

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2016/HP/2415**

BETWEEN:

**TEMBO CHRISFORD AND FOUR OTHERS**

**PLAINTIFFS**

AND

**TIGER CHICKS**

*(T/A PROGRESSIVE POULTRY LIMITED)*



**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26<sup>th</sup> DAY OF  
FEBRUARY, 2018**

*For the Plaintiffs : In person*

*For the Defendants : Mr E. Mwitwa with Ms J Mapambe, Mwenye and Mwitwa  
Advocates*

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## **R U L I N G**

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CASES REFERRED TO:

1. **Sonny Paul Mulenga & Vismer Mulenga** (Both personally & Practising as SP Mulenga International) **and Chainama Hotels Limited and Elephants Head Hotel Limited and Investrust Merchant Bank Limited SCZ No 15 of 1999**

LEGISLATION REFERRED TO:

1. **The Court of Appeal Rules, Statutory Instrument No 65 of 2016**
2. **The High Court Rules, Chapter 27 of the Laws of Zambia**

This is a ruling on an application made by the Defendant for an order to stay execution of the judgment delivered on 13<sup>th</sup> November, 2017, made pursuant to Order 10 Rule 5 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016, and Order 36 Rule 10 of the High Court

Rules, Chapter 27 of the Laws of Zambia. Counsel relied on the affidavit filed in support of the application as well as the skeleton arguments , and stated that the said Orders relied on empower the court to stay execution of any judgment, where sufficient reasons are advanced. That Order 10 Rule 5 of the Court of Appeal Rules specifically provides for stay of execution of judgment pending appeal, as an appeal does not automatically stay a judgment.

That the gist of the application as shown in paragraphs 3-17 of the affidavit filed in support of the application is that the Defendant has filed a notice and memorandum of appeal, exhibited as 'GP1' and 'GP2' to the affidavit, which show that the Defendant has advanced four grounds of appeal, which it believes have prospects of success. In this regard paragraphs 9-11 of the said affidavit are instructive, and on that basis Counsel prayed that the application be granted.

In response, the 1<sup>st</sup> Plaintiff submitting on behalf of the other Plaintiffs told the court that they opposed the application, and relied on the affidavit in opposition. He noted that it is the Defendant's right to appeal against the judgment, but their view was that there was nothing wrong with the judgment. Counsel for the Defendant objected to the reference to paragraphs 4-6 of the affidavit in opposition stating that they did not comply with the Order V Rules 15-16 of the High Court Rules, Chapter 27 of the Laws of Zambia. This, he stated was on account of the fact that paragraph 4 of the said affidavit refers to the Plaintiffs being advised by legal minds, but did not go further to state who those legal minds were.

That Order V Rule 18 of the said High Court Rules states that if a deponent of an affidavit refers to being advised, they must state the name of the person that has advised them. It was also stated that

paragraph 5 of the affidavit in opposition advances legal arguments which also amount to conclusions, as they contend that the Defendants application lacks merit, while paragraph 6 of the said affidavit in opposition voices the Plaintiffs opinion of the court's judgment, when Order V Rule 15 of the High Court Rules requires that only facts and not opinions must be stated in an affidavit. Counsel asked that the paragraphs be expunged from the affidavit.

The Plaintiffs in response to the objection asked to be given time to amend the affidavit stating that it would not be fair to stay the judgment.

Counsel in reply submitted that they maintained that paragraphs 4 and 6 of the affidavit should be expunged from the record as they offended Order V Rules 14-18 of the High Court Rules. That the Plaintiffs would not be prejudiced by the stay, as the Defendant is a viable concern with means to settle the judgment sum, and that the converse is true of the Plaintiffs, as if the Defendant succeeded on appeal and the Plaintiffs had been paid, the prospects of recovering the judgment sum from them would be minimal if not non-existent.

Counsel prayed that the application be granted, as the Plaintiffs had not demonstrated any prejudice that they would suffer by the application being granted, and that any prejudice could be atoned for by interest being awarded on the judgment sum.

I have considered the application. Order 10 Rule 5 of the Court of Appeal Rules, Statutory Instrument No 65 of 2016 provides that;

***“An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed against unless the High Court, Quasi. Judicial Body, or the Court so orders and***

***no immediate act or proceeding shall be invalidated, except so far as the Court may direct.”***

Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia on the other hand states that;

***“Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment.”***

The basis of the application is that the Defendant has appealed against the judgment delivered in this matter, and that the appeal has prospects of success. The Plaintiff in opposing the application relied on the affidavit in opposition, and Counsel for the Defendant opposed the reliance on paragraphs 4 and 6 of the said affidavit in opposition on the ground that they offended Order V Rule 14 to 18 of the High Court Rules, Chapter 27 of the Laws of Zambia.

A perusal of the said affidavit in opposition shows that in paragraph 4, the 1<sup>st</sup> Plaintiff as deponent of the affidavit, refers to being advised by legal minds that the grant of an order of stay of execution of a judgment is discretionary, and that the court will in granting such an order look at the prospects of success of the appeal.

As rightly submitted by Counsel for the Defendant, where a deponent of an affidavit refers to them being advised, they must state who has advised them. This is in line with Order V Rule 18 of the High Court Rules which states that;

***“When the belief of a witness is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given***

***respecting the informant, and the time, place and circumstances of the information.”***

Clearly the affidavit in opposition does not state who advised the 1<sup>st</sup> Plaintiff and the said paragraph is therefore defective. Secondly, paragraph 5 of the said affidavit refers to the want of merit of the Defendant's application going by the provisions of the Minimum Wages and Conditions of Employments (General Order) 2012, while paragraph 6 of the said affidavit refers to the Plaintiffs opinion of the judgment and thereby goes against the provisions of Order V Rule 16 of the said High Court Rules which provides that;

***“Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.”***

I will therefore not consider the said paragraphs when determining the application. It is trite that an appeal does not operate as a stay of execution, and that a successful party should only be denied the immediate fruits of their judgment on sufficient cause being shown. The case of ***SONNY PAUL MULENGA & VISMER MULENGA (Both personally & Practising as SP Mulenga International) AND CHAINAMA HOTELS LIMITED AND ELEPHANTS HEAD HOTEL LIMITED AND INVESTRUST MERCHANT BANK LIMITED SCZ No 15 of 1999*** is authority to that effect.

In considering what sufficient cause is, the prospects of success of the appeal is one such factor, and secondly that where the judgment is not stayed, it may result in irreparable damage being occasioned to the

applicant. The Defendant in this matter submitted that if the judgment is not stayed, and the Plaintiffs executed the same, it would not be able to recover the monies paid if it were to succeed on appeal. That conversely if the Plaintiffs were to succeed at trial, the Defendant being a viable concern would be able to pay the judgment sum.

On perusal of the grounds of appeal and the matter as a whole, I will stay execution of the judgment, but on the condition that the Defendant pays the total judgment sum into court within fourteen days from today. Failure to do so will result in the Plaintiffs being at liberty to execute the judgment. Costs shall be in the cause, and leave to appeal is granted.

**DATED THE 26<sup>th</sup> DAY OF FEBRUARY, 2018**

*S. Kaunda*

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**S. KAUNDA NEWA  
HIGH COURT JUDGE**