

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**CAZ/08/40/2017**  
Application/Appeal No.

IN THE MATTER OF: POST NEWSPAPER LIMITED (IN LIQUIDATION)

**AND**

IN THE MATTER OF: THE COMPANIES ACT CHAPTER 388 OF THE  
LAWS OF ZAMBIA

**BETWEEN:**

ANDREW HERBERT CHIWENDA  
ROY HABAALU  
BONAVENTURE BWALYA  
MWENDALUBI MWEENE  
ABEL MBOOZI  
ZAMBIA REVENUE AUTHORITY



1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT  
3<sup>RD</sup> APPELLANT  
4<sup>TH</sup> APPELLANT  
5<sup>TH</sup> APPELLANT  
6<sup>TH</sup> APPELLANT

**AND**

POST NEWSPAPER LIMITED (in Liquidation)  
INVESTRUST BANK PLC

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

*Before the honourable Judge President this 28<sup>th</sup> day of February 2017*

*For the 1<sup>st</sup> to the 5<sup>th</sup> Appellants: Mr. Mosha of Mosha and Company*

*For the 6<sup>th</sup> Appellant: Mrs. Katongo, Acting Legal Counsel Officer  
Mr. Chitupila, Legal Officer*

*For the 1<sup>st</sup> Respondent: Mr. Luo of Messrs Palan & George Advocates*

*For the 2<sup>nd</sup> Respondent:*

*Mr. Sitimela of Messrs Fraser Associates*

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

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### ***Cases referred to:***

- 1. Mukumbuta & Others vs Nkwilimba Choobana and Others (2003)**
- 2. *Development Bank of Zambia and another vs Sunvest Limited and Another (1997) S J 10***
- 3. *Hang'andu & Company (a firm) vs Mulubisha 2008 ZR 82 Vol 2***
- 4. *B.P. Zambia PLC vs Interland Motors Ltd SCZ Judgment No. 5 (2001)***

The 1<sup>st</sup> to 5<sup>th</sup> Appellants seek stay of proceedings in cause number 2017/HPC/0050. The background to this application as can be gathered from the affidavit sworn by the 5<sup>th</sup> Appellant Abel Mboози, and the exhibits annexed thereto, is that the 1<sup>st</sup> respondent was placed under compulsory liquidation for failure to settle its debts. A provisional liquidator was appointed by a High Court Judge, Nkonde J, on 1<sup>st</sup> November 2016. Subsequently, the 2<sup>nd</sup> Respondent to the appeal in this court, notified the provisional liquidator of the 1<sup>st</sup> respondent's indebtedness to the 2<sup>nd</sup> respondent, by letter dated 2<sup>nd</sup> November 2016. Therein was tabulated the total amount owing, as well as the properties by which the said indebtedness was secured.

On 19<sup>th</sup> January 2017, the 2<sup>nd</sup> respondent was joined to the proceedings as a secured creditor. It appears the provisional liquidator and the 2<sup>nd</sup> respondent engaged in discussions over the debt owed by the Post Newspaper, and a consent order settled as a result. This prompted a shareholder in the Post Newspaper, Mr. Fred M'membe, to commence an action against Investrust

Bank Zambia Limited PLC on the 3<sup>rd</sup> February 2017, under cause number 2017/HPC/0050. He seeks a declaration that all the actions taken by the defendant in attempting to assign the debt owed to it by the Post Newspapers Limited to an entity aligned to Mr. Mosho pursuant to a consent order settled in cause number 2016/HPC/518 are null and void for having been done pursuant to a consent order signed without the authority of the plaintiff, among other declarations.

The appellants came to learn that Mr. M'membe had commenced an action against the 2<sup>nd</sup> respondent under cause number 2017/HPC/0050, which matter was before a different judge. They as a result applied to Nkonde J that cause number 2017/HPC/0050 be consolidated with cause number 2016/HPC/0518. The reasons assigned for that application were that the reliefs sought in 2017/HPC/0050 relate to the same issues of law and fact arising from and within those in cause number 2016/HPC/0518. Further, that at the core of both causes of action aforesaid are the assets of the 1<sup>st</sup> Respondent Company over which the 2<sup>nd</sup> respondent holds a floating and fixed charge and which assets are now under the custody and control of the Provisional Liquidator of the 1<sup>st</sup> respondent appointed by the Court. Therefore, the matter in cause number 2017/HPC/0050 addresses the same questions of law and fact as those in cause number 2016/HPC/0518. In the appellants' view, the issues raised by Mr. M'membe in cause number 2017/HPC/0050 could have been raised in the matter before Nkonde J. As matters stood, there was a likelihood of the Courts rendering conflicting judgments over the same

assets in the winding-up of the 1<sup>st</sup> Respondent. They thus urged that court to consolidate the two actions.

The said appellants also applied for an order to stay proceedings and all orders made under cause number 2017/HPC/0050, pending determination of the application to consolidate. In a terse ruling, Nkonde J refused to stay those proceedings, on the ground that he had no jurisdiction to stay an order made by a judge of co-ordinate jurisdiction.

Aggrieved at that decision, the appellants filed a Notice of Appeal, on 14<sup>th</sup> February 2017 so as to agitate the decision of Nkonde J. According to the Memorandum of Appeal, the sole ground of appeal is that the learned puisne judge fell into gross error when he rejected or refused to grant the stay of proceedings in cause number 2017/HPC/0050. The said appeal has not been processed, having only been filed into court on the 14<sup>th</sup> February 2017.

On the 20<sup>th</sup> February 2017, the appellant filed an ex-parte application before a single judge, to stay proceedings under cause number 2017/HPC/0050 pending the determination of an application to consolidate the said cause number 2017/HPC/0050 with the proceedings under cause number 2016/HPC/0518 pursuant to the provisions of Order X Rule 2(1) and (5) as read with the provisions of Order X Rule 5 of the High Court of Appeals Rules.

Upon perusing the application, I formed the view that I should hear the application inter-partes. I accordingly appointed the 24<sup>th</sup> February 2017 at 08:30 hours for hearing.

At the said hearing, Mr. Mosha, of Messrs Mosha and Company represented the 1<sup>st</sup> to the 5<sup>th</sup>, appellants while Mrs. Katongo and Mr. Chitupila, acting Legal Counsel and Legal Officer respectively, appeared on behalf of the 6<sup>th</sup> Appellant. The 1<sup>st</sup> Respondent was represented by Mr. Luo of Messrs Palan and George Advocates, while the 2<sup>nd</sup> Respondent was represented by Mr. Sitimela of Messrs Fraser Associates. Mr. Mosha informed me that reliance was being place on the affidavit in support as well as the skeleton arguments.

In the said skeleton arguments, learned counsel begins by reciting Order X Rule 2(1) of the Court of Appeal Rules, which proscribes how an application to a single judge of the Court may be made. He also cites rule (2) of sub rule (5) of the said Order, which allows the making of an application ex parte under rule 2(1) of Order X. Learned counsel additionally refers to the provisions that relate to consolidation of matters in the High Court Act, as well as Order 49 Rules of the Supreme Court 1999.

My attention has been drawn to ***Mukumbuta & Others vs Nkwilimba Choobana and Others***<sup>1</sup> and ***Development Bank of Zambia and Another vs Sunvest Limited and Another***<sup>2</sup> where the Supreme Court discussed consolidation of causes, and disapproved of multiplicity of actions respectively. My attention has equally been drawn to ***Hang'andu & Company (a firm) vs Mulubisha***<sup>3</sup> and ***BP Zambia PLC vs Interland Motors Ltd***<sup>4</sup> where the Supreme Court enjoined litigants to ventilate their grievances in one matter, instead of deploying them piecemeal in different causes. My attention has

further been drawn to section 13 of the High Court Act, which I will not recite here, for reasons that will soon become apparent.

It is submitted that this court has discretion to order stay of proceedings. Learned counsel has endeavoured to show that the parties in the two causes are similar and the subject matter the same. It is asserted that the plaintiff in cause number 2017/HPC/0050 has filed a Notice of Intention to be heard at the hearing of the petition in cause number 2016/HPC/0518 under rule 10 of the Winding Up Rules of 2004, by virtue of his being a shareholder in the 1<sup>st</sup> respondent in the cause subject of this appeal. It is further stated that the defendant in cause number 2017/HPC/0050 is the 2<sup>nd</sup> Respondent in the case under cause number 2016/HPC/0518 as a secured creditor over the assets of the 1<sup>st</sup> Respondent. The debt in question is the crux of the claims in cause number 2017/HPC/0050. Therefore, the argument proceeds, it is only just and equitable that cause number 2017/HPC/0050 be stayed pending determination of the application to consolidate the said matter with cause number 2017/HPC/0518 which is the main matter as it is all encompassing, and will address all issues in controversy among the parties in both causes, as envisaged by section 13 of the high Court Act.

It is further submitted that in the event cause number 2017/HPC/0050 is not stayed pending the application to consolidate, there is a likelihood that the judges presiding over the two causes may render conflicting rulings or orders over the same assets, thereby bringing the name of the court into disrepute.

Further, avoidable costs will be incurred if the action sought to be stayed is not stayed.

Mr. Masha reiterated the gist of the arguments and urged me to stay proceedings pending determination of the appeal.

Learned counsel for the 6<sup>th</sup> appellant Mrs. Katongo informed me that the 6<sup>th</sup> appellant was served with the application the previous day after 17:00 hours, and learned counsel only had sight of the application on the morning the matter was coming up for argument. It was as a result not possible to obtain instructions from the 6<sup>th</sup> appellant. In the circumstances, learned counsel would neither support nor oppose the application.

Learned counsel for the 1<sup>st</sup> Respondent, Mr. Luo, informed me that the 1<sup>st</sup> Respondent had no objection to the application. Learned counsel for the 2<sup>nd</sup> Respondent, Mr. Sitimela indicated that his client neither supported nor objected to the application. He however felt duty-bound to state that his client had applied to dismiss the action under cause number 2017/HPC/0050 for abuse of process. That application was scheduled for hearing on the 27<sup>th</sup> February 2017 at 08:30 hours.

I have considered the application for stay of proceedings in cause number 2017/HPC/0050, as well as the arguments advanced to persuade me to accede to that application. The rule pursuant to which it sought to obtain the said stay before me is Order X rule 2(1), which is in the following terms:

***“An application to single judge shall be made by notice of motion or summons within fourteen days from the date of the decision complained of.”***

Sub rule 5 of the same Order and rule is cited. It stipulates:

***“An application referred to in sub rule 1 may be made ex parte in the case of urgency but in any such case, a certificate of urgency filed by the practitioner for the applicant or if the application is not represented by a practitioner, by the master, shall be filed with the application.”***

It will be seen that these rules relate only to procedure, and are to guide an applicant who desires to make a competent application to a single judge of the Court of Appeal. Section 9 of the Court of Appeal Act prescribes the power of a single judge of the court, in the following terms:

**9. A single judge of the court may exercise a power vested in the court not involving the decision of an appeal.....**

Order VII 2(1) Court of Appeal Rules echoes section 9 of the Act, as follows:

***2(1) An application to the court not involving the decision of an appeal shall, unless made in the course of the hearing of an appeal, be made in the first place to a single judge.***

Section 9 of the Act leaves no doubt that a single judge cannot exercise a power involving the decision of an appeal. The judge may only determine interlocutory applications. In the present case, the decision appealed against is that of the court below, refusing to stay proceedings in cause number 2017/HPC/0050. That is the appeal the Court of Appeal will have to determine in due course. That being the case, a single judge cannot purport to decide that issue, as it is the preserve of the Court.



The application before me is to *“stay proceedings under cause number 2017/HPC/0050 pending the determination of an application to consolidate cause number 2017/HPC/0050 with the proceedings under cause number 2016/HPC/0518.”*

Clearly, this application is misconceived. The question whether or not cause number 2017/HPC/0050 should be stayed properly falls to be determined by the Court, as it is not an interlocutory application, but the main appeal. It is analogous to an appeal against refusal of injunctive relief, or refusal of leave to apply for judicial review. In the premises, I refuse to stay proceedings in cause number 2017/HPC/0050 for want of jurisdiction. I make no order for costs as the Respondents did not object to the application.

Dated the .....<sup>28<sup>th</sup></sup> day of .....<sup>February</sup>..... 2017.



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**F. M. CHISANGA  
JUDGE PRESIDENT  
COURT OF APPEAL**