IN THE HIGH COURT FOR ZAMBIA **2020/HP/A022**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

ELIAS MUNSHYA **APPELLANT**

AND

THE COUNCIL OF THE ZAMBIA INSTITUTE OF LEGAL EDUCATION **RESPONDENT**

Before: ***The Hon. Mr. Justice C. Zulu.***

For the Appellant: Mrs. M. Mumba, Messrs Lusenga Mulongoti Advocate.

For the Respondent: Ms. M. Undi and Mr. J. Chileshe, of Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners.

R U L I N G

Cases referred to:

1. ***Nedson Nzowa v. Peter Lusaka Chintala (Appeal No. 135/20020.***
2. ***George Balamoan v. Aidan Gaffney (1971) Z.R. 29.***
3. ***Y.B. Transport v. Supersonic Motors Limited (2000) Z.R. 22.***
4. ***Twampane Mining Co-operative Society Limited v. E and M Story Mining Limited (S.C.Z. Judgment No. 20 of 2011).***
5. ***Kuta Chambers v. Concilia Sibulo (2018) Special Edition Z.R. 33.***
6. ***Zambia Consolidated Copper Mines Ltd v. Chileshe (2002) Z.R. 86.***
7. ***R.B. Policies At Lloyds v. Butler [1949] 2 ALL E.R. 226, page 229 and 230.***

Legislation referred to:

1. ***The High Court (Appeals) (General Rules) Chapter 27 of the Laws of Zambia.***
2. ***The High Court Rules Chapter 27 of the Laws of Zambia.***
3. ***The Student Rules, Statutory Instrument No. 205 of 1973.***

This ruling is in respect of an application by the Respondent for an order for costs following the filing of the notice to discontinue the appeal by the Appellant. The application was made pursuant to the ***High Court (Appeals) (General Rules) Chapter 27 of the Laws of Zambia***, which deals with appeals from any board or authority to the High Court, and Rule 6 (3) provides:

> ***Where a notice of withdrawal is filed in accordance with sub-rule (1), the appeal shall be deemed to have been dismissed without further order by the High Court but, failing agreement between the parties, the appeal shall remain on the list for the purpose of hearing any issue as to costs or other matters outstanding between the parties.***

A brief background to this application is that, on November 16, 2020, the Appellant filed a notice of appeal in the High Court. The appeal was against the decision rendered by the Zambia Institute of Advanced Legal Education (ZIALE) dated May 7, 2020. The decision was allegedly in respect of the Appellants' application for direct admission to the Zambian Bar or enrollment to sit for the Legal Practitioners Qualifying Examination (LPQE). It was alleged that the ZIALE decided to defer the Appellant's application because the Appellant did not state which of the above two options the Appellant specifically was desirous to pursue; direct admission to the Zambian

Bar or to sit for bar examinations. Hence the appeal, *inter alia* stating that:

> ***The Respondent erred in law and in fact when it decided that the Appellant's application for admission to the Zambian Bar is contradictory.***

The date set for hearing the appeal was on March 2, 2021, however, on February 17, the Respondent raised a preliminary issue on a point of law to the effect that:

> ***The purported Notice of Appeal is incompetent and or irregular as it was not lodged within four (4) weeks from the date of communication of the decision of the Council of Zambia Institute of Advanced Legal Education as prescribed by Rule 6 (5) of the Student Rules, Statutory Instrument No. 205 of 1973 (amended) as read with the Legal Practitioners Act, Chapter 30, Volume 4, of the Laws of Zambia.***

On the return date of hearing the appeal, Counsel for the Appellant, Mrs. Mumba, indicated that she had instructions from the Appellant to discontinue the appeal. And my reaction was that given those instructions, a formal notice of discontinuance had to be filed. Later in the day, a notice of discontinuance of the said appeal was filed. And following the notice of discontinuance, the Respondent then filed the present application for an order for costs.

An affidavit in support was deposed to by Mailesi Undi, the Respondent's Advocate, who basically recounted events leading to this application as stated in hereinbefore.

An affidavit in opposition was deposed to by Monica Mumba, Counsel for the Appellant. The reasons advanced to dissuade the court from

granting the application are that: before the Appellant lodged the appeal, he sought to engage the Respondent to amicably resolve the dispute with a view to avert costs being incurred, but the Respondent spurned the Appellant's initiative; and that instructions to discontinue the matter was communicated to the Respondent before the date of hearing.

In support of the application, the Respondent Counsel's argued that by virtue of the Appellant filing a notice of discontinuance, the Respondent was entitled to costs pursuant to Rule 6(3) of the ***High Court (Appeals) (General) Rules*** aforementioned. Additionally, Order XVII rule 1 of the ***High Court Rules Chapter 27 of the Laws of Zambia*** was relied on, which provides:

> ***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 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 Judge may deem just.***

And the case of ***Nedson Nzowa v. Peter Lusaka Chintala (Appeal No. 135/2002)***, was adverted to, in which the Supreme Court held:

> ***We are at a loss to understand the reasoning of the Judge in the court below as a litigant who has been dragged to court in a suit which is subsequently discontinued is entitled to the costs he or she has incurred in defending the suit....***

In apparent reaction to the position taken by the Appellant to avoid costs, that the action was taken out due to the Respondent's inertia to resolve the matter amicably, the Respondent's Counsel made reference to the case of ***George Balamoan v. Aidan Gaffney (1971) Z.R. 29*** wherein it was *inter alia* held:

> ***I agree with Mr. McLellan- Shield's contention and hold that if the plaintiff chooses a wrong mode of action and thereby makes the defendant to incur costs he should not thereafter allege that any costs incurred by the defendant have been incurred unnecessarily. I take the view that it is improper for a plaintiff to involve the other party in costs and then turn round and say that such costs have been incurred unnecessarily. If it had not been for the plaintiff's issue of the irregular writ the defendant would never have incurred the costs that he has. I hold that those costs incurred by the defendant were properly and necessarily incurred....***

While the Appellant's Counsel acknowledged that "costs follow the event", in the present case it was argued that, the Respondent was not entitled to costs. And the reasons given for opposing the application stated in the affidavit in opposition were restated.

Furthermore, the case of ***Y.B. Transport v. Supersonic Motors Limited (2000) Z.R. 22*** was vouched, wherein it was held:

> ***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.***

According to the Appellant's Counsel, it was wrong for the Respondent to ask for costs when the matter was before court due to its conduct. And that since the Court did not adjudicate on the matter there was no need to grant the Respondent an order for costs.

In reply, the Respondent's Counsel argued that the failure or delay by the Appellant to file the appeal within four weeks was not the responsibility of the Respondent. It was, therefore, argued that when parties are seeking an amicable solution, time did not stop to tick. In this regard the case of ***Twampane Mining Co-operative Society Limited v. E and M Story Mining Limited (S.C.Z. Judgment No. 20 of 2011)*** was referred to, wherein it was held:

> ***The position of the law is that ex curia settlement discussions do not and cannot stop the time from running. The principle was ably espoused by the learned authors of*** *Chitty on Contracts, General Principles, paragraph 1949 at page 1267,* ***where they stated, inter alia, that once time has started running, it continues until proceedings are commenced or the claim is barred. Parties must bear in mind that ex curia settlement discussions may, fail or succeed, hence the reason to be prudent enough to prepare for any eventuality, watch the time and take necessary steps as provided in the Rules of Court.***

I was thus urged to grant an order for costs as prayed.

I have carefully considered the affidavits and the arguments for and against the application. It is important to note that in litigation generally no party has a right to costs. However, costs are in the discretion of the court, awarded for the purpose of indemnifying a successful party against the expenses he/she has been put in by the losing party (see ***Kuta Chambers v. ConciliaSibulo (2018) Special Edition Z.R. 33***).

It is important to note that "costs follow the event", meaning a successful party must be paid the costs incurred in respect of prosecuting or defending the action, by the losing party. And it is trite that where a party discontinue his/her matter in court, the other party is entitled to his/her costs incurred up to the time the matter was discontinued.

In the light of Rule 6 (3) of the ***High Court (Appeals) (General) Rules***, a withdrawal of an appeal implies that the appeal has been dismissed. And applying the principle that "costs follow the event", the Respondent herein is entitled to costs. The Appellant has, however, brought in the dimension that the Respondent's conduct prior to the appeal should be considered. In other words, the Appellant somewhat argued that but for the Appellant's conduct i.e. being averse to be engaged to settle the matter amicably, his appeal would not have been statute barred.

What is of material consideration is what prompted the Appellant to withdraw the appeal. The decision by the ZIALE, the basis of the Appellant's complaint was made on October 7, 2020. And in terms of

Rule 6(5) of the ZIALE, ***Student Rules Statutory Instrument No. 205 of 1973*** as amended, provides:

> ***6(5) Any applicant who is dissatisfied by a decision of the Council under this rule may, within four weeks from the communication of such decision to him appeal therefrom to the High Court and thereafter to the Supreme Court of Zambia.***

The appeal to the High Court was lodged on November 16, 2020, outside the time limit of four weeks from the date the decision was supposedly communicated to the Appellant. As earlier noted this prompted the Respondent to raise a preliminary issue (*in limine*): whether the purported notice of appeal was incompetent or/and irregular as it was not lodged within four (4) weeks from the date the decision of the ZIALE was communicated to the Appellant. Conversely, this objection questioned the jurisdiction of the Court to hear and determine an appeal that appeared stale. What followed thereafter was the filing of the notice of discontinuance by the Appellant.

Clearly, there is no conduct on the part of the Respondent to warrant an order to disentitle it from being awarded costs or avoid the application of the principle that "costs follow the event". The Appellant's failure to be mindful that, in pursuing an *ex curia* settlement, time in which to appeal did not stop to run, and having seemingly run out of time, the Respondent cannot shoulder the blame for that failure or neglect.

The fatal consequences of taking out an appeal out of time with no room for extension of time within which to appeal are well known.

Comparably, I am compelled to make reference to the case of ***Zambia Consolidated Copper Mines Ltd v. Chileshe (2002) Z.R. 86*** in which recourse was had to paragraph 1949 of *Chitty on Contracts* 26th Ed., thus:

> ***The general principle is that once time has started to run, it continues to do so until proceedings are commenced or the claim is barred. The principle (if any is possible in so technical a matter) is that a plaintiff who is in a position to commence proceedings, and neglects to do so, accepts the risk that some unexpected subsequent event will prevent him from doing so within the statutory period.***

Further analogy is drawn from the case of ***R.B. Policies At Lloyds v Butler [1949] 2 ALL E.R 226, page 229 and 230***, wherein Streatfeild J. had this to say:

> ***One of the principles of the Limitation Act 1939 is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end to those matters and that there shall be protection against stale demands.***

In the circumstances of this case, it is inconceivable how the Appellant should be assisted from paying costs incurred by the Respondent hitherto. Inversely, it is unimaginable on what basis the Respondent should not be indemnified against unnecessary costs or expenses incurred as a result of being dragged to court albeit abortively .

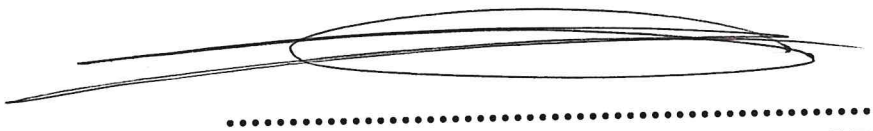
When the Respondent was served with the notice of appeal, and sought for legal representation from Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioner, up until the appeal was withdrawn,

costs in terms of legal fees and disbursements were incurred, which costs must be paid by the Respondent. The argument that no order for costs should be granted because, the appeal was not adjudicated on is misconceived. I trust for the Appellant to engage his Counsel, a deposit was paid in terms of legal fees to prosecute the appeal, therefore, costs are not incurred only if adjudication of the case has materialized. Costs start to be incurred even before process is filed or a defence or opposition is filed in court.

Finally, I entirely agree with the Respondent's Counsel that this is a proper case in which to order costs of this appeal and incidental thereto in favour of the Respondent following the withdrawal of the appeal by the Appellant. And I so order, the same to be taxed in default of agreement.

Leave to appeal is granted.

DATED THIS 1ST DAY OF JUNE, 2021.



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THE HON. MR. JUSTICE CHARLES ZULU