IN THE COURT OF APPEAL OF ZAMBIA NOM/40/2023

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

RAVASIA PETROLEUM LIMITED **APPELLANT**

AND

KUTASHA INDUSTRIES (PTY) (T/A LIQUID SOLUTIONS RSA) **RESPONDENT**

CORAM: Mchenga, DJP, Banda-Bobo and Sharpe-Phiri, JJA
On 17th October, 2023 and 19th January, 2024.

For the Appellant: N/A

For the Respondent: N/A

RULING

Banda-Bobo, JA, delivered the Ruling of the Court.

Cases referred to:

1. Sonny Paul Mulenga and Others v. Investrust Merchant Bank (1999) ZR 101
2. Wilson v. Church (No. 2) (189) 12 ChD, 454
3. Richard M. Chizyuka and Another v. Credit Bank Limited (Appeal No. 8/113/99)
4. Zambia Revenue Authority v Post News Papers Limited (Appeal No. 36 of 2016) (S.C.)

Legislation referred to:

- The Court of Appeal Rules, 2016
- The Rules of the Supreme Court, (RSC) White Book, 1999 Edition

1.0 Introduction

1.1 This is a Ruling on a Notice of Motion by way of renewal, of an application from the decision of a single Judge of this Court. The Applicant seeks an order for stay of Execution of a Ruling dated 30th November 2021, pending determination of an appeal before this Court. The application is made pursuant to Section 9(b) of the Court of Appeal Act, No. 7 of 2016 as read together with Order X rule 2(8) of the Court of Appeal Rules, 2016.

2.0 Background

2.1 The brief background is that the respondent instituted proceedings against the appellant herein.

2.2 Later, the appellant filed three applications before the trial Judge, namely:-

(a) An application to raise a preliminary issue;

(b) An application for an order for special leave to review the Ruling of 30th November, 2021;

(c) An application for an order to stay execution of the Ruling of 30th November 2021.

2.3 The learned Judge, in his Ruling of 20th January 2023 declined to grant any of the applications as set out above.

3.0 **The Appeal**

3.1 Dissatisfied with the turn of events, the appellant, on 25th January 2023 filed a Notice of Appeal and Memorandum of appeal. Three grounds of appeal were proffered, namely:-

> **Ground One: The learned High Court Judge erred in law and fact when he held that the application for special leave was not brought within 14 days when the law provides that an application for leave can be brought after 14 days from the date of the Ruling;**
>
> **Ground Two: The learned High Court Judge erred in law and fact when he refused the application for special leave for review of the Ruling dated 30th November, 2021, but went to determine the substantive application for review which was not before him when the application which was before him was for special leave to review;**

Ground Three: The learned High Court Judge erred in law and fact when he dismissed the preliminary issues raised, as being destitute of merit contrary to the evidence before him.

3.2 Further, the applicant had applied before the High Court, for an order to stay execution. However, the same was denied by the lower court on 20th January 2023. The applicant promptly renewed the application before a single Judge of this Court.

4.0 **Decision of the single Judge**

4.1 On 2nd May 2023, the learned single Judge of this Court declined to grant the stay of execution and dismissed it for lack of merit.

4.2 The single Judge considered whether the applicant had advanced cogent and sufficient reasons to warrant the grant of an order of stay of execution.

4.3 She then considered the prospects of success and found that these were dim. As such, she opined that this was not a proper case in which she could exercise her

discretion to grant an order of stay of execution pending appeal.

5.0 **Renewed Application before the full Court**

5.1 The applicants, being dissatisfied with the decision of the single Judge, have by way of Notice of Motion, now renewed the application before us. This being a renewed application, the applicant filed before us, the same documents filed before the single Judge of this Court.

5.2 In the accompanying affidavit for a stay of execution sworn by Farook Gulam Mohammed Seedat, it was deposed that the lower court on 20th January 2023 declined to grant an order to stay execution of the Ruling dated 30th November 2021.

5.3 He alluded to the dissatisfaction with the Ruling, and the filing of the Notice and Memorandum of Appeal as a result. That an application to stay was renewed before a single Judge of this Court, but the same was declined. That this application is therefore a renewal of the application declined by the single Judge of this Court.

5.4 It was averred that this application to the full court is made on the grounds that:-

(i) The appeal has high prospects of success;

(ii) That there are special and cogent reasons warranting the stay of the High Court Ruling dated 30th November 2021, these being:-

(i) The fact that the business of the applicant has been crippled due to the suspension of its trading licence by the Energy Regulation Board from 29th June 2022 to date;

(ii) That both parties had been in the business of distribution, importation and exportation of petroleum products. That prior to the suspension of the licence, the applicant had diligently serviced its judgment debt and liability to the respondent monthly, in sums of US$40,000. That however, after the said suspension, its business was falling, which led to its failure to pay the Judgment debt as ordered in the Ruling of 30th November 2021;

(iii) That the suspension of its licence has negatively affected its financial status;

(iv) That if the respondent was to execute on the judgment debt, the subject of the appeal, the applicant will be left a shell of what is left of it currently, and it would suffer irreparable damage, while the appeal will be rendered nugatory.

5.5 That the applicant has demonstrated good and sufficient reasons for the granting of the application for the stay of execution by this Court.

5.6 We were beseeched to grant the order sought; and that no prejudice will be occasioned to the respondent if the same is granted.

5.7 In the application before the single Judge, the application had been opposed on grounds that the applicant was seeking an order of stay of execution of a judgment or ruling that it had not appealed against. That the applicant had been permitted upon application, to liquidate the debt

in instalments, on 30th November 2021, in a monthly sum of US$40,000. That it defaulted in paying this amount.

5.8 That the applicant has not satisfied the requirements for the grant of an order of stay of execution of the High Court Ruling.

6.0 **Arguments**

6.1 Both parties, in the matter before the single Judge filed arguments, which we have considered, but we do not intend to reproduce them herein.

7.0 **Hearing**

7.1 None of the parties appeared at the hearing despite there being evidence of service of the Notice of Hearing.

8.0 **Our Analysis and Decision**

8.1 We have carefully considered the application and the Ruling rendered by the single Judge of this Court. The issue for determination is whether this is a matter in which we should grant a stay of execution pending appeal and thereby vary, reverse or discharge the Ruling of the single Judge that refused to grant the order sought in the first place.

8.2 Section 9(b) of the Court of Appeal Act, on which this Motion is premised states that:-

> **"9(b) In civil matters, an order, direction or decision made or given in pursuance of the powers conferred by this Section, may be varied, discharged or reversed by the Court."**

8.3 Order X rule 2 (8) of the Court of Appeal Rules states that:-

> **"(2)(b) A person who is aggrieved by a decision of a single judge and who intend to have such decision varied, discharged or reversed by the court under Section 9(b) of the Act, shall, before the date of hearing of the application by the court, file three extra copies of the proceedings ..."**

8.4 From the above, it is evident that the Court is vested with powers to vary, discharge or indeed reverse the decision of the single Judge. It is trite that this Court is vested with discretionary power to grant a stay of execution.

8.5 Order 59/13/2 of the Rules of the Supreme Court, (RSC) White Book, 1999 Edition is pertinent, as regards the circumstances under which this Court can rightly exercise its discretion to grant a stay, where it states that:-

"Neither the court below nor the Court of Appeal will grant a stay, unless satisfied that there are good reasons for doing so ... This applies not merely to execution, but to the prosecution of proceedings under judgment or order appealed from."

9.0 In the case of **Sonny Paul Mulenga and Others v. Investrust Merchant Bank**[1] it was guided that:-

"In terms of our rules of court, an appeal does not automatically operate as a stay of execution; and it is utterly pointless to ask for a stay solely because an appeal has been entered; more is required to be advanced to persuade the court below, or indeed this Court that it is desirable, necessary and just to stay a judgment pending appeal ...

In exercising its discretion, whether to grant a stay or not, the court is entitled to preview the prospects of success of the proposed appeal."

9.1 In the case of **Wilson v. Church**[2] it was stated that:-

"... I will state in my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see to it that the appeal, if successful is not rendered nugatory."

9.2 In the case of **Richard M. Chizyuka and Another v. Credit Bank Limited**[3] it was held that:-

> **"... the court should examine the prospects of the application succeeding in the appeal, and it should not only be desirable but necessary and just to stay a judgment pending appeal."**

9.3 Additionally, in the case of **Zambia Revenue Authority v Post News Papers Limited**[4] the Supreme Court observed that:

> **"..... where a Judgment or Ruling is stayable, the principles state that stay of execution pending appeal, is a discretionary remedy. A party is not entitled to it as of right and such discretion must be exercised judiciously and on well-established principles. Firstly, the successful party should not be denied the immediate enjoyment of a Judgment, unless there are good and sufficient grounds. Stay of Execution should not be granted for the mere convenience of the Post. Neither should it be granted purely on sympathetic or moral considerations. Secondly, in exercising its discretion, whether to grant a Stay or not, the Court is entitled to preview the prospects of success of the proposed appeal..... we wish to emphasize that the prospects of success of the pending appeal, is a key consideration, in deciding whether or not to stay execution of the Judgment appealed against."** (emphasis by the Court)

9.4 The above authorities make it clear that before a court can exercise its discretion to grant a stay of execution of judgment pending appeal, it ought to be satisfied that the applicant has a claim on merit. The court has to be satisfied that there is something more which makes it just and necessary for a stay to be granted and for the other party to be deprived of enjoying the fruits of its judgment.

9.5 It is also apparent from the authorities that the court is entitled to preview the prospects of success of the proposed appeal. It is also pertinent that if the appeal has prospects of success, it should not be rendered nugatory by the court not granting the stay, as that may ruin the applicant.

9.6 Finally, it is patent that there must be an appeal pending hearing.

9.7 Reverting to the matter before us, the applicant has contended that the appeal before court has prospects of success, that there are special circumstances warranting the grant of an order of stay, and that the applicant will

suffer irreparable damage if the stay of execution is not granted and the applicant succeeds.

9.8 On the other hand, the respondent contended that the application is unsustainable in that the applicant seeks an order for a stay of execution in a judgment that it has not appealed against, nor is it a subject of proceedings before this Court. That the proposed grounds of appeal are bereft of merit, and so prospects of success are not there. Further, that there are no special circumstances that justify the applicant keeping the respondent out of its money.

9.9 We have considered the Ruling of the single Judge. We have also considered the Ruling of the lower court, and the grounds of appeal proffered. We have come to the inescapable conclusion that this is not a matter in which we can exercise our discretion and grant a stay. Our perusal of the record shows that no cogent and sufficient reasons have been advanced to warrant the grant of such an order. Further, we find that there are no prospects of success of the appeal. Furthermore, we find no basis on

which to vary, discharge or indeed reverse the decision of the single Judge who declined to grant a stay of execution pending appeal. It is our view, that the prospects of success of the appeal are pretty dim.

9.10 Finally, we have noted, and agree with the respondent, that the applicant seeks to stay a Ruling that it has not appealed against, and which is not a subject of proceedings before this Court. It is patent from the cited authorities that a stay will only be granted where there is an appeal pending hearing.

9.11 On 30th November, 2021, the lower court entered a Ruling against the applicant, in the sum of US$765,666.68 to be liquidated in monthly instalments of US$40,000; effective January, 2022 month end. It was against that Ruling that the applicant filed an application for special leave to review, whose essence was to ask the court below to vary the Order for US$40,000 to a lesser figure. From the grounds of appeal, it is apparent that the initial Ruling of 30th November, 2021 has never been appealed against; and it is not the subject of the appeal herein. That being

the case, it cannot be the subject of a stay as there is no appeal against it. This reinforces our view that the prospects of success are dim.

9.12 Accordingly this application lacks merit and it is dismissed with costs to the respondent, to be taxed in default of agreement.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE