I·T

IN THE HIGH COURT FOR ZAMBIA 2015/HP/ARB/009
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

In the matter of the Arbitration Act No. 19 of 2000

and

In the matter of an Arbitration

and

In the matter of: *An Application for registration and enforcement of an Arbitral Award Pursuant to section 18 of the Arbitration Act No. 19 of 2000 as read with Rule 16 of the Arbitration (Court Proceedings) Rules SI No. 75 of 2001*

BETWEEN:

KNOX MBAZIMA **APPLICANT**

AND

TOBACCO ASSOCIATION OF ZAMBIA **RESPONDENT**

CORAM: **HONORABLE JUSTICE MR. MWILA CHITABO, SC**

For the Applicant: *Mr. K. Mwondela of Messrs Lloyd Jones & Co.*

For the Respondent: *Mrs. M.B Mutuna and Mr. M. Sakala of Messrs Mweshi Banda & Associates*

R U L I N G

Cases referred to:

1. *Michael Chilufya Sata v. Chanda Chimba III, ZNBC, Muvi TV Limited and Mobi International Limited (2011) 2 ZR 444*

2. *Indo (Z) Limited and Lighthouse Investments Limited No. 487/2016 (unreported)*

Legislation referred to:

1. *Supreme Court Rules Chapter 27 of the Laws of Zambia*

This is an application for stay of the Ruling of the Court dated 19th February, 2016 vacating an earlier exparte order dated 2nd November, 2015 granting the Applicant leave to file further affidavit in support of exparte summons to set aside arbitral Award published on 31st August, 2015 pending determination of the appeal.

The application is supported by an affidavit deposed to by the Advocate of the Applicant one Misozi B. Kapeya. The essence of the affidavit is that the Applicant filed a notice and memorandum of appeal on 11th March, 2016 to the Supreme Court.

That it is not certain when the appeal may be determined pointing out that the evidence which was expunged by the Court is required by the Applicant and if the appeal was to succeed the appeal would be rendered void.

It is for these reasons that they sought the stay of the Ruling alluded to.

In support of the application, the learned Counsel filed in heads of arguments and list of authorities and helpful relevant judicial precedents.

The Respondent filed in an opposing affidavit through its Advocates deposed to by one **Musenge Sakala**. The gravamen of the affidavit was that the Applicant has not vigorously pursued its application to stay proceedings and there has been inordinate delay and that the Applicant has no prospect of success in its appeal and thus the application must be denied.

I am indebted on the researchful industry by learned counsel for the respective parties. I will not restate the submissions of the parties but I assure the parties that I will take into account all the factors that the Court should disclose its mind to in considering whether to grant or not grant a stay in respect of matters on appeal. This will become evident in the Ruling.

Faced with the stay application, I visited the case of ***Michael Chilufya Sat v. Chanda Chimba III and 3 others***[1] where his Lordship Dr. Matibini SCJ as he then was pronounced himself on the subject. I propose to restate the guidelines item by item and simultaneously apply the same to the facts in the case in casu.

"***Holding (1)*** .....

Holding (2) *An appeal does not operate as a stay of execution. In order for any judgment, decision*

appealed from to be stayed, the Court is required to order or direct to that effect.

The Applicant did not exhibit the Notice of Appeal and the memorandum of appeal filed on 11th March, 2016 on the assumption that the said documents were on the Courts file. This approach is erroneous for two reasons. Firstly there are infact neither copies of the notice of appeal nor memorandum of appeal because the records relating to appeals are within the jurisdiction of the master of the Supreme Court who accepts duly filed appeals and assign cause numbers of the Supreme Court to the successfully lodged appealed.

Secondly, there is no evidence on the face of this Courts record that the said notices and memorandum of appeal were actually filed. The Applicant was under a duty to exhibit the notice and memorandum of appeal which were lodged.

Having said this however, the opposing affidavit by the Respondent admits that the Applicants filed a notice of appeal as averred. There is therefore no contest on the fact that the appeal was rightly and properly entered.

The application for stay is therefore properly before the Court. This limb has been satisfied.

"***Holding 3*** *Thus in terms of the Rules of the Court the entry of an appeal does not operate as a stay of execution. More is required to be desirable,*

necessary or just to stay the Ruling pending appeal"

The Applicant has deposed that if the proceedings are not stayed the appeal will be rendered nugatory if infact the appeal succeeds and the much sought expert evidence is rendered admissible.

The Respondent has countered the argument pointing out that the Applicant is guilty of inordinate delay in launching its stay application.

Whereas I agree there has been inordinate delay in the part of the Applicant, I do not think that the inanition on the part of the Respondent can be the sole ground upon which to anchor a denial of the stay of the proceedings. There is some force in the Applicant submissions that proceeding with the hearing of the substantive matter might be wasteful and may cause procedural predicaments if the appeal in fact succeeded.

This limb has been met. It is necessary and just to stay the Ruling notwithstanding the indolence on the part of the Applicant. It must however be remembered that one of the legal maxims is that "*equity assists the vigilant and not the indolent*".

"***Holding 4*** *Further it must show that special circumstances exist to warrant the grant of stay or that without a stay the Appellant stands to suffer irreparable damage"*

It has not been demonstrated what irreparable damage will be suffered by the Applicant if the stay was denied other than the cost implication for undertaking a hearing in this Court which may turn out to be wasteful if the Superior Court is to uphold the appeal, a rehearing might be ordered. Notwithstanding the failure to demonstrate irreparable damage other than grave inconvenience, I will hold that the limb under consideration tilts in favour of the Appellant.

> ***"Holding 5*** *Whatever is the case, some special ground or reason should be shown to exist. It is impossible to innumerate in advance all the matters that might be considered to constitute special circumstances"*

This guideline or limb has already been dealt with in the immediate preceding paragraph.

> ***"Holding 6*** *Notwithstanding allegation/s that there was a misdirection that the judgment was against the weight of evidence to support, it is not a special circumstance on which a Court will grant"*

I need not emphasise this guideline. The mere fact that he Applicant is aggrieved of the Ruling and entertains prospects of succeeding in the Superior Court/s cannot be the sole ground to grant a stay.

"**Holding 7** *Where a party is appealing exercising his undoubted right of appeal, a Court ought to see to it that there is a likelihood that the appeal might succeed, it should not be rendered nugatory"*

I must admit that this guideline that requires the Court to preview the prospects of success or failure of the appeal is indeed challenging on two grounds. Firstly once a Judgment or Ruling is passed, the Judge ordinarily becomes functus officio and should uphold earlier Rulings in the proceedings.

In support of this proposition reference is made to the recent Supreme Court case of ***Indo (Z) Bank Limited and Light House v. Themsen Limited***[2] where their Lordship held at page J10 as follows:-

> *"It was a misdirection for the learned Trial Judge to change his position in the Judgment as the Appellants* ***locus standi*** *had been decided upon by him earlier. Under the doctrine of* ***stare decis*** *it is necessary for the Court to follow earlier judicial decisions when the same points arise again in litigation"*

Though the holding in the said case was in respect of a finding/ruling made earlier by a Judge in which ruling the Judge departed from in his final Judgment; I am of the view that their Lordships pronouncement also aptly apply in the case in casu.

Having upheld ruled in favour of the Respondent and expunged the further affidavit, I cannot be heard to say after a preview and hold that there are prospects of the appeal succeeding. Such a holding will tantamount to saying I should not in the first place have held as I did. In the circumstances on the facts of this case I find nothing to make me form an opinion that there are prospects of succeeding by the Applicant.

Secondly, an exercise of previewing may lead to premature anticipation of the outcome of the appeal. But I have indicated in the immediate preceding paragraphs upon preview I have found no material to make me form a different view from the one upheld in the Ruling appealed against.

> ***"Holding 8*** *Thus in exercising its discretion whether or not to grant a stay, a Court is entitled to preview the prospects of the proposed appeal"*

I have already dealt with this factor of preview of appeal in the immediate preceding paragraphs. This limb has been proven.

> ***"Holding 9*** *The rationale for stringent conditions or criteria in exercising the discretion to grant a stay is that a successful party should not be deprived immediate enjoyment of the fruits of his or her Judgment or Ruling unless good and sufficient grounds are shown"*

I have already held under holding number 3 that it is desirable and necessary to stay the Ruling. Further it is one of the corner stone of our jurisprudence that a litigant must be given an opportunity to be heard. This should not be understood to mean that once a party has been given an opportunity to be heard automatically means that party or litigant will carry the day at the end of the day.

In any event the factor of depriving a successful litigant of the fruits of its Judgment does not automatically come into play in the present scenario. The final Arbitral award in this matter which was published by the Arbitrator is facing challenge in the High Court. The issue of deprivation of the Respondent of the fruits of the Judgment does not arise.

This issue is evenly balanced.

> ***"Holding 10*** *The following criteria may be used in considering an application for stay of injunction whether the Applicant has made a strong showing that he is likely to succeed on merits, whether the applicant will be irreparably injured, a stay absent whether the issuance of a stay will substantially injure the other parties interested in the proceedings and where public interest lies"*

It is in public interest that a litigant be given an opportunity to be heard and present the admissible evidence to the adjudicator or Court.

Having traversed the guidelines enunciated in the ***Michael Chilufya case***[1] and upon consideration of the case in casu, I have formed a firm view that this is a fit and proper case to stay execution of the Ruling dated 19th February, 2016 pending appeal.

Ordinarily costs follow the event. A successful litigant is not to be deprived of his earned costs, unless good reason exists why such costs cannot be awarded.

In the present case, the Applicant has demonstrated alarming disposition of not timeously making its stay application which has resulted in the Respondent take out certain application.

The justice of the case is that I make no order as to costs, put simply that each party bears its own costs.

The parties are informed of their respective rights of appeal.

Delivered this 31st day of August, 2016.

Re – Delivered with rectification of clerical errors of interposition of parties.

Mwila Chitabo, SC
Judge