

SCZ Judgment No. 18 of 2016

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IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 36 OF 2016

HOLDEN AT LUSAKA

SCZ/8/339/2015

(Civil Jurisdiction)

BETWEEN:

ZAMBIA REVENUE AUTHORITY

APPELLANT

AND

POSTS NEWSPAPERS LIMITED

RESPONDENT

CORAM: Mwanamwambwa, D.C.J., Hamaundu and Kabuka, J.J.S.,

On 7th June, 2016 and 13th June, 2016

For the ZRA:

Mrs D.B.Goramota, In-house Legal Counsel, and Mr. G. Mwamba, Legal Officer of Zambia Revenue Authority

For the Post:

Mr. N. Nchito, S.C. of Messrs Nchito and Nchito

JUDGMENT

Mwanamwambwa, D.C.J., delivered the Judgment of the Court.

Cases Referred to:

1. **Sonny Mulenga (& Others) v Investrust Merchant Bank Limited (1999) Z.R. 101.**
2. **Mumba (& Others) v Zambia Red Cross Society (2006) Z.R. 137.**
3. **Attorney General v Maureen Nawakwi – Selected Judgment No. 16 of 2016 (unreported).**
4. ***Carmine and Watson Nkandu Bowa (Sued as Administrator of the Estate of Ruth Bowa) v. Fred Mubiana and Zesco Limited (2012) Z.R. 165 .***

Legislation Referred to:

1. **Rules of the Supreme Court, 1999, Order 59, Rule 13.**
2. **The Income Tax Act, CAP 323 Section 77 (4).**

For convenience, we shall refer to the Appellant as "Z.R.A." and the Respondent as "*the Post*".

This is an appeal against the Ruling of the High Court of 10th November 2015, granting an Order to stay execution of its judgment of 30th October 2015.

On 31st May 2016, the Post filed a notice of intention to raise a preliminary objection. It was raised pursuant to **Rules 19 and 68 (2) of the Zambian Supreme Court Rules and Order 41A of the Rules of the Supreme Court, 1999**.

The preliminary objection sought determination of an objection on a point of law:

- 1. That the appeal filed in this matter should be dismissed by reason of the fact that the record of appeal filed into Court on 26th February, 2016 is defective in that it is not compliant with Rules 58 (4)(g), (h) and (i) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia as the documents filed in support of the application of 10th December 2015 that resulted in the Order at page 227 of the record of appeal, which documents are vital to the determination of the appeal have not been exhibited in the record of appeal.**

At the hearing on 7th June 2016, Mrs. Goramota informed the Court that ZRA, was served with the Post's notice to raise a preliminary objection, on 6th June 2016, the day before hearing.

She submitted that the Post breached **Rule 19** of the **Zambian Supreme Court Rules**, which requires such a notice to be served on the other party, not less than seven (7) days prior to the hearing of the appeal. She urged us not to entertain it.

Mr. Nchito confirmed that he served the notice on 6th June 2016, but he argued that he had complied with **Rule 19**.

We found that the notice in question did not comply with **Rule 19 (1)**. Nevertheless, we used our discretion under **Rule 19 (2)**, entertained and heard it. We then summarily dismissed it and proceeded to hear the appeal. We said that we would give our reasons in the Judgment. We now wish to give the reasons.

On behalf of the Post, the gist of the submission by Mr. Nchito, State Counsel, was that by not including the summons in question, in the record of appeal, ZRA breached **Rule 58 (4) (h), (i) and (m)** of the **Zambian Supreme Court Rules**. Therefore, this appeal is incompetent and should be dismissed.

On behalf of ZRA, Mr. Mwamba pointed out that only documents that are material or relevant to an appeal, should be included in the record of appeal, pursuant to **Rule 58 (4) (h) (i) and (m)**. He submitted that the application giving rise to page 227 of the record of appeal, was heard ex-parte, by Sikazwe J., on or about 11th December 2015. He argued that this appeal is

against the Ruling of 10th November 2015, by Siavwapa J., staying execution of his Judgment of 30th October 2015. That the appeal is not against the ex-parte application heard by Sikazwe, J. That the ex-parte summons before Sikazwe J., is not relevant to this appeal. Therefore, it did not need to be included in this record of appeal. He added that ZRA was not afforded a chance to be heard, inter-parte, on that application. He argued that ZRA did not breach Rule 58.

In answer to our question, Mr. Mwamba stated that the proceedings by Sikazwe J., which resulted into the order at page 227 of the record, were done ex-parte. That ZRA was never afforded an inter-parte hearing at all. Indeed, the order confirms this. It has no provision for inter-parte hearing. He added that ZRA was never given a copy of the ex-parte summons complained of. Therefore, ZRA could not include it in this record of appeal.

Mrs. Goramota advanced an alternative argument on behalf of ZRA. She argued that rules of procedure are regulatory. That failure to follow them is curable and not fatal. That if the Court were to find that ZRA breached **Rule 58 (4) (g) (h) and (i)**, she requested that it be given a chance to amend the record of appeal, to include the omitted ex-parte chamber summons.

We have examined **Rule 58 (4) (g) (h) and (i)**. In so far as relevant, it states that:-

“The record of appeal shall contain the following documents in the Order in which they are set out:

- “(g) Copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal.**
- (h) Copies of all affidavits read and all documents put in evidence in the High Court, so far as they are material for the purposes of the appeal, ...”**
- (i) Such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant to the appeal.”**

It is clear from the foregoing that documents that are required to be put in the record of appeal are those, which are relevant or material for the determination of the appeal. This appeal is against the Ruling of 10th November 2015, by Siavwapa, J., staying execution of his Judgment of 30th October 2015, which dismissed the Post’s application for judicial review. The ex-parte chamber summons, which is the subject of this preliminary objection, was heard and granted by Sikazwe, J., on or about 11th December 2015. Pursuant to that ex-parte summons, Sikazwe, J., granted an Order, which appears at page 227 of the record of appeal. The affidavit in support of the ex-parte summons is at pages 208-226.

We consider the ex-parte summons in question not material or relevant to this appeal; because the appeal is not against the ex-parte proceedings and decision of Sikazwe, J. Accordingly, we hold that the omission of that ex-parte summons from the record of appeal, is not a breach of **Rule 58 (4) (g), (h) and (i)** of the Zambian Supreme Court Rules. Accordingly, this appeal is properly before us.

We wish to make two observations here.

One is that, in addition to what we have said on the merit of this preliminary objection, ZRA has given a valid reason for not including the ex-parte summons. It was not served with the ex-parte summons in question by the Post.

Second is that we are surprised that ZRA was not afforded a chance to be heard, inter-parte, on the proceedings before Sikazwe, J. That was a breach of procedure and standard practice. We are alive to the fact that ex-parte proceedings in question and the decision thereon are not the subject of this appeal. But the preliminary objection by the Post has led to the revelation of deviation from procedure. This has made it necessary for us to comment on the breach of procedure.

We now move on to deal with the appeal.

The brief facts of the matter are that the Post owes the ZRA amounts of money in unpaid tax liabilities amounting K26,856,230.91. In trying to resolve the matter, the ZRA's Commissioner – Domestic taxes, invited the Post to a meeting where it was agreed that the Post should propose how it intended to settle the tax liabilities. The Post, through a letter to the ZRA's Commissioner-Domestic Taxes, applied to pay the said tax liabilities in six instalments. The ZRA's Commissioner-General responded to the letter rejecting the Post's proposed payment plan.

The record shows that previous applications by the Post, to pay tax liabilities in instalments and in certain instances, applications by the Post asking the ZRA to waive penalties and interest, was allowed by the ZRA.

After the rejection of the Post's proposal, it commenced judicial review proceedings seeking, among other things, the following reliefs:

- "1. An order of certiorari to remove into the High Court for the purpose of quashing the said decisions; and**
- 2. An order of mandamus to compel ZRA to allow the Post to pay its tax liabilities in instalments..."**

The grounds upon which the application was made were procedural impropriety and irrationality. On procedural impropriety, the Post contended that in dismissing it's

application to the Commissioner-Domestic Taxes, the Commissioner-General took away the Post's right to be heard on appeal.

As regards irrationality, the Post contended that the decision to disallow it to pay its tax obligations in instalments was irrational and *Wednesbury* unreasonable.

The Court below delivered its judgment on the 30th of October, 2015. It held that the Commissioner-General of the ZRA enjoys immense powers in the administration of the Income Tax Act. That he had authority to take over the communication and to make the decisions that he made. The Court was of the view that procedural impropriety would not arise unless it was shown that in taking over the communication and the decision-making function from his subordinate, the Commissioner-General did not act in accordance with the law. That whether or not he made a bad decision was outside the province of judicial review. He added that the Act does not place the Commissioner-General at appellate level in the administration of the Act. That he is instead placed as the primary player and decision maker.

The Court was of the view that the Commissioner-General did not have to hear the Post before taking over the matter from the Commissioner-Domestic Taxes because this was one of those cases where the rules of natural justice do not apply.

Accordingly, the lower Court found no basis for exercising the discretionary prerogative of certiorari prayed for against the decision of the Commissioner-General.

As regards the grounds of irrationality, the lower Court found that looking at the history of non-compliance by the Post in the payment of its tax liabilities, the refusal to allow the Post to pay the tax liabilities, in instalments did not look like a decision in defiance of logic or accepted moral standards. That it was not outrageous. That it is a decision which a right thinking person, more so, a person tasked with the responsibility of receiving and collecting revenue on behalf of the Republic would make.

Therefore, the motion for judicial review failed and the remedies sought by the Post were refused.

The Post appealed against the above judgment and applied for a stay of execution of the judgment pending appeal, pursuant to **Order 59 Rule 13 (1) and (9) of the Rules of the Supreme Court**.

On the 10th of November 2015, the learned trial Judge delivered his Ruling on the application for stay. On the prospect of success of the Post's appeal against the Judgment of 30th October 2015, he said as follows: -

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“One of the criteria upon which an order of stay may be granted is where there is a high prospect of the appeal succeeding. If that were the only criteria, I, most certainly would not grant the order.”

However, he was of the view that it would not be in the interest of the ZRA and the nation to collect outstanding tax at once and render families jobless while an appeal is pending. He agreed with Counsel for the Post that it makes good sense, to maintain the status quo, pending the appeal, because not doing so, would cause more injury to the Post than it would to the ZRA, who would levy distress if the appeal failed and recover what is due to it.

He said that it was inclined to grant the order of stay, solely on the basis that not doing so, had the potential to lead to the closure of the business of the Post. He added that it remained the duty of the Post to continue paying its tax obligations for as long as it remained a going concern. The Court ordered that the Post should make itself current on its tax obligations with the ZRA within ninety days of the disposal of the appeal by this Court and that in the interim, it should continue to pay its taxes both current and outstanding.

Dissatisfied with the above Ruling, the ZRA appealed to this Court on four grounds. These are: -

Ground One

The Court below erred in both law and in fact when it confirmed the stay of execution and ordered that the Post should make itself current with its tax obligations with the ZRA within ninety days of disposal of the appeal by the Supreme Court, thereby exceeding its jurisdiction.

Ground Two

The Court below erred in both law and in fact when it disregarded the statutory time frame within which the Post as a tax payer is supposed to pay its taxes.

Ground Three

The Court below erred in law and in fact when it disregarded the principle that taxes are payable immediately notwithstanding an appeal by the tax payer.

Ground Four

The Court below erred in law and in fact in proceeding to grant the stay of execution even after establishing that the Post's intended appeal had no merit.

The ZRA argued grounds one and four together.

In support of ground one and four of the appeal, the gist of the ZRA's argument was that the Court below misdirected itself and exceeded its jurisdiction, when it strayed out of the circumscription of the enabling law and the application before it and pronounced itself on a matter which was a subject of the Post's appeal pending hearing before this Court.

Mrs. Goramota and Mr. Mwamba submitted that by pronouncing itself on the question of how and when the Post should settle its tax obligations, the Court below purported to act as an appellate Court and reversed its own judgment in which it had dismissed the Post's motion for judicial review.

They added that by ruling that the Post should make itself current on its tax obligations within ninety days of the disposal of the appeal by the Supreme Court, the Court below usurped the jurisdiction of this Court. That in deciding whether to grant a stay, the Court ought to look at the prospects of the appeal succeeding and the irreparable damage that "ZRA" would suffer if the stay is not granted. The following cases were cited in support of the argument: -

- (a) Sonny Mulenga and Another v Chainama Hotels Limited, Investrust Merchant Bank Limited ⁽¹⁾.
- (b) Richard Chizyuka, Betty Chizyuka vs Credit Africa Bank Limited Appeal No. 8/113.1999 (unreported); and
- (c) Watson Nkandu Bowa (Suing as Administrator of the Estate of the late Ruth Bowa) vs Fred Mubiana and Zesco Limited ⁽⁴⁾.

Counsel pointed out that having found that the Post's appeal had no prospects of success, the Court below based its decision of granting a stay of execution pending appeal solely on the prospect of irreparable damage on the part of the Post, if a stay is not granted. Counsel added that this was a misdirection because the law requires that apart from irreparable damage

that maybe suffered by "*the ZRA*", the appeal should have a high prospect of success. To support their argument, they referred to a passage under **the Rules of the Supreme Court, 1999, Order 59/13/2.**

They concluded that where the appeal has not sufficient merit or prospects of success, the Court should not grant a stay, even if enforcement of the judgment under appeal would result in irreparable damage or in this case, the Post's business being closed down.

Under grounds two and three, Counsel for the ZRA pointed out that **Section 77 (4)** of **the Income Tax Act** provides that Income Tax is due and payable to the ZRA on the date of the notice of assessment. They submitted that by ruling that the Post shall make itself current on its obligations with the ZRA within ninety days of the disposal of the appeal by the Supreme Court, the Court below disregarded the statutory time frame within which the Post as a taxpayer is required to pay its taxes to the ZRA.

Counsel added that **Section 106** of **the Income Tax Act, CAP 323** of the Laws of Zambia, provides that every assessment under the Act stands good unless proved otherwise by the person assessed upon objection or appeal. They further referred to **Section 77 (6)** of **the said Act** which provides that: -

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“Sub-Section (4) shall have effect notwithstanding that the person assessed objects to or appeals against the assessment.”

Counsel added that the legal provisions referred to above, are in line with the principle in taxation of **“pay now talk later”**. In support of her submission, she cited **Metcash Trading Limited v The Commissioner for the South African Revenue Services and the Minister of Finance – CCT 3 of 2000**. In that case, the Constitutional Court of South Africa upheld the **“pay now argue later”** provision in the **Value Added Tax Act**, which obliges the tax payers to pay the assessed amount notwithstanding an appeal.

Counsel concluded by submitting that by ruling that the Post shall make itself current on its tax obligations with the ZRA within ninety days of the disposal of the appeal by the Supreme Court, the Court below did not only disregard the statutory time frame within which the Post, as a tax payer, is required to pay its taxes but also disregarded the statutory principle that taxes are due and payable immediately an assessment notice is served on the tax payer.

In response on grounds one and four, Mr. Nchito, State Counsel, submitted in sum, that the lower Court was within its authority to grant the order of stay, as prescribed by **Order 59, Rule 13 (1)** and **59/13/9** of **the Rules of the Supreme Court, 1999 Edition** and **Rule 51** of the **Zambian Supreme Court**

Rules. He submitted that the lower Court was in order to do so because the pending appeal by the Post has reasonable prospects of success. He argued that a trial Court has absolute or unfettered discretion to order a stay of execution. That where a lower Court has exercised discretion to grant a stay of execution, and imposed conditions, an appellate Court will be slow to interfere. In further support of his submissions, he cited a number of authorities. These include:-

- (a) **Becker v Earl's Court Limited (1911) 56 S.J. 26.**
- (b) **The Ratata (1897) P118, at page 132.**
- (c) **Attorney-General v Emerson (1889) QBD 56.**
- (d) **Linotype-Hell Finance v Baker (1992) 4 ALL E.R. 887**
- (e) **Hammond Suddard Solicitors v Agrichem International Holdings Limited (2001 E.W.C.A. 2065.**
- (f) **Wilson v Church (1879) 12 Ch D. 454.**
- (g) **Hansard v Lothbridge (1891) 8 T.L.R. 179.**
- (h) **Carmine Safaris Zambia Limited & another v Zambia National Tender Board (Appeal No. 145 of 2003).**
- (i) **Order 59/13/2 of the Rules of the Supreme Court, 1999.**

In response on grounds two and three, Mr. Nchito, State Counsel, submitted that these two grounds touch on matters that are to be determined under Appeal No. 07/2016, by the Post. He pointed out that the Post does not dispute that taxes are due and payable. He said that what the Post disputes was the Commissioner-General's unreasonable use of his powers to review the assessment. He said that **Section 114 (1) (b)** of **the**

Income Tax Act provides for appeals from the Commissioner-General's discretion and determination. He points out that the Post's appeal number 07/2016 queries the Commissioner-General's refusal to pay the tax obligations in instalments. That the Post seeks to be treated like other tax payers with even larger tax obligations, who have either not paid their tax obligations or have been allowed to pay their tax in instalments. That the Post had made reasonable proposals to the Commissioner-Domestic Taxes. That, however, instead of the Commissioner-Domestic Taxes, responding to the Post's assessment appeal, it was the Commissioner-General who refused the proposed payment plan. That this meant that the Post's right to appeal the assessment and be heard was curtailed by the Commissioner-General.

Mr.Nchito pointed out that the current appeal and that of the Post Newspaper Limited Number 07 of 2016 are inextricably linked. That if this appeal is granted, it would have the effect of rendering Appeal No. 07/2016 nugatory, as ZRA would levy distress and close down operations of the Post. He pointed out that even after the order staying execution was granted, ZRA made attempts to shut down the Post. In this respect, he referred to Court Search warrants executed on 10th December 2015, which brought operations of the Post to a grinding halt. That the Post had to commence contempt proceedings and obtain an order restraining ZRA from continuing to search it and

levying distress for any amount, until determination of its appeal.

In reply on behalf of ZRA; on grounds one and four, Mrs. Goramota and Mr. Mwamba referred to **Carmine and Watson Nkandu Bowa v Fred Mubiana and Zesco** ⁽⁴⁾. They pointed out that, that case re-affirmed the **two-fold test** on stay of execution, pending appeal, as follows:-

“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 appellant’s appeal succeeds.”

They argue that the two must coincide in order to warrant the granting of a stay. They submitted that where the appeal has no sufficient merit or prospect of success, the Court should not grant a stay even if enforcement of the judgment under appeal will result in irreparable damage or the business of the losing party being closed. They argued that in this case, the two-fold test required for the grant of a stay was not met or satisfied. Therefore, the stay should not have been granted.

In reply on grounds one, two and three Counsel for ZRA submitted that the submission by the Post that grounds two, three and four touch on matters that are subject matter of the Post’s pending appeal, confirms and vindicates ZRA’s argument that the trial Court erroneously strayed out of its jurisdiction

and the enabling law, when it pronounced itself on a matter which was, and still is, the subject matter of the Post's pending appeal. They reiterated that the question of how and when the Post should make itself current on its tax obligations with ZRA, had become a subject matter of the Post's appeal.

We hasten to observe that the issue in grounds one, two and three are the subject of the pending appeal by the Post. However, the very issues arose in the Ruling staying execution, when the learned trial Judge said as follows:-

"In that regard, it is hereby ordered that the Applicant shall make itself current on its tax obligations with the Respondent within ninety days of disposal of the appeal by the Supreme Court."

And the very issues adversely affected ZRA. Therefore, they are open to discussion in this appeal.

We have examined the Judgment of 30th October 2015 and the Ruling of 10th November 2015, granting stay.

In our view, there are two main issues in this appeal. One is whether the Judgment of 30th October 2015 was stayable. Second is whether a trial Court is entitled to order a stay of execution that goes beyond determination of an appeal.

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. Only a Judgment, or Ruling which awards a remedy and which can be enforced by Court process, can be stayed: by analogy **See: - Mumba and Others v Zambia Red Cross Society ⁽²⁾.**

The Judgment of 30th October 2015 did not award ZRA any compensation in the form of money or property. It simply refused to give the Post Judicial Review. It was not capable of enforcement by Court execution. Therefore, there was nothing to stay about it. Further, as correctly argued by Mrs. Goramota and Mr. Mwamba, by granting a stay of execution, the learned trial Judge, in fact reversed his decision and granted Judicial Review, coupled with a stay of Zambia Revenue Authority's right to levy distress for tax arrears. We wish to emphasize that in fact, what was stayed by the Ruling appealed against, was not the judgment of 30th October 2015; but the intended move by ZRA to levy distress for tax arrears. We must state that on the law and evidence, it was improper and an error to order stay of the intended move by ZRA to levy distress for tax arrears, pending determination of appeal number 7 of 2016, by Post.

Further, where a Judgment or Ruling is stayable, the principles state that stay of execution pending appeal, is a discretionary remedy. A party is not entitled to it as of right. And such discretion must be exercised judiciously and on well established principles. Firstly, the successful party should not be denied the immediate enjoyment of a Judgment, unless there are good and sufficient grounds. Stay of execution should not be granted for the mere convenience of the Post. Neither should it be granted purely on sympathetic or moral considerations. Secondly, in exercising its discretion, whether to grant a stay or not, the Court is entitled to preview the prospects of success of the proposed appeal. In particular, where the Judgment appealed against involves payment of money, the Appellant must show that if such money is paid, then there will be no reasonable prospect of recovering it in the event of the appeal succeeding. Such proof is what amounts to good and sufficient grounds warranting a stay: **See:-**

(a) Rules of the Supreme Court [1999], Order 59, Rule 13.

(b) Sonny Mulenga (& Others) v Investrust Merchant Bank Limited ⁽¹⁾.

(c) Carmine and Watson Nkandu Bowa (sued as Administrator of the Estate of Ruth Bowa v Fred Mubiana and Zesco Limited

⁽⁴⁾.

We wish to emphasize that the prospect of success of the pending appeal, is a key consideration, in deciding whether or not to stay execution of the judgment appealed against. Here

we wish to re-affirm the two-fold test, as stated in our decision in Carmine and Watson Nkandu Bowa (sued as Administrator of the Estate of Ruth Bowa v Fred Mubiana and Zesco Limited ⁽⁴⁾, as quoted by Mrs. Goramota and Mr. Mwamba on page 16 of this Judgment. A passage under Order 59/13/2 of the Rules of the Supreme Court, 1999, cited by Counsel on both sides, is to the same effect. It states as follows:-

“Nowadays the Court may be prepared (*provided that the appeal has sufficient merit*) to grant a stay, even where that test is not satisfied, if enforcement of the judgment under appeal would result in the Post’s house being sold or business being closed down.”

But, we note that in quoting this passage, Mr. Nchito omitted the words: **“provided that the appeal has sufficient merit.”** The omission was deliberate. We find it highly undesirable for State Counsel to sieve out a key element of a quoted passage; just because it is against his client’s case. Authorities must be quoted in full and truthfully.

We further note that all the several cases cited by Mr. Nchito also say that for a Court to stay execution pending appeal, it must be shown that the appeal has prospect of succeeding. In short, a Court should order a stay pending possible victory. It should not stay pending loss. If a Court knows and says that the appeal will fail, then there is no reason, in law, to stay execution of the Judgment appealed against.

We do not agree with the submission by Mr. Nchito that a trial Court has unfettered discretion to grant a stay of execution pending appeal. The discretion to stay must be exercised within the principles set out above.

Mr. Nchito, State Counsel, vehemently argued that the pending appeal by the Post has prospect of success. And, therefore, the learned trial Judge was right in granting stay of his Judgment of 30th October. This argument invites us to comment on the prospect of success or otherwise, of the pending appeal. Indeed, decided cases, such as **Sonny Mulenga v Investrust Merchant Bank Limited** ⁽¹⁾, allow us to do so.

We are of the view and indeed agree with the learned trial Judge and the two Counsel for ZRA, that the pending appeal by the Post has no prospect of success. We say so for two reasons.

One is that the grounds on which the Post sought judicial review against ZRA do not exist. We agree with the learned trial Judge that there was no illegality, unreasonableness or procedural impropriety, in the manner the Director General of ZRA, demanded immediate payment of tax arrears and refused payment in instalments. There is evidence on record that before this case arose, the Post had defaulted on tax payments. It incurred statutory penalties on the default. It applied to ZRA to be allowed to pay the tax arrears in instalments. It was allowed

to do so. Also on its request, ZRA waived the penalties. Given the Post's past record of defaults on tax payment, it cannot be seriously argued that the Commissioner-General behaved unreasonably in not allowing the Post to pay tax owing by instalments. **The Income Tax Act** allowed him to demand payment at one go. So, the learned trial Judge was justified in refusing to grant certiorari.

Second, is the way the remedy of mandamus was pleaded. Mandamus will issue to compel an authority to exercise jurisdiction that it has wrongfully declined; and to enforce the exercise of statutory duties and discretion in accordance with law: **See De Smith's Judicial Review 6th Edition, 2007, page 704 (paragraph 10-035)**. Mandamus must not order an authority to do, what needs to be done, in a particular way; but to do so according to law. It must allow exercise of discretion. If an authority is ordered to do a specified act in a particular way, then that becomes a mandatory injunction and not mandamus.

In this case, the Post sought an order of mandamus, to compel ZRA (i.e. the Commissioner-General), to allow the Post to pay its tax liabilities in instalments. It was asked for, in the form of a mandatory injunction; that left no room for exercise of discretion. It was sought in a wrong way. So, in addition to the considerations of the Post's claim on merit, mandamus was not available in the incorrect manner it was pleaded.

We further agree with Counsel for ZRA that the learned trial Judge erred in law, in granting, "*stay of execution*", after he had held that the Post's pending appeal had no prospect of succeeding. In effect, the learned trial Judge granted the "*stay*" purely for the convenience of the Post. His decision was based purely on sympathetic and moral considerations; and hence outside the legal principles governing stay, as set out above. In **Attorney General v Maureen Nawakwi** ⁽³⁾, we said that Courts should not be swayed by sympathy into making moral judgments. We wish to add that such judgments deviate from the Rule of Law, the principle which ensures consistency, certainty, uniformity, fairness in the delivery of justice. We, too, have sympathy for the Post, over the consequences that might arise from the execution of the warrant of distress. But the law has to be observed and enforced. It must be remembered that on being appointed, Judges take oath to do justice according to law, without fear, malice or illwill.


On the second issue, we also agree with Mrs. Goramota and Mr. Mwamba that the learned trial Judge erred in law when he granted the "*stay*" for 90 days, after the decision of the Supreme Court, on the pending appeal. Here the learned trial Judge clearly went beyond his jurisdiction. He tried to exercise the powers of the appellate Court. It is for this Court, and not the trial Judge, to decide whether or not to grant a stay of execution, after disposal of the appeal.

For the reasons given above, we find merit in grounds one and four. We allow them.

Coming to grounds two and three, we note that the pending appeal does not question the amount of tax due. Notwithstanding that, we agree with Mrs. Goramota and Mr. Mwamba that in issuing stay, the learned trial Judge disregarded **Section 77 (4)** of the Income Tax Act, which requires that Tax be paid on the date due. The stay prevented the ZRA from levying distress for Tax under the Income Tax Act.

We find merit in grounds two and three of the appeal. We hereby allow them.

For the reasons we have given above, we reverse and set aside the Ruling of 10th November 2015, by the High Court. We allow this appeal, with costs to the ZRA, to be taxed in default of agreement.


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M.S.MWANAMWAMBWA
DEPUTY CHIEF JUSTICE


.....
E. M. HAMAUNDU
SUPREME COURT JUDGE


.....
J. K. KABUKA
SUPREME COURT JUDGE