

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

APP. 84/2023
CAZ/08/505/2023



BETWEEN:

MOXICO RESOURCES ZAMBIA LIMITED 1ST APPELLANT

EUROAFRICA KALENGWA MINES LIMITED 2ND APPELLANT

AND

KALENGWA MINERAL PROCESSING LIMITED RESPONDENT

Coram: *Chashi, Chishimba and Sichinga, JJA*
On 25th October, 2023

For the Appellant: No appearance

For the Respondent: No appearance

R U L I N G

Sichinga, JA, delivered the Ruling of the Court.

Cases referred to:

1. *Sonny Paul Mulenga and Others v. Investrust Merchant Bank (1999) ZR 101*
2. *Bowa v. Mubiana and Another (2012) 3 ZR 170*

Rules referred to:

1. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

1.0 Introduction

1.1 The appellants have moved the Court by way of *ex-parte* summons for an order for stay of execution of the Judgment of the High Court (Musona J), handed down on 22nd September, 2023 on grounds that the appellants' appeal has prospects of success and shall be rendered nugatory without a stay of execution of judgment pending appeal. The application is made pursuant to **Order 10 Rule 5 of the Court of Appeal Rules¹** as read with **Order 59/13/9 of the Rules of the Supreme Court²**.

2.0 Appellants' position

2.1 The application is supported by two affidavits dated 3rd October, 2023 and 11th October, 2023. The affidavits speak to the same issues. According to the latter affidavit, sworn by one Davis Mwanamoya, the 1st and 2nd appellants Director, and the respondent obtained judgment in its favour.

2.2 That on 25th September, 2023, the lower court delivered a Ruling on an application for leave and stay of execution of Judgment and held that:

“i. Leave to appeal would be granted on condition the appellants should pay 30% of the Judgment sum of USD \$21,000,000.00 (the Judgment sum); and

ii. The stay of execution is granted on the basis that the appellants shall fulfill the conditions for the application for leave to appeal and appeal on or before 31st October, 2023 failing which the stay shall stand discharged and the respondent will be at liberty to execute.”

2.3 The gist of the affidavit in support is that 30% of USD\$21,000,000.00 which amounts to \$6.3 million or **Zambian Kwacha** equivalent of about K132,300,000.00 is too excessive and astronomical, and in essence amounts to a refusal of the requisite stay of execution of judgment pending appeal.

2.4 It is further deposed that a single Judge of the Court, Makungu JA dismissed the application for a stay of execution of Judgment on 4th October, 2023, necessitating the application to the full Court.

2.5 In sum, the deponent urged the Court to grant the application on the special circumstances deposed.

3.0 Our consideration and decision

3.1 We have carefully considered the application before us together with the affidavit and skeleton arguments on record. It is trite law that an appeal does not automatically operate as a stay of execution and that it will be granted on good and convincing reasons. Ordinarily a successful party should not be denied the fruits of his judgment. A plethora of authorities hold to this effect, *inter alia* **Sonny Paul Mulenga and Others v. Investrust Merchant Bank¹**.

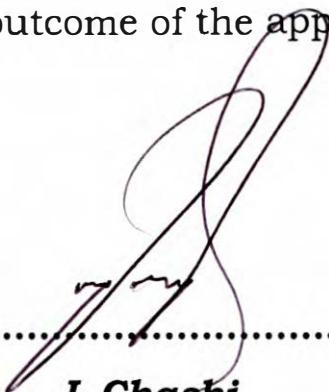
3.2 Further, in the case of **Bowa v. Mubiana and Another²**, the Supreme Court stated that in an application for a stay pending appeal, the primary considerations are the prospects of the appeal succeeding and irreparable damage, if a stay is not granted and the appellant's appeal succeeds.

3.3 In the application before us, the complaint is that the grant of leave by the lower was attached to a condition which the applicant cannot fulfill, that is the payment into court of about \$6.3 million dollars. In its judgment the lower court awarded

the respondent the claimed amount of US\$21,000,000.00. The appellant has appealed against this amount.

- 3.4 A perusal of the other grounds of appeal shows that they raise issues relating to ownership of the land and mining rights. We are of the view that the appellant may have an interest in the land, which interest may be worth protecting. Where such interests are likely to exist, the *status quo* should be maintained until the rights of the parties are properly and finally determined to avoid irreparable damage. We therefore find the payment of the sum of \$6.3 million as a condition to grant the stay exorbitant and an affront to the principles of access to justice and a fair trial. We accept that the condition to pay such a colossal sum amounts to a refusal to grant the stay.
- 3.5 We accordingly set aside the order of the lower court. Instead, we grant an order of stay of execution pending appeal.

3.6 Costs will abide the outcome of the appeal.



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J. Chashi

COURT OF APPEAL JUDGE



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F.M. Chishimba

COURT OF APPEAL JUDGE



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D.L.Y. Sichinga, SC

COURT OF APPEAL JUDGE