

IN THE COURT OF APPEAL OF ZAMBIA

App No. 81 of 2023

HOLDEN AT LUSAKA

CAZ/08/48/2023

(Civil Jurisdiction)



BETWEEN:

PAMUTENDE FARMS LIMITED

1ST APPELLANT

ANTONETTE BLANKENBERG

2ND APPELLANT

AND

ALESSANDRA VALENZA

RESPONDENT

Coram: Chashi, Sichinga and Sharpe-Phiri, JJA
27th March, 2024 and 10th April, 2024

*For the Appellants: Mr. C. Salati and Ms. C. Tembo- Shula of Messrs.
Mulenga Mundashi Legal Practitioners*

For the Respondent: Mrs. D. Findlay of Mesdames D. Findlay & Associates

JUDGMENT

Sichinga JA, delivered the judgment of the court.

Cases referred to:

- 1. Mambo New Advanced Pharmacy v Mwenya Katungu Entreprises
HP/996/2015*
- 2. Rosemary Bwalya v Mwanamuto Investment Limited and Others CAZ
Appeal No. 139 of 2017*
- 3. Sharp v Wakefield HL 1891*

4. *BP Zambia Plc v Interland Motors Limited* (2001) ZR 37
5. *Wilheim Roman Buchman v The Attorney-General* SCJ No. 76 of 1994
6. *The Attorney-General v Nigel Mutuna and Others* SCZ Appeal No. 232 of 2013
7. *Lufunda Shindola v The People* SCZ Appeal No. 48 of 2003
8. *Choonga v Zesco Recreation Club, Itezhi Tezhi* SCZ Appeal No. 168 of 2013
9. *Gerrison Zulu v Zesco Limited* (2005) ZR 39
10. *Mumba v Lungu* (2014) Vol. 3 ZR 351
11. *Taylor v Lawrence* (2003) QB 528
12. *Shedden v Patrick* (1869) IHL SC 470, 545
13. *Zambia Revenue Authority v Hitech Trading Company Limited* SCZ Judgment No. 40 of 2000
14. *Dr. Aloys Wobben and Another v Yogesh Mehra and Others* (2014) AIR 2210
15. *Finance Bank Zambia Ltd v Official Receiver (As Interim Receiver of the Estate of Dimitrios Mono-Kandilos (in Bankruptcy) and Another* SCZ Appeal No. 37 of 2019
16. *Royal bank of Scotland v Citrusdal Investments Limited* (1971) 3 All ER 558
17. *Thames Launches Ltd v trinity House of Deptford Strond* (1961) 1 All ER 26
18. *Kelvin Hang'andu & Co., (A Firm) v Webby Mulubisha* (2008) 2 ZR 89
19. *Societe Nationale des Chemis de Pur du Congo v Kakonde* SCZ Appeal No. 183 of 2008
20. *Hakainde Hichilema and Others v The Government of the Republic of Zambia* SCZ Appeal No. 28 of 2017

Legislation referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England* (1999 Ed.) Vol. 1

Other authorities referred to:

1. *Halsbury's Laws of England 4th edition Volume 37*

1.0 Introduction

- 1.1 This is an appeal against the Ruling of the High Court (Mapani-Kawimbe J, as she then was) dated 8th December, 2022, on the respondent's application for an order to stay proceedings pending the hearing and determination of: (i) an application for an order of interim attachment of property; and (ii) an application to pierce the 1st defendant's corporate veil under cause number 2014/HPC/0148 pursuant to **Order 3 Rule 2 of the High Court Rules**¹. The learned Judge in the court below granted the application and ordered the proceedings in this matter to be stayed pending the outcome of proceedings under cause no. 2014/HPC/0148.

2.0 Brief facts

- 2.1 The respondent, on 31st March, 2014, commenced an action against the appellants in the High Court, Commercial Division under cause no. 2014/HPC/0148 claiming *inter alia*, rescission of a contract entered into between the 2nd appellant and the respondent for the sale of shares and an order for the refund of US\$328,547.47. Judgment was handed down in that matter on 26th May, 2017 wherein Nkonde J ordered the 2nd appellant to pay the respondent monies paid and expended to the 2nd appellant for the benefit of the 1st appellant.

- 2.2 On 26th March, 2018, the respondent commenced assessment proceedings, which are said to be pending. Further applications by the respondent to pierce the 1st appellant's corporate veil and for an interim attachment of property are also pending in the said action.
- 2.3 Following the judgment under cause no. 2014/HPC/0148, on 22nd June 2022, the respondent placed a caveat on the 1st appellant's property, Farm No. 9881, Mpongwe, since the 2nd appellant was the sole shareholder of the 1st appellant company after the demise of the other joint shareholder, one Denis Pelos in 2015.
- 2.4 On 14th October, 2022, the appellants commenced an action under cause no. 2022/HP/1631 by way of originating summons for an order for removal of the caveat placed on the property by the respondent. The action was before Mapani-Kawimbe J.
- 2.5 On 9th November, 2022, the respondent applied to stay execution of the proceedings under cause no. 2022/HP/1631 pending the outcome of proceedings under cause no. 2014/HPC/0148. The application was scheduled to be heard on 8th December, 2022. The appellants were served with the application on 7th December, 2022. They applied for the hearing of the application for the stay of proceedings to be adjourned.
- 2.6 Mapani-Kawimbe J declined the application to adjourn the matter and to hear the application for the removal of the caveat. She delivered her ruling on 8th December, 2022, which is the subject of this appeal.

3.0 The appeal

3.1 Dissatisfied with the Ruling of the court below, the appellants, on 27th January, 2023, lodged this appeal before the Court, advancing the following grounds:

1. **The court below erred in law and fact, when it proceeded to determine the respondent's application to stay the proceedings for the removal of the caveat placed over the 1st appellant's property, when the stay application was only served on the applicants a day before the hearing date; and**
2. **The court below erred in law and fact, when it proceeded to stay the removal of caveat proceedings and held that the court would make conflicting decisions if the application for the removal of the caveat was heard and determined, without considering that action under cause no. 2022/HP/1631, has no bearing on the action under cause no. 2014/HPC/0148.**

4.0 Appellants' arguments

4.1 The appellants filed their heads of argument on 27th March, 2023.

4.2 In support of the first ground of appeal, the appellants argued that **Order 30 Rule 3 of the High Court Rules supra** provides that summons shall be served four clear days before the hearing, unless in any case it shall be otherwise ordered. It was submitted that the provision is couched in mandatory terms, and therefore, it was not in the respondent's discretion to elect when to effect service on the appellants.

4.3 The Court was asked to note that the respondent had made an application to stay proceedings which was scheduled to be heard on 8th December, 2022. That the

appellants also filed a notice to adjourn the main hearing for the removal of the caveat. On 16th December 2016, the appellants, through their advocates, filed a further application to adjourn the stay application on the ground that they were served with the application a day before and had no opportunity to respond.

- 4.4 The appellants submitted that it appeared to be the respondent's intention to ambush them, which is frowned upon in litigation. Reliance was placed on the case of ***Mambo New Advanced Pharmacy v Mwenya Katungu Enterprises***¹ in which the lower court loathed the element of surprise or ambush as having no place in good and fair litigation.
- 4.5 It was submitted that the court was wrong to proceed to hear the application and further grant the application to stay proceedings. We were urged to set aside the ruling of the lower court.
- 4.6 On the second ground of appeal, the appellants complain against the lower court's holding that there would be conflicting decisions if the application for the removal of the caveat was heard.
- 4.7 Our attention was drawn to ***Halsbury's Laws of England***¹ at paragraph 437 where it states as follows:

"A stay of proceedings arises under an order of the court which puts a stop or stay on the further conduct of the proceedings in that court at the stage which they have reached so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action

taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of the process.”

4.8 We were referred to considerations a court takes into account when granting an order to stay proceedings. Reliance was placed on the case of **Rosemary Bwalya v Mwanamuto Investment Limited and Others**² where we stated that it is trite that for a stay of proceedings to be granted, there must be special circumstances demonstrated by the applicant.

4.9 The appellants submitted that in exercising its discretion to grant a stay of proceedings, the court below should have had regard to fairness and justice. Reliance was placed on the English case of **Sharp v Wakefield**³ where it was held *inter alia* that:

“Where judicial discretion is exercised, the action should be according to the rules of reason and justice, not according law and not humour. In other words, discretion ought not to be arbitrary but regular and legal.”

4.10 It was argued that the lower court did not exercise its discretion judiciously and gravely prejudiced the appellants by granting the stay of the removal of caveat proceedings.

4.11 Ultimately, it was submitted that an application to remove a caveat is different from an application to pierce the corporate veil of a company or for interim attachment of property because the reliefs being sought are different. That conflicting decisions are only possible where the subject matter between

two different courts is the same. Reliance was placed on the case of ***BP Zambia Plc v Interland Motors Limited***⁴.

4.12 We were urged to find in favour of the appellants and set aside the ruling of the lower court.

5.0 Respondent's arguments

5.1 The respondent filed her heads of argument on 5th March, 2023.

5.2 In response to the appellant's first ground of appeal, it was submitted that the appellants were seeking to appeal on matters that were never placed before the lower court. That the assertion that the appellants were only served with the application a day before was noted before the lower court. We were invited to consider the lower court's proceedings at line 12 of page 448 of the record of appeal, which indicates that the appellants' counsel had nothing to say in relation to the scheduled application to stay proceedings.

5.3 We were referred to a number of authorities on the principle that a matter that is not raised in the court below cannot be raised before an appellate court as a ground of appeal. These include ***Wilhelm Roman Buchman v The Attorney-General***⁵, ***The Attorney-General v Nigel Mutuna and Others***⁶, ***Lufunda Shindola v The People***⁷, ***Choonga v Zesco Recreation Club, Itezhi Tezhi***⁸ and ***Gerrison Zulu v Zesco Limited***⁹ and ***Mumba v Lungu***¹⁰. That in the latter case the Supreme Court guided that in allowing a party to do so in bringing new matters before an

appellate court undermines the respective functions of the trial courts and policy of the law.

- 5.4 We were invited to note that the letter of service at page 17 of the record of appeal: (i) does not form part of the proceedings in the court below; (ii) amounts to new evidence adduced on appeal; and (iii) evidence at the bar. It was submitted that it is trite that evidence which was available but not adduced before the lower court cannot be permitted on appeal, as it allows a litigant to have a second bite of the cherry. Reliance was placed on the cases of ***Taylor v Lawrence***¹¹ and ***Shedden v Patrick***¹².
- 5.5 Counsel submitted that it was inappropriate to sneak in new evidence in this manner, and also inappropriate to adduce such evidence at the bar. The case of ***Zambia Revenue Authority v Hitech Trading Company Limited***¹³ referred to.
- 5.6 In conclusion, it was restated that the first ground of appeal is premised on an issue that was never argued in the court below.
- 5.7 In response to the appellants' contention under the second ground of appeal, it was submitted that it is trite law that the granting of an order to stay proceedings is a discretionary remedy under the court's inherent jurisdiction. That it is exercised with due regard to all the circumstances of the case while bearing in mind that the object of the order is to prevent undue prejudice or abuse of the court process.

- 5.8 It was contended that whilst the appellants argued that the lower court did not exercise its discretion judiciously as its decision prejudiced the appellants, the issue of prejudice was never brought to the attention of the lower court. Pages 446 to 450 of the record of appeal referred to.
- 5.9 Regarding the appellants' contention that the lower court did not apply its discretion judiciously on the ground that it did not understand the facts, it was submitted that issues relating to the caveat were not considered by the lower court. That the lower court only considered whether there was a basis for staying the proceedings with regard to the circumstances. It was submitted that the lower court exercised its inherent power to prevent abuse of the court process by staying proceedings, where there is a possibility of conflicting decisions on issues that are likely to arise in both matters. The case of ***BP Zambia PLC v Interland Motors Limited*** *supra* referred to.
- 5.10 The respondent referred to a plethora of authorities on the test to be applied in determining whether a subsequent matter should be stayed. These include but not limited to the cases of ***Dr. Aloys Wobben and Another v Yogesh Mehra and Others***¹⁴, ***Finance Bank Zambia Ltd v Official Receiver (As Interim Receiver of the Estate of Dimitrios Mono-Kandilos (in Bankruptcy) and Another***¹⁵, ***Royal bank of Scotland v Citrusdal Investments Limited***¹⁶, ***Thames Launches Ltd v Trinity House of Deptford Strond***¹⁷, ***Kelvin Hang'andu & Co.***,

(A Firm) v Webby Mulubisha¹⁸ and Societe Nationale des Chemis de Pur du Congo v Kakonde¹⁹.

5.11 It was argued that in line with these authorities the lower court was on firm ground in determining that the two actions and the issues therein were closely related. Therefore, there existed the possibility of conflicting decisions from two courts.

5.12 In conclusion we were urged not to interfere with the lower court's exercise of its discretion.

6.0 Considerations on appeal

6.1 We have carefully considered the record of appeal including the ruling of the court below and the arguments of the parties. The all-encompassing question is whether the learned Judge in the court below judicially stayed the proceedings of the matter under cause no. 2022/HP/1631 before her, pending the outcome of applications in cause no. 2014/HPC/0148. We will address the two grounds of appeal simultaneously as they are interrelated.

6.2 It is trite that the High Court has general judicious power for the fair administration of justice to make any interlocutory orders it considers necessary for doing justice. This includes the power to stay the whole or any part of any proceedings or judgment either generally or until a specified date or occurrence. The court's general power is found in **Order 3 Rule 2 of the High Court Rules** *supra*. It provides as follows:

“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

6.3 In the case of ***Hakainde Hichilema and Others v The Government of the Republic of Zambia***²⁰ the Supreme Court had the following to say on the applicability of *Order 3 Rule 2*:

“Looking at the provisions of Order 3 rule 2 of the High Court Rules, it is clear that the Order only applies to interlocutory orders and not final orders.”

6.4 In our view, this means that while a stay is in place, the proceedings remain alive. However, no further steps may be taken to progress the claim other than an application to lift the stay.

6.5 In the present case, the court below was faced with two applications on record. The first was the substantive application by the appellants for the removal of the caveat pursuant to which the action commenced under cause number 2022/HP/1631 on 14th October, 2022. So far as is relevant to this appeal, it was scheduled to be heard on 8th December, 2022. The second was the application, by the respondent, to stay the proceedings pending the outcome of two other applications under cause no. 2014/HPC/0148. It, too was scheduled to be heard on 8th December, 2022.

6.6 On the date of hearing, 8th December, 2022, the court was faced with yet another application by the appellants, to adjourn the hearing for the removal of the caveat and the

hearing for the stay as they had only been served a day before, on 7th December, 2022 with the application for the stay. The court below refused the applications to adjourn and proceeded to determine the application to stay the proceedings.

- 6.7 The learned Judge cannot be faulted for proceeding to grant a stay as the wording of *Order 3 Rule 2 of the High Court Rules* is clear. Such an interlocutory order may be made whether expressly made by a party or not. From the proceedings at pages 446 to 448 of the record of appeal, the appellants did not object to the lower court's decision to proceed with the application to stay. Further, the learned Judge in the court below availed the appellants an opportunity to be heard to which they stated they had nothing to say. The first ground lacks merit and is accordingly dismissed
- 6.8 Turning to the issue of the substantive matter, in granting the stay of proceedings, the learned Judge had the following to say:

“It is clear from the affidavit in support of the application for stay that the caveat which the applicants’ seek to remove is predicated by suit no. 2014 HPC/0148. The respondent has made 2 applications in that cause and one that deals with the substance on the piercing of the 1st applicant’s corporate veil.

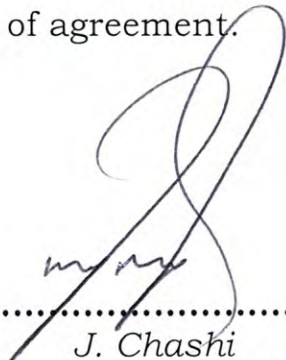
To avoid the possibility of the courts making conflicting decisions with the potential of embarrassing themselves. I shall stay proceedings in this suit in anticipation of the outcome of cause no. 2014/HP/0148.”

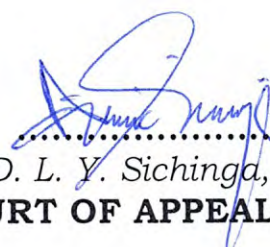
- 6.9 It is clear that in granting the order to stay the learned Judge was concerned with the resultant effect of the piercing of the 1st applicant's corporate veil in light of the application for the removal of the caveat pending before her, given that the subject property is registered in the name of the 1st appellant.
- 6.10 Granted the application under cause no. 2014/HPC/0148 for the application to pierce the veil is different from the application for the removal of the caveat. Considering the circumstances of this case, we accept the respondent's submission that the decision under cause no. 2014/HPC/0148 would have a bearing in the current suit.
- 6.11 The appellants, in one breath attack the learned Judge for lacking a proper understanding of the facts to enable her exercise her discretion judiciously and contend this gravely prejudiced them. Yet in the next breathe they go on to rely on the case of ***BP Zambia Plc v Interland Motors Limited supra***, which speaks to possible conflict over the same subject matter and not to similar actions before two courts as they sought to advance in their submissions.
- 6.12 Courts may grant stays for various reasons relating to the efficient progress of the proceedings which make an order to stay desirable. In the present case, the learned Judge was concerned with the possibility of conflicting decisions over the same subject matter before her. Whilst the appellants have argued that they were prejudiced, there have failed to

demonstrate the prejudice they would suffer in staying the proceedings. In any event, the order for stay granted was interlocutory and not final. The appellants will still be heard on their substantive suit for the removal of the caveat. The second ground of appeal is misconceived and suffers the same fate as the first one. It is dismissed.

7.0 Conclusion

7.1 Both grounds of appeal having failed, this appeal is hereby dismissed for lack of merit, with costs to the respondent to be taxed in default of agreement.


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J. Chashi
COURT OF APPEAL JUDGE


.....
D. L. Y. Sichinga, SC
COURT OF APPEAL JUDGE


.....
N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE