

IN THE HIGH COURT FOR ZAMBIA

2019/HP/1150

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

IVWANJI PUTA

PLAINTIFF

AND

PESHI MG'WADI

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 10TH DAY OF JULY, 2020.**

For the Plaintiff: N/A

For the Defendant: Mr. Peshi Mg'wadi - In Person

RULING

CASES REFERRED TO:

1. *Zambia Export and Import Bank vs. Mkuyu Farms Limited and Others* (1993/1994) Z.R. 36;
2. *Sandy Kawayo & Another vs. First Alliance Bank (Z) Limited* SCZ/8/208/1999;
3. *John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency (ADRA) vs. Keren Motors (Z) Limited* SCZ Judgment No. 14 of 2012;
4. *Richard Chizyuka & Betty Chizyuka vs. Credit Africa Bank* Appeal Number 8/113/99.
Richard Chizyuka & Betty Chizyuka vs. Credit Africa Bank Appeal Number 8/113/99.
5. *Southern Cross Motors limited vs. Nonc Systems Technology Limited* (2012) Vol. 1 ZR 524;
6. *Monk vs. Bartram* (1891) 1 Q.B. 346; and
7. *Sonny Paul Mulenga & Others vs. Investrust Merchant Bank Limited* (1999) ZR 101.

LEGISLATION REFERRED TO:

1. *The High Court Act, Volume 3, Chapter 27 of the Laws of Zambia; and*

1 INTRODUCTION

1.1 This is a Ruling on the Appeal against the Ruling of the Registrar dated 1st June, 2020, in which the Registrar dismissed the Defendant's application for payment of the Judgment debt by instalments and refused to stay execution of Judgment pending Appeal to a Judge at Chamber.

2 BACKGROUND

2.1 On 12th February, 2020, the Plaintiff obtained Judgment on Admission in the sum of ZMW173,000.00 and proceeded to levy execution against the Defendant on 6th May, 2020. This prompted the Defendant to apply to stay execution of Judgment on Admission, pending application to pay Judgment sum by instalments. The said applications were filed on 27th May, 2020.

2.2 On 1st June, 2020, the Registrar rendered a Ruling dismissing the Defendant's application to pay Judgment sum by instalments and on 4th June, 2020, the Registrar dismissed the Defendant's application for an Order Staying Enforcement/Execution of Judgment pending Appeal to a Judge at Chamber.

2.3 Being dissatisfied with the Rulings, the Defendant appealed to this Court and advanced the following Grounds of Appeal: -

1. That the Learned Registrar erred in law and fact when he ruled that the Defendant failed to demonstrate some sufficient reason when applying for stay in terms of Order XXXVI Rule 9 of The High Court Rules;
2. That the Learned Registrar erred in law and fact when he decided that there were no special circumstances or cause for granting an Order to stay judgment.

3 SUBMISSIONS

- 3.1 In his Skeleton Arguments filed in support of the Appeal, the Defendant cites **Order 47, Rule 1 (1)** of **The Rules of the Supreme Court**² and *inter alia* submits that he complied with the rules of Court, but the Registrar did not actually examine the Defendant as to means, particularly that the Defendant had actually stated his source of income and his means.
- 3.2 The Defendant relied on the case of **Zambia Import and Export Bank vs. Mkuyu Farms Limited and Another**¹ and contended that the Registrar was supposed to examine the Judgment Debtor.
- 3.4 The Defendant further submitted that he is desirous of settling the Judgment Debt by instalments, but can only do so if he is allowed to pay affordable instalments from the small business income he has. He contends that the Court has power to allow him to pay the debt in instalments and give the conditions for such a provision. He fortified his submissions by citing **Order XXXVI, Rule 9** of **The High Court Rules**¹.

3.5 The Appeal is unopposed and the Plaintiff did not attend Court on the return date despite being aware of the date of hearing. No reasons were advanced for her absence.

4 **THE LAW**

4.1 I have carefully considered the Appeal before me, the Affidavit evidence on record and Skeleton Arguments. The Defendant's application was anchored on **Order XXXVI, Rule 9** of **The High Court Rules**¹, which is couched as follows: -

"Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any instalment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one instalment, there shall be no order for stay of execution on the balance."

4.2 The Appeal was also anchored on **Order 47 Rule 1 (1)** of **The Rules of the Supreme Court**², which is couched as follows: -

"Where a judgment is given or an order made for the payment by any person of money, and the court is satisfied on an application made at the time of the

judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution-

(a) *that there are special circumstances which render it inexpedient to enforce the judgment or order, or*

(b) *that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the court may by order, stay the execution of the of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit." (Court's emphasis)*

4.3 Further **Sub rule 3 of Order 47, Rule 1 of The Rules of the Supreme Court**² provides as follows: -

"An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his." (Court's emphasis)

5 ANALYSIS AND FINDINGS

5.1 I propose to deal first with the Defendant's application to settle the Judgment sum by instalments. In referring to **Order 47, Rule 1 of The Rules of the Supreme Court**² cited above, the Supreme Court, in the case of **Zambia Export and Import Bank vs. Mkuyu Farms Limited**

and Others¹ stated that "it is quite clear from this order that a court may order a judgment debt to be satisfied by instalments upon sufficient cause being shown by the judgment debtor."

5.2 In the case of **Sandy Kawayo & Another vs. First Alliance Bank (Z) Limited**², the Court held as follows: -

"The jurisdiction to permit payment of money judgment by instalment is undoubtedly a discretionary one... Order 47/1 requires the Court to be satisfied that there are special circumstances which render it expedient... the debtor should make out a good case for instalments which can be considered to be sufficient reason or special circumstances." (Court's emphasis)

5.3 In the Affidavit of the Defendant, filed on 27th May, 2020, in support of his application to pay Judgment debt in instalment, the relevant paragraphs read as follows: -

- "6. That I am desirous to discharge the judgment sum, but I am currently not able to do so by single payment as I do not have immediate cash or assets to do so;
7. That I run a business in which I supply goods to clients and I do so on a regular basis, from which business I also sustain myself and pay rentals;
8. That from the current economic shutdown due to the COVID-19 pandemic, my business and income have drastically reduced.
9. That in the circumstances I am only able to raise the amount of ZMW10,000 in a reasonable transaction, which amount I would pay towards settlement of the judgment sum; and

10. *That I would be able to settle the judgment sum starting from the month-end of June, 2020 and would also increase the instalment should my earnings in any particular month allow."*

- 5.4 In terms of **Order XXXVI, Rule 9** of **The High Court Rules**¹, the Defendant ought to demonstrate some "sufficient reason" in applying to pay Judgment debt by instalments. Under **The Rules of the Supreme Court**², there must be shown to be "special circumstances" or "cause", which render it desirable to order a stay. Applying the above in this matter, the Defendant was required to adduce cogent evidence, such as proof of incorporation of his business, bank account details and statements, his income, nature and value of his business and properties, as well as details of indebtedness to other persons apart from the Judgment Creditor. For only then can a Court make an informed decision as to the "proper balance between the needs of the judgment debtor to be granted a stay of execution and the needs of the judgment creditor to obtain due and prompt satisfaction of his judgment debt" as provided under **Order 47, Rule 1 (2)** of **The Rules of the Supreme Court**².
- 5.5 It is my considered view that the Defendant did not satisfy the parameters prescribed under the foregoing legal provisions and as such, the Registrar was perfectly in order when he dismissed the Defendant's application.

- 5.6 I will now deal with the refusal by the Registrar to stay execution pending Appeal. It is a well settled principle of law that a successful litigant is entitled to the immediate enjoyment of the fruits of its Judgment, as per holding of the Supreme Court in the case of **John Kunda (Suing as Country Director of and on behalf of the Adventist Development and Relief Agency (ADRA) vs. Keren Motors (Z) Limited**³. It is also trite that the Court has the discretion to Order a Stay of Execution provided there are sufficient grounds warranting such an Order.
- 5.7 As shown in paragraph 4 above, there was need for the Defendant to clearly demonstrate the basis or grounds upon which a stay should have been granted, as was held in the case of **Richard M. Chizyuka and Betty Chizyuka vs. Credit Bank**⁴. In the present case, in order for the Registrar to have granted a stay, the Defendant had to satisfy him that there are prospects of him succeeding in his application to pay debt by instalment and in his Appeal. In other words, the Defendant should have shown that he had sufficient grounds to warrant an order of stay of execution of Judgment. This is in line with **Order XXXVI, Rule 10 of The High Court Rules**¹, which provides as follows: -

"Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment." (Court's emphasis)

5.8 Further, in the case of **Southern Cross Motors Limited vs. Nonc Systems Technology Limited**⁵, it was observed that: -

"...the applicant ought to demonstrate some 'sufficient reason' in applying for a stay. Under Order 47 Rule 1 of the Rules of the Supreme Courts, there must be shown to be 'special circumstances' or 'cause' which render it desirable to order a stay. This requires evidence to be adduced..." (Court's emphasis)

5.9 I have addressed my mind to the case of **Monk vs. Bartram**⁶, 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." (Court's emphasis)

5.10 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.

5.11 In the case of **Sonny Paul Mulenga & Others vs. Investrust Bank Limited**⁷, the Supreme Court of Zambia held as follows: -

"In terms of our rules of Court an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered. In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal. The successful party should not be denied immediate enjoyment of a Judgment unless there are good and sufficient grounds." (Court's emphasis)

5.12 The holding of the Supreme Court in the above cited case is also applicable in an application for stay pending application to pay Judgment debt by instalments. As seen above, it is clear that a Court is entitled to preview the prospect of success of the application that has accompanied the application for stay. As stated earlier, I have perused the Affidavit in Support of the application to pay Judgment debt by instalments and in my view, there are no special circumstances shown, on which the Registrar could have granted a stay of execution.

6 CONCLUSION

- 6.1 For the foregoing reasons, I find no reason to overturn the decisions by the Registrar to dismiss both applications for payment of Judgment sum by instalment and stay of execution.
- 6.2 The Appeal has no merit and is dismissed.
- 6.3 I make no order as to costs.
- 6.4 Leave to appeal is granted.

Dated the 10th day of July, 2020.



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P. K. YANGAILO
HIGH COURT JUDGE