

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

CAZ/08/409/2020



BETWEEN:

**LC AND DK LIMITED (In Receivership)
ANGEL POULTRY LIMITED**

**1ST APPELLANT
2ND APPELLANT**

AND

LOVEMORE CHIKUNI CHINYAMA

RESPONDENT

CORAM : Chishimba, Ngulube and Siavwapa JJA

On 21st January, 2021 and 3rd February, 2022

For the 1st Appellant : Mrs. A. Mwalula of Messrs Ndemanga
Mwalula and Associates and Mr. D. Mutonga
of Messrs Paul Norah Advocates

For the 2nd Appellant: N/A

For the Respondent : Mr. B. Batakhathi of Messrs
Muyatwa Legal Practitioners

R U L I N G

CHISHIMBA, JA, delivered the ruling of the Court.

CASE AUTHORITIES CITED:

1. S.P Mulenga & Others v Investment Merchant Bank (1999) ZR 101
2. Micro Finance v Premier Holdings Intern Inc. 385 F 3d-72,77 (2004)
3. Annot Lyle (1886) 11P.114
4. Monk v Battram (1891) 1QB
5. Zambia Revenue Authority v Post Newspaper Limited SCZ No. 18/2016.

6. Sinim Enterprises Zambia Limited & Harry Sinyangwe V Stanbic Bank
Motion No. 2 of 2019 (CA)
7. Fred Mubiana v Zesco Limited (2012) ZRL 165

LEGISLATION REFERRED TO:

1. The Court of Appeal Act No7 of 2016

The 1st appellant, pursuant to **Section 13 and Order VII Rule 1 (1) of the Court of Appeal Rules** as read together with **Order 59 Rule 13 of the Rules of the Supreme Court** of England (RSC), has applied for an order of stay of execution pending leave to appeal our judgment dated 30th December 2021.

The application is supported by an affidavit and skeleton arguments dated 12th January 2022. The appellant, being dissatisfied with the judgment of this court, is desirous of appealing to the Supreme Court on the basis that the appeal has raised important points of law that affect the broader public interest and there are prospects of success. The applicant exhibited the proposed memorandum of appeal, contending that we erred on points of law and fact as highlighted therein. That there are novel questions of law intended to be raised for determination by the Supreme Court.

The 1st Appellant further states that they are in receipt of a letter of demand from the respondent's advocates threatening to evict the

2nd appellant from the property. That there is imminent threat of execution of judgment and it is in the interest of justice to grant the appellants a stay of execution of judgment. If not granted the appellants will be prejudiced particularly, the 2nd appellant who acquired an interest in the property will be evicted and suffer great injury. Also that the assets of the company will be further depleted by the respondent.

The appellants submit that though an appeal does not operate as a stay of execution, the court can exercise discretion to stay a judgment upon sufficient grounds. In casu that if a stay is not granted the application for leave to appeal will be rendered a mere academic exercise or nugatory. Reference was made to **Order 59 Rule 13/2 of the RSC** and the case of. Further the case of **S.P Mulenga & Others v Investment Merchant Bank** ⁽¹⁾ was cited on the principle that a stay is only granted on good and convincing reasons.

The 1st appellant also seeks a stay of proceedings pursuant to **Order 59 Rule 13 (1) of RSC** on the basis that it will assist in the facilitation of justice and enable it to prosecute the application before us. That the appellant has demonstrated the prejudice to be

suffered. The case of **Micro Finance v Premier Holdings Intern Inc. 385 F 3d-72, 77** ⁽²⁾ was cited on the balancing of competing interest in an application for a stay of execution.

It was contended that the respondent will not suffer any prejudice. Instead the appellants stand to suffer great injustice. We were implored to grant the stay of execution to enable the 1st appellant prosecute its appeal.

At the hearing of the application, the applicant's advocates reiterated the arguments advanced in the skeleton arguments which we will not rehash.

The respondent opposed the application and relied on the list of authorities and skeleton arguments in opposition dated 20th January 2022. Though the respondent alludes to having filed an affidavit in opposition, there was none placed on the record. The respondent began by making reference to **Order-59 Rule 13(2) of RSC** and the cases of **Annot Lyle** ⁽³⁾, **Monk v Battram** ⁽⁴⁾ and **Zambia Revenue Authority v Post Newspaper Limited** ⁽⁵⁾. On the principle that the court will only grant a stay of execution where there are good and compelling reasons for doing so and that a stay of execution is a discretionary remedy.

It is contended that the 1st appellant has not demonstrated that there are good or compelling reasons upon which to order a stay of execution of judgment. Further that the judgment having been declaratory in nature, does not provide for any form of execution by way of court process and as such cannot be stayed. Reference was made to the case of **Zambia Revenue Authority** (supra). In a nutshell, that the judgment sought to be stayed merely declared the writ of possession issued by the 1st appellant irregular. It did not award any money or property and there is nothing to stay that is capable of execution.

At the hearing of the application, the respondent submitted in the alternative that in any event, the application for a stay is improperly before court because there is no appeal before the Supreme Court. We were referred to the case of **Sinim Enterprises Zambia Limited & Harry Sinyangwe V Stanbic Bank** ⁽⁶⁾.

In the alternative, that should we be of the view that the application is properly before us, the respondent contends that the writ of possession subject of appeal having been set aside, the parties returned to the original position before wrongful execution. Therefore there is nothing to stay. Further in the event that there is something

to stay we must preview the prospects of success. The case of **Fred Mubiana v Zesco Limited** ⁽⁷⁾ was cited in which the Supreme Court outlined the test to be considered before granting a stay as being prospects of success and irreparable damage. We were urged to dismiss the application.

The 1st appellant in response to the contention that the application is incompetently before the court, submits that it is not erroneously before us. A motion was filed for leave to appeal on 7th January 2021 pending before the court. Leave has not yet been denied. That the judgment is capable of enforcement as per impending threat of execution. It was prayed that execution of the judgment be stayed pending determination of motion for leave to appeal to Supreme Court.

We have considered the application for a stay of execution and proceedings pending leave to appeal to the Supreme Court. As earlier stated, we delivered judgment in favour of the respondent where we held that the writ of possession executed against the respondent was irregularly issued and upheld the decision by the court below setting it aside.

The appellant seeks a stay of execution and proceedings pending the hearing of the motion for leave to appeal to the Supreme Court.

We shall begin by addressing the argument raised by the respondent that the application is incompetently before us because no appeal has been filed in the Supreme Court. This argument is misconceived. A notice of appeal in the Supreme Court can only be filed after leave to appeal has been granted by the Court of Appeal. There is pending a motion for leave to appeal. Therefore, we hold that the application for stay of execution pending leave to appeal is properly before us.

It is trite that an appeal or intended appeal shall not operate as a stay of execution or proceedings under the judgment or decision appealed against except in so far as the court considers that there are good reasons to grant a stay of execution.

The grant of a stay of execution is a discretionary and equitable remedy. It may be granted on the followings principles, where the appellant would suffer loss which could not be compensated in damages, where special circumstances of the case so require, or

where if the stay is not granted the appeal will be rendered nugatory of academic.

The 1st appellant contends that the appeal has prospects of success, having raised points of law of public importance. At this stage we will not delve deeply into the issue of prospects of success as it will be dealt with in the motion for leave to appeal to the Supreme Court.

As regards whether there are good reasons or compelling reasons for us to grant a stay of execution of judgment, we see no basis for the grant of a stay. The judgment in issue simply upheld the setting aside of the irregularly issued writ of possession. We do not see any irreparable loss or damages to be suffered by the applicant, which cannot be atoned for by award of damages in the event of the intended appeal succeeding. Further there are no special circumstances requiring that a stay be granted. In fact the effect of the judgment upholding the setting aside of the writ of possession is that the parties reverted back to their original position with possession reverting back to the respondent who was wrongly evicted.

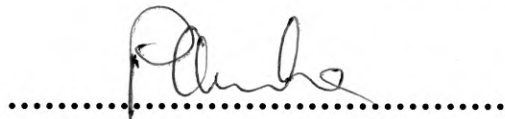
Though the appellant contends that there is imminent threat of execution, perusal of our judgment shows that the damages awarded are subject to assessment and cannot be executed upon without being assessed.

As regards the order of stay of proceedings sought, we are inclined to grant the same pending the hearing of the motion for leave to appeal and the proceedings are stayed accordingly. As regards the stay, we decline to grant the stay of execution. Costs abide the outcome of the motion for leave to appeal.



F. M. Chishimba

COURT OF APPEAL JUDGE



P. C. M. Ngulube

COURT OF APPEAL JUDGE



M. J. Siavwapa

COURT OF APPEAL JUDGE