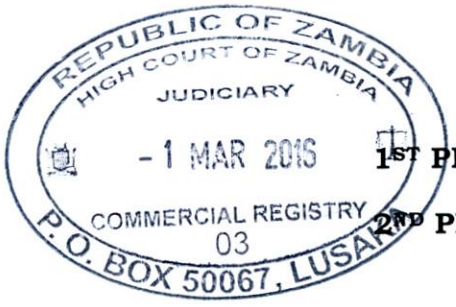
IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2012/HPC/0577

BETWEEN:



DIMITRIOUS MONOKANDALOS **1ST PLAINTIFF**

FILANDRIA KOURI **2ND PLAINTIFF**

AND

FINANCE BANK ZAMBIA LIMITED **DEFENDANT**

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the Plaintiffs	:	*Mr S. Sikota SC- Messrs Central Chambers.M S. Mambwe- Messrs Mambwe Siwila& Lisimba Advocates.*
For the Defendant	:	*Mr K. Chenda - Messrs Simeza Sangwa & Associates.*

RULING

LEGISLATION REFERRED TO:

1. ***Rule 51 of the Supreme Court Rules, Cap 25 of the Laws of Zambia.***
2. ***Order 59 Rule 13 of the Rules of the Supreme Court of England 1999 Edition (White Book).***

CASES REFERRED TO:

1. ***Shaw V Holland (1900) 2 Ch.305.***
2. ***Linotype- Hell Finance Ltd V Baker (1992) 4 All ER 887.***
3. ***G.L Baker Limited V Medway Building & Supplies Limited (1958) 3 All ER 540.***

4. ***J.S Wardell V University Engineering Limited and NCCM Limited (1977) Z. R 62.***
5. ***Attorney General V LAZ Vol 1 (2008) ZR 21.***
6. ***Mukumbuta V Mukumbuta, SCZ Judgment No. 8 of 2003.***
7. ***Mulenga and Others V Investrust Merchant Bank Limited (1999) Z.R. 101.***
8. ***Monk V Batram [1891] 1 Q.B. 346.***
9. ***Michael Chilufya Sata V Chanda Chiimba III ZNBC, Muvi TV Limited Mobi TV International Limited (2011) Vol 2.***

This is an application by the Defendant to Stay Proceedings pending appeal pursuant to Rule 51 of the Supreme Court Rules, Cap 25 of the Laws of Zambia and Order 59 Rule 13 of the Rules of the Supreme Court of England 1999 Edition (White Book) and all Enabling Provisions of the Law.

The application is supported by an Affidavit sworn by Sokwani Peter Chilembo the Assistant Director- Legal and Company Secretary of the Defendant and Skeleton Arguments filed into Court on the 16th February, 2015.

It is deposed by Mr Chilembo that on 3rd December, 2014 this Court not only delivered a ruling dismissing the Defendants application for amendment and extension of time but also granted the Defendant leave to appeal against the said ruling.

Further, that the Defendant exercised its right of appeal and lodged a notice with the Supreme Court under Appeal No. 21 of 2015 which was now awaiting cause listing.

It is also his deposition that the appeal had reasonable prospects of success. Moreover that due to the stage at which these proceedings had reached and by reason of the backlog of cases before the Supreme Court it was likely that this action would have been tried and determined before the Appeal could be

heard by the Supreme Court (Which was currently hearing civil appeals lodged before 2015).

Moreover, given that the appeal sought to allow for the Defendant to amend its defence and present a counterclaim, then in the absence of a stay of these proceedings, the appeal would be rendered nugatory and an unnecessary academic exercise as it would serve no purpose to amend pleadings in a case that had already been tried and determined. Further, that the leave that was granted to the Defendant by this Court would similarly be defeated and rendered meaningless.

Meanwhile, that the Plaintiffs would suffer no prejudice if the stay was granted as in the event that their (monetary based) claim before this Court succeeded, the interval between the appeal and the eventual trial of this action would be adequately covered by an award of interest that would have accrued in the interval.

There is also an Affidavit in Opposition filed into Court on 22nd May, 2015 sworn by Silas Mambwe the Co- Counsel representing the Plaintiff. He stated that on or about 30th May, 2012, the Defendant appealed to the Supreme Court against a decision of this Court refusing the Defendant's application to dismiss this action for want of prosecution.

That like they had done now, they promptly applied for Stay of Proceedings pending determination of their appeal, making the same arguments as they made now but the Court refused to stay proceedings in its ruling delivered by Justice Kajimanga on 23rd January, 2013.

Moreover, that he had been instructed to oppose this application on the basis that the issue of stay pending appeal was res judicata. That the Defendant did not and had never appealed against the decision of Mr Justice Kajimanga as aforesaid.

That even the appeal pending for which the stay was earlier being sought had since been dismissed by the Supreme Court. Further, that the trial of this matter had been delayed even when the Plaintiff complied fully with the Orders for Directions in 2013.

Counsel for the Defendant filed in Skeleton Arguments. He relied on Rule 51 of the Supreme Court Rules, Cap 25 of the Laws of Zambia as read with Order 59 Rule 13 of the Rules of the Supreme Court of England, 1999 Edition which confers power on this Court to order inter alia a stay of proceedings pending determination of an appeal to the Supreme Court. He went on to state that Order 59 Rule 13 in its explanatory notes under 59/13/2 provides inter alia that:

> ***"...the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v Church (No. 2) (1879) 12 Ch. D 454 at 458, 459, CA), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court (Becker v Earl's Court Ltd (1911) 56 S.J 206; The Ratata (1897) P. 118, p. 132; Att- Gen. v Emerson (1889) 24 Q.B.D 56 at 58,59) and the Court will grant it where special circumstances of the case so require".***

Counsel also cited the case of **SHAW V HOLLAND (1)** where Lord Alverstone MR had this to say on the issue of stay of proceedings pending appeal:

> ***"The general rule, I think, should be that the proceedings under a judgment should not be stayed pending an appeal unless on special grounds...But I think that in every case some special ground should be shown upon any application to the Court for a stay".***

Counsel also relied on the case of **LINOTYPE- HELL FINANCE LTD V BAKER (2)** where Staughton LJ said that:

> ***"It seems to me that if a Defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospects of success that is a legitimate ground for granting a stay of execution".***

Counsel also contended that the prospects of success of the Defendant's appeal could be gleaned from the three grounds of appeal exhibited in the Affidavit in support of this application. In addition, he referred this Court to the English decision in **G.L BAKER LIMITED V MEDWAY BUILDING & SUPPLIES LIMITED (3)** where the Court of Appeal espoused the principle that an amendment of pleadings should be allowed where there would be no loss or detriment to the plaintiffs which could not be compensated through an order for costs. As Jenkins L. J aptly put in (in his decision against the judgment appealed):

> ***"It appears therefore that in the present case the learned judge ought in the exercise of his discretion to have granted this amendment if it appeared that this would involve no loss or detriment to the Plaintiffs which could not be made good to them by an appropriate order as to costs".***

Counsel went on to state that this principle has been echoed in our local case law in **J.S WARDELL V UNIVERSITY ENGINEERING LIMITED AND NCCM LIMITED (4)** where it was held that:

> ***"Order 20 rules 5 and 8 RSC provide that amendments to pleadings 'May be allowed at any stage in the proceedings' and amendments may be allowed before or at or after the trial or even after judgment on appeal. As a general rule,***

however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated by an Order for costs... ".

He further stated that in the case before Court, there was no proof or even any allegation of any prejudice to the Plaintiffs which could not have been atoned for by an order for costs of (say the) amendments to be made by the Plaintiffs to their own documents in response to the Defendant's amendment.

According to Counsel, the Defendant's pending appeal therefore had prospects of success and these included:

That this court granted the Defendant leave to appeal, that the Defendant had done everything required of it before the appeal could be cause listed. Moreover, that the appeal was lodged in 2015 and the Supreme Court was currently hearing civil appeals lodged before 2015. Further that the case before Court had reached an advanced stage and was likely to be tried and determined by this Court before the Defendant's appeal could be heard and finally that if this case was determined before the appeal could be heard then the leave to appeal granted by this court would have served no useful purpose as the appeal would be rendered nugatory and academic as it would be absurd to amend pleadings in a case after it had been concluded.

Counsel was also of the view that the Supreme Court had time and again expressed the undesirability of determining appeals where the orders sought would serve no purpose for being academic after issues had been overtaken by events as was the case in **ATTORNEY GENERAL V LAZ (6)**.

It was also Counsels submission that having granted the Defendant leave to appeal on its own volition, this Court ought to safeguard the Defendant's right of appeal from being rendered meaningless in the absence of a stay of these proceedings.

Counsel lastly contended that it was in the interests of justice for this Court to stay the proceedings before it for the duration of the appeal now pending before the Supreme Court.

Counsel for the Plaintiffs also filed Skeleton Arguments opposing the Defendant's application. He submitted that the issue of staying proceedings pending appeal had already been determined in this matter and that the circumstances were exactly the same in that there was an appeal against an interlocutory ruling and the law that was to be considered was exactly the same as before. Further that the parties were exactly the same. According to Counsel, the issues were Res Judicata and bordered on abuse of Court process.

Counsel also averred that they had in this cause already submitted on the law of Res Judicata and Collateral Estoppel. Counsel further submitted that these two doctrines established the rule that once a case has reached a final judgment, re- litigation of the claims and issues is generally barred.

Counsel contended that Res Judicata evolved from a Latin maxim, which stands for **"the thing has been judged"** meaning thereby that the issue before the Court has already been decided by another court, between the same parties. Therefore the court will dismiss the case before it as being useless.

Under the companion rule of Collateral Estoppel, the Plaintiff will not be allowed to file a second lawsuit for money damages using a different cause of action or claim. Under this rule, the parties are precluded from litigating a

second lawsuit using a different cause of action based on any issue of fact common to both suits that had been litigated and determined in the first suit. For example, the Plaintiff who lost her auto accident based on a theory of negligence cannot proceed with a second lawsuit based on an allegation that the driver intentionally struck her auto, thus making it an intentional TORT cause of action. A court would assert collateral estoppel because the Plaintiff could have alleged an intentional tort cause of action in the original complaint.

Counsel also stated that the four factors considered in determining the validity of a plea of Claim Preclusion are satisfied in this instance. These were, that the claim was decided in the prior suit and is the same claim being presented in this present action in question, that there was a final judgment, that the party against whom the plea was asserted was a party to the prior suit and that the party against whom the plea is asserted was given a fair opportunity to be heard on the issue and could have raised all matters connected with the claim in the previous action.

It was also the contention of the Plaintiff that this habit by the Defendant of making applications on issues and matters which had already been dealt with by this Court is an abuse of court process and must be condemned in the strongest terms. Counsel then argued that Mr Justice A. M. wood dismissed the Defendant's application for consolidation in the Ruling delivered on 7th March, 2014 stating that these two matters did not arise from the same transaction to merit consolidation. His Lordship equally bemoaned the pace at which the matter was being handled and directed that pleadings be concluded with dispatch.

Counsel also added that bringing this application was tantamount to forum shopping and an abuse of Court process which was frowned upon by the Courts in the Supreme Court case of **MUKUMBUTA V MUKUMBUTA (6)** where the Court disapproved of forum shopping.

He then submitted that he wished to remind this Court that it was a Commercial Court intended to expedite the disposal of matters brought before it. Moreover that the failure to comply with Orders for Directions by the Defendant by hiding under numerous interlocutory applications which had failed before was merely intended to delay the trial of the matter to which they had a struggling defence and must be condemned in the strongest terms.

During the hearing on 18th June, 2015 both Counsel for the Plaintiffs as well as the Defendant were present. Counsel for the Defendant relied on the Affidavit in Support and Skeleton Arguments filed into Court on 16th February, 2015. Counsel for the Defendant also added that although the law in this application as well as the previous one were the same, the circumstances were distinguishable.

According to him, the earlier ruling was for Stay Pending an Appeal which had the object of preventing this matter from being heard on the merits. In the application herein the pending appeal did not seek to prevent this matter being heard on the merits but instead modify the issues to be determined on the merits. Further that unlike the previous application, the appeal which this application touched on had already been heard and it was for these reasons that he contended that there was no abuse of court process and the issues were not RES JUDICATA.

Counsel for the Plaintiff relied on the Affidavit in Opposition and Skeleton Arguments filed on 22nd May, 2015 to oppose the application. In sum it was his submission that this application had already been made before in this cause and a decision made on the same grounds. Further that the law as well as the circumstances were exactly the same, hence making the matter RES JUDICATA.

I have considered the Affidavit evidence, the Skeleton Arguments and the authorities cited by both learned Counsel for the Defendant and the Plaintiffs.

The gist of the Defendant's arguments in support of this application are that the special circumstances existing herein include that the Defendant's appeal has some prospects of success. Further, that there was no proof or any allegation of prejudice to the Plaintiffs which could not be atoned for by an order for costs in respect of amendments to be made by the Plaintiffs to their own documents in response to the Defendant's amendment. Moreover, that any delay which the amendments would have occasioned could not be a reason to refuse the application for amendment of pleadings.

In opposition to this application Counsel for the Plaintiff contended that the issue of staying proceedings pending appeal had already been determined in this very matter. Counsel then relied on the two doctrines of Res Judicata and Collateral Estoppel to show this Court that the issue before it had already been decided by another Court between the same parties and that the Plaintiff would not be allowed to file a second lawsuit for money damages using a different cause of action or claim.

This application by the Defendant was made under Rule 51 of the Supreme Court Rules, Cap 25 of the Laws of Zambia and Order 59 Rule 13 of the Rules of the Supreme Court of England 1999 Edition. These provisions state that:

> ***"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.***

"Except so far as the court below or the Court of Appeal or a single judge may otherwise direct -

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal".

It is trite law that the question of whether or not to grant a stay is entirely within the discretion of the Court and like any discretionary power it ought to be exercised carefully.

A brief background of this matter from the record will show that it has now been in Court for the past 19 years which shows that there has already been inordinate delay. Further as stated by Counsel for the Plaintiffs this being a Commercial Court matters brought before it should be disposed of within the shortest possible time.

The starting point on the law relating to stay of proceedings, rulings or orders generally are the High Court Rules, Cap 27 of the Laws of Zambia. Order XLVII, Rule 5 states that:

"An appeal shall not operate as a stay of execution, or proceedings under the judgment, or a decision appealed from, except so far as the Court below or the Court may order, and no immediate act or proceeding shall be invalidated, except so far as the Court below may direct".

The principle that emerges from this rule is that an appeal does not operate as a stay of execution. Therefore, in order for a judgment, proceedings or any decision appealed from to be stayed, the Court is required to make an order to that effect. It is my considered view that the fact that the legislators

promulgated such a law entailed that it was not automatic that when a party appealed in a matter he was entitled to a stay.

Another important case for consideration in making such an order is that of **MULENGA AND OTHERS V INVESTRUST MERCHANT BANK LIMITED (7)** where Chief Justice Ngulube, (as he then was) in the Supreme Court held that:

> ***"In terms of our rules of Court, an appeal does not automatically operate as a stay of execution and it's utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the Court below or this Court that it is desirable, necessary, and just to stay a judgment pending appeal. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds...In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal".***

Another relevant case to which I addressed my mind is **MONK V BARTRAM (8)** where the Court of Appeal expressed sentiments on what might not be considered to constitute **"special circumstances."** In delivering the judgment of the Court of Appeal, Lord Esher, M.R. observed as follows at page 346:

> ***"It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution".***

In the matter before Court a perusal of the Memorandum of Appeal exhibited in the Affidavit in Support of the Defendant's application shows misdirections and errors perceived on the part of the Appellant which as shown in the case of **MONK V BARTUM** aforesaid are not special circumstances on which the Court will grant a stay of execution or proceedings.

In the Zambian case of **MICHAEL CHILUFYA SATA V CHANDA CHIIMBA III ZNBC, MUVI TV LIMITED MOBI TV INTERNATIONAL LIMITED (9)** Matibini J (as he then was) stated that:

> ***It must also be noticed that in exercising the discretion whether or not to grant a stay, a Court is entitled to preview the prospects of the proposed appeal. The rationale for these stringent conditions, or criteria in exercising the discretion to grant a stay, is that a successful party should not be denied immediate enjoyment of the fruits of the judgment or ruling, unless good and sufficient grounds are advanced or shown".***

After considering this matter thoroughly I am in agreement with Counsel for the Plaintiffs that the application before Court has been made before as the law to be considered as well as the circumstances are the same. In a Ruling delivered by Justice Kajimanga on 23rd January, 2013 he found that the Defendant had not made out a good case to persuade this Court to exercise its discretion to stay the proceedings at the time pending appeal.

Moreover, the authorities I have cited above show that this Court can only grant this application where there are special circumstances which I have not found herein. Further, there are no prospects of this appeal succeeding in my view. This is because I found the Defendant's application not to be necessary or proper and that it would not actually eliminate statements which may tend to prejudice, embarrass or delay the fair trial of the suit

which are among the conditions precedent to granting such an application in Order XVIII Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia on amendment.

Moreover, I have found that even if the appeal herein was to succeed it would not create any prejudice on the part of the Defendant that would not be atoned for in form of monetary damages. Hence it would not be an academic exercise as contended by Counsel for the Defendant.

Counsel for the Defendant also argued that the Plaintiffs will suffer no prejudice if the stay is granted as in the event that their (monetary based) claim before this Court succeeds, the interval between the appeal and the eventual trial of this action would be adequately covered by an award of interest that would have accrued in the interval.

While this may be a sound argument I note that this matter has been before the Courts for almost two decades and since I have not found it desirable, just and necessary to stay these proceedings it would be a denial of justice on my part to allow this application as justice delayed is justice denied.

In the circumstances, I hereby dismiss the Defendant's application.

Costs of this matter are awarded to the Plaintiffs and are to be taxed in default of agreement.

Delivered in Chambers at Lusaka this 1st day of March, 2016.

.....

William S. Mweemba
HIGH COURT JUDGE.