

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



2016/HPC/0196

**IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT
RULES, CHAPTER 27 OF THE LAWS OF
ZAMBIA AND ORDER 88 OF THE RULES OF
THE SUPREME COURT (1999) EDITION**

AND

**IN THE MATTER OF: LOAN TERM FACILITY DATED 10TH MARCH,
2015**

AND

**IN THE MATTER OF: PAYMENT SECURED BY LEGAL MORTGAGE
AND**

**IN THE MATTER OF: AN ORDER FOR POSSESSION, SALE AND/OR
FORECLOSURE OF SUBDIVISION NO. 1 OF
SUBDIVISION A OF FARM NO. 2882, LUSAKA**

BETWEEN:

INVESTTRUST BANK PLC

APPLICANT

AND

TRYMORE MWENDA T/A MWENDA ESTATES

RESPONDENT

**CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at
Lusaka on the 21st day of February, 2018**

For the Applicant: Mr. M. Mukupa of Messrs. Isaac and
Partners

For the Respondent: Mr. P. G. Katupisha of Milner and Paul Legal
Practitioners

RULING

Cases referred to:

- 1. Adams v. Lindsell (1818) 106 E.R. 250.*
- 2. Household Fire Insurance v. Grant (1997) 4 Ex D 2016.*

3. *Linotype-Hell Finance Limited v. Baker* (1992) 4 All E.R. 887.
4. *Sonny Paul Mulenga and Vismar Mulenga, Chainama Limited v. Investrust Merchant Bank* (SCZ Judgment No. 15 of 1999).
5. *Michael Chilufya Sata v. Chanda Chimba III, Zambia National Broadcasting Corporation Muvi TV Limited Mubi TV International Limited*, 2010/HP/1282.
6. *Zambia Telecommunications Company Limited (ZAMTEL) v. Aaron Mweene Mulwanda Paul Ng'andwe*, SCZ Judgment Number 7 of 2012.
7. *Amber Louise Guest Milan Trbonic v. Beatrice Mulako Mukinga and the Attorney-General*, 2010/HP/0344.

Legislation referred to:

1. *Rules 50 (1) and (2) and 51 of the Supreme Court Rules of Zambia, Chapter 25 of the Laws of Zambia.*
2. *Section 51 of the Supreme Court Act, Chapter 25 of the Laws of Zambia.*
3. *Order 39, Rule 1 of the High Court Act, Chapter 27 of the Laws of Zambia.*
4. *Section 24 (1) (e) of Supreme Court Act, Chapter 25 of the Laws of Zambia.*

Publication referred to:

Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition [Thomson West, 2004].

These are applications by the Respondent for an Order for Stay of Execution of the Ruling dated 28th July, 2016 and for an Order for

Leave to Appeal to the Supreme Court Against the Ruling dated 28th July, 2016 (hereinafter collectively called the “Applications”).

The Applications were made pursuant to Rules 51 and 50 (1) and (2) of the Supreme Court Rules of Zambia, Chapter 25 of the Laws of Zambia (hereinafter referred to as the “Supreme Court Rules”), respectively; and were filed into court on 26th August, 2016.

The Applications are Supported by affidavits (both sworn by the Respondent and hereinafter referred to as the “Affidavits in Support”), and Skeleton Arguments, also filed into court on 26th August, 2016.

The background to this Application is that the Applicant in this matter, commenced an action by way of Originating summons against the Respondent, on 5th May, 2016; in which the following relief is sought:

(a) an order that the Respondent does forthwith pay the Applicant the sum of Three Hundred and Fifty-Eight Thousand, Eight Hundred and Twenty-Three Kwacha (K358,823.00), due and owing to the Applicant as at 21st April, 2016, plus interest thereon at commercial bank lending rate, by reason of the Respondent’s default in fulfilling its obligations under the Loan Term Agreement availed to it by the Applicant;

(b) and/or in the alternative, an order for possession, sale and/or foreclosure over the property against which the Respondent is registered as owner;

- (c) an order that interest be calculated on the amount owing before judgment at commercial bank lending rates and that the rate of interest after judgment be calculated at the rates determined by Bank of Zambia;
- (d) that costs of and incidental to these proceedings be borne by the Respondent in any event; and
- (e) any other relief that the Court deems fit.

Subsequent to the said commencement of action and by a Notice of Motion filed into court on 18th May, 2016, the following preliminary issues were raised by the Respondent, seeking to have the matter dismissed, namely: -

- (a) that the action against the Respondent is wrongly premised and misconceived at law as the cause of action has not yet accrued on account of the Applicant's failure to satisfy the condition precedent set out in Clause 6 of the Mortgage Deed; and
- (b) that the action against the Respondent should be dismissed with costs for irregularity.

A ruling was, accordingly delivered on 28th July, 2016, by this Court, dismissing the preliminary issues raised, as being without merit. Consequently, the Respondent made these Applications.

In the Affidavit in Support, pertaining to the Summons for an Order for Stay of Execution of the Ruling, it is the deponent's testimony that upon obtaining a loan facility in the sum of Three Hundred and Eighty Thousand Kwacha (K380,000.00) from the Applicant Bank, on

or around 10th March, 2015, he provided the Applicant Bank with a Certificate of Title No. 5300 relating to Subdivision V of Subdivision No. 1 of Subdivision A of Farm No. 2882, Lusaka, as security for the said loan, thereby creating a legal mortgage. To support this assertion, the deponent has produced exhibits "TM1" to "TM6", being copies of documents speaking to the said transaction.

The deponent has deposed that he was made to understand that the security documents executed were meant to bind both he and the Applicant Bank and that he has so far made several payments towards the said loan and is still desirous of liquidating the outstanding debt and doing business with the Applicant Bank.

The deponent has also averred that, following the commencement of this matter, he raised preliminary issues against the action as he genuinely believed it was premature for want of demand notice prior to commencement of the action and contrary to the terms of the loan agreement. The deponent, thus, has maintained the belief that there having been no demand notice served upon him by the Applicant Bank, this action is misconceived.

It is the deponent's testimony that the Applicant Bank claimed to have sent him a demand on WhatsApp and produced a copy of the alleged conversation without revealing either the sender or the recipient. To this end, the deponent produced exhibit "TM7", being a copy of the said conversation.

Producing exhibit "TM8", a copy of the Applicant Bank's letter of demand, the deponent averred that the said letter allegedly served on

him, which he said to have refused to acknowledge, in fact bears the 'received' date stamp of the Applicant Bank.

It is also the deponent's testimony that this Court, while acknowledging that the issuance of a demand notice was a condition precedent to commencing this matter, dismissed his application to raise preliminary issues, by holding that the WhatsApp messages were made to serve the demand notice on the Respondent.

Further, the deponent avers that this Court, in its ruling dated 28th July, 2016, construed that the letter of demand in question was served on him as the term requiring the same under the mortgage deed did not require the Applicant Bank to produce any proof of Service of the demand. To buttress this assertion, the deponent has produced exhibit "TM9", being a copy of the said ruling.

The deponent has finally, stated that he is desirous of appealing against the said ruling as the mortgage deed in issue has prescribed a mode of service for such a demand notice; and that the allegation by the Applicant Bank that they tried to personally serve the demand notice on the deponent is meant to mislead this Court.

Finally, the deponent deposes that he believes that the Applicant Bank ambushed him with court process without first issuing a demand notice; and that he believes that a stay of execution of the ruling in question is necessary, in the interest of justice.

The Application for Stay of Execution of Ruling is augmented by Skeleton Arguments, the gist of which is that proof of service of a demand notice was implied by the fact that the clause in issue, being

clause 6 of the mortgage deed, provided to the effect that every demand posted is to be deemed to have been made on the day it was so posted and that the clause, thus, places an obligation on the Applicant Bank to provide proof of the date on which the demand was posted. To this end, Counsel for the Respondent referred the Court to the cases of *Adams v. Lindsell*¹ and *Household Fire Insurance v. Grant*².

Counsel for the Respondent has also referred the Court to Section 51 of the Supreme Court Act, Chapter 25 of the Laws of Zambia (hereinafter referred to as the "Supreme Court Act"); and to the cases of *Linotype-Hell Finance Limited v. Baker*³ and *Sonny Paul Mulenga and Vismar Mulenga, Chainama Limited v. Investrust Merchant Bank*⁴, to support his submission that an appeal does not operate as a stay of execution and that a party ought to satisfy the court that without a stay of execution he will be ruined.

With respect to the Application for an Order for Leave to Appeal to the Supreme Court, the Respondent has sworn an Affidavit in Support thereof, which has essentially reverberated the contents of the Affidavit in Support of the Summons for an Order for Stay of Execution of Ruling, recounted above.

There are no Skeleton Arguments augmenting the application for leave to appeal, on the Court record. However, the said Application is accompanied by a List of Authorities making reference to Rule 50 and Section 24 (1) (e) of Supreme Court Act and the cases of *Adams v. Lindsell* and *Household Fire Insurance v. Grant* (already referred to above).

At the hearing of both Applications on 31st May, 2017, Counsel for the Respondent indicated that he would rely on the Affidavits in Support and the Skeleton Arguments accompanying the Applications. Counsel for the Applicant Bank, on the other hand, indicated that they had no objections to the Applications, save that they prayed that the Court grants the Applicant Bank costs of the Applications and that the Respondent should furnish security for costs for the appeal.

In reply, Counsel for the Respondent prayed that costs be in the cause as the matter is still ongoing and further, that there were no special circumstances to warrant an application for security of costs.

I have carefully considered the Affidavits in Support, the List of Authorities and the Skeleton Arguments augmenting the Applications; as well as submissions by Counsel at the hearing.

The issue that falls for determination, in my view, is whether the Respondent has satisfied the conditions precedent to warrant an order for stay of execution and an order for leave to appeal.

In addition to the cases cited by the Respondent in his Skeleton Arguments, another case in respect of both Applications herein, although not binding on this Court, but highly persuasive, is the case of *Michael Chilufya Sata v. Chanda Chimba III, Zambia National Broadcasting Corporation Muvi TV Limited Mubi TV International Limited*⁵. It was held, in the said case, as follows:

“1...

2. *An appeal does not operate as a stay of execution. In order for a judgment or any decision appealed from to be stayed, the Court is required to order or direct to that effect.*

3. *Thus in terms of the Rules of Court, the entry of an appeal does not automatically operate as a stay of execution. More is required to be advanced or shown that it is desirable, necessary or just to stay a judgment or a ruling pending appeal.*

4. *Further, it must also be shown either that special circumstances exist to warrant the grant of stay or that without a stay, a defendant stands to be ruined or suffer irreparable injury.*

5. *Whatever the case, some special ground or reason should be shown to exist. It is impossible to enumerate in advance all the matters that might be considered to constitute special circumstances.*

6...

7. *When a party is appealing, exercising his undoubted right of appeal, a Court ought to see to it that if there is a real likelihood that the appeal might succeed, it should not be rendered nugatory.*

8. *Thus, in exercising the discretion whether or not to grant a stay, a Court is entitled to preview the prospects of the proposed appeal.*

9. *The rationale for the stringent conditions or criteria in exercising the discretion to grant a stay is that a successful party should not be deprived immediate enjoyment of the fruits of judgment or ruling, unless good and sufficient grounds are advanced or shown..."*

Indeed, it is clear from the above that more has to be shown for the court to be persuaded to grant an order for stay of execution. Further,

it is also clear that an important issue to consider in an application for leave to appeal is whether the appeal has prospects of succeeding.

I have carefully perused the Court record and I am of the view that the Respondent has raised a critical issue touching on the interpretation of clause 6 of the Mortgage, which clause was already interpreted in the ruling of this Court, dated 28th July, 2016. This act by the Respondent, in my view, is calculated to invite this Court to go back to review its decision.

The principles of review (which application is governed by Order 39 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia), are settled in our Supreme Court case of *Zambia Telecommunications Company Limited (ZAMTEL) v. Aaron Mweene Mulwanda Paul Ng'andwe*⁶, as follows:

“For review under Order 39 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court, and has been discovered since the decision but could not with reasonable diligence, have been discovered before.”

It is trite that parties ought to bring all relevant issues before a court to aid it determine them in the interest of justice; and that a court becomes *funtus officio* once it delivers its decision on a matter. However, there are exceptional circumstances where a court can revisit its decisions and such circumstance, as elucidated above, is where fresh evidence is discovered that could not reasonably have been available at the time issues fell for determination.

The issue raised by the Respondent, being one originating from a clause already addressed at preliminary issue stage, cannot now be introduced to the Court for determination in this fashion. The Respondent had the chance, then, to raise it in his arguments in support of that application. It seems to me, that the Respondent has only raised the new issue as an afterthought.

The scope of review is limited and it is my considered view that the Respondent has failed to demonstrate that the new issue satisfies the criterion established in the case of *Zambia Telecommunications Company Limited (ZAMTEL) v Aaron Mweene Mulwanda Paul Ng'andwe* (already cited above), to warrant a review.

At this point, therefore, any questions seeking what appears to be further interpretation of clause 6 of the Mortgage would be inapt, as I hold the view that the said exercise of interpretation is *res judicata*. Thus, the question raised by the Respondent, seems to me, to be an indirect bidding to this Court to go back to an issue that has been definitively settled by the ruling of 28th July, 2018 or which issue is *res judicata*.

According to Black's Law Dictionary, 8th Edition, the doctrine of *res judicata* has two effects, namely; that of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in an earlier suit (otherwise known as 'claim preclusion'); and that of foreclosing relitigation of matters that have once been litigated and decided (otherwise known as 'issue preclusion').

Clearly, on the examination of the facts before this Court, I opine that the situation created by the Respondent by virtue of the Applications, herein, is one captured by the doctrine of *res judicata* as espoused above.

The significance of the doctrine of *res judicata* cannot be emphasised enough and in this regard, it was the holding, by my Learned brother Matibini, J. (as he then was), in the case of *Amber Louise Guest Milan Trbonic v. Beatrice Mulako Mukinga and the Attorney-General*⁷, that:

“The underlying principle regarding the plea of res judicata is expressed in the maxim: reipublicae ut sit finis litium; meaning that it is in the public interest that there should be an end to litigation.”

Although I am alive to the fact that a High Court decision is not binding on this Court, I am persuaded by the sentiments of my Learned brother and I adopt the same.

In view of the foregoing, this matter in so far as the interpretation of clause 6 of the Mortgage is concerned, is *res judicata*, and should not be litigated upon before this Court. This Court, in this regard, stands *functus officio*.

Therefore, with the exception of the new issue calling for a reinterpretation of clause 6 of the Mortgage, which interpretation has been established to be *res judicata*, the Respondent has not shown that special circumstances exist to warrant the grant of a stay of execution or that without a stay, a Respondent stands to be ruined or suffer irreparable injury. The matter has yet, to be determined on the merits and proceeding to trial would not, in my view, prejudice the Respondent in any way, as the result of the said trial may favour

either the Respondent or the Applicant Bank. The irreparable injury or ruin alleged is merely speculative in this instance.

It goes without saying, therefore, that the Respondent's position cannot properly be sustained under the case of *Linotype-Hell Finance Limited v. Baker*, sought to be relied upon by the Respondent.

Further, as the Respondent has not shown, by his contention (in respect of which it has been established that this Court has become *funtus officio* with respect to the issues in the ruling of 28th July, 2016) or by advancing any other ground that there is a likelihood of his appeal succeeding, there remains no issue in light of which the prospects of success may be determined.

In view of the foregoing, therefore, I reiterate the *ratio decidendi* for dismissing the preliminary application espoused by this Court in the ruling of 28th July, 2016 and find that I am not satisfied that the Respondent has shown any prospects of the appeal succeeding. The no-objection submission by the Applicant, notwithstanding, I find no merit in the Respondent's Applications and both are dismissed accordingly.

Costs shall be in the cause.

Dated at Lusaka the 21st day of February, 2018.



W.S. MWENDA (Dr)
HIGH COURT JUDGE