

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0009

IN THE COMMERCIAL DIVISION

HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF: THE LANDLORD AND TENANT (BUSINESS PREMISES) ACT, CHAPTER 193 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SHOP No. G48 LEVY BUSINESS PARK

BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY

APPLICANT

AND

**FOOD LOVERS MARKET LUSAKA LIMITED
CHITA CHIBESAKUNDA
TIBERIUS AUGUSTUS VILJOEN
NGOSHE MWANANSHIKU
IGNUS VAN ROOYEN
CUBRIAN SERVICES LIMITED**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT**

Before Hon. Madam Justice Dr. W. S Mwenda in Chambers the 8th day of December, 2016

For the Applicant: Mr. K. Musaila of Chonta Musaila and Pindani Advocates

For the 1st Respondent: No Appearance

For the 2nd - 6th Respondents: Mr. B. Luo of Palan and George Advocates

RULING

Cases referred to:-

1. *Michael Chilufya Sata v Chanda Chimba III and Three (3) Others 2010/HP/1282 (unreported)*
2. *Sonny Paul Mulenga & 2 Others v. Investment Merchant Bank Limited (1999) Z.R. 101.*

3. *Richard M. Chizyuka, Betty B. M. Chizyuka and Credit Africa Bank Limited SCZ Appeal No. 8/113/99 (unreported)*
4. *Nyampala Safaris Zambia Limited & Others v. Zambia Wildlife Authority and Others SCZ/8/179/2003 (unreported)*

Legislation referred to

1. *Order 47 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Order 59 Rule 13 (1) of the Supreme Court Practice, 1999 (The White Book)*

This is an application for stay of execution of ruling pending appeal filed by the Respondents herein. This application comes in the wake of a Ruling by this Court delivered on 8th September, 2016 in which the 2nd, 3rd, 4th, 5th, and 6th Respondents' application for misjoinder was dismissed for lack of merit. An ex-parte order of stay of execution of the Ruling was granted on 11th October, 2016.

The Respondents filed an Affidavit in Support of the application as well as a List of Authorities and Skeleton Arguments.

The Applicant opposed the application and to this end filed an Affidavit in Opposition and Skeleton Arguments in Support of its case.

At the hearing Mr. Luo, learned Counsel for the Respondents submitted that his clients would rely on the Affidavit in Support of the application and Skeleton Arguments filed into Court by the Respondents. He prayed that this Court confirms the ex-parte order of stay of execution granted on 11th October, 2016.

Mr. Musaila, learned Counsel for the Applicant submitted that the Applicant was opposing the application and would rely on the Affidavit in Opposition to the application and Skeleton Arguments filed in support of its case. He prayed that the application be dismissed with costs and that the ex-parte order of stay of execution of the Ruling be discharged.

In the affidavit in support of the application for an order of stay of execution of ruling pending appeal, Chita Chibesakunda, the 2nd Respondent herein, deposed that being dissatisfied with the Ruling of this Court given on 8th September, 2016 they

had lodged an appeal to the Court of Appeal and to that end had lodged the requisite Notice of Appeal and Memorandum of Appeal which he exhibited and produced marked "CC1" and "CC2", respectively. He averred that he was advised by his Counsel and verily believed that the appeal had the requisite merit.

He deposed further, that he was advised that filing of a Notice of Appeal and Memorandum of Appeal does not operate as a stay of execution of the Ruling and hence the need to apply for an order of stay. He was of the view that the Applicant would not be prejudiced in any way if the Ruling was stayed pending appeal to the Court of Appeal but that conversely, the interest of justice would be served because if the Ruling is not stayed, it would render their appeal to the Court of Appeal nugatory and/or academic.

The Respondents argued in their Skeleton Arguments that this Court is vested with the jurisdiction to entertain the application by virtue of Order 47 rule 5 of the High Court Rules which stipulates that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or Court so orders.

The Respondents further argued that the 2nd, 3rd, 4th, 5th, and 6th Respondents' appeal was meritorious and as such there is sufficient grounds to compel this Court to grant a stay as was held by Dr. Justice Patrick Matibini (as he then was) in the case of ***Michael Chilufya Sata v. Chanda Chimba III and 3 Others (1)***.

The Respondents further cited the cases of ***Sonny Paul Mulenga and Vismer Mulenga (both personally and Practising as SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited and Investment Merchant Bank Limited (2)*** and the case of ***Richard Chizyuka, Betty B. M. Chizyuka and Credit Africa Bank Limited (3)*** where Lewanika J. S. (as he then was) stated thus:

"I can only grant the application for a stay if I am of the opinion that there are prospects of the applicants succeeding with their appeal".

The Respondents submitted that this is a proper and just matter for the grant of a stay and in order to avoid a situation where the decision on appeal is rendered nugatory and merely academic. Further, that the application is in the interest of justice and not designed to deprive the Applicant of the fruits of the Ruling.

It is their prayer that the Court grants an order of stay so as to preserve the status quo until the appeal is determined.

Dorothy Soko, the Applicant's Acting Director – Investments, swore an affidavit in opposition to the application for an order of stay of execution of ruling pending appeal in which she deposed that she was advised by Counsel for the Applicant and verily believed the same to be true that perusal of the Notice of Appeal and Memorandum of Appeal, exhibits "CC1" and "CC2" in the Affidavit in Support, shows that the appeal herein lacks merit. She also deposed that she had been advised and verily believed the same to be true that this Court is entitled to preview the appeal's prospects of success before granting an order for stay of execution.

The Applicant argued in the Skeleton Arguments that a stay of execution can only be granted when there are good reasons to grant the stay as per the editorial notes of order 59 rule 13 (2) of the White Book.

The Applicant submitted that in the case of ***Sonny Mulenga and Others*** referred to above, the Supreme Court held that:-

"In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal ... more is required to be advanced to persuade the Court 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".

The Applicant also cited the case of ***Nyampala Safaris Zambia Limited and Others v. Zambia Wildlife Authority & Others (4)*** where the Supreme Court observed:

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

Further, in the case of **Monk v. Bartram (5)** the Court Stated as follows:-

"It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which a court will grant a stay of execution".

The Applicant submitted that there are no good reasons for granting the Respondents a stay of execution in this action. It further submitted that the Respondents have the onus to demonstrate to this Court that the appeal has reasonable prospects of success.

According to the Applicant, the Respondents have failed to discharge this burden, it cannot genuinely be argued that the Ruling appealed against is erroneous; the provisions of section 383 of the Companies Act relied upon by this Court in its Ruling being very clear. That the appeal herein is therefore highly likely to fail. It was the Applicant's contention that in the premises, the granting of a stay of execution would be unjust, contrary to the authorities cited and prejudicial to the Applicant. Therefore the Respondent's application for stay of execution of the Ruling should be dismissed with costs.

I have considered the Affidavits filed by the parties in support of their respective cases, the Skeleton Arguments and authorities cited and the *viva voce* submissions.

It is indeed trite law that an appeal does not operate as a stay of execution or of the proceedings under the decision appealed from and hence the need to specifically

apply to court for an order of stay. However, I am also alive to the requirement that before an order of stay is granted the applicant must show that the appeal has good prospects of succeeding. Indeed, there must be good and convincing grounds to compel the Court to grant the order of stay.

I have perused the grounds of appeal in the Memorandum of Appeal and I am not convinced that the appeal has good prospects of success.

I find that there are no sufficient grounds to compel this Court to grant a stay of execution of the Ruling of 8th September, 2016.

For the above reasons, the application for stay of execution of the Ruling is dismissed for being without merit. The Ex-Parte Order of Stay of Execution of Ruling granted on 11th October, 2016 is discharged forthwith.

Costs of this application are awarded to the Applicant, which costs are to be agreed or taxed in default of agreement.

Dated at Lusaka the 8th day of December, 2016.


W. S. MWENDA (Dr)
JUDGE