

R1

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



**2017/HP/0279**

**B E T W E E N :**

WELUZANI ZULU

**PLAINTIFF**

**AND**

SP MULENGA INVESTMENTS LIMITED

**1<sup>ST</sup> DEFENDANT**

G MARTIN KWANJE

**2<sup>ND</sup> DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 7<sup>th</sup>  
day of November, 2017**

For the Plaintiff : No Appearance  
For the 1<sup>st</sup> Defendant : Mrs. R. Mbewe, Messrs Kangwa Kapita Advocates

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

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**Cases Referred To:**

1. *Nyampala Safaris and 4 Others v Wildlife Authority and 6 Others* (2004) Z.R 49 (S.C)
2. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited* (1999) Z.R 101 (S.C)
3. *Tresphord Chali v Bwalya Emmanuel Kanyanta Ngandu* SCZ/8/009/2014

**Legislation Referred To:**

1. *High Court Act, Chapter 27*

This is the 1<sup>st</sup> Defendant's application to stay execution of Judgment pending determination of an appeal. It is filed pursuant to

Order 47 Rule 5 of the High Court Rules and supported by an Affidavit.

The background facts are that the Court delivered judgment on 25<sup>th</sup> July, 2017, wherein it held the 1<sup>st</sup> Defendant liable for the failed sale agreement between it and the Plaintiff. Consequently, the 1<sup>st</sup> Defendant was condemned to damages and costs. The 1<sup>st</sup> Defendant being dissatisfied with the judgment of this Court lodged an appeal to the Court of Appeal. The gist of the Affidavit in Support is that the 1<sup>st</sup> Defendant is convinced that its appeal has high prospects of success. The 1<sup>st</sup> Defendant contends that if the judgment is not stayed, its appeal will be rendered futile and a mere academic exercise.

At the hearing, Learned Counsel for the 1<sup>st</sup> Defendant relied on the Affidavit filed herein and the Skeleton Arguments, for which I am grateful. I have seriously considered the application together with the Affidavit and skeleton arguments filed herein. I shall not reproduce the skeleton arguments suffice to state that they will be taken into account in the Ruling. The application raises the question whether in the circumstances of this case, I should exercise my discretionary

power to stay of execution of my Judgment delivered on 25<sup>th</sup> July, 2017.

It is a well settled principle of the law that a Court will not grant a stay of execution of Judgment unless they are good and reasonable grounds for doing so. What amounts to "good and reasonable grounds" is posited in **Order 59/13** of the **Rules of the Supreme Court**, which puts it thus:

**"Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation.....But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the Court and the Court will grant it where the special circumstances of the case so require.....but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour"**

In the case of **Nyampala Safaris and 4 others v Wildlife Authority and 6 others, Mambilima, JS<sup>1</sup>**, as she then was, re-stated this position of law, when she declared that a stay should only be granted where good and convincing reasons have been advanced by a party. She went on to state that the rationale for the position was that a successful litigant should not be deprived of the fruit of litigation as a matter of course.



In the case of **Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited and Elephants Head Hotel v Investrust Merchant Bank Limited<sup>2</sup>**, the Supreme Court held that:

- “(i) In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered.**
- (ii) In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal succeeding.**
- (iii) The successful party should not be denied immediate enjoyment unless there are good and sufficient grounds”.**

Considering the guidelines outlined in the above cited cases, the question is, has the 1<sup>st</sup> Defendant met the criteria outlined above to enable me exercise my discretionary power to grant a stay of execution of the judgment in question?

I have come to the conclusion that the 1<sup>st</sup> Defendant has not met the threshold for being granted a stay. It is trite in considering an application for a stay that I have a duty to examine the grounds of appeal, to determine whether it has prospects of succeeding. This however, by no means, implies that I should delve into the merits of each ground of appeal. I have perused the Memorandum of Appeal and observe that it mainly assails findings of fact and does not raise difficult points of law. In my view, the appeal has little prospects of succeeding.

In the case of **Tresphord Chali Vs Bwalya Emmanuel Kanyanta Ngandu**<sup>3</sup> the Supreme Court held that:

"The court below held that the appellant had failed to prove his case. The court accordingly dismissed the action. The appellant wants to stay execution of that judgment. We are at a loss to what the purpose of staying execution of that judgment is. The appellant sought some declarations. He failed to obtain any. For example the appellant's claim for a declaration that Farm L/19962/M belongs to him failed. Does he, by the stay of execution that he seeks, want that claim to be deemed to have succeeded until the appeal is determined? If that is what he wants then this application is untenable because this is not the purpose for which an order for stay of execution of a judgment is granted. The same can be said about the other declarations that he sought. Therefore, we see no purpose for granting any stay of execution in this appeal. We dismiss the application, with costs to the respondent."

My Judgment is entirely against the 1<sup>st</sup> Defendant. Thus, what is there to stay? I therefore, decline to grant the application for the reasons stated above.

I make no order as to costs.

Dated this 7<sup>th</sup> day of November, 2017.

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**