(P. 315)

SCZ JUDGMENT NO. 14/2012

IN THE SUPREME COURT FOR ZAMBIA
SCZ/8/91/2011
HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF THE ARBITRATION ACT, 2000

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

JOHN KUNDA	(suing as Country Director of and On Behalf of the Adventist Development and Relief Agency (ADRA))	**APPELLANT**

Versus

KEREN MOTORS (Z) LIMITED	**RESPONDENT**

CORAM: CHIBESAKUNDA, PHIRI AND MUSONDA, JJJS.,
On 6th October 2011 and on 11th April 2012

For the Appellant:	***Mr. K. Hangandu of Kelvin Hangandu & Co.***
For the Respondent:	***Major M. Mushemi of Nhari Mushemi & Co.***

(316)

R U L I N G

Musonda, JS, delivered the Ruling of the Court.

Case Referred To:

1. ***Zinka V Attorney General (1990 – 92) ZR at p.73.***
2. ***Wilson V Church (No. 2) (1879) Ch D 454 at p.458.***
3. ***Sonny Paul Mulenga et al V Investrust Merchant Bank Limited (1999) ZR 101.***
4. ***Re Cain (1974) ZR 71.***
5. ***Cregg V Georgia 429 US 130 1 (1976) p.31.***

Legislation Referred To:

1. ***Arbitration Act No. 19 of 2000.***

This was an appeal against the Ruling of a single Judge refusing an application to stay execution of judgment pending appeal. On 6th August 2008, a single Arbitrator awarded the sum of K310,471,260.80 against the Appellant. This was in respect of transportation services rendered by the Respondent plus, interest

and costs. The appellant commenced an action by originating summons, seeking to set aside the arbitral award of the sole

(317)

arbitrator. The ground was that the Award was affected by fraud and (or misrepresentation within the terms contemplated by Section 17(2) (b) (iii) of the Arbitration Act No. 19 of 2000 hereafter referred to as the Act).

The learned Judge in the court below after analyzing the Arbitral Award held that:

> ***"Having critically examined the evidence adduced before the Arbitrator, his analysis of the evidence and the findings he made, I do not see any impropriety in his conclusion. In particular, I am of the firm opinion that the plaintiff has not shown to this court, that the award was tainted with fraud. On the contrary the view of the this court is that the Arbitrator properly found, after analyzing the evidence before him, that an ad hoc committee, which included representatives from independent organization and the two parties determined the average weight***

applicable in calculating and readjusting the agreed amount of K360,471,260.80 due to the claimant (Respondent in this court). I cannot agree more with Arbitrator's finding that the

(318)

suggestion by the Respondent of using a weigh bridge came as an afterthought"

The learned Judge concluded that he was satisfied that the plaintiff (appellant in this court) had not satisfied the requirement of Section 17 (2) (b) (iii) of the Act.

The appellant appealed to a single Judge of this court who equally refused the application after an inter-partes hearing. The appellant filed four grounds of appeal. The first ground was that the Appellant has a justifiable appeal before the Supreme Court. It was argued that if an appellant files a bona fide appeal or genuinely exercises his right of appeal, he must be given a fair opportunity to be heard, and that encapsulates the right not to have the judgment appealed against prematurely executed, while the judgment subject to the appeal is pending appellate review ***Zinka V Attorney General***[(1)]. At common law, an appeal is

bona fide if it is not shown to be vexatious or filed as a pretext for attaining some other ulterior or improper motive unconnected to the ligitgation, the case of ***Wilson V Church***[2] was cited for that proposition of the law.

(319)

It was canvassed that part of the Order, which directs payment to the bondholders should be stayed, to insulate the appeal, if successful, being rendered nugatory. It was argued that our decision in ***Mulenga et al V Investrust Merchant Bank Limited***[3] where we said:

> ***"A single Judge had refused to stay execution of the judgment of the High Court pending appeal and so prompting the motion before us which in substance is a rehearing by the full court of the applications which was unsuccessful. In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask a stay solely because an appeal has been entered. More is required to be advanced to persuade thecourt below or this court that it is desirable, necessary and just to***

stay a judgment pending appeal. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds"

In ground one it was argued that the above authority does not warrant in anywise the extraordinary unlawful course taken by the

(320)

single Judge, to in effect prejudice the outcome of the appeal, thereby usurping to himself the power reserved by law in the Supreme Court to determine appeals. The single Judge having held that the learned Judge' judgment in the court below "cannot be faulted" as it was well reasoned and that the prospect of the appeal succeeding was dim, meant that the appeal was prejudiced by a single member of the court.

In ground two, it was argued that the entire judgment is liable to execution and therefore, if there be execution of the whole judgment prior to determination of the appeal by the full court, the appeal shall in fact be rendered moot or nugatory. An appeal court must ensure that no appeal is rendered nugatory or

moot by the premature execution of the judgment subject to appeal: ***Wilson V Church supra,*** was cited for that proposition of the law. In the same case Brett CJ said at page 459:

> ***"This is an application to the discretion of the court, but I think that Mr. Benjamin has laid down the proper rule of conduct for the exercise of judicial***
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> (321)
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> ***discretion, that where the right of appeal exists and the question is whether the fund shall be paid out of court, the court as a general rule ought to exercise its best discretion in a way, so as not to prevent the appeal, if successful, from being nugatory"***

It was argued that the court must exercise its discretion in a way that will prevent the appeal, if successful, from being nugatory. Mr. Hangandu, went on that it was a requirement of the due process of law, that no court ought, by its slothful conduct of a case render it moot.

According to the principle of due process of law, an appellate

court that neglects to try a case until after the judgment subject to appeal has been executed, is itself guilty of violating the due process of law. In ***Re Cain***[4], Doyle CJ, held that it is a fundamental constitutional principle, under the "Speedy Trial Clause", that judicial proceeding be dealt with as soon as is reasonably practicable.

(322)

In ground three, it was argued that the stay of execution will not prejudice the respondent at all in that execution of the entire judgment can still be levied after the full court has disposed of the substantive appeal, should the appeal fail.

It was argued the single Judge's holding that, "as the other party was awarded a sum of money and this is a corporate entity with the capacity of refunding the money if the appeal succeeded was erroneous. This court was referred to the opinion of Powell J's opinion in ***Cregg V Georgia***[5] when he said:

"Under controlling statutes, such petition cannot be acted upon except by the full court in regular or special session. If the executions were carried out before the petition for rehearing could be acted upon by court, the harm to petitioners would obviously be irreparable. In addition, the case would then be moot. Nor is there reason to believe that the granting of a stay until the petition for rehearing can only be considered will prejudice the interests of the respondent states. In these circumstances, I conclude that the issuance of the mandate in each

(323)

of these cases should be, and hereby is, stayed until further order of this court"

It was argued, following Cregg's Case supra, that a stay should be granted if the denial would render the case moot/nugatory and if no prejudice is caused.

Ground four, it was argued that the decision to discharge the stay of execution of judgment by a single judge and the order that a substantive appeal be determined without an immediate stay of the judgment subject to the appeal, has effectively denied the

right to a speedy trial guaranteed to it by Article 18 (9) of the Constitution of Zambia. Mr. Hangandu alluded to the fundamentality of the right to a speedy trial.

Major Mushemi for the Respondent did not file a written response to the grounds of appeal, but responded orally. It was argued that the ruling of a single Judge refers to the Statute, which is the basis of the whole action. There was no allegation of fraud against the Arbitrator. The requirement of Section 17 2(b) (iii) were

(324)

not met. There was detailed reconciliation by the parties regarding the issues alleged to be fraudulent. There was a payment by the appellant of more than K900 million towards the K2 billion. The parties drew an agreement after the payment of K900 million. The balance was K265 million. The agreement was signed by the country representative. The appeal could not succeed because the appellant is alleging fraud between the parties. There is no proven evidence of fraud as shown by two

judgments, one of the High Court and the single Judge of the Supreme Court.

Mr. Hangandu, in his reply said, the Act is coming for the first time for the interpretation of Section 17. If a stay is given and Keren Motors is wound up, the Adventist Development Relief Agency will suffer irreparable damage.

We have considered submissions from both Counsel indepth.

We do not agree that if the appellant files a bona fide appeal that encapsulates the right not to have the judgment appealed

(325)

against prematurely executed, while the judgment subject to the appeal is pending. We disagree with that notion, as it undermines Section 51 of the Supreme Court Act, which is couched in these terms:

"An appeal shall not operate as a stay of execution or of proceedings under the decision

appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the court may direct"

On the literal interpretation of this provision, it does not say a bona fide appeal acts as a stay. No appeal acts as a stay, unless the court says so. We therefore find no merit in the first ground of appeal.

We have considered the argument in ground two that the entire judgment is liable to execution, but what is not mentioned here is that the appellant had paid K900 million towards the indebtness. In these circumstances where there is partial

(326)

admission of liability, could one say the damage will be irreparable, we think not. The second ground of appeal equally lacks merit.

We have considered the submissions in ground three that the stay of execution will not prejudice the Respondent, as judgment can still be levied after the full court has disposed off

the substantive appeal. The argument in ground three flies in the teeth of our decision in ***Sonny Paul Mulenga et al V Investrust Merchant Bank Limited supra,*** where we reiterated the necessity of a successful party in litigation to enjoy the fruits of the Judgment. To say there is no prejudice when the successful party holds on to an unexecuted judgment, is a statement made without conviction. The third ground lacks merit.

In ground four, it was argued that the decision by a single judge to discharge the stay denied the appellant a speedy trial. We do not see how the discharge of a stay of execution exercisable under Section 51 of the Supreme Court Act, delays the trial. The Constitution here is quoted out of context. This demonstrates a

(327

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serious misunderstanding of the discretion of High Court Judges and Supreme Court Judges to grant or deny a stay of execution.

This ground equally lacks merit. In any event it is the appellant who delayed to enter the appeal.

The issue that arise in this appeal is the interpretation of Section 17 (20 (b) (iii) of the Arbitration Act. The question is, is it the fraud of the Arbitrator or the litigant, which can lead to setting aside the award. This is novel and is the issue to be determined in the main appeal. We have noted that the fraud is being alleged to the balance of the debt. The appellant has already paid K900 million to the Respondent. There is no total deprivation of the fruits of the judgment. We will therefore reverse the single Judge's decision to discharge the stay and maintain the status quo, until the substantive appeal is heard. The costs of the interlocutory application will be costs in the cause. _

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L. P. Chibesakunda
SUPREME COURT JUDGE

(328)

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G.S. Phiri
SUPREME COURT JUDGE

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P. Musonda

SUPREME COURT JUDGE