

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



2013/HP/0021

BETWEEN:

**ANTONIO VENTRIGILIA
MANUELA VENTRIGILIA
ZAMBEZI PORTLAND CEMENT LIMITED**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF**

AND

**EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK**

1ST DEFENDANT

ROBERT MBONANI SIMEZA *(In his capacity as
Receiver of ZAMBEZI PORTLAND CEMENT
LIMITED (In Receivership))*

2ND DEFENDANT

Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiffs:

Mr. A. Siwila, Mr. S. Mambwe, of Mambwe, Siwila and Lisimba Advocates, Mr. C. M. Sianondo, of Malambo & Company, and Mr. K. Khanda, of Messrs Central Chambers.

For the second Defendant:

Mr. L. Mwamba, of Messrs Simeza, Sangwa & Associates.

RULING

Cases referred to:

- 1. *Sonny Paul Mulenga & Another v Investment Merchant Bank (SCZ Judgment No. 15 of 1999).***
- 2. *Nyampala Safaris & Others v Zambia Wildlife Authority & Others (SCZ/A/179/2003).***

3. ***Mulenga and Others v Investrust Merchant Bank Limited(1999) Z.R. 101.***
4. ***Zambia Revenue Authourity v Post Newspaper SCZ Judment No. 18 of 2016.***
5. ***Kalyoto Muhalyo Paluku v Granny's Bakery Limited & Others (2006) Z.R. 119.***
6. ***Minnesota Mining Manufacturing Co. v Rennicks (U.K.) Ltd. R.P.C. 331.***
7. ***Watson Nkandu Bowa v Fred Mubiana & Another SCZ Selected Judgment No. 21/2012.***
8. ***Zambia Seed Company Limited v Chartered International (Pvt) Limited [1999] ZR 151.***

Legislation and Other Works referred to:

1. ***The High Court Rules Chapter 27 of the Laws of Zambia.***
2. ***The Supreme Court Practice, White Book 1999 Edition Vol. 1. para. 62/C/69.***
3. ***Black's Law Dictionary 10th Edition*** pages 689, 422, 1639 and 1485.

This Ruling is in respect of an application on the part of the Plaintiffs to stay execution of the Ruling dated May, 10, 2019. The application was made pursuant to Order XXXVI r. 10 of the **High Court Rules Chapter 27 of the Laws of Zambia.**

A brief account leading to this application is that, the Plaintiffs took out summons herein to set aside the consent order executed in this cause dated April 16, 2014, between the third Plaintiff, on the one hand, and second the Defendant, on the other hand. The second Defendant raised a notice of motion to raise a preliminary objection; whether the procedure employed by the Plaintiffs to apply in the same cause to set aside the

consent order was proper or not. The preliminary objection was successful, and I held as follows:

I wish to reiterate that there is no settled exception to the well settled principle that a party seeking to set aside a consent judgment has to commence a fresh action. Therefore, the application herein to set aside the consent order in the same action in which it was executed and approved is irregular and must be dismissed for procedural impropriety....The application to set aside the consent order stands dismissed with costs as well.

Consequently, the second Defendant took out taxation proceedings to tax the bill of costs on a party to party basis endorsed with the sum of K269,033.45. The taxation was made pursuant to the said ruling. Taxation means the judicial process by which is determined the amount of legal costs and expenses that are to be paid to, (see para. 62/C/39 of the **White Book 1999 Edition**). Prior to the taking out of taxation proceedings, the Plaintiffs in particular the first and second Plaintiffs (hereinafter called the Plaintiffs) being dissatisfied with the said ruling, filed a notice of appeal in the Court of Appeal, advancing the following grounds:

- 1. The Court below misapprehended the law when it dismissed the Plaintiffs' application holding that a 'consent order' such as the one under discussion could not be set aside within the same action but by commencing a fresh action.***
- 2. The Court below misapprehended the law when it held that the comments and observations made on the setting aside of a 'consent order' by the Supreme Court in *Kalyoto Muhalyo Paluku v Granny's Bakery Limited & Others (2006) ZR 119 case*, where obiter dicta and therefore not binding on it.***
- 3. The Court misdirected itself in law and in fact when it held that, as regards the 'consent order', it was functus officio***

and could therefore not entertain an application to set aside the same.

4. The learned trial Judge erred when he failed to deal with the all matters in controversy.

The Plaintiffs' Counsel kindled their submission by citing Order XXXVI Rule 10 of the High Court Rules, Chapter 27 of the Laws of Zambia, which provides:

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

A couple of memorable cases relevant to the subject matter were cited by the Plaintiffs' Counsel, thus: Sonny Paul Mulenga & Another v Investment Merchant Bank (SCZ Judgment No. 15 of 1999); and the case of Nyampala Safaris & Others v Zambia Wildlife Authority & Others (SCZ/A/179/2003), wherein the Supreme Court held:

A stay of execution is only granted on good and convincing reasons. The rationale for this is clear, which is that a successful litigant should not be deprived of the fruit of litigation as a matter of course. The application for stay of execution must therefore clearly demonstrate the basis on which such a stay should be granted.

Further reference was made to the case of Mulenga and Others v Investrust Merchant Bank Limited (1999) Z.R. 101, wherein it was held:

An appeal does not automatically operate as a stay of execution. And further that the Court is entitled to preview the prospect of the proposed appeal.

While acknowledging that the grant of a stay of execution or otherwise was discretionary, the Plaintiffs' Counsel argued that the appeal had real prospects of success warranting the grant of the subject application. And

that if the stay was not granted, the appeal would be rendered nugatory and imperil the position of the Plaintiffs if the taxation proceedings were allowed to proceed. It was further contended that no prejudice would be occasioned to the second Defendant if a stay of execution was granted.

Mr. Mwamba, Counsel for the second Defendant in opposing the application argued that, the application was completely misconceived. He noted that the ruling sought to be stayed did not have an award of remedies. He therefore argued that the ruling was incapable of being enforced by way of execution. According to him the ruling was not stayable, because an order for costs was not a remedy. He relied on the case of **Zambia Revenue Authority v Post Newspaper SCZ Judgment No. 18 of 2016**, wherein the Supreme Court in a judgment delivered by Mwanamwambwa D.C.J (as he then was) said:

Where a Judgment or Ruling refuses Judicial Review or an Injunction, there is nothing to stay; because such a Judgment or Ruling does not award a remedy, such as money or property which can be obtained by court execution. In short, a failed Judgment or Ruling cannot be stayed because it did not award anything. If there is nothing to execute about such a Judgment or Ruling, then there is nothing to stay about it.

According to Mr. Mwamba, what was stayable in the present case are taxation proceedings.

He also argued that the Plaintiffs had not demonstrated the prospect of success on appeal. He observed that it was not enough to merely say there are prospects of success. I was therefore urged to dismiss the application.

In reply the Plaintiffs' Counsel submitted that they had vividly demonstrated that the appeal had prospects of success, because the **Kalyoto Muhalyo Paluku v Granny's Bakery Limited & Others (2006) Z.R. 119**, favoured their arguments on appeal. And it was contended that

the Ruling was stayable, because the taxation proceedings are an off-shot of an order for costs.

Finally, the Plaintiffs' Counsel submitted that the **Zambia Revenue Authority** case (supra) was distinguishable from the present case, in the sense that the said case did not deal with the issue of costs.

I have carefully considered the application, the argument for and against. The primordial issue to be determined is whether the ruling appealed against dated May 10, 2019, is capable of being stayed. Perhaps, I should start by unlocking the meaning of some key words. Firstly, the word "execution" entails generally judicial enforcement of a money judgment or a court order directing the Sheriff and his/her officers to enforce a judgment or an order of the court by seizing and/selling the property of the judgment debtor to recover the judgment debt. Secondly, the word (s) "stay" or "stay of execution" simply means: "*stay*: the postponement or halting of a proceeding, judgment, or the like... *stay of execution*: suspension of judgment". Thirdly, the word "cost" means, the amount paid or charged for something; price or expenditure. And fourthly, the word "remedy" means: "the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief" (see **Black's Law Dictionary, 10th Edition** pages 689, 422, 1639 and 1485).

It is undoubted that an order for costs herein was granted in favour of the second Defendant. The award for costs is without any specific amount to be paid by the Plaintiffs. This is so because, the costs thereof are subject to taxation if not agreed by the parties to ascertain the reasonable amount of legal costs and expenses (disbursement) payable to the second Defendant.

It is also clear that the subject ruling granted no remedies to the second Plaintiff in the sense of awarding a sum of money or property, save for costs. However, from the definition given in respect of the word “remedy”, I reckon the word also encompasses costs. Firstly, an unpaid advocate can issue a legal suit against his/her client to recover his costs, as such recovery of costs constitute a remedy in that context. Secondly, costs as an incident of litigation is generally payable to a successful party. And when so ordered the successful party can enforce the right to recover costs, as the second Defendant has sought to do herein.

I agree with the Plaintiff’s’ Counsel that the **Zambia Revenue Authority** case is measurably distinguishable from the present case, the issue in that case was not whether an order for costs was stayable or not. From my considered opinion sure-footed in common law, I take the view that an order for costs is amenable to execution, and it follows that it can be stayed, to forestall it’s execution, which starts with taxation proceedings and terminate with the issuance of a certificate of taxation. I am persuasively fortified in making this proposition by making reference to the case of **Minnesota Mining Manufacturing Co. v Rennicks (U.K.) Ltd. R.P.C. 331**, wherein Aldous J., was faced with an application for stay of execution of an order for costs, and this is what he said:

The defendants submitted that the order for taxation and payment should be stayed, as a result of the appeal could mean that the costs of the taxation would be wasted. That is correct in that a successful appeal is likely to reverse the order as to costs that I made. The practice is that an order for taxation and the payment of costs is normally ordered providing that repayment is secured. In this case, the plaintiffs accept that any money ordered will be paid back to their solicitor upon their solicitor and their joint undertaking to repay if so ordered. Thus, payment will be made if necessary.

I conclude that the defendants have not made out any special circumstance for the staying of the order for taxation. It may turn out that the costs will be wasted, but the court can ensure that the plaintiffs pay reasonable costs. Further delay in taxation could mean that the plaintiff would never recover their costs. I conclude that no stay should be granted.

It will be worth noting for purposes of appreciating in depth in addition to the above cited case, by making reference to the general practice of the Supreme Court Taxing Office obtaining as at October 1, 1996, as provided under para. 62/C/69 of the **White Book 1999 Edition**, thus:

Enforcement:

(a) The issue of a certificate of taxation enable the Receiving Party to seek enforcement of the order for costs which gave rise to the taxation proceedings....

(b) Applications for a stay of execution of the order for costs should be to the Court Office in which the action was proceeding before the taxation commenced:...

Notwithstanding the generality of the present application to stay the Ruling, the target is obvious, thus the order for costs and the taxation thereof. I have no hesitation to come to the conclusion that, an order for costs, culminating in taxation proceedings is stayable pending appeal, upon an application by an affected party, against whom the order was made, provided special circumstances are disclosed. Needless to say, special circumstances are not identical in all cases, but are various and varied in each case

And I now turn to the second limb of this application, whether there are good and convincing grounds to grant the application. And I am mindful that this discretion must not only be exercised judicially, but judiciously as well, bearing in mind the competing rights of the parties hereto. As earlier noted consideration of the prospect of the appeal succeeding is of

primary consideration. In the case of **Watson Nkandu Bowa v Fred Mubiana & Another SCZ Selected Judgment No. 21/2012**, the Supreme Court had this to say:

In an application for stay of execution pending appeal, the considerations are: the prospect of the appeal succeeding and the irreparable damage if a stay is not granted and the appellants' appeal succeeds.

The ruling, the subject of this appeal discloses a relatively novel issue. Thus, how to reconcile the pronouncement made in case of **Kalyoto Muhalyo Paluku v Granny's Bakery Limited & Others** (supra) with the pronouncement made in **Zambia Seed Company Limited v Chartered International (Pvt) Limited [1999] ZR 151**, regarding the proper mode to be adopted for setting aside a consent order or judgment, or to what extent the two cases are distinguishable *vis-a-vis* setting aside Consent Judgment. And with this appeal in place it means that the matter is still open to litigation. The foregoing is a clear indication to me that this is a special circumstance or exceptional circumstance to warrant the grant of a stay of execution of the order for costs. Indeed, if not stayed, the enforcement of the order for costs will proceed, and if the appeal succeeds with costs, the Plaintiff may face irreparable damage to recover back the costs once taxed and enforced, especially that our system seem not have a secured repayment system for costs, comparable to the one mentioned in **Minnesota Mining Manufacturing Co. v Rennicks (U.K.) Ltd. R.P.C. 331**. The balance of justice in this particular matter favours the grant of an order for a stay.

Finally, the application is granted to the extent that the order for costs and the taxation are stayed pending appeal. And costs shall be in the cause of the pending appeal.

DATED THE 7TH DAY OF FEBRUARY 2020.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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THE HON. MR. JUSTICE CHARLES ZULU