

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2002/HPC/0275



BETWEEN:

TOTAL AVIATION AND EXPORT LIMITED

PLAINTIFF

AND

RICHARD NSOFU MANDONA

DEFENDANT

ZAMBIA NATIONAL COMMERCIAL BANK PLC

First 3rd Party

ZAMBIA NATIONAL OIL COMPANY

Second 3rd Party

LIMITED (*In Liquidation*)

INDENI PETROLEUM REFINERY COMPANY

Third 3rd Party

Before the Hon Lady Justice Irene Zeko Mbewe

For the Plaintiff : *Ms L Maboshe of Messrs Corpus Legal
Practitioners*

For the Defendant : *Mr W Mubanga SC of Messrs Chilupe and
Permanent Chambers*

*Mr Eddie Mumba of Messrs A.D Mwansa
Mumba and Associates*

*For the First 3rd Party : Mrs. A Mwalula Legal Manager - Zambia
National Commercial Bank*

For the Second 3rd Party : N/A

For the Third 3rd Party : N/A

RULING

Cases referred to:

1. *Metal Fabricators of Zambia v Washington Mwenya Zimba SCZ/170/2002*
2. *Kangwa and Others v Zambia Environmental Management Agency and Others (Appeal No. 40/2012) ZMSC 143*
3. *Sonny Paul Mulenga and Vismar Mulenga (Both personally and practicing as SP Mulenga International), Chainama Hotel Limited and Elephants Head Hotel Limited v Investrust Merchant Bank Limited (1999) ZR. 101*
4. *Trinity Engineering (PVT) Limited v Zambia National Commercial Bank Limited (1997) SJ. 12 (SC)*
5. *Winchester Cigarette Machinery Limited v Payne [1993] Times Law Report 647*
6. *Monk v Bartram [1891] 1 Q.B 346*

7. *DBZ and Mary Ncube (As Receiver) v Christopher Mwanza and 63 Others SCZ/8/103/08*

Legislation Referred To:

1. *Constitution of Zambia (Amendment) Act No 2 of 2016*
2. *High Court Rules, Cap 27 of the Laws of Zambia*
3. *Rules of the Supreme Court, 1999 Edition*

This is a Ruling on the Defendant's application for a stay of execution and further proceedings and an order to set aside writ of *fiery facias* for irregularity.

The application for a stay of execution and further proceedings is made pursuant to **Order 36 Rule 10 of the Rules of the High Court, Cap 27 of the Laws of Zambia** by way of summons dated 21st October 2015 and supported by an affidavit and skeleton arguments of even date.

The brief facts leading to the applications are as follows. The Plaintiff commenced an action against the Defendant (the applicant herein) in which Judgment was entered in favor of the Plaintiff on 18th July 2008 ordering the Defendant to pay the judgment sum of

K179,024, 591.01 (unrebased) with interest and costs. Dissatisfied with this Court's decision, the Defendant with the consent of other parties filed a Consent Order dated 29th October, 2008 to stay execution of the said Judgment pending appeal to the Supreme Court. The Supreme Court dismissed the appeal on 22nd July 2015, and the Plaintiff then proceeded to execute Judgment of this Court dated 18th July 2008. Consequently, a writ of *feri facias* was filed into Court on 28th August, 2015 and execution was carried out on the 14th September 2015.

In the supporting affidavit dated 21st October 2015 deposed by the Richard Nsofu Mandona the Defendant and Applicant herein, it was averred that Judgment was entered against him on 18th July 2008. According to the deponent, the Judge that delivered the High Court Judgment misdirected herself both in law and facts. It is averred that any recovery of the Judgment sum by the Plaintiff will amount to unjust enrichment. That the deponent has since filed a Notice of Motion in the Supreme Court challenging the Order dismissing his appeal on the ground that the record of appeal was incomplete arising from the misplacement of the court record by this Court

since July 2009 (**Exhibit RNM-1**"). The Defendant prayed for leave for an Order to stay execution and further proceedings pending hearing of the motion by the Supreme Court.

The Defendant in his skeleton arguments relied on **Order 36 Rule 10 of the High Court Rules, Cap 27 of the Laws of Zambia**, and **Order 59 Rule 13 (2) (a) Rules of the Supreme Court, 1999 Edition**. It was submitted that under the cited Rules, a party liable to execution can apply to the Court for an order to stay execution and further proceedings of a judgment. Counsel cited the case of **Metal Fabricators of Zambia vs. Washington Mwenya Zimba (1)** in emphasizing the point that the Defendant has good and convincing reasons to warrant the grant of a stay as shown in the Notice of Motion and affidavit in support of this application. Further that if the application is not granted, the said Motion and intended appeal to the Supreme Court will be rendered nugatory and a futile academic exercise, and will suffer irreparable damage. The Defendant submitted that he desires the Supreme Court to hear and determine the effect of the Plaintiff's (formerly Mobil Oil Zambia Limited) recovery of K179,024,591.01 being the judgment sum in

addition to K179,024,591.01 which it retained following its failure to deliver fuel in that value, or refund itself.

The Plaintiff opposed the application and filed its affidavit and skeleton arguments on 20th November 2015. The affidavit is deposed by Patrick Chimfwembe Chiluba the General Secretary in the employ of the Plaintiff. It is deposed that the Defendant in paragraph 5 of his affidavit in support of this application is attempting to raise new issues which were not the subject of his appeal and that in essence, he is attempting to have this Court usurp the jurisdiction of the Supreme Court to re-litigate the appeal. That the Defendant has shown proof of when the judgment sum was paid to the Plaintiff, and that the recovery of the judgment sum by the Plaintiff will not amount to unjust enrichment as it was awarded the said judgment sum by this Court in its Judgment dated 18th July 2008. It is further deposed that the Defendant is forum shopping and abusing court process as he had made a similar application to stay proceedings and execution in the Supreme Court which was withdrawn. Further that the motion

before the Supreme Court has no merit and is unlikely to succeed, and that the Defendant has not shown special circumstance to warrant the grant of the order to stay execution. In conclusion, it is averred that this application is of no consequence since execution took place on 14th September 2015 and that this is not an appropriate case where the Court can exercise its discretion to grant the application before it.

By way of skeleton arguments the Plaintiff submitted that contrary to the Defendant's assertions, this Court has no jurisdiction to make a determination on the issues raised under **Order 59 Rule 13 (1) (a) of the Rules of the Supreme Court 1999 Edition**. That contrary to the law cited by the Defendant, the proper law on stay of execution is **Order 47 of the Rules of Supreme Court, 1999 Edition**. The case of **Kangwa and Others v Zambia Environmental Management Agency and Others (2)** was cited where the Court stated that an application based on a wrong law is misconceived. It was argued that all the cases cited by the Defendant relate to instances where there is an appeal, which is not

so in the present case as the Defendant's appeal was already dismissed.

Further that the well settled law on stay of execution is that the applicant must show that there are special circumstances upon which the Order should be granted. It was submitted that the applicant in this case has failed to show that there are good and sufficient grounds upon which to deny the Plaintiff its fruits under its Judgment. This principle was stated in the case **Sonny Paul Mulenga and Vismar Mulenga (Both personally and practicing as SP Mulenga International), Chainama Hotel Limited and Elephants Head Hotel Limited v Investrust Merchant Bank Limited (3)**. That it is trite law that there cannot be an order to stay execution of a Supreme Court judgment as was held in the case of **Trinity Engineering (PVT) Limited vs. Zambia National Commercial Bank Limited (4)**.

From the foregoing case, it was submitted that the Supreme Court Order dated 22nd July 2015 in it dismissed the Defendant's appeal amounts to a final decision of that Court. The Plaintiff concluded by submitting that the Defendant has not shown that there exists

special circumstances to warrant the grant of an order to stay execution and further proceedings.

The First 3rd Party filed an affidavit in opposition on 19th November 2015 deposed by George Mubanga Kashoki its Assistant Manager in the Special Management Department. The gist of the evidence is that following the Supreme Court's dismissal of the appeal on 22nd July 2015 due to an inordinate delay of six (6) years on the part of the Defendant in filing the record of appeal, this Court's Judgment dated 18th July 2008 is enforceable. Further that the Defendant's motion to challenge the dismissed appeal filed into the Supreme Court does not have merit more so that the appeal was dismissed on grounds of the Defendant's failure to file a complete record of appeal contrary to the rules of court. That the Defendant's application to stay proceedings lacks merit as proceedings of the Supreme Court cannot be stayed and neither can the appeal which was dismissed be revived. That the Defendant has not shown any exceptional or special circumstances to warrant the grant of stay of execution hence the application cannot succeed. That consequently,

the Defendant' s application for a stay of execution and proceedings be dismissed.

In advancing its position, the First 3rd Party filed skeleton arguments into Court on 18th November 2015 in which it was argued that it is trite law that an order for stay cannot be granted unless there are exceptional circumstances, (**Winchester Cigarette Machinery Limited v Payne**) (5), and that a Court does not deprive a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled (**Monk v Bartram**) (6).

At the hearing of the application to stay execution and further proceedings, Counsel relied on their respective affidavits, skeleton arguments and list of authorities filed into Court.

It is common cause for both applications that Judgment was entered in favour of the Plaintiff in the sum of K179,024, 591.01 (un-rebased) with interest and costs on 18th July 2008. The Defendant being dissatisfied with the said Judgment appealed to the Supreme Court on 22nd July 2015. Prior to the appeal to the Supreme Court, the parties by way of a Consent Order dated 29th October 2008 stayed the execution and further proceedings pending

determination of the appeal. The Supreme Court appeal was dismissed on 22nd July 2015 and following that the Plaintiff proceeded to enforce the Judgment of this Court by way of writ of *fiери facias* dated 28th August, 2015.

The issue for determination is whether or not to grant a stay of execution and further proceedings pending determination of the notice of motion by the Supreme Court.

The Defendant has relied upon **Order 36 Rule 10 High Court Rules, Cap 27 of the Laws of Zambia** in making the application for a stay of execution and proceedings which states as follows:

"10. Except as provided for under Rule 9, the Court or Judge may on sufficient grounds, order stay of execution of a Judgment."

Order 59 Rule 13 (1) (a) Rules of the Supreme Court, 1999 Edition provides as follows:

"(1) Except so far as the court below or the Court of Appeal or a single judge may otherwise direct-

- (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below."**

These Orders clearly empower the Court to order a stay of execution or proceedings where sufficient cause is shown by an applicant. However, it is important to pause for a moment and ask what the implication of the notice of motion filed in the Supreme Court is ? The Defendant filed a notice of motion arguing that the Supreme Court erred in dismissing his appeal on a technicality, and that the appeal was not heard on its merit. The peculiar situation is that the application before me is intended to stay the decision of the Supreme Court dismissing the Defendant's appeal. Can there be a stay of execution of a Supreme Court Order? In determining this, I am guided by the Supreme Court's holding in the case of **Trinity Engineering (PVT) Limited v Zambia National Commercial Bank Limited (1997) SJ. 12 (SC)** where it was stated that:

"The question is not whether or not the High Court has jurisdiction to order a stay of execution of this Court's decision but whether or not there can be a stay of

execution of a final judgment. Judgments of this court are final and there can be no stay of execution of a final judgment.”

Based on the position of the Supreme Court in the foregoing case, there can never be a stay of execution of a final Judgment of the Supreme Court. This issue of finality emanates from the Constitutional provisions as contained in Article 125 (1) of the **Constitution of Zambia (Amendment) Act** that the Supreme Court is the final court of appeal (except in constitutional matters). I hasten to add that though the Defendant has the constitutional right to appeal, the Supreme Court made a final Order dismissing the Defendant's appeal on grounds that the record of appeal was incomplete for a period of six years. I find that the Defendant is circumventing the finality of the appeal by attempting to re-open the case through the current application. Permitting any party to re-open an already dismissed appeal from the Supreme Court, by that party filing repeated interlocutory applications, is an abuse of court process and would have far reaching adverse impacts on the general administration of justice. I further opine that the salutary

maxim "*interest reipublicae ut sit finis litium*" is applicable in that there should be an end to litigation (See **DBZ and Mary Ncube (As Receiver) v Christopher Mwanza and 63 Others**) (7).

For reasons stated aforesaid, the net result is that the Defendant's application for a stay of execution and further proceedings lacks merit and is accordingly dismissed.

Costs follow the event, and to be taxed in default of agreement.

The Defendant's second application is for setting aside the writ of *feri facias* for irregularity pursuant to **Order 46 Rule 2 of the Rules of the Supreme Court, 1999 Edition** made by way of summons dated 21st October 2015. The application is supported by an affidavit in support deposed by Mr Richard Nsofu Mandona the Defendant herein. The gist of the evidence is that following the Supreme Court's dismissal of the Defendant's appeal on 22nd July 2015, a notice of motion was filed challenging the dismissal of the appeal on grounds that the matter be heard on its merit. That following the dismissal of the appeal, the Plaintiff filed a writ of *feri facias* on 28th August, 2015 which was executed on 14th September 2015 and certain goods belonging to a non-Claimant were seized.

According to the Defendant, a period of six (6) years had elapsed thereby requiring the Plaintiff to obtain leave of the Court prior to the issuance of the writ of *fieri facias* on the 28th August, 2015, and that the Defendant never received a demand letter from the Plaintiff. On the said basis, the Defendant prayed for the setting aside of the writ of *fieri facias* for irregularity.

The Plaintiff opposed the application by way of affidavit deposed by Patrick Chifwembe Chiluba the General Secretary in the employ of the Plaintiff. The gist of his evidence is that following the dismissal of the Defendant's appeal in the Supreme Court, the Plaintiff executed a writ of *fieri facias* on 14th September 2015. The deponent denies that some goods seized belonged to a non-Claimant. It is deposed that though six (6) years have elapsed from the date of the High Court Judgment on 18th July 2008 and 28th August, 2015 when the writ of execution was issued, the Plaintiff did not require leave of the Court before issuing the writ of *fieri facias*. That the Defendant was written to and served with a notice of demand (**Exhibit "PCC1"**).

At the hearing, Counsel for the Defendant submitted that the Plaintiff did not obtain this Court's leave to issue the writ of *fiery facias* as per requirements of **Order 46 Rule 2 of the Rules of the Supreme Court, 1999 Edition**, as this Court's Judgment is dated 18th July 2008 which period is more than six (6) years.

In response to the issue of the six (6) years elapsing, Counsel for the Plaintiff submitted that after judgment was passed on 18th July 2008, the Defendant appealed to the Supreme Court which dismissed the appeal on 22nd July 2015, hence the six (6) years should start to count from 22nd July 2015 being the date of the Supreme Court Order. The Plaintiff urged the Court to dismiss the Defendant's application with costs.

Counsel for the Defendant submitted that the argument by the Plaintiff on calculation of the six (6) years is misleading as it is on a High Court Judgment that the writ of execution was issued, and therefore the six (6) year period is from 18th July 2008 and not 22nd July 2015. Further that the **Order 46 Rule 2 of the Rules of the Supreme Court, 1999 Edition** is binding on the Plaintiff.

I have considered the affidavit evidence, skeleton arguments and list of authorities and the oral submissions of the respective Counsels.

The Defendant's application is predicated on **Order 46 Rule 2 and 4 of the Rules of the Supreme Court, 1999 Edition** which states as follows:

"2.(1) A writ of execution to enforce judgment or order may not issue without the leave of the Court in the following circumstances that is to say-

- (a) Where six years or more have elapsed since the date of judgment or order;**
- (b) Where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;**
- (c)**
- (d)**

" 4. (1) An application for leave to issue a writ of execution may be made ex parte unless the Court directs it to be made by summons.

(2) Such application may be supported by an affidavit -

- (a) identifying the judgment or order to which the application relates and, if the judgment or order is for payment of money, stating the amount originally due thereunder and the amount due thereunder at the date of the application.
- (b) stating, where the case falls within rule 2 (1) (a) the reasons for the delay in enforcing the judgment or order;
- (c) stating where the case falls within rule 2 (1) (b) or (d) the change which has taken place in the parties entitled or liable to execution since the date of the judgment or order.
- (d) stating, where the case falls within rule 2 (1) (c) or (d) that a demand to satisfy the judgment or

order was made on the person liable to satisfy and that he has refused or failed to do so.

- (e) giving such information as is necessary to satisfy the Court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.**

(3) The Court hearing such application may grant leave in accordance with the application or may order that an issue or question, a decision on which is necessary to determine the rights of the parties, be tried in a manner in which any question of fact or law arising in an action may be tried and, in either case, may impose such terms as to costs or otherwise as it thinks fit.

The single issue for my determination is whether or not to set aside the writ of *fieri facias* for irregularity.

Counsel for the Defendant argued that the requirement for leave to issue execution under **Order 46 Rule 2 (1) (a) of the Rules of the Supreme Court, 1999 Edition** is mandatory as this Court's Judgment was passed on 18th July 2008 representing a period of more than six (6) years. The following is my take. When this Court rendered its Judgment on 18th July 2008, the parties on the same date entered a Consent Order for a stay of execution and further proceedings pending appeal. The effect of the stay of execution and further proceedings resulted in the stoppage of the entire case and the suspension of enforcement of this Court's Judgment pending determination of the appeal by the Supreme Court. Aptly stated, a stay is the act of temporarily stopping a judicial proceeding through the order of a Court. From the time of the stay, the time "froze" so to speak until the disposal of the appeal on 22nd July 2015 wherein the clock started ticking. Therefore, to say that time started running on 18th July 2008 when this Court delivered Judgment, and not from 22nd July 2015 when the Supreme Court dismissed the appeal would not only be unjust on the part of the Plaintiff, but would defeat the purpose of a stay of execution and further proceedings. In view of the foregoing, I concur with Counsel for the Plaintiff that

the period of six (6) years runs from 22nd July 2015. The implication of this is that **Order 46 Rule 2 (1) (a) of the Rules of the Supreme Court, 1999 Edition** is inapplicable as six (6) years or more has not elapsed since the date of the Judgment or Order.

Counsel for the Defendant relied on **Order 46 Rule 2 (1) (b) and Rule 4 (1) (c) of the Rules of the Supreme Court, 1999 Edition** that requires leave of the Court before issuance of the writ of *fieri facias* following a change in name having taken place, whether by death or otherwise in the parties entitled or liable to execution under the judgment or order. In my considered view, and I opine and concur with Counsel for the First 3rd Party that the correct interpretation is that it targets a change made after a judgment or order. Suffice to say, after a cursory glance at the record, it shows that a Consent Order was in fact entered into by the parties on 8th June, 2009 to substitute the name of the Plaintiff from Mobil Oil Zambia Limited to Total Aviation and Export Limited which the Defendant was well aware of. In this respect, I find that the facts do not support the Defendant's assertion.

Counsel for the Defendant argued it is mandatory under **Order 46 Rule 4 of the Rules of the Supreme Court, 1999 Edition** that an application for leave to issue a writ of execution ought to consist of particulars required for inclusion so as to ground the relevant and necessary application. Counsel argued that the writ of *fiery facias* was irregular as the Plaintiff did not issue a demand for payment of the judgment sum prior to execution as envisaged under **Order 46 Rule 4 (1) (d) Rules of the Supreme Court, 1999 Edition**. Counsel for the Plaintiff and First 3rd Party argued that the cited Order is inapplicable and a misconception of the law. A perusal of the affidavit in opposition to summons to set aside writ of execution for irregularity shows a demand notice from the Plaintiff to the Defendant vide a letter dated 25th August, 2015 ("**Exhibit PCC-1**"). I concur that **Order 46 Rule 4 (1) (d) Rules of the Supreme Court, 1999 Edition** is inapplicable to the case at hand.

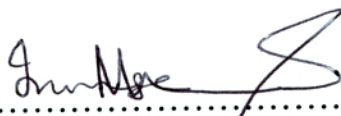
The non applicability of **Order 46 Rule 4 of the Rules of the Supreme Court, 1999 Edition** is further evident in sub-rule (3) where a Court hearing an *ex parte* application for leave to issue a writ of execution may order that an issue or question, a decision on

which is necessary to determine the rights of the parties, be tried. It is plainly clear that following the dismissal of the Defendant's appeal by the Supreme Court, the rights of the parties as determined by this Court stand. On the peculiar facts of this case, and as I understand it and logically speaking, the Court cannot make any further determination on the rights of the parties. It would be a travesty of justice and intolerable, and lead to great uncertainty if this Court could revisit, in the manner professed by the Defendant following the Supreme Court's dismissal of the appeal, the already determined rights of the parties.

The net result is that the Defendant's application to set aside the writ of *fieri facias* for irregularity lacks merit.

Costs follow the event, to be taxed in default of agreement.

Delivered in Chambers in Lusaka this 3rd day of April, 2017.



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HON IRENE ZEKO MBEWE
HIGH COURT JUDGE