IN THE HIGH COURT FOR ZAMBIA **2013/HP/1153**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CARLSON CHINGWENGWEZI **PLAINTIFF**

AND

SONAR INTERNATIONAL LIMITED **DEFENDANT**

BEFORE HONORABLE MR JUSTICE MWILA CHITABO, SC

For the Plaintiff: *Mr. W. Mhanga of Messrs AKM Legal Practitioners*

For the Defendants: *N/A*

R U L I N G

Cases referred to;

1. *Luanshya Copper Mines and First Rand Ireland Plc and other creditors of Luanshya and 2 others SCZ/8/168/2009*
2. *Zambia Revenue Authority and Post Newspaper Limited Appeal No. 36 of 2016, SCZ/8/2015 (unreported)*
3. *Khalid Mohamed v. The Attorney General 91982) ZR 49*
4. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172*

This is an application by the Defendant to stay the Judgment of this Court rendered on 10th October, 2017 awarding the Plaintiff a sum of K369, 075.00 with interest.

The application is supported by an affidavit deposed to by one **Binod P. Menon**.

The essence of which is that firstly that in his view there are high prospects of the appeal succeeding. Secondly, that stay absent, the Judgment on appeal would be rendered nugatory if the defendant were to succeed on appeal.

This was on the ground that the Plaintiff has no means and may not be able to refund the sums received.

The application was understandably opposed by an affidavit in opposition deposed to by the Plaintiff **CARLSON CHINGWENGWEZI**. The essence of which was that there are no prospects of the appeal succeeding.

That where as the Defendant has alleged that the Plaintiff has no means and is not likely to refund the Defendant in the event that the appeal was to succeed, there is no evidence that the Plaintiff in fact has no means.

It was finally deposed that the Court issues an order that the Judgment sum be paid into Court pending the determining of the appeal and further that the sum paid into Court inclusive of accrued interest continues to attract interest.

It was pointed out that this option was not attractive to the Plaintiff.

The Plaintiff's Advocate also filed skeleton arguments in opposition.

The summary of which were that

(1) That a successful litigant must not be deprived of the fruits of his Judgment.

(2) That an appeal does not automatically operate as a stay of execution solely because an appeal has been entered.

In support of the above legal propositions, reliance was placed on the Supreme Court Judgment of ***Luanshya Copper Mines and First Rand Ireland Plc and other creditors of Luanshya and 2 others***[1] which Ruling was handed down on 9th October, 2009 by Mwanamwambwa, JS (as he then was).

They finally invited the Court to deny the Defendants application and dismiss it with costs.

The parties agreed that the Court proceeds to render its Ruling on the basis of the material filed into Court.

The Court of final resort in the case of ***Zambia Revenue Authority and Post Newspapers Limited***[2], dealt with the subject matter of stay applications. Mwanamwambwa, DCJ put it this way at page J119:-

> *"Further where a Judgment or Ruling is stayable, the principles state stay of execution pending appeal is a discretionary remedy. A party is not entitled to it as a matter of right. And as such discretion must be exercised judiciously and on well established principles.*

Firstly, the successful party should not be denied the immediate enjoyment of a judgment unless there are good and sufficient reasons. Stay of execution should not be granted for the convenience of the Post Newspaper. Neither should it be granted purely on sympathetic or moral considerations.

Secondly, in exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of success of the proposed appeal. In particular, where the Judgment appealed against involves payment of money, the appellant must show that if that type of money is paid then there will be no reasonable prospects of recovering it in the event of the appeal succeeding. Such proof is what amounts to good and sufficient grounds warranting stay. See

(a) Rules of the Supreme Court [1999] Order 59 Rule 3

(b) Sonny Mulenga and another v. Investments Merchant Bank Limited (1999) ZR 101

(c) ....."

I will now address and apply the law to the facts in casu.

(1) **Prospects of a successful appeal**

I have previewed my Judgment and I don't find any material to persuade me to form an opinion that the appeal has prospects of succeeding. Indeed other than proclaiming that there are high prospects of succeeding, no attempt has been made to demonstrate how the appeal is likely to succeed.

Even taking into account the memorandum of appeal the same do not assist the Appellant (Defendant) in demonstrating that there are prospects of succeeding. What is contained therein are the complaints which the Appellant will articulate in the superior Court of Appeal.

This ground is destitute of any merit and I dismiss it.

(2) **Failure by Defendant (Respondent) to reimburse the Judgment debt**

It was deposed to that the Plaintiff is of unstable income and therefore the Defendant will be able to recover the money once paid. There has been no evidence to support the assertion that the Plaintiff is of unstable income which view the Defendant found to be scandalous.

The burden of proof in our jurisdiction and jurisprudence is well settled. It is that it rests on he who is alleging. The apex Court had occasion to pronounce itself on the subject in the case of ***Khalid Mohamed v. The Attorney General***[3], Ngulube DCJ as he then was put it this way at page 51 Lines 17 – 24

> *"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its inanition or for some reason*

or other, Judgment should nevertheless be given to him on the ground that a defence put up by the opponent has also collapsed. Quite clearly a Defendant in such a case would not even need a defence".

Yet in another case, that is the case of ***Wilson Masauso Zulu v. Avondale Housing Project Limited***[4], his Lordship had the following to say at page 175 lines 16 – 24.

"I think it is accepted that where a Plaintiff alleges that he has been wrongfully dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to Judgment whatever may be said of the opponents case.

As we said in ***Khalid Mohamed v. The Attorney General (1)***

'Quite clearly, a defendant in such circumstances would not even need a defence'"

In the case in casu, it is encumbent on the Defendant to show good and sufficient grounds warranting a stay that is that the Plaintiff is impecunious, a man of straw and of no means.

This has not been demonstrated. The second ground is devoid and destitute of merit and I dispatch it. There was an alternative proposition that that if the Court was inclined to grant the stay application, the Judgment sum and interest be paid into Court with a rider that such amounts as are deposited would continue to

attract interest. The rationale is that the winner would access the funds without delay.

Seductive as the proposition and invitations is I do not accept it.

Firstly because, payments made into Court do not attract interest as such payments are not placed in a fixed deposit interest earning account. A payment made into Court may be withdrawn out of Court at any time.

Payments into Court will necessarily entail the freezing of interest accumulation. It is for these reasons that I have declined the invitation by the Plaintiff to order the payment of money into Court.

It is the duty of litigants to mitigate their claims and damages. It is not the function of the Court to Order parties to mitigate their claims and damages. The reason is that once a Court has delivered its Judgment, it becomes *functus officio*.

In my view I will be going too far to dictate to the parties how they should go about their business.

This said however, the parties are at liberty to enter into consent orders as to the option of payment into Court is attractive to both parties.

In conclusion, the Defendants' application to stay the afore mentioned Judgment is void of any merit and it dispatched with the attending costs which costs are to be taxed in default of agreement.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand and seal this 21 day of November, 2017

Mwila Chitabo, SC
Judge