

MUSA KIKA
versus
LUKE MALABA
and
MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
and
THE JUDICIAL SERVICE COMMISSION
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA, KWENDA & MUSITHU JJJ
HARARE, 15 June 2021

Urgent Court Application

No appearance for the applicant
M. Nzarayapenga, for the 1st respondent
T. Magwaliba, for the 2nd & 4th respondents
ABC Chinake, for the 3rd respondent

MUREMBA J: This is a unanimous decision of the court. The applicant filed an urgent court application which was allocated to us on the 14th of June 2021. After perusing it, we set it down for hearing today at 2pm for the purpose of doing case management.

An hour before the hearing we were served with a notice of withdrawal of the application with a tender for wasted costs.

The respondents' lawyers appeared for the hearing. However, the applicant's lawyers did not appear even after we had directed them to appear through the Registrar's office. The Registrar informed us that they said that they were not coming.

We note the following uncontested submissions which were made by the respondents' counsels.

1. That they all received the notice of withdrawal just before the time set for the hearing
2. That they had all finished preparing opposing papers in anticipation of the hearing and filing by end of day this date.

Mr *Nzarayapenga* and Mr *Chinake* accepted the withdrawal and a tender of wasted costs. Both counsels further submitted that these costs should be inclusive of the costs of preparing the notices of opposition. They asked the court to make this clear in the order for costs.

Citing the cases of *Meda v Sibanda* 2016(2) ZLR 232(CCZ) & *Abramacos v Abramacos* 1953(4) SA 474(SR), Mr *Magwaliba* submitted that once a matter has been set down for hearing its withdrawal is at the discretion of the court. In exercising its discretion, the court considers the conduct of the party withdrawing the matter. If the party withdrawing a matter is unnecessarily litigious, the court may decline a withdrawal and opt instead to dismiss the matter on the merits. He submitted that *in casu*, this was applicant's third application in 4 weeks. In addition, the applicant had no courtesy to appear before the court as directed. Mr *Magwaliba* moved the court to exercise its discretion whether to accept the withdrawal or to dismiss the application on the merits and in either case with an order for wasted costs.

Disposition

Having carefully considered submissions made by counsels for all the respondents, it is the decision of this court to allow the withdrawal with a tender of wasted costs. We have decided not to dismiss the application on the merits because the notice of withdrawal was filed before the respondents had filed their notices of opposition. This is a matter which was not yet ready for hearing. So, it may not be dismissed on the merits.

With regards to the issue of costs, we note that the applicant has tendered wasted costs. That tender is enough to take care of concerns raised by Messrs *Chinake* and *Nzarayapenga*. By definition, wasted costs are all costs reasonably incurred in preparation for the case. In light of this definition, there is no need for the order to spell out that wasted costs shall include costs for preparing the notices of opposition.

In the result, it be and is hereby ordered that:

1. The matter is withdrawn.
2. The applicant shall pay the respondents' wasted costs.

KWENDA J agrees

MUSITHU J agrees.....

Dube-Banda Nzarayapenga, 1st respondent's legal practitioners

Kantor & Immerman, 3rd respondent's legal practitioners

Attorney General's Office, Civil Division, 2nd & 4th respondents' legal practitioners