Milcap Publishing Group AB v Coranto Corp Pty Limited**[6] the Court eloquently observed that:

> "**When an ex-parte order is sought, the person seeking the order must be frank and disclose to the Court all the matters which, if put before the Court, might have an effect upon the Court's decision. The facts that should be disclosed go both to matter of liability and**

matters of discretion. If a fact is material in that it would be a matter to be taken into account by a Court in the making of the decision to grant an injunction or in the formulation of the order that is to be made, it is a matter that ought to be disclosed."

The obligation to provide full disclosure, the failure to disclose a material fact and the consequences arising there from was equally considered in the case of **Locker Group Pty Limited v HEA Australia Pty Limited**[7]. In that case it was held *inter alia* that if material non-disclosure is established, the Court will be astute to ensure that a plaintiff who obtains an *ex parte* order without full disclosure is deprived of any advantage he may have derived by the breach of duty.

In the present case I must firmly assert that this Court's inherent jurisdiction and discretion was inappropriately or wrongly evoked when the plaintiff's counsel failed to disclose a material fact that the 1st defendant had not consented to pay the costs of the action. In light of the breach of duty occasioned by the plaintiff's counsel, I find his arguments and authorities advanced before Court to be misconceived and inapplicable. I entirely agree with counsel for the 1st defendant that before the Court is able to exercise its discretion to grant any relief it must be appropriately moved. I equally find that the malafide use of the legal process by the plaintiff's advocate cannot be justified by the absence of the 1st defendant before Court.

I now turn to consider the correct procedure to be followed when a party wishes to discontinue an action before Court. The 1st defendant has taken issue with the procedure employed by the

plaintiff of simply making an application on the date of hearing to discontinue the action. To this effect it has been submitted that the procedure to be followed when a party wishes to discontinue an action is provided for in *Order XVII Rule 1 of the High Court Rules.* Pursuant to *Order XVII Rule 1* in order to discontinue an action the party must file a notice of discontinuance before the date of hearing. Counsel for the plaintiff has submitted that *Order XVII Rule 1* was not applicable to this matter. The contention by the plaintiff's counsel is that since his client decided to personally engage the 1st defendant in an *ex-curia* settlement, there was no need to resort to the provisions of *Order XVII Rule 1* when the matter came up for trial on 1st August, 2017.

I have carefully considered the submissions by both parties and taken time to peruse through *Order XVII Rule 1 of the High Court Rules.* For ease of reference I have reproduced the said *Order 17 Rule 1* which provides as follows: -

> 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 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. 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 or a Judge, be allowed on such terms as to costs and as to any subsequent suit and otherwise as to the Court or a Judge may seem just.*

It is my immediate affirmation that *Order XVII Rule 1* generally provides for discontinuance of actions for whatever reasons the plaintiff may have. Contrary to the assertion by the plaintiff's counsel I must state that apart from *Order XVII Rule 1,* there is no any other rule under the *High Court Rules* that provides for discontinuance of actions.

A close examination of *Order XVII Rule 1* which is couched in mandatory terms reveals that a discontinuance must be done by way of filling a notice and serving it on the other party before the date of hearing. It will be seen that *Order XVII Rule 1* does not make reference to any instances when the plaintiff is exempted to comply with the stipulated procedure. For this reason, I have no hesitation in holding that the *viva voce* application for discontinuance of the action made by the plaintiff's advocate when the matter came up for trial was indeed in contravention of *Order XVII Rule 1.* I have not specifically addressed other points made by counsel for the plaintiff in his submissions, they have not been overlooked. I find nothing in them that requires discussion.

Having established that counsel for the plaintiff failed to provide full disclosure regarding the settlement of costs in his *ex-part* application, it is hereby adjudged that the order obtained on 1st August, 2017 is set aside. The plaintiff is directed to file the requisite notice of discontinuance in keeping with the provisions of *Order XVII Rule 1 of the High Court Rules.* In view of the breach of duty occasioned by the plaintiff's advocates, they are personally condemned to bear the costs of this application.

Dated this *29th* day of *May,* 2020

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M. CHANDA
JUDGE