

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2013/HPC/0351

IN THE MATTER OF : MIROCK INVESTMENTS LIMITED PETITIONER

AND

ZCON CONSTRUCTION LIMITED RESPONDENT & JUDGMENT
DEBTOR

IN THE MATTER OF: THE COMPANIES ACT, CAP 388 OF THE LAWS
OF ZAMBIA

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

For the Petitioner



Mr L. Zulu- Messrs Tembo,
Ngulube & Associates.

For the Respondent & Judgment Creditor : No Appearance.

R U L I N G

LEGISLATION & WORKS REFERRED TO:

1. *Rules of the Supreme Court of England, 1999 Edition (White Book).*
2. *Practise Direction No. 1 of 1993.*
3. *Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia.*

CASES REFERRED TO:

1. *ECOBANK Zambia Limited v ZCON Construction Co. Ltd & Ors 2011/HPC/0611*

This is an application by the Petitioner for an order to discharge an ex parte order staying execution pending appeal pursuant to Practise Direction No. 1 of 1993 as read with Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia.

The application is supported by an Affidavit sworn by Chiza Gondwe the Director in the Petitioner Company and Skeleton Arguments filed into Court on 10th April, 2014.

It is deposed by Mr Chiza Gondwe that after the winding up Order against the Respondent, the Respondent proceeded to lodge an appeal in the Supreme Court against the said judgment and also obtained an order staying execution of the judgment herein pending appeal.

That however, the order staying execution was obtained ex parte without giving the Petitioner an opportunity to have a say on the said application. In view of this he had been advised that a party who is likely to be affected by an order of a Court must be accorded an opportunity to be heard on such an application.

It is further deposed that the ex parte order staying execution had no provision for an inter partes hearing hence there was no contemplation that the Petitioner will ever be heard on that application.

It is also deposed that in such circumstances this Court has power to discharge the said order on grounds of irregularity. He also stated that he had been advised that staying execution of a judgment was in the discretion of this Court and in this case it was not in the interest of justice to stay execution of the Judgment to wind up the Respondent without ordering conditions to protect the Petitioner.

Further, that the Judgment clearly showed that the Respondent had not disputed owing the Petitioner the sum of K402, 000.00, interest and costs which sums were subject of a Judgment of this Court which had not been appealed against by the Respondent.

That this money had remained outstanding and had never been paid to the Petitioner thus this Court placed it into liquidation. Moreover that the Respondent without paying this undisputed money, still wanted this Court's decision to be stayed and yet it was a legally sound decision.

It is also his deposition that this Court had the power to put a condition to the stay to the effect that the Judgment be stayed pending appeal on condition that the Respondent forthwith paid the sum of K402,000.00 to the Petitioner.

That such a condition would not prejudice the Respondent as the debt was not in dispute and to the contrary if the order to stay execution of judgment was granted without any condition the moneys that were lawfully due to the Petitioner would be tied up for another three to four years that the matter would take to be disposed of by the Supreme Court due to its heavy workload. Thus this Court of Justice should balance the interests of the Petitioner with those of the Respondent in granting an order for stay pending appeal.

There is no Affidavit in Opposition from the Respondent.

Counsel for the Petitioner filed in Skeleton Arguments in support of his application. He submitted that Order 3 Rule 2, Cap 27 of the Laws of Zambia empowered this Court to make orders which would do justice in a particular manner.

He also submitted that Practice Direction No. 1 of 1993 required that all parties must be heard on an application and further that where the application was granted *ex parte*, the party in whose favour the application was made must provide a return date for the determination of the matter in the presence of the other party.

Counsel further contended that as was disclosed in the Affidavit in Support, the Petitioner was never granted any opportunity to have a say on the application to stay execution of Judgment on appeal.

Further, that it was an irregularity which empowered this Court to discharge the *ex parte* order forthwith. As regards the principles governing stay of execution pending appeal, Counsel contended that this was not a proper case for grant of stay of execution pending appeal without any conditions or at all.

Counsel then cited Order 59 Rule 13/7 RSC 1999, (White Book) on the powers of the Court on a grant of a Stay of execution which states as follows:

“The court has a discretion whether to impose terms on the grant of a stay. As regards the debt or damages awarded, there is no general practice: according to the circumstances (for example, the probability of their not being recovered if the appeal is successful, and the chances of success in the appeal) the money may be ordered to be paid into court, or only some of it. Unless it is quite plain that something must be recovered, a term should not be imposed that part of the money should be paid to the plaintiff and not be repayable in any event. The defendant may be ordered to pay the money to the plaintiff, the plaintiff giving security for repayment if the appeal is successful, or the defendant, if the Plaintiff prefers that course, to pay the money into court”.

It was also Counsel's submission that this case was not proper for the grant of an order staying execution of the winding up pending appeal because the Respondent had no prospects of success on appeal and the application was made for the sake of buying time as the grounds for winding up the Respondent were not in dispute.

Counsel also invited this Court to peruse the plea of the Respondent in the submissions requesting the Court to instead give it more time to pay the debt due to the Petitioner which was subject of the winding up petition as opposed to ordering a winding up.

According to Counsel, the Respondent had clearly not disputed owing the Petitioner on the Judgment debt which was the basis of the winding up order. They were simply asking for more time.

Counsel contended that if this Court was inclined to make the order for a stay of execution pending appeal then at the very least the stay ought to come with some conditions. Counsel then craved the indulgence of this Court to impose a condition that the money which was owed to the Petitioner by the Respondents must be paid forthwith.

Further Counsel reminded this Court that it was a Court of justice which should not be used by the parties to hide their responsibilities to pay debts.

He also stated that the Supreme Court had on numerous occasions stressed the need for a successful party to enjoy the fruits of his judgment as an important principle the court should consider in applications such as these. Thus he urged this Court to balance all interests of the parties before it in arriving at a decision. According to him, the proposed condition would not prejudice the Respondent as he had not disputed the debt due to the Petitioner.

As a matter of fact he argued that the proposed condition was consistent with the one set by Justice Wood in the matter of **ECOBANK ZAMBIA LIMITED V ZCON CONSTRUCTION COMPANY LIMITED & OTHERS (1)** in which the Judge ordered a stay of execution of Judgment pending appeal on condition that the Judgment sum was to be paid forthwith into court.

This condition was approved by the full bench of the Supreme Court as proper. It was Counsel's prayer that this Court would discharge the stay obtained without hearing the Petitioner herein.

The Defendant did not file Skeleton Arguments in Opposition to the application.

During the hearing on 29th October, 2014, only Counsel for the Petitioner was present. He submitted that he would rely on the Affidavit in Support as well as the Skeleton Arguments already filed and on the Court's record. To augment these he stated that there had been no reaction from the Respondent although they were aware of the date. Moreover that the basis of their application was that the Respondent obtained a stay of Judgment placing it into liquidation which order was obtained *ex parte* and did not indorse an *inter parte* hearing date and therefore denied the Applicant chance to be heard.

I have considered the Affidavit evidence and the Skeleton Arguments. I have also noted that Counsel for the Respondent and Judgment Debtor did not appear on the date of the application. Neither did he file any Affidavit in Opposition or Skeleton Arguments to counter those of the Petitioner.

Counsel for the Petitioner contended that I should order that there be no stay of execution pending appeal and that should I be inclined to grant a stay I should impose a condition that the undisputed amount owed to the Petitioner must be paid forthwith.

In making this application, Counsel for the Petitioner relied on Order 3 Rule 2 of the Rules of the High Court, Cap 27 of the laws of Zambia which states that:

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”.

Counsel also cited Practice Direction No. 1 of 1993 which states that:

- “1. In an action between two or more parties, it is a normal requirement of justice that the other side should be notified and heard before an order is made against them or adverse to their position...”***
- 2. Exparte applications described above are justified only when the case is one of real urgency and the order obtained should generally be expressed to be until a certain day unless a Judge or Registrar otherwise directs.***
- 3. As a general practice, all such exparte applications and orders obtained must be followed by a hearing interpartes within a reasonable time unless a Judge or Registrar for good cause otherwise directs”.***

The record will show that an Exparte Order for Stay of Execution was granted by this Court on 21st March, 2014. However, after this Order was made it was not followed by an interparte hearing within a reasonable time as set out in the practice direction No. 1 of 1993 and there is no other direction made by a Judge or Registrar for good cause showing why this has been the case.

Moreover, it is not in dispute that the Judgement Debtor owes the Petitioner the sum of K402, 000.00 and that is why the Court ordered that the Respondent be wound up on 3rd March, 2014.

In the circumstances I find that as argued by Counsel for the Petitioner it is not in the interest of justice to maintain the stay of execution. I therefore grant the Petitioner's application. I accordingly Order and Direct that the ex parte order staying execution pending appeal dated 21st March, 2014 be discharged forthwith. Costs to the Petitioner to be taxed in default of agreement.

Leave to appeal is granted.

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



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE.