

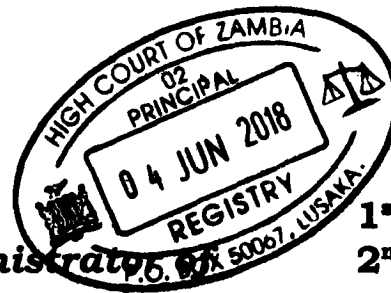
**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2017/HP/2193

BETWEEN:

JONATHAN VAN BLERK

**DENNY NYONI (*Suing as Administrator of*
the estate of Violet Nyoni)**



**1st PLAINTIFF
2nd PLAINTIFF**

AND

THE ATTORNEY GENERAL

LUSAKA CITY COUNCIL

LEGACY HOLDINGS LIMITED

KWIKBUILD CONSTRUCTION

BANTU CAPITAL CORPORATION LTD

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT**

***Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the..... day of
June, 2018***

For the 1st Plaintiff: Mr. E. L. Eyaa, Messrs. KBF & Partners.

For the 5th Defendant: Mr. K. Khanda, Messrs. Central Chambers.

RULING

Cases referred to:

- 1. Water Wells Ltd v. Wilson Samuel Jackson (1984) Z.R. 98 (S.C)***
- 2. Mulenga and Others v. Investrust Merchant Bank Limited (1999) Z.R. 101***
- 3. Watson Nkandu Bowa (suing as Administrator of the Estate of the Late Ruth Bowa Nkandu)v.Fred Mubiana and Zesco Limited (Appeal No.121/2011) at page 13.***

Legislation referred to:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia.***
- 2. Order 29/L/23 and 29/L/30 of the Rules of the Supreme Court of England, 1965.***

This is a ruling on the 5th defendant's application for an order for assessment of damages following the ruling of this court dated 6th April, 2018 dismissing the plaintiffs' entire action for being res judicata and an abuse of court process and consequently discharging the interim order of injunction granted to the 1st plaintiff on 21st December, 2017.

The application is made pursuant to Order 27 Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia and it is supported by an affidavit dated 18th April, 2018 deposed by Jordan Sibanda, the Director of Finance in the 5th defendant Company. The deponent avers that following the ruling of this court dismissing the plaintiffs' action and discharging the ex parte interim order of injunction that had been granted to the 1st plaintiff on the acquired portions of farm 4300, the 5th defendant has suffered damage on account of the withdrawal of a pending investment on its portion of the subject

property, due to the existence of the aforementioned ex parte interim order of injunction proof of which is evidenced by the exhibit marked **"JS3"**. The 5th defendant therefore, seeks an order for assessment of damages.

The 5th defendant's application was opposed by the 1st plaintiff by way of an affidavit deposed by Jonathan Van Blerk, the 1st plaintiff in this matter, dated 11th May, 2018. The deponent avers that this application is prematurely before this court as he has since lodged an appeal and also applied for a stay of execution of the ruling of this court dismissing the matter and discharging the ex parte interim order of injunction.

When the matter came up for hearing of the application on 11th May, 2018, counsel for the 5th defendant relied on the affidavit in support of the application and also briefly submitted that the 1st plaintiff should indemnify the 5th defendant for the loss suffered on the basis of the undertaking given by the 1st plaintiff to indemnify the defendants for any loss that the defendants would suffer should this court find that the interim order of injunction should not have been granted.

In opposing the application, the 1st plaintiff relied on the affidavit in opposition filed herein. Counsel for 1st plaintiff also made viva voce arguments. In his arguments, counsel submitted that when there is an application which may result in a judgment or order being set aside, that application ought to be accorded priority over other proceedings. The case of **Water Wells Ltd v. Wilson Samuel Jackson**¹ was cited to that effect. Counsel contended that as the 1st plaintiff has lodged an appeal against the ruling dismissing his action and discharging the interim order of injunction, the application for assessment of damages is prematurely before this court. He submits that in line with the **Water Wells Ltd v. Wilson Samuel Jackson**¹ case, an appeal is in effect an application to set aside or vary the ruling of this court and takes priority over the application for assessment of damages.

In reply, counsel for the plaintiff submitted that the application for assessment of damages is competently before this court as there is no stay of execution of the ruling appealed against.

I have carefully considered the affidavit evidence and the oral arguments by counsel. The issue for determination is whether this

is a proper case to exercise my discretion to enforce the undertaking by the 1st plaintiff as to damages following the discharge of the interim order of injunction.

Before I delve into a determination of the 5th defendant's substantive application for an order of assessment of damages, I am of the view that it imperative for this court to address the 1st plaintiff's arguments that the 5th defendant's application for assessment of damages is prematurely before this court as there is an appeal and an application for a stay of execution of the ruling pursuant to which the application for assessment has been made and that priority should be accorded to the appeal.

It is a well settled principle of law that an appeal against a judgment or an order of a court does not operate as stay of execution of the judgment or order appealed against. See: **Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubiana and ZESCO Limited² and Mulenga and others v. Investrust Merchant Bank Limited (1999) Z.R. 101³**. Following my ruling dismissing the 1st plaintiff's action dated 6th April, 2018, the 1st plaintiff on 17th April, 2018 applied for an

Ltd v. Wilson Samuel Jackson.¹ I am of the considered view that the preceding case is distinguishable from this case on account that in the preceding case, the deputy registrar delivered a ruling on the assessment of damages on a judgment in default of appearance and defence when there was also before him a pending application to set aside the said judgment in default and whose outcome would have determined the fate of the application for assessment of damages. In the present case, there is only one application before this court which is for assessment of damage and as this court has already rendered its ruling on the 1st plaintiff's application to stay execution of the ruling dismissing the plaintiffs' action, the 1st plaintiff cannot through this argument indirectly and yet again, ask this court to stay execution of the said ruling.

Coming to the 5th defendant's substantive application for the enforcement of the undertaking as to damages, Order 27 Rule 6 of the High Court Rules provides-

A Judge may, on application or on his own motion pursuant to an undertaking as to damages, order an assessment of damages arising out of discharged injunction found to have been unjustified, and that the damages shall be assessed by the Registrar.

The power of this court to enforce the undertaking as to damages is discretionary and the undertaking is given to the court. The learned authors of the **White Book in Order 29/L/23** have espoused that the court is likely to enforce the undertaking as to damages if the court discharges the interlocutory injunction before trial or if it is of the view that the interlocutory injunction should not have been granted in the first place. Further, in **Order 29/L/30**, the learned authors of the White Book set out the questions the court must resolve when determining whether to enforce an undertaking as to damages and they state the following:

When an application to enforce an undertaking as to damages is made there were two separate points to consider: first, as a matter of discretion, should the Court order that the undertaking be enforced?, secondly, if so, what loss had the defendant suffered in terms of money, was it caused by the order and was it too remote? (Balkanbank v. Taher (No. 2) [1995] 1 W.L.R. 1056, CA). A judge may leave both questions to be determined at the same time, or, more probably, in an enquiry as to damages, or he may decide the first question himself. If he answers it in the sense that the undertaking should be enforced, he may then leave it to some other holder of judicial office to enquire into causation, remoteness and quantum.

On the first question, I am of the considered view that the 1st plaintiff should not have been granted the ex parte interim order of injunction dated 21st December, 2017 as the commencement of this

action by the 1st plaintiff was an abuse of court process and the issue of the compulsory acquisition of a portion of the 1st plaintiff's land is res judicata. I therefore, find that this is a proper case to warrant the exercise of my discretion to enforce the undertaking as to damages and I hereby grant the 5th defendant an order to have the damages assessed.

On the second question, having granted the 5th defendant an order to have the damages assessed, I order the Registrar to deal with the determination of what loss if any, the 5th defendant has suffered in terms of money and whether the loss suffered if any, was as a result of the order of interim injunction granted to the 1st plaintiff on 21st December, 2017.

I award the costs of this application to the 5th defendant which costs are to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka the 4th day of June 2018.


MATHEW. L. ZULU
HIGH COURT JUDGE