

**IN THE COURT OF APPEAL
FOR ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

CAZ Appeal No. 114/2019

BETWEEN :

ROAD DEVELOPMENT AGENCY

AND

AGRO FUEL INVESTMENTS LIMITED



APPELLANT

RESPONDENT

CORAM : Mchenga DJP, Chishimba and Majula, JJA
17th June, 2020 and 10th July, 2020

For the Appellant : Mr. C. Magubwi of Messrs Tembo Ngulube and Company Associates

For the Respondent : Mr. L. Mwamba, Mr. M. Nkunika and Mr. C. Ngoma of Messrs Simeza Sangwa Assocostes

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Scherer v. Counting Investments Limited [1986] 1 WLR 615
2. Mutale vs Zambia Consolidated Copper Mines SCZ Judgement No. 12 of 1994
3. YB and F Transport Limited v. Supersonic Motors Limited SCZ Judgment No. 3 of 2000
4. Costa Tembo v. Hybrid Poultry Farm (Z) Limited SCZ Judgment No. 13 of 2003
5. Collett v. Van Zyl Brothers Limited (1966) ZR 65
6. Hina Furnishing Lusaka Limited v. Mwaiseni Properties Limited (1983) ZR 40
7. Knight and Another v. Clifton and Others [1971] 2 ALL ER 378
8. Afrope Zambia Limited Vs. Anthony Chate and Others SCZ Appeal Number 160 of 2016

9. General Nursing Council of Zambia Vs. Ing'utu Milambo Mbangweta (2008) Z.R. 105 Volume 2
10. Booker Bus Services Limited vs Stanbic Bank Zambia SCZ/8/226/2014
11. Alex Lwando and Another v. Mathews Mwansa Mulenga CAZ Appeal No. 151 of 2017
12. Wootton v Central Land Board [1957] 1 All ER 451
13. Super Marine Handling Services ltd vs Kenya Revenue Authority Civil Appeal 85 of 2006
14. Cecilia Karuru Ngayu vs Barclays Bank of Kenya and Credit Reference Bureau Africa ltd Civil Case No. 17 of 2014 (2016 CKLR)
15. Elias Musonda vs Luanshya Milling Company & 4 Others Appeal 166/174 of 2017

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Rules of the Supreme Court of England (White Book) 1999 Edition.
2. The High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.
3. Halsbury's laws of England

INTRODUCTION

1. This is an appeal against the Judgment of the High Court delivered by Justice M. Chanda, arising from judicial review proceedings which were dismissed on account of lack of jurisdiction. Having dismissed the matter for want of jurisdiction, the court below ordered that the parties bear their own costs.
2. The appeal addresses the issue of costs and the exercise of inherent judicial discretion to award costs.

FACTUAL BACKGROUND

3. We will not give a detailed narration of the pleadings in the lower court as the matter was not determined on the merits and centers on the issue of the award of costs by a court. The brief facts precipitating the appeal are as follows; the Respondent commenced judicial review proceedings against the Appellant and Zambia Weights and Measures Agency in the High Court by way of notice of application for leave dated 2nd September, 2015. The Respondent sought the following reliefs;

- i. ***An Order of certiorari to remove into the High Court for purpose of quashing the following decisions:***
 - a) **The decision of the 1st Respondent (Appellant herein) to impound and detain the Applicant's (Respondent herein) motor vehicles registration numbers ALX 1224 and ALF 3166 on 16th February, 2015 and on 2nd March, 2015 respectively on grounds that they were overloaded whilst driving on public roads;**
 - b) **The decision of the Director of the 2nd Respondent (Zambia Weights and Measures Agency) to grant a permissible error of 6 % excess of the previous weighed load in the certificate of type approval issued to the 1st Respondent.**
- ii. ***A declaration that the Haenni WL 103 Class IV portable instrument cannot be used for trade in Zambia.***
- iii. ***A declaration that the 1st Respondent violated the conditions upon which ZWMA granted authority for the 1st Respondent to use the Haenni WL 103 class IV portable instrument.***
- iv. ***A further declaration that RDA violated the Conditions set in Gazette Notice No. 341 of 2013 when it failed to record on the tickets of the weighing results, the GPS, incline and orientation of place of weighing the Applicant's tracks.***
- v. ***A declaration that condition 3 of Gazette Notice No. 341 of 2013 is illegal and therefore null and void ab initio.***

- vi. *An order of mandamus to compel the 1st Respondent to revoke Gazette Notice No. 341 of 2013*
- vii. *An order of prohibition to prohibit the 1st Respondent from using the Haenni WL 103 Class IV portable instruments for trade in Zambia.*
- viii. *A declaration that condition 3 of the certificate of type approval issued by the 2nd Respondent to the 1st Respondent which grants a permissible error of 6% excess of the previous weighed load is illegal and therefore null and void ab initio*
- ix. *An order of mandamus to compel the 2nd Respondent to revoke the said certificate of type approval issued to the 1st Respondent*
- x. *Damages for loss of business resulting from the 1st Respondent's decision to detain the Applicant's vehicles registration numbers ALX 1224 and ALF 3166 and*
- xi. *All necessary and consequential directions*

ARGUMENTS IN THE COURT BELOW

4. The Appellant in the court below raised the issue of whether or not the court had jurisdiction to hear and determine the application for leave to commence judicial review notwithstanding the application being filed three months from the date of decision complained of. Essentially that there was no application or order granting extension of time within which the application ought to have been made pursuant to **Order 53 Rule 4 of the Supreme Court 1999 Edition.**
5. Arguments were advanced by the respective parties on the law relating to judicial review proceedings and in connection with the sought reliefs. For purposes of this appeal, we will only

address the issue raised by the Appellant in respect of the court's jurisdiction to hear and determine the matter on the merits.

6. The Respondent in its arguments in the court below submitted that despite there being a delay in commencing the action for judicial review, the court had the requisite discretion to hear the matter.
7. The Respondent contends that a delay in commencing an action is not a reason to automatically refuse the substantive reliefs sought. Therefore, the court could not refuse to determine the matter on account that there was delay in commencing the action, because serious issues of illegalities in respect of the decision subject of judicial review were raised.
8. The Respondent had in addition argued that an action which challenges a statute cannot be estopped on account of delay in commencing an action.
9. The Appellant on the issue of jurisdiction, submitted in the lower court that a party cannot commence judicial review proceedings out of time without leave of court in line with the provisions of **Order 53 Rule 14 Sub-Rule 58 of the Rules of**

the Supreme Court of England (White Book) 1999 Edition.

The Appellant further argued that where an application for extension of time has not been made, the court has no jurisdiction to grant any of the sought reliefs. The Appellant, in a nutshell, contended that the court below lacked the requisite jurisdiction to make a determination on the merits.

DECISION OF THE COURT BELOW:

10. The court below considered the matter and stated that under the provisions of **Order 53 Rule 4 (1)** of the **Rules of the Supreme Court (White Book) 1999 Edition**, a party commencing judicial review proceedings ought to do so within a period of 3 months, failure to which a party is at liberty to make an application for extension of time pursuant to **Order 53 Rule 14 (58) of the White Book**.
11. The court held that the extension of time must be preceded by a notice which ought to be served on the other party. Only then will the court proceed to grant an order for extension of time to allow a claimant to file an application for judicial review out of time.

12. The court below further held that the Respondent had failed to file a motion to extend time, and that the application for judicial review was not properly before it. That, it had no jurisdiction to determine the matter, because the provisions of **Order 53 Rule 14 (58)** of the **Rules of the Supreme Court (White Book)** on the provision for leave to file an application for judicial review out of time are mandatory and cannot be dispensed with.
13. Consequently, the court below dismissed the Respondent's action and ordered that the parties bear their own costs.

GROUND OF APPEAL

14. The Appellant raised a sole ground of appeal namely that;

“The Court below erred in law when it found and held that each party was to bear its own costs, when on the facts and circumstances of the case, the Appellant was the successful party”.

ARGUMENTS BY THE PARTIES

15. The Appellant filed heads of argument dated 3rd July, 2019. The Appellant submits that the rationale behind an order for costs is that a party that has been unjustifiably or improperly brought to court should be compensated for the expenses incurred, necessitated by the claimant's action. In respect of the principles governing an award of costs, we were referred to

the English case of **Scherer v. Counting Investments Limited** ⁽¹⁾ where the court held, in a nutshell, that costs ordinarily follow the event. That a judge has unlimited discretion to make any order as to costs that he considers the justice of the case demands. We were further referred to the Supreme Court decision in **Mutale vs Zambia Consolidated Copper Mines** ⁽²⁾ where the court held that the general rule as to costs is that a successful party will only be deprived of costs if his conduct in the course of the proceedings merits the court's displeasure or the success is more apparent than real. To further buttress the point on costs, our attention was drawn to the cases of **YB and F Transport Limited v. Supersonic Motors Limited** ⁽³⁾ and **Costa Tembo v. Hybrid Poultry Farm (Z) Limited** ⁽⁴⁾.

16. The Appellant submits that a successful litigant is ordinarily entitled to their costs. The Appellant argued that though costs are not as a matter of right and may be subject to certain considerations such as the conduct of the successful party during the proceedings, it had a reasonable expectation of being awarded the costs of the proceedings. The basis being that it had successfully opposed the Respondent's application for

judicial review. Further, that the Appellant's success in the court below was real and not apparent. In addition, that the Appellant had not conducted itself in a manner displeasing to the court.

17. It was contended that the Appellant had filed in a notice of motion to raise preliminary issues on a point of law dated 15th September 2015. The Appellant sought to raise the issue regarding the jurisdiction to hear the application for Judicial Review. Further, that the lower court in its Judgment upheld the issue regarding its jurisdiction and dismissed the matter accordingly. We were referred to page J21 of the said judgment.
18. The Appellant reiterated that as is evident from the holding in the Judgment of the lower court, its success was real and not apparent. The Appellant submits that though the court has the discretion under **Order 40 Rule 6 of the High Court Rules** to award costs, the court below ought to have exercised the said discretion judiciously in favor of the Appellant. On the issue of judicial discretion and the manner it should be exercised, the cases of *Collett v. Van Zyl Brothers Limited* ⁽⁵⁾, *Hina Furnishing Lusaka Limited v. Mwaiseni Properties Limited* ⁽⁶⁾ and *Knight and*

Another v. Clifton and Others ⁽⁷⁾ were referred to. The court in the above cited cases discussed the principle that judicial discretion must be exercised according to rules of reason and justice and must be justified. Where there is material on which the court can exercise discretion, it is not justified to deprive a successful party of its costs.

19. The Appellant submitted that there were sufficient grounds before the lower court for it to award costs to the Appellant as the Respondent had improperly commenced an action against the Appellant. Further, the conduct of the Appellant was not such that it be denied an order for costs. We were urged to allow the appeal.
20. The Respondent opposed the appeal. Counsel for the Respondent, Mr. L Mwamba submitted that the exercise of judicial discretion by the court will rarely be interfered with unless the discretion was exercised on the wrong principles. As authority the Kenyan case of **Super Marine Handling Services ltd vs Kenya Revenue Authority** ⁽¹³⁾ was cited, where the appellate court dealt with the issue of trial court's exercise of its discretion on award of costs and stated that an appellate court

should not interfere unless the discretion has been exercised unjudicially or on wrong principles. We were further referred to the case of **Cecilia Karuru Ngagu vs Barclays Bank of Kenya and Credit Reference Bureau Africa Ltd** ⁽¹⁴⁾ which dealt with the issue of award of costs, and the considerations such as conduct of parties, subject of litigation and the circumstances leading to the institution of proceedings and termination.

21. The Respondent went on to draw our attention to our decision in the case of **Elias Musonda vs Luanshya Milling Company & 4 Others** ⁽¹⁵⁾, in which we took into account the conduct of the 2nd and 3rd Respondents who necessitated the action and partially allowed the appeal on costs.
22. It was contended that being a successful litigant is not the only consideration. The subject of litigation being judicial review is considered generally to be of public importance. The reason being that the applicant moves the court in public interest and that the decision of the High Court would benefit the public.
23. It was submitted that because of the importance attached to the subject of litigation, costs cannot be awarded on the mere fact that a party has succeeded. Because the proceedings were

terminated on a technicality, it is only fair that each party bears its own costs. In any event, at the leave stage the court below had found an arguable case fit for further investigation.

24. The Respondent made reference to the motion at page 60 of the record namely the notice of intention to raise preliminary issues on a point of law raised by the Appellant in the court below.
25. The Respondent contended that the Appellant's conduct in the proceedings was not blameless, as shown by several non-attendances before court. Hence the reason the court below did not award costs. We were argued not to interfere with the exercise of discretion by the court below.
26. The Appellant in response, submits that the Kenyan authorities cited by the Respondent are not binding on court but are merely of persuasive value.
27. It was further submitted that contrary to the contention by the Respondent that the awards of costs is determined by factors such as subject matter, the rule is that a successful party should not be denied costs.
28. As regards the non-attendances before the court below, the Appellant contends that the same cannot constitute

misconduct. In any event, it is an issue that ought to have been raised in the court below. The Appellant argues that its conduct in the proceedings was blameless. We were urged to allow the appeal.

DECISION OF THE COURT:

29. We have considered the appeal, the authorities cited and arguments advanced. The issue for determination is whether the court below judiciously exercised its discretion by making an order that the parties bear their own costs.
30. It is not in dispute, as earlier stated in the factual background, that the matter commenced by the Respondent was dismissed on the basis of lack of jurisdiction by the court. The lower court then ordered that costs be borne by the respective parties themselves.
31. The basic rule of attribution of costs is that costs follow the event. The rationale is to compensate the successful party for the trouble taken in prosecuting or defending the case. According to **Halsbury's Laws of England**, the court's absolute and unfettered discretion to award costs must be exercised

judicially and not arbitrary but in accordance with reason and justice.

32. To depart from the principle of costs follow the event, there must be good reasons, such as matters in the domain of the public interest, these will be exempted from costs. A successful party may be denied costs if it is proved that but for his conduct the action would not have been brought. Further where there is misconduct in the conduct of proceedings, the court may decline to award costs to the successful party.

33. Therefore, in determining the issue of costs, the court is at liberty to consider the conduct of the parties, events leading to the termination of proceedings and the consequences of the order of costs.

34. In respect of the principle that costs follow the event and are awarded at the court's discretion, see the case of ***Afrope Zambia Limited v. Anthony Chate and Others*** ⁽⁸⁾ in which the Supreme Court stated that;

“We have ... stated in a number of authorities that costs are in the discretion of the court.”

35. Further, in the case of ***General Nursing Council of Zambia Vs. Ing'utu Milambo Mbangweta*** ⁽⁹⁾ the Supreme Court held that:

"It is trite law that costs are awarded in the discretion of the court, such discretion is however to be exercised judicially."

36. The contention by the Appellant is that it ought to have been awarded costs having successfully defended the matter. The Supreme Court has time and again guided on principles to be applied when awarding costs. The earlier cited cases as well as the case of ***Booker Bus Services Limited vs Stanbic Bank Zambia*** ⁽¹⁰⁾ are instructive.

37. It is trite that the court may refuse to grant a party costs in an instance where that party has not conducted itself properly during the course of the proceedings. In the case of ***Alex Lwando and Another v. Mathews Mwansa Mulenga*** ⁽¹¹⁾, we stated as follows;

"The Appellant has failed to show any conduct that the Court have possibly disapproved of, on the part of the Respondent, to deprive him of his costs. We have not seen anything on the record to justify a departure from the general principle that a successful litigant should not be deprived of his costs..."

38. The English Court of Appeal, in the case of ***Wootton v Central Land Board*** ⁽¹²⁾ addressed the issue of costs *viz a vie* the discretion for a court to award the same. The court in interfering with a tribunal's award of costs stated as follows;

"It is a common place in cases which come before this court relating to the exercise of a discretion, and more particularly relating to the

exercise of a discretion in regard to costs, that this court is very slow indeed to interfere with such exercise. Put in another way, it can be asserted that there is no question of law which this court is competent to determine relating to the exercise of a discretion unless it is shown clearly that, in the exercise of the discretion, the tribunal appealed from has in some material and substantial respect wrongly or unjudicially exercised the discretion, either by some wrong, some erroneous, direction of itself as a foundation for the exercise, or ... where the result arrived at is one producing in the opinion of this court a manifest injustice..."

39. We have perused the proceedings in the court below. There was no misconduct, omission or neglect on the part of the Appellant nor was there any oppressive conduct attributed to the Appellant which would have induced the court below to deprive it of the costs. The Appellant successfully defended the action which was subsequently dismissed. We see no basis for the learned trial judge depriving the successful party the order of costs. We find that the court below did not exercise its discretion judiciously when she ordered each party to bear own costs.

40. We are of the view that costs ought to have followed the event the Appellant having succeeded in defending the suit. This is a proper case for us to interfere with the award of costs made by

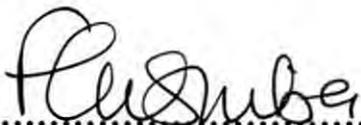
the lower Court, which misdirected itself and was wrong in the exercise of the discretion. We hereby set aside the order made by the court below. We accordingly award costs to the Appellant to be taxed in default of agreement.

CONCLUSION

41. We accordingly uphold the appeal. Costs follow the event.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



.....
F.M. Chishimba
COURT OF APPEAL JUDGE



.....
B. M. Majula
COURT OF APPEAL JUDGE