

**IN THE SUPREME COURT FOR ZAMBIA**

**SCZ/8/ 080/2012**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**BARCLAYS BANK ZAMBIA PLC**

**APPLICANT**

**AND**

**LENNOX NYANGU AND 601 OTHERS**

**RESPONDENT**

***Before Hon. Mrs. Justice E.N.C Muyovwe on the 13<sup>th</sup> April, 2012.***

For the Applicant: Ms. L.C. Kasonde, Messrs Mulenga Mundashi and Company

For the Respondent: Mr. M.L. Mukande, Messrs M.L. Mukande and Company

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

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**Cases referred to:**

- 1. Standard Chartered Bank vs. Willard Solomon Nthanga and 402 Others SCZ No. 13/2008**
- 2. John Paul Mwila Kasengele and 40 Others vs. Zanaco SCZ No. 161/1999**

This is an application for a stay of execution of judgment pending the hearing of an application for leave to appeal pursuant to **Order 47 Rule 1** and **Order 59 Rule 13** of the **Rules of the**

**Supreme Court.** The Appellant has also filed an application for leave to appeal the entire judgment pursuant to **Rule 50** and **Rule 48 of the Supreme Court Rules, Cap 25 of the Laws of Zambia.**

I will first deal with the application for a stay of execution.

In the affidavit in support of this application sworn by Chanda Sichalwe Kasanda, he deposed that the Court below on 24<sup>th</sup> January, 2012 delivered a judgment in favour of Respondents in which it ordered the immediate payment of the Respondents entitlements of about K90 billion. That the current surplus of assets over liabilities of the Barclays Bank Pension Fund is approximately K6 billion. That if the Respondents proceeded to execute, the fund would be wound up and the Applicant's operations would be crippled. That the High Court only granted partial leave to appeal. That the Applicant being dissatisfied with the whole judgment intends to appeal to the Supreme Court and has made an application for leave to appeal the entire judgment. That the lower Court, in its Ruling dated 9<sup>th</sup> March, 2012 refused the application for a stay of execution pending the application for leave to appeal. According to paragraph 9, the Appellant is

desirous that the execution of judgment be stayed pending the determination of the application for leave to appeal against the whole judgment as the Respondents may execute any time thereby rendering the Appellant's appeal academic.

The Respondents filed a combined affidavit in opposition to cover both applications. In the affidavit in opposition sworn by Lennox Nyangu he states that the Respondents exited the Applicant's employment between 1980 and 2004 and none of the Respondents have received their pension benefits from the Applicant although the Applicant agreed that the same is due. Further, that since the Applicant conceded their entitlement it was an abuse of the Court process for it to make the two applications before Court as this is merely intended to prolong the suffering of the Respondents. That the Applicant cannot agree on the formula to use for payment.

That the Applicant's formula is against the **Pensions Scheme Regulation Act No. 28 of 1996**. That the stay applied for has no legal basis and the chances of the appeal succeeding are nil. That since the benefits are yet to be assessed by the Deputy Registrar, the issue of execution cannot arise. That,

therefore, the two applications are misconceived and the Court should not exercise its discretion in favour of the Applicant. Alternatively, should the Court entertain the application, it should order the Applicant to pay into Court that which they conceded.

On behalf of the Applicant, Ms. Kasonde relied on the affidavit in support of this application, in particular paragraph 4 in which it is stated that the Court below ordered for the immediate payment of the Respondent's entitlement to the tune of K90billion. She referred to the last paragraph of the Judgment at Page 42 which reads as follows:

**“Leave to appeal to the Supreme Court granted in respect of my decision that the last earned salary be used to compute benefits and that the recommended 17.5 percent by the Actuary and the Board of Trustees be awarded. The other variations agreed to by the Bank in the MOU so-called and published should be immediately paid and I so order.”**

Ms. Kasonde submitted that the Applicant is a separate entity from Barclays Bank Pension Fund and this was argued in the lower Court. She submitted that there is sufficient ground upon which a stay should be granted. In response to the affidavit in opposition, she submitted that in the lower Court, it was argued

that the MOU was non-legally binding. She argued that there is only one portion of the claim which has been referred for assessment and this is the amount referred to by the Actuary. She submitted that the application be granted with costs.

On behalf of the Respondents, Mr. Mukande submitted that he fully supported the Ruling of the lower Court. He submitted that the Applicant's application is based on three grounds: that it is the Barclays Pension Fund which is liable; that the Applicant has appealed and that they have no ability to pay. Mr. Mukande argued that the Applicant commenced the proceedings in the Court below and the third claim as per the Writ of Summons is for:

**A declaration that Plaintiff is not in breach of any contractual obligation to the Defendants and that the Defendants' pension dues and claims thereon are to be addressed and resolved in accordance with the Barclays Bank Zambia Plc Pension Fund Rules and the law on pensions in Zambia and not through illegal actions injurious of the Plaintiff**

Mr. Mukande argued that in its pleading, the Applicant did not state that it is not the right party. He submitted that if the Applicant felt it was not the right party then it should have joined the Pensions Fund to the action.

Regarding the ability to pay, he contended that there is nowhere in the judgment where the Applicant has been ordered to pay K90 billion. Mr. Mukande submitted that the lower Court ordered the Applicant to pay what it had agreed to pay. He submitted that the Court below found that the evidence was littered with admissions that the Applicant owed the pensioners their pension benefits and the reason why the Applicant could not pay, was the reason why the matter was in Court. That the Applicant could not agree on the formula to use. That having admitted that it owes the Respondents their benefits then it should pay what it owes so that the Respondents can then justify the balance.

He submitted that the Court below found that withholding the pension benefits is not justifiable as such benefits are payable as a matter of law under the Pensions Benefit Act. He cited the case of **Standard Chartered Bank Plc vs. Willard Solomon Nthanga and 402 Others**<sup>1</sup>. He contended that Courts cannot aid law breakers and that, therefore, the issue of liability to pay is a far cry. On inability to pay he buttressed his argument on the case of **John Paul Mwila Kasengele and 40 Others vs.**

**Zanaco**<sup>2</sup>. He submitted that it is not correct that the Respondents are relying on the MOU but that the lower Court found evidence of admissions by the Applicant. He argued that under **Order 47(1)** and **Order 59(3)(2) of the Rules of the Supreme Court**, the Court has discretion to grant a stay but that there must be special circumstances to warrant the denial of the right of the successful litigant to enjoy the fruit of his judgment. He contended that this application is intended to frustrate the Respondents from accessing their benefits which they worked. He submitted that the Applicant has not come with clean hands. He prayed that the application fails with costs.

In reply, Ms. Kasonde argued that the value of the items purportedly agreed to in the MOU amount to K90 billion. She contended that it was not true that the evidence was littered with admissions and the Applicant's view is that the trial Court erred when it made such a finding and that the findings were made on the basis that the MOU was legally binding. That such a finding is not supported by the law. She argued that Claim 3 in the Writ of Summons is not an admission that the Bank was liable but that the claims over benefits arose out of the counterclaim by the

Respondents for their benefits from the Applicant. That the Respondents should have joined the party whom they identified as the one owing them their benefits as the Applicant is a mere Bank.

That the Applicant has decided to appeal the lower Court's decision on the merits and that it will be unfair to the Applicant to pay before the appeal is heard. She maintained that paragraph 4 of the affidavit in support shows that there are special circumstances in this case as the value of the award is K90 billion while the current assets are valued at K6 billion. She urged the Court to grant the application in the interest of justice.

I have considered the affidavit evidence and the submissions by both learned Counsel.

**Order 59/13/2 of the Rules of the Supreme Court** is clear that a stay can be granted if the appeal will be rendered nugatory; that if the damages are paid there will be no reasonable prospect of the Appellant recovering them in the event of the appeal succeeding and indeed, that a stay should only be granted where there are good reasons for departing from the starting



principle that the successful party should not be deprived of the fruits of the judgment in his favour.

In this case, the Applicant has come to seek a stay on account of the last paragraph of the judgment of the lower Court where, inter alia, the learned Judge said:

**“The other variations agreed to by the bank in the MOU so-called and published should be immediately paid and I so order.”**

Ms. Kasonde argued that in fact the Applicant did not agree as alleged and that the learned trial judge misdirected himself when he made such a finding. That, therefore, it would be unfair for the Applicant to pay the Respondents pending appeal. Mr. Mukande vehemently disputed that the lower Court made an Order for K90 billion to be paid immediately and that the matter is supposed to go for assessment. Ms. Kasonde fears that the Respondents could execute on the basis of the trial Court’s order for an immediate payment of what the Bank allegedly agreed to pay.

My considered view, is that the Applicant’s application for a stay has merit especially having regard to the trial Court’s Order

for immediate payment of what the Bank agreed. In any case, the Applicant's argument is that the lower Court misapprehended the facts as the Bank did not agree. And I agree with Ms. Kasonde that it would be unfair to the Applicant pay pending the hearing of the main appeal. I have perused the judgment and the submissions in this application raise some serious issues such as whether the MOU signed between the parties is legally binding; whether the Bank agreed to pay certain amounts and whether the Applicant is the right party. I find that the appeal has prospects of success and in any event, it is important that a case of this nature, where ex-employees are claiming pension benefits dating as far back as 1980 is best heard on its merits in order to put the matter to rest, in the interest of both parties.

I, therefore, grant the Applicant a stay of execution of judgment pending the hearing of an application for leave to appeal.

Turning to the application for leave to appeal, Ms. Kasonde submitted that she was relying on the affidavit in support. She referred paragraph 5 of the affidavit in support which states that the lower Court restricted the leave to appeal to only one portion

of the judgment. That when the Applicant applied for a stay of execution and for leave to appeal, both applications were refused and the trial judge restated that leave to appeal was only for one portion of his judgment. She submitted, inter alia, that the Applicant wants to challenge the whole judgment and of particular importance is the finding that the MOU between the parties was legally binding. She submitted that the Applicant has a good arguable case on the merits. She urged me to grant the application.

Mr. Mukande opposed the application and relied on the affidavit in opposition sworn by Lennox Nyangu which states, inter alia, that the application is an abuse of the Court process and that leave cannot be granted in a case where the appeal is doomed. He contended that the Applicant should have exhibited a Notice of Appeal for the portion it was granted by the Court. That in fact the Applicant is out of time and that to apply for leave to appeal the entire judgment is faulty, hence the reason why he argued that this is an abuse of the Court process. That the issue of the MOU was correctly interpreted by the Court below. He prayed that

the application should be dismissed with costs for it is a manoeuvre to defeat the cause of justice.

I have considered the affidavit evidence and the submissions by both learned Counsel.

Certainly, it follows that since I have granted the application for a stay of execution, I should grant the application for leave to appeal. I must state that it was erroneous for the trial Judge to grant leave for only a part of the judgment. To suggest that the Applicant should have applied for the portion which was granted and return to apply for the 'balance' is absurd as this would be cumbersome and impractical.

In a nutshell, the trial Court should have granted leave to the Applicant to appeal against the whole judgment. Indeed, the trial Court did not give any reason for its insistence to grant leave to the Applicant against only one portion of the judgment.

As I have stated herein, the application for leave has merit and it is granted.

Costs in the cause.

**Delivered in Chambers on this 13<sup>th</sup> day of April, 2012.**

**E.N.C. MUYOVWE**  
**SUPREME COURT JUDGE**