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IN THE SUPREME COURT OF ZAMBIA **SCZ/8/128/2013**
HOLDEN AT LUSAKA **Appeal No. 122/2013**
(Civil Jurisdiction)

BETWEEN

ZANA ENTERPRISES LIMITED AND 20 OTHERS **APPELLANTS**

AND

NATIONAL PENSION SCHEME AUTHORITY **1ST RESPONDENT**
LIBERTY PROPERTIES LIMITED **2ND RESPONDENT**

Coram: **Chibomba, Phiri and Malila, JJS**
On 19th August, 2015 and 7th October, 2015

For the Appellants: Mr. M. J. Katolo of Messrs Milner Katolo & Associates
For the 1st Respondent: No appearance
For the 2nd Respondent: Mr. M. S. Chisenga of Corpus Globe Legal Practitioners

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J U D G M E N T

MALILA, JS delivered the Judgment of the Court.

Cases referred to:

1. *Mutech (Z) Ltd v. Kenya Airways Limited (Appeal No. 164/2007)*
2. *Collet v. Van Zyl Brothers Ltd (1966) ZR 65*
3. *Musonda v. Simpemba (1978) ZR 175*
4. *General Nursing Council of Zambia v. Mbangweta (2008) ZR (vol. 2 105)*

5. *YB and F Transport v. Supersonic Motors Limited (SCZ judgment No.3 of 2000)*
6. *Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited (1994) SCZ*

Legislations referred to:

1. *Supreme Court Rules, Chapter 25 of the Laws of Zambia*
2. *High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Rules of the Supreme Court, 1999 edition*
4. *Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia*

By notice of motion supported by an affidavit, the respondent moved this court to order costs against the appellant following the appellant's unilateral withdraw of its appeal.

The background facts to the present motion are deeply embedded into legalities regarding the interpretation of the Landlord and Tenant (Business Premises) Act, chapter 193 of the Laws of Zambia, but are largely irrelevant for the present purpose.

The appellants, who were tenants in the 1st respondent's premises known as Levy Business Park, were unhappy with certain decisions taken by the 1st respondent in respect of the various business premises leased by them. They took out originating process under

the Landlord and Tenant (Business Premises) Act, chapter 193 of the laws of Zambia, seeking certain reliefs from the High Court. In the meantime, they sought from the court an order of interim injunction.

The High Court considered the application for an interim injunction and declined it. The High Court also dismissed the appellants' cause of action on the 21st March, 2013. The appellants then applied to the learned High Court judge to review her ruling of 21st March, 2013. This too, was declined. On 3rd May, 2013, the appellants filed in a notice of appeal against the ruling dismissing the cause of action as well as that declining a review of the ruling.

On the 6th of January, 2015, a notice of hearing was issued in respect of the appellant' appeal. The same was cause listed for hearing on the 4th of February, 2015 at 09:00 hours.

A week later on the 13th January, 2015, the appellants filed a notice of withdrawal of appeal pursuant to rule 63 of the Supreme Court Rules, chapter 25 of the Laws of Zambia. The notice read as follows:

> **TAKE NOTICE THAT THE APPELLANTS herein ZANA ENTERPRISES LIMITED AND 20 OTHERS hereby discontinue all further proceedings in the above mentioned appeal on the ground that the appeal has been overtaken by events..."**

The notice of motion before us is sequel to the discontinuance of the appeal in the manner described. The 2nd respondent's grievance is that it was put to great cost by reason of the appeal, and that the unilateral discontinuance of the appeal by the appellants did not afford the 2nd respondent opportunity to argue its case on costs, and hence, the application through this motion for the court's order on costs.

In the brief affidavit in support of the notice of motion sworn by Mr. Sidney Chisenga, learned counsel for the 2nd respondent, it was averred that as the withdrawal of the appeal was without the

consent of the parties, it was desirable that the court makes an order as to costs; a point repeated in the 2nd respondent's heads of argument. Mr. Chisenga, after quoting the provisions of rules 63(1) and 63(3) of the Supreme Court Rules, chapter 25 of the Laws of Zambia, submitted that the appellants withdrew the appeal without the consent of the 2nd respondent and, therefore, in accordance with rule 63(3), the appeal remains on the list and should come on for hearing on the issue of costs.

The motion was opposed through an affidavit in opposition sworn by Mr. Frank Mupezeni Sikazwe, an advocate in the firm of Messrs Milner Katolo and Associates, advocates for the appellants. The short point made in that affidavit is that the appeal was withdrawn by way of notice of discontinuance before the scheduled hearing date as it was overtaken by events since the lease agreements, which were the subject of the appeal, were declared null and void by a different High Court judge, and the injunction was no longer required.

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In the skeleton heads of argument filed on behalf of the appellants, and upon which Mr. Katolo, learned counsel for the appellants indicated he would place reliance in opposing the motion, it was contended that rule 63(1) of the Supreme Court Rules allows a party to withdraw an appeal at any time before the matter is called upon for hearing by serving a notice in form CIV/7 in the Registry; that nowhere in that rule is the consent of the other party to the appeal mentioned as a condition precedent for the filing of the notice.

It was further contended that the appellants' appeal to the Supreme Court against a ruling refusing an injunction by the High Court concerning the enforcement of the lease agreement, was rendered academic when a different High Court judge, in a related matter, declared the agreements null and void.

The learned counsel further submitted that costs are in the discretion of the court and urged us to order that each party bears its own costs as that would serve the interests of justice better. The

learned counsel relied on rule 77 of the High Court Rules, chapter 27 of the Laws of Zambia.

In his supplementary oral arguments in opposition to the motion, Mr. Katolo submitted that the motion turns on the interpretation of rule 63(3) of the Supreme Court Rules, chapter 25 of the Laws of Zambia. According to Mr. Katolo, a reading of that rule does not entitle a party to proceed by way of motion to ask for costs in an appeal that has been discontinued by notice. In the view of Mr. Katolo, the appeal has not been called for hearing to deal with the issue of costs.

As regards the time for filing of the withdrawal of the appeal, Mr. Katolo submitted that rule 63(3) allows the appellant to file the withdrawal at any time after lodging the appeal but before it is called for hearing which is what the appellants did in the present case. He also argued that the filing of the notice of withdrawal does not entitle the other party to costs as of right. It was contended that the motion before the court is not supported by rule 63(3).

Mr. Katolo's alternative argument reiterated what was already in the heads of argument, namely, that if the court is inclined to take the position that a notice of motion was the appropriate way by the respondent in claiming costs in the present matter, the court should, at the very least, order each party to bear its own costs.

We have carefully considered the arguments of the parties in this motion. The overarching question is whether, where the appellant unilaterally discontinues an appeal through a notice under rule 63 of the Supreme Court Rules, chapter 25 of the Laws of Zambia, any outstanding issue as to costs would be raised through a notice of motion as the 2nd respondent has done in this case. In other words, following the discontinuance of the appeal is the avenue of a motion available to determine the issue of costs?

Rule 63 of the Supreme Court Rules reads as follows:

> **"(1) An appellant may at any time after lodging the appeal and before the appeal is called upon for hearing serve on the parties to the appeal and file in the Registry a notice on From CIV/7 of the Third Schedule to the effect that he does not intend further to prosecute the said appeal.**

(2) If all parties to the appeal consent to the withdrawal of the appeal without order of the court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their practitioners, and the appeal shall thereupon be deemed to have been dismissed. In such event any sum lodged in court as security for costs of the appeal shall be paid out to the appellant.

(3) If all the parties do not consent to the withdrawal of the appeal aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodged in court as security for the costs of the appeal."

We understand Mr. Katolo's argument to be a technical one, namely, that in view of the provisions of rule 63(3) of the Supreme Court Rules as we have quoted them above, proceeding by way of motion for an order as to costs following the discontinuance of an action, is procedurally incorrect since for purposes of hearing any issue as to costs, the appeal should remain on the list. In other words, that the issue of costs ought to be heard in the appeal itself and not in a motion.

In the case of **Mutech (Z) Ltd v. Kenya airways Limited**[1] a similar situation as here, confronted us. The appellant withdrew, by notice of discontinuance, the appeal about a week before the scheduled date for hearing. The respondent did not consent to the withdrawal of the appeal. There was no agreement between the parties as to costs either. By notice of motion, the respondent applied for costs under rules 48(7), 63(3) and 77 of the Supreme Court Rules, chapter 25 of the Laws of Zambia. The appellant did not contest the application. We held in that case that the motion for costs should succeed principally because there was no evidence that rule 63(1) was complied with by the appellant, and that the motion in that case was not contested. In *casu,* the picture presented is different. The motion is contested; the very use of the motion to determine the question of costs is in issue.

In the present case, it is imperative that the full import of rule 63 is appreciated. Discontinuance of an appeal under rule 63 parallels, in our view, discontinuance of suits in the High Court. Useful analogies can therefore, be drawn from what obtains when a suit

has been discontinued. In terms of Order XVII of the High Court Rules, chapter 27 of the Laws of Zambia:

> **"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 the discontinuance or withdrawal to the Registrar and to every defendant as to whom he desires to continue 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..."**

Order 62 rule 5 of the Rules of the Supreme Court 1999 (edition) is headed *"Cases where order for costs deemed to have been made."* It provides, so far as is material, that:

> **"5 – (1) In each of the circumstances mentioned in this rule an order for costs shall be deemed to have been made to the effect respectively described and, for the purposes of section 17 of the Judgments Act, 1838, the order shall be deemed to have been entered up on the date on which the event which gave rise to the entitlement to costs occurred.**

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(3) Where a party by notice in writing and without leave discontinues an action or counterclaim or withdraws any particular claim made by him as against any other party, that other party shall be entitled to his costs of the action or counterclaim or his costs occasioned by the claim withdrawn, as the case may be, incurred to the time of receipt of the notice of discontinuance or withdrawal."

We are inclined to the view that the withdrawal of an appeal and a withdrawal of a suit or action are not dissimilar so that the provisions of Order XVII of the High Court Rules and Order 65 rule 5 of the Rules of the Supreme Court, apply to a withdrawal of an appeal *mutatis mutandis*.

On a broader canvass, we are of the settled view that once a party to an appeal abandons it by way of entry of a notice of withdrawal or discontinuance of appeal, whether with or without an order of the court, that abandonment implies that the appeal is dismissed. When an appeal is withdrawn at the stage when it is ripe for hearing, as in the present case, it is by implication a concession that it has no prospects of success, for whatever reason. The effect of the withdrawal, therefore is that the appeal is dismissed.

In the present case, we take it that the critical issue is not whether or not the 2nd respondent is entitled to costs, but whether the method by which they have tabled that request for costs is the correct one. We note that entitlement to costs is only raised as an alternative argument by the learned counsel for the appellants.

We have examined rule 48 of the rules of the Supreme Court to determine whether an application for costs for a discontinued appeal can competently be brought under that rule. That rule falls under Part III entitled *"Civil Appeals."* Rule 47 makes its plain that Part III applies only to *"civil appeals and applications and to matters related thereto."* To us, this provision clearly implies that Part III applies as well to appeals as to matters related to appeals. Rule 48(1) directs how applications to a single judge are to be made. Perhaps of moment for the present purpose is rule 48(5) which states that:

> **"An application involving the decision of an appeal shall be made to the court in like manner as aforesaid but the proceedings shall be filed in quintuplicate and the application**

shall be heard in court unless the Chief Justice or presiding judge shall otherwise direct."

In our considered view, this provision is wide enough to allow for any ancillary application including those for costs to be made under rule 48(5). In other words, an application for costs in an appeal that has been withdrawn, is quite properly an application on a matter related to an appeal and may legitimately be brought under rule 48(5) of the Rules of the Supreme Court. More importantly, nothing in rule 48 of the Supreme Court Rules limits or otherwise affects the inherent power of this court to make such order or give such directions as may be necessary for the ends of justice, or to prevent abuse of court process. We do not think, therefore, that Mr. Katolo's objection is well founded.

The learned counsel for the appellant has also submitted that in the event that we accepted the route taken by the 2nd respondent and entertain the application through this motion for costs, we should order that each party bears its own costs.

As rightly observed by Mr. Katolo, costs are always awarded in the court's discretion. And we have repeatedly articulated this position in many case authorities. The cases of **Collet v. Van Zyl Brothers Ltd**[2], **Musonda v. Simpemba**[3] and **General Nursing Council of Zambia v. Mbangweta**[4], have all consistently carried our position that costs are warded in the discretion of the court and not merely at the whims of a party to litigation. We have also repeatedly asserted that the discretion reposed in the court to award costs should be used judiciously and not arbitrarily or capriciously. Using discretion entails the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances. One of the principles guiding the exercise of that discretion in regard to award of costs is that postulated in the case of **YB and F Transport v. Supersonic Motors Limited**[5]. There we stated as follows:

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

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Similar sentiments were carried in the case of **Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited**[6] where Gardner, JS, stated that:

> **"With regard to the argument as to costs, the general rule is that a successful party should not be deprived of his costs unless his conduct in the course of proceedings merits the court's displeasure or unless his success is more apparent than real, for instance, where only nominal damages are awarded."**

We have stated earlier on in this judgment that the effect of a withdrawal of the appeal is that the appeal is dismissed. This dismissal creates an entitlement for the other party to costs. In other words, the party withdrawing the appeal is in the position of an unsuccessful party while the respondent party is the successful party.

As it emerges that the award of costs should normally be guided by the principle that costs follow the event, the effect is that the party who calls forth the event by instituting the appeal, will bear the costs if the appeal, for any reason not attributable to the respondent, fails; but if this party shows legitimate occasion by

successfully prosecuting his appeal, then the respondent should bear the costs. However, the vital factor in settling the preference is the judiciously exercised discretion of the court, accommodating the special circumstances of the case, while being guided always by the ends of justice. In some cases, claims of public interest will be a relevant factor in the exercise of such judicial discretion as will also be the motivation and conduct of the parties prior to, during, subsequent to and after the commencement of the litigation.

Taking all these considerations into account, we are for our part perfectly satisfied that this is an appropriate case in which we should exercise our discretion to award costs in favour of the 2nd respondent.

We find merit in the motion and we grant the order sought with costs.

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H. Chibomba
SUPREME COURT JUDGE

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G. S. Phiri
SUPREME COURT JUDGE

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M. Malila, SC
SUPREME COURT JUDGE