

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

**2015/HP/2147**



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

CITIBANK ZAMBIA LIMITED

**PLAINTIFF**

**AND**

SUHAYL DUDHIA

**DEFENDANT**

**Before Hon. Mrs. Justice M. Mapani-Kawimbe in Chambers on 15<sup>th</sup> June, 2018**

For the Plaintiff : Mr. R. Petersen, Messrs Chibesakunda & Company  
For the Defendant : Ms. S. Kalima, Messrs J & M Advocates

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**R U L I N G**

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**Cases Referred To:**

1. *Shilling Bob Zinka v The Attorney General* (1991) SJ (SC)
2. *Bellamano Limited v Ligure Lombarda* (1976) ZR 267
3. *Zambia National Holdings Limited and United National Independence Party v The Attorney General* (1984) SJ 22 (SC)

**Legislation Referred To:**

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court, 1999 Edition*

The Defendant filed *ex parte* summons dated 8<sup>th</sup> June, 2018, to stay execution of the Court's ruling delivered on 5<sup>th</sup> June, 2018. In that ruling, I entered a monetary judgment for the Plaintiff on the ground that the defence did not challenge its claims nor attach any liability upon which, it could have defended itself. Instead of proceeding *ex parte*, I ordered the matter to be heard *inter partes* on 11<sup>th</sup> June, 2018. When the matter came up for hearing at 14.15 hours, Mr. R. Petersen, Learned Counsel for the Plaintiff, raised an *issue in limine* under Order 14A of the Rules of the Supreme Court (RSC) as follows:

**1. That the Defendant's application was prematurely before Court.**

To support his preliminary objection, Counsel submitted that the Defendant had not been granted leave to appeal by this Court. As a result, what was stated in the Defendant's summons was not factual and the application was prematurely before Court. Counsel added that Order 47 Rule 5 of the High Court Rules (HCR), could only be invoked if an appeal had been lodged with an appellate Court. By failing to do so, the Defendant had employed wrong



procedure in seeking a stay of execution of ruling. He prayed to Court to strike out the application and to grant the Plaintiff costs.

The response of the Defendant through his Learned Counsel, Ms. S. Kalima, was firstly a concession that there was no appeal that had been lodged with the Court of Appeal. Also that the application for leave to appeal was pending before this Court. Nevertheless, Counsel submitted that the Defendant filed simultaneous applications for leave to appeal and stay of execution of ruling on 8<sup>th</sup> June, 2018. This was done in the hope that if the Defendant was granted leave to appeal, he would proceed to present his application for a stay of ruling.

Ms. Kalima urged me to exercise my discretion under Order 3 Rule 2 of the HCR by granting a conditional stay, so that the Defendant could file his appeal. According to Counsel, that allowance would serve the interest of justice albeit the Defendant had not fulfilled the requirements of Order 45 Rule 5 of the HCR.

She invited me to the case of **Shilling Bob Zinka v The Attorney**

**General**<sup>1</sup> where the Supreme Court stated *inter alia*:

**"...If a power exists and its exercise can be traced to a legitimate source, then, the fact that such power is incorrectly or erroneously exercised under a wrong source or power will not vitiate the exercise of the power in question..."**

On that basis, Counsel asserted that the application for a stay of execution of ruling was properly before Court because it was presented under known law. She prayed to Court to dismiss the *issue in limine*.

In rejoinder, Mr. Petersen submitted that the certificate of urgency filed with the summons only indicated that the application for stay was pressing. He added that while it may have been the intention of the Defendant to argue the application for leave first, he did not serve the Plaintiff court process within two clear days before the return date as required by Order 30 Rule 3 of the HCR. In failing to do so, the Defendant exposed that there was no urgency on the application for leave to appeal.



Counsel contended that since the Defendant had filed his application on a wrong provision of law, he could not ask the Court to exercise jurisdiction it did not possess. To reinforce his position, he cited the case of **Bellamano Limited v Ligure Lombarda**<sup>2</sup> where it was held *inter alia* that:

**"...It is always necessary, on the making of applications, for the summons or notice of application to contain a reference to the order or rule number or other authority under which relief is sought..."**

He also called in aid the case of **Zambia National Holdings Limited and United National Independence Party v The Attorney General**<sup>3</sup> where it was held *inter alia* that:

**"...The jurisdiction of the High court on the other hand is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law..."**

Counsel went on to submit that while the Court has discretion under Order 3 Rule 2 of the HCR to make any interlocutory order for the purpose of doing justice; the Defendant's circumstances did not avail themselves to that provision. He concluded by reiterating his prayer.

I have anxiously considered the *issue in limine* and the arguments of Learned Counsels for which I am grateful. Order 14A of the Rules of the Supreme Court says:

**"The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-**

- a) Such question is suitable for determination without a full trial of the action, and**
- b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.**
- 2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just."**

The effect of Order 14A RSC is stated in the explanatory notes and exposes that an application for determination of a question of law or construction may be made by a party or the Court on its own motion. Further, such application can be made at any stage of the proceedings. The *issue in limine* tabled before this Court arose just before the hearing of the application for a stay. And by Order 14A RSC the Plaintiff was entitled to raise issue.

The summons on which the Defendant seeks to stay execution of ruling is premised on Order 47 Rule 5 of the HCR which reads:

**"5. An appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed from, except**



**so far as the court below or the Court may order, and no intermediate act or proceeding shall be invalidated, except so far as the court below may direct."**

As rightfully pointed out by Learned Counsel for the Plaintiff, Order 47 Rule (5) HCR predicates that an appeal would have been lodged into an appellate Court at the time of seeking a stay. In the absence of an appeal, a Court cannot under that provision consider an application for a stay. The record clearly shows that there is an application for leave to appeal pending in this Court and in effect there is no appeal in any appellate Court.

Consequently, Order 47 Rule (5) cannot be invoked by the Defendants as no appeal exists and this position was conceded by the Defendant. It would, therefore, be undesirable for this Court to proceed under Order 3 Rule 2 when Order 47 Rule (5) is not subject to that Order and has clear provision on what should be considered in an application for a stay. Besides, doing justice under Order 3 Rule 2 of the HCR does not demand that a Court should depart from settled law as the Defendant seems to suggest.

I therefore, decline to entertain the Defendant's application for a stay of execution of ruling because it is incompetently before Court. My favourable response to the *issue in limine* entails that it has merit. I award costs to the Plaintiff to be taxed in default of agreement.

Dated this 15<sup>th</sup> day of June, 2018



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