



REFERENCE NO. 2/2002

IN THE COMESA COURT OF JUSTICE
LUSAKA, ZAMBIA

CORAM: Korsah, Nyankiye, Kalaile, Sakala, and Mutsinzi L.J.J.

Registrar: S.H. Zwane, Esq.

EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK (PTA BANK)

APPLICANT

Versus

MARTIN OGANG

RESPONDENT

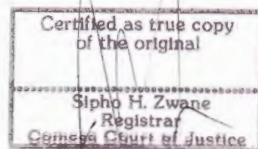
For the Applicant: Prof. F. Ssempebwa of Katende, Ssempebwa & Co., Kampala
Uganda and Mrs F. Ziumbe

For the Respondent: Mr J. Nangwala and Mr R. Okallany, Kampala, Uganda

JUDGMENT OF THE COURT

Lord Justice Sakala delivered the Judgment of the Court.

On 18th September 2002, the Applicant filed in the Registry of this Court an Application for an order on the measures of inquiry to be employed in Reference No.2/2002 and seeking guidance from the Court as to the appropriate measures of inquiry to be employed before the Court in Reference 2/2002. The Applicant prayed for orders: that the Respondent shall appear in person and give evidence at the hearing of Reference No. 2/2002; that the Respondent shall produce, in Court, a copy of his contract of employment with the Applicant and all other documentation relating to his employment with the Applicant which may be in his possession or under his control; that evidence may be led by examination of witnesses; and that the costs of the Application be costs in the cause.

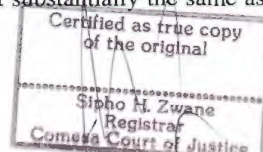


The application was made under Rule 39 of the Rules of the COMESA Court of Justice. Suffice it to mention that the application was opposed by the Respondent on the ground that the Respondent was a party in Reference No. 2/2002 and cannot qualify to be a witness in that Reference where the Applicant is a Respondent; that the application is misconceived and bad in law and the Court cannot compel a party to a suit to give evidence in support of the opposite party's case; that it was an integral part of the Respondents' case against the Applicant that he was not given opportunity to respond to the findings contained in the alleged KPMG Report before he was dismissed; and that the Respondent cannot be compelled to respond to findings in a purported report. The Respondent prayed that the Applicant's application to summon him as its witness when he is a party be dismissed with costs.

Before the Advocate for the Applicant could argue the application, the Court at its own instance, raised a preliminary issue with the parties with regard to the status of Reference No. 1B/2000 and Reference No. 2/2002 both involving the same parties and raising substantially the same issues. The Court explained that pursuant to compliance with an order of the Lord President dated 20th September 2002, discontinuing the proceedings in Reference 1B/2000 under Rule 69.2 of the Rules of COMESA Court of Justice and ordering that the Respondent pays costs, nothing could be entertained under Reference No. 2/2002 while costs in Reference No.1B/2000 remain unpaid, as that reference was still pending. This preliminary issue raised by the Court was in terms of Rule 74.1(b) of the Rules of COMESA Court of Justice relating to stay of proceedings.

Reacting to the preliminary issue raised by the Court, Professor Ssempebwa, on behalf of the Applicant, confirmed that costs had not been paid. He submitted that he agreed with the Court on the interpretation of the law and prayed that all the proceedings founded on Reference 2/2002 be stayed until compliance with the Lord President's order of costs dated 20th September 2002 of the discontinued Reference No. 1B/2000. He also prayed for costs of that day's proceedings.

In response to the submission by Professor Ssempebwa, Mr Nangwala, on behalf of the Respondent, advanced two arguments. First, that at the time of filing Reference 2/2002, there was no Reference before the Court substantially the same as

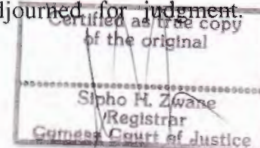


of Reference No.2/2002. He contended that there had been a failure to appreciate the import of the two References. According to Counsel, the proceedings set aside by the Court's Judgment of 26th April 2002 were the pleadings in amended Reference 1B/2000 whose essence was to claim for special damages for wrongful dismissal. He submitted that the moment the pleadings were set aside, there were no pleadings for wrongful dismissal. According to Counsel, what was then discontinued was the Original Reference 1B/2000 before the amendment.

The second argument on behalf of the Respondent centered on the interpretation of Rule 74.1(b). It was submitted that at the time of filing the subsequent Reference No.2/2002, there was no order for costs to be complied with. It was further contended that before Rule 74.1(b) can apply, there must be, at the time of filing a subsequent Reference, an order for costs. It was pointed out that in the instant case Reference No.2/2002 was lodged in May 2002 while the Order of costs was made in September 2002. The submission was that at the time of filing Reference No. 2/2002, there was no order for costs to be complied with.

In his short reply, Professor Ssempebwa pointed out that if the argument that at the time of lodging Reference 2/2002, there was no order as to costs, then the Rule would be evaded by simply filing a Reference simultaneously with the application for discontinuance and then argue that at the time of filing the Reference there was no order as to costs. He submitted that the order to pay costs is subsequent to the discontinuance of an earlier Reference. The Professor further argued that there is no way that pleadings can be withdrawn by means of a letter as contended. He urged the Court to stay all the proceedings under Reference No. 2/2002 until the order for costs for the discontinued Reference No.1B/2000 has been complied with.

We have anxiously considered the brief submission of the Professor and the spirited arguments by Mr Nangwala. We are inclined to conclude that Mr Nangwala has misapprehended the sequence of his own case. The short history of Reference No. 1B/2000 is that it was filed on 20th January, 2000. On 16th October, 2001, when the Reference came up for hearing, Mr Nangwala applied to file an amended Reference 1B/2000. The application was granted. The Reference was argued on the basis of the amendment. Thereafter the matter was adjourned for judgment.



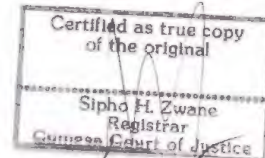
However, on 15th April, 2002, the Applicant filed an application in the Registry of this Court for stay of proceedings in the amended Reference No.1B/2000 and prayed for an order that the matter be heard de novo. For reasons stated in our judgment in that application we held that:

“It follows, therefore, that the proceedings, thus far, in Reference 1B/2000 in which Mr Justice Ogoola participated, are irregular and must be set aside. Reference 1B/2000 is referred to the Judge President for his consideration under Article 22.”

According to Mr Nangwala, this was the end of the amended Reference No. 1B/2000, leaving only the original Reference No. 1B/2000 in which wrongful dismissal was not pleaded. This is a total misunderstanding of our judgment. What we set aside are the proceedings and not the Reference. The contention of Mr Nangwala was that upon the amended reference 1B/2000 being set aside there were before the Court no pleadings for wrongful dismissal. We cannot accept these arguments which totally misapprehend the sequence of events and suggest the existence of two References at the same time. In our view, after the Respondent was granted the amendment, there was only one Reference 1B/2000. Indeed, there were preliminary References in respect of Reference No. 1B/2000 which included an application to amend original Reference 1B/2000 to show that the Respondent had been wrongfully dismissed and to seek special damages.

We, however, are satisfied that on 13th May 2002 when Reference No. 2/2002 was filed, there was pending before this Court Reference No. 1B/2000 between same parties and involving substantially the same issues.

In the Respondents' application to discontinue Reference No. 1B/2000, Mr Nangwala for some unfathomable reason, sought an order of costs against the Applicant, the Lord President rightly, in our view, refused to grant the Respondent such an order and awarded costs in favour of the Applicant. How can Mr Nangwala say that at the time of filing Reference 2/2002, there was no Reference 1B/2000 before this Court? It also renders absurd the assertion that the order of costs for discontinuance of Reference 1B/2000 must be extant before the filing of Reference No. 2/2002.



On 20th September 2002, the Lord President made the following order in respect of Reference 1B/2000:

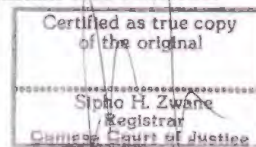
And so, whilst I hereby order that Reference No. 1B of 2000 be removed from the Cause List of the Court, I also hereby order as I can, and in accordance with subrule 6 of Rule 62, that the Applicant pays to the Respondents costs if they have been applied for in the Respondents' defence filed in respect of Reference No. 1B of 2000; and also costs in respect of successful preliminary pleadings filed by the Respondents in connection with Reference No. 1B of 2000, where the costs applied for therein, have not been paid. If the Applicant and the Respondents are unable to agree as to the amount of the costs hereby awarded, the costs shall be taxed by the Registrar.

The preliminary issue raised by the court was based on Rule 74.1(b) which states:

The Court may stay proceedings at its own instance or on the application of a party to the proceedings or a party who, not being a party to the proceedings, establishes that it has a substantial interest in the subject matter of the action or will be adversely affected by the decision in the matter; or in any case, where-

(b) any subsequent suit is brought before compliance with an order of the costs of a discontinued case under Rule 69, for the same or substantially the same cause of action;

We have no difficulty in applying this Rule to the facts raised in our preliminary issue. There was here filed a subsequent Reference No.2/2002 before the Applicant complied with an order for the costs of a discontinued Reference No. 1B/2000 which had substantially the same cause of action. We agree with the interpretation of Counsel for the Respondent that at the time of filing the subsequent Reference there was no order of costs. But the issue is not the filing of the Reference. The correct interpretation of Rule 74.1(b) is that proceedings in a subsequent case, in the instant situation Reference 2/2002, may be stayed if brought before compliance with an order for the costs in a discontinued Reference, in the instant case Reference



No. 1B/2000. Thus, proceedings in Reference 2/2002 cannot be heard before costs are paid in the discontinued Reference 1B/2000.

It is common cause that the order for costs in the discontinued Reference 1B/2000 has not been complied with. We, therefore, order that all the proceedings founded on Reference No. 2/2002 be stayed until the costs of the discontinued Reference 1B/2000 have been paid.

The Respondent herein is given three months from the date hereof to comply with the order for costs, failing which the Applicant may apply to have Reference 2/2002 struck off.

Since the preliminary issue was raised at the instance of the Court, each party will bear its own costs.

It is so ordered.

Dated 21st day of October, 2002

K.R.A. Korsah
Lord Justice

A. Nyankiye
Lord Justice

J.B. Kalaile
Lord Justice

E.L. Sakala
Lord Justice

J. Mutsinzi
Lord Justice

