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**IN THE COURT OF APPEAL OF ZAMBIA** APPEAL NO. 103/2019
**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*


**BETWEEN:**

**KANSANSHI MINING PLC** **APPELLANT**

**VS**

**MATHEWS MWELWA** **RESPONDENT**

***Mchenga DJP, Chishimba, and Majula, JJA***
***20th May, 2020 and 16th July, 2020***

*For the Appellant* : *Mr. H. Pasi of Messrs. Mando & Pasi Advocates*
*For the Respondent* : *No appearance*

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# JUDGMENT

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MAJULA JA, delivered the Judgment of the Court.

**Cases referred to:**

1. *Amiran Limited vs Robert Bones, Appeal No.42 of 2010*
2. *Zambia National Commercial Bank vs Joseph Kangwa Appeal No.54 of 2008.*
3. *Tembo vs Hybrid Poultry Farm (Z) Limited (2003) ZR 93.*
4. *Zyambo vs Abraham Sichalwe SC J. No. 16 of 2016.*
5. *Engen Petroleum Zambia Limited vs Willis Mwamba & Jeremy Lumba Appeal 117/2016*

**Legislation referred to**

1. The Industrial Relations Court Rules, Statutory Instrument No 34 of 1996

## 1.0 Background

1.1 On the 12th September 2018, the respondent filed a notice of complaint together with an affidavit against the appellant. The basis of the complaint was that the respondent had wrongfully and unlawfully been dismissed from employment. The respondent sought various reliefs.

1.2 The appellant disputed the claims and the matter proceeded to trial on 15th October, 2018 before Justice D. Mulenga in the Industrial Relations Division of the High Court. Judgment was delivered in favour of the respondent on 15th March, 2019. Amongst the reliefs awarded was an order for costs. The appellant is greatly displeased with the order for costs and has launched this appeal.

## 2.0 Ground of Appeal

Dissatisfied with the portion of the Judgment which ordered that the appellant to pay costs, the appellant has appealed on the following ground:

> *"The court below erred in law when it ordered the appellant to pay the respondent's costs when there was no unreasonable delay; improper, vexatious or*

*unnecessary steps taken or other improper conduct by the appellant in the court below".*

**Appellant's Arguments**

The appellants' sole ground of appeal is that the court erred in law when it ordered the appellant to pay the respondents costs when there was no unreasonable delay; improper, vexatious or unnecessary steps taken or other improper conduct by the appellant.

The appellant has called in aid **Rule 44** of the **Industrial Relations Court Rules**[1] which sets out when costs should be inflicted on a party in the Industrial Relations Court. That in the absence of unnecessary delay, improper, vexatious or unnecessary steps taken or other improper conduct by the appellant costs should not have been awarded to the respondent.

The appellant has referred us to two Supreme Court decisions namely, ***Amiran Limited vs Robert Bones,***[1] and ***Zambia National Commercial Bank Plc vs Joseph Kangwa***[2] delivered in 2016 where the import of Rule 44 of the Industrial Relations Court Rules was explained.

It was submitted that on the basis of the foregoing, there were no grounds upon which the court should have condemned the appellants to pay the respondent's costs and that the court below did not find any impropriety on the part of the appellant in its defence of the matter.

We have been urged to uphold the sole ground of appeal with costs to the appellants.

**Respondent's Arguments**

The respondent did not file any arguments neither did he attend court on the day of hearing on 20th May, 2020. The appellant sought to rely entirely on the heads of arguments filed.

**Our decision**

The appeal being on the award of the costs, it is imperative that we address our minds to the law as regards the same.

It is trite law that a successful litigant is entitled to costs. This principle has been echoed in numerous cases.

In ***Costa Tembo vs Hybrid Poultry Farm Limited***[3] it was held that a successful party is entitled to costs.

The Supreme Court reiterated this principle in ***Zyambo vs Abraham Sichalwe***[4] when they stated that *'it is trite that costs follow the event'.*

It is clear from these cases that the general rule is that a successful litigant is entitled to costs. However, the Judge does have discretion to award or not award costs. In awarding or dealing with the award, the Judge must exercise his or her discretion judiciously.

Turning to matters which are before the Industrial Relations Court Division of the High Court however, there is a criteria that has been set out for a party to be entitled to an award of costs.

This criteria has been spelt out in **Rule 44** of the **Industrial Relations Court Rules** which provides as follows:

> *"(1) where it appears to the Court that any person has been guilty of unreasonable delay, or of taking improper, vexations or unnecessary steps in any proceedings, or of other unreasonable conduct, the court may make an order for costs or expenses against him."*
>
> *(2) where an order is made under sub-rule (1), the court may direct that the party against whom the order is made shall pay to any other party a lump sum by way of costs or expenses, or such proportion of the costs of expenses as may be just, and in the last mentioned case may itself assess the sum to be paid, or may direct that it be assessed by the Registrar, from whose decision an appeal shall lie to the court."*

In ***Amiran Limited vs Robert Bones,***[1] Mambilima CJ guided as follows:

> *"That in matters before the Industrial Relations Court, costs can only be awarded against a party if such a party is guilty of unreasonable delay, or of taking improper, vexatious, or unnecessary steps in any proceedings, or of other unreasonable conduct."*

Similar sentiments were expressed in ***Zambia National Commercial Bank vs Joseph Kangwa***[2] where it was held that:

*"With regard to costs, Rule 44 of the Industrial Relations Court Rules contained in the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia provides that a party should only be condemned in costs if they have been guilty of misconduct in the prosecution or defence of the proceedings. We wish to adopt the principle in that rule since this is a matter coming from the Industrial Relations Court. We do not find any misconduct in the respondent's defence of this appeal."*

A scrutiny of these judgments reveals that the criteria for award of costs as envisaged in **Rule 44** of the **Industrial Relations Court Rules** has been eloquently explained. Our understanding is that in as much as it is trite law that costs follow the event, matters in the Industrial Relations Division fall in a special or unique category. This means that the general rule does not apply to matters brought in the Industrial Relations Division. The rationale behind this is that litigants should not be discouraged from deploying their claims before the court for fear of being condemned in costs. They must be able to assert their rights.

Historically, the Industrial Relations Court was meant to be accessible to litigants without following strict rules of procedures and legal technicalities. The majority of litigants were unrepresented and the environment was made conducive for them to assert their rights. There have been recent developments where the majority of the complainants now engaged lawyers which was not the case previously. The question as to the award of costs as explained in the recently decided cases applies equally to employers and employees. In other words, it applies to both parties.

In order for one to be awarded costs the onus falls on them to demonstrate that the claim falls under one of the exceptions. The long and short is that the general rule of costs follows the event does not apply in matters under the Industrial Relations Division *"unless one is guilty of unreasonable delay or taking improper vexatious or unnecessary steps in any proceedings or the other unreasonable conduct."*

A claim for costs must thus fall in one of the instances highlighted above and if not costs should not be awarded. This was the reasoning espoused in ***Engen Petroleum Zambia Limited vs Willis Mwamba & Jeremy Lumba***[5] where the Supreme Court set aside the order for costs awarded to the respondents on the ground that there was no basis to have awarded costs when the respondents did not fall into the criteria stipulated in **Rule 44(1)**.

Pertaining to this matter, we have taken time to meticulously examine the record to ascertain whether or not there was any justification to condemn the appellant in costs. The record reveals that trial commenced on 15th October, 2018, where the respondent testified from 14.20 hours to 15.56 hours. The matter was adjourned to the next Solwezi High Court Session.

On 4th March 2019 the appellant called three witnesses who gave evidence from 14.30 hours to 17.29 hours and they closed their case. Judgment was delivered on 15th March, 2019.

Nowhere on the record is there an indication that the appellant offended the provisions of **Rule 44** of the **IRC Rules**. There is no evidence suggesting that they were guilty of any unreasonable conduct.

In short, we hold the view that no impropriety can be ascribed to the appellant. Therefore, following the decisions of the Supreme Court in ***Amiran Limited vs Robert Bones, Zambia National Commercial Bank Plc vs Joseph Kangwa***[1] and ***Engen Petroleum Zambia Limited vs Willis Mwamba & Jeremy Mumba***[5], to name only a few, our hands are tied. We find no basis upon which the court below could have awarded costs to the respondent. The criteria as laid down in Rule 44 had not been satisfied.

In light of what we have stated in the proceeding paragraphs, we hold that the appeal has merit and uphold it.

We accordingly set aside the order on costs.

Each party to bear their own costs on appeal and in the court below.

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C.F.R. Mchenga
**DEPUTY JUDGE PRESIDENT**

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

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