

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

2021/HP/0195

BETWEEN:



ANTONIO VENTRIGLIA

1ST PLAINTIFF

MAUELLA VENTRIGLIA

2ND PLAINTIFF

ZAMBEZI PORTLAND CEMENT LIMITED

3RD PLAINTIFF

AND

**EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK**

DEFENDANT

**Before the Honourable Lady Justice S. Chocho in chambers, the 21st day of
January 2025.**

*For the Plaintiffs: Mr. S Mambwe, Mr. A Siwila both of Messers Mambwe,
Siwila & Lishimba Advocates and Mr. C Sianondo of
Messers Malambo & Company.*

For the Defendant: Mr. C.J Mumba of Messers Chibesakunda & Company.

R U L I N G

Cases referred to:

- 1. Zambia Revenue Authority v Post Newspapers SCZ Judgment
No. 18 of 2016.***
- 2. Bidvest Food Zambia1 and Others v CAA Import and Export
Limited SCZ Appeal No. 56 of 2017.***
- 3. Namulya Mungomba and Others V Peter Machungwa and
Others SCZ No. 3 of 2003.***

4. *Barnes V Black Horse Limited (2012) EWHC 1950 (QB).*
5. *LC and DK Limited (In receivership) and Another v Lovemore Chikuni Chinyama CAZ Appeal 270 of 2020.*
6. *Director of Public prosecutions V Esther Nyawa Tembo Lungu 2023 /HPEF / 23.*
7. *Wang Ying v Youjun Zhuang and Others 2020/CCZ/0155*

Legislation and other Authorities referred to:

1. *Order 13 Rule 12 of the Court of Appeal Rules.*
2. *Section 13 of the Court of Appeal Act, Act No. 7 of 2016.*
3. *Order 47 Rule 5 of The High Court Rules, Chapter 27 of the Laws of Zambia.*
4. *Halsbury's Laws of England 4th Edition, Vol 37 pages 330-332.*

1. INTRODUCTION

- 1.1. This Ruling is in respect of an application by the Defendant for an Order to stay proceedings pending determination of Notice of Motion for an Order for leave to appeal to the Supreme Court of Zambia and also pending determination of the appeal if leave is granted made pursuant to **Order 10 Rule 5 , Order 13 Rule 12 of the Court of Appeal Rules, Section 13(4) of the Court of Appeal Act, Order 59 Rule 13 of the Rules of the Supreme Court of England and Order 3 Rule 2 of the High Court Rules.**

1.2. The application is supported by a composite affidavit deposed to by one Edward Sampa and a list of authorities and skeleton arguments filed into Court on August 23rd, 2024.

2. BACKGROUND

2.1. The background to this matter as per pleadings and affidavit evidence presented before Court is that the Plaintiffs commenced this action against the Defendant by way of Writ and Statement of Claim on March 23rd, 2021 claiming the following reliefs:

- i) An Order that Consent Order entered into between the 3rd Plaintiff and the 1st and 2nd Defendants in cause number 2008/HN/268 (2013/HP/0021) dated April 16th, 2014 to be set aside on the ground that it was entered into by mistake and or/misrepresentation;
- ii) Damages arising from the entry of the Consent or Order;
- iii) Interest on the amount due;
- iv) Further and other relief; and
- v) Costs of the suit.

2.2. The Defendant filed an application for an Order to set aside and/or strike out action for irregularity and/or lack of Jurisdiction on August 20th, 2021 which was dismissed in a Ruling dated February 28th, 2022.

- 2.3. The Defendant appealed the decision of the High Court in the Ruling dated February 28th, 2022 by filing into the Court of Appeal its Notice of Motion and Memorandum of Appeal on March 10th, 2022.
- 2.4. In a Judgment dated June 28th, 2024, the Court of Appeal dismissed the Defendant's appeal.
- 2.5. The Defendant on July 12th, 2024 filed into the Court of Appeal an application for leave to appeal to the Supreme Court.
- 2.6. In light of the pending application before the Court of Appeal the Defendant made an application for an Order to stay proceedings pending determination of Notice of Motion for an Order for leave to appeal to the Supreme Court of Zambia and also pending determination of the Appeal if leave is granted.

3. AFFIDAVIT EVIDENCE

- 3.1. The Defendant filed an affidavit deposed by one Edward Sampa on August 23rd, 2024.
- 3.2. The Defendant avers that in order to appeal to the Supreme Court of Zambia, the Defendant is required to obtain leave to appeal from the Court of Appeal and on July 12th, 2024, the Defendant made its application for leave to appeal to the Supreme Court.

- 3.3. The Defendant avers that if the proceedings before this Court were to continue and reach their conclusion prior to the determination of the appeal, the notice of motion for leave to appeal and the subsequent appeal will be rendered a nugatory.
- 3.4. The Defendant avers that if the proceedings before this Court are not stayed there is a risk of great expense being occasioned and there will be a waste of time if the Appellate Court renders a decision contrary to the Ruling of this Court.
- 3.5. The Defendant avers that the notice of motion for leave to appeal and the intended appeal have reasonable prospects of success.
- 3.6. The Defendant further avers that the notice of motion and the intended appeal are concerned with matters of significant public interest.
- 3.7. In opposition, the Plaintiffs filed an affidavit in opposition on September 11th, 2024 deposed by one Danielle Ventriglia.
- 3.8. The Plaintiffs aver that the Court of Appeal having rendered its decision dismissing the appeal, the application to stay proceedings will nullify the effect of the Court of Appeal Judgment as there is no active appeal.
- 3.9. The Plaintiffs aver that the Defendant is trying to obtain advantage by perpetuating the Consent Judgement subject of challenge.

3.10. The Plaintiffs aver that stay of proceedings is a serious and fundamental interference with a party's right to litigate towards the trial on the substantive merits of the case.

3.11. The Plaintiffs further aver that the matter is not wantonly brought by the Plaintiffs but has merit and is not fit for staying as there is no appeal.

3.12. The Plaintiffs aver that the Defendant made the present application with an intention to delay proceedings.

4. THE LAW AND SUBMISSIONS

4.1. I have had occasion to review and consider the application, having heard Counsel for the Plaintiffs and Counsel for the Defendant, read the affidavits, skeleton arguments and list of authorities for which I am grateful.

4.2. The Defendant submits that the decision whether to grant a stay of proceedings or not lies within the discretion of this Court. Placing reliance on the **Order 13 Rule 12 of the Court of Appeal Rules**.

“Where an application may be made to the Court of the High Court, it shall be made in the first instance to the High Court”.

- 4.3. The Defendant submits that the threshold to be met for the grant of stay of proceedings is simply that there must be good reasons and that what amounts to good reasons varies but includes:
- i) The consideration of irreparable damage to be suffered;
 - ii) Prospects of success;
 - iii) Whether the appeal will be rendered a nugatory; and
 - iv) Saving unnecessary expenses and the Courts time.
- 4.4. The Defendant relied on the cases of **Zambia Revenue Authority v Post Newspapers SCZ Judgment No. 18 of 2016** and **Bidvest Food Zambia¹ and Others v CAA Import and Export Limited SCZ Appeal No. 56 of 2017²** which I have taken note of.
- 4.5. The Defendant submits that an appeal is yet to be filed as there is a pending application for leave to appeal and there is need for the status quo to be maintained to avoid the leave to appeal and the intended appeal being rendered a nugatory.
- 4.6. The Defendant further submits that if the proceedings in this action had to continue while the application for leave or intended appeal is pending and Judgment is entered in favour of the Plaintiffs, the decision of the Appellate Court granting leave to appeal or upholding the Defendant's appeal will be rendered moot. The Defendant placed reliance on the case of Dean **Namulya**

Mungomba and Others V Peter Machungwa and Others SCZ

No. 3 of 2003³ in which the Supreme Court stated as follows:

“The learned trial judge correctly directed himself when he said he was not asked to stay a judgment but proceedings pending the hearing or happening of something, namely the results of the appeal to Supreme Court. After considering whether the stay should be refused on the ground of prejudice, delay or abuse of process the learned trial judge was of the view that these are not matters available in the present proceedings. In not so many words, he felt that if he was wrong in not joining Dr. Kalumba under Order 14 of the High Court Rules, then the judicial review proceedings would go on without affording him a chance to be heard, the whole process would be nugatory or a waste of time. We cannot fault the approach taken by the learned trial judge to granting the stay. He properly exercised his inherent jurisdiction to stay the judicial review proceedings pending the hearing of this appeal”.

- 4.7. The Defendant submits further that it is prudent and procedurally efficient that the High Court’s proceedings be stayed in order to prevent a waste of this Courts time in the event that the Defendant is successful in obtaining leave to appeal and subsequently successful in its appeal which will have the effect of terminating the Plaintiffs’ entire action.

- 4.8. The Defendant submits that the Plaintiff will not suffer prejudice if the Order for stay is granted considering that the proceedings in casu were only commenced until many years after the Plaintiff became aware of the facts on which they based their claim and any delay caused by the determination of the pending appeal will not cause the Plaintiff to suffer any prejudice. In making this submission, the Defendant relied on the case of **Barnes V Black Horse Limited (2012) EWHC 1950 (QB)**⁴.
- 4.9. The Defendant submits that the it has met the requirements in **Section 13 of the Court of Appeal Act** as the Appeal has prospects of success and it reveals sufficient public interest.
- 4.10. The Defendant submits further that the Defendant's immunity from suit is an important issue of public interest and that if the Ruling of 28th February, 2022 is allowed to stand, there will be serious consequences adverse to various sectors of the Zambia society.
- 4.11. The Defendant submits that it exists to promote economic and social development in its member states which include Zambia and if Zambia does not recognize and apply the immunity to which the Defendant is entitled to, the Defendant is unlikely to be in a position to fund other projects in this jurisdiction which will in

turn have an impact on the Zambian economy and business community.

4.12. In opposition, The Plaintiffs submit that a stay of proceedings is not a remedy the Court grants readily as it involves an interruption of the proceedings before Court and without further hearing of the matter. In making this submission, the Plaintiffs relied on the authority in **Atkins Forms, 2nd Edition at page 171** where it was stated as follows:

***“for this reason, stay of proceedings is always a very serious and grave step, for its consequences may be of far reaching importance for the parties. The general rule of procedural law is that a litigant is entitled to have his claim to the relief or remedy which he seeks tried on the substantive merits of the case, and therefore a stay of proceedings is a discretionary jurisdiction which, ought to be very sparingly exercised and only in exceptional cases.*”**

4.13. The Plaintiffs submitted that there is no exceptional circumstance demonstrated in this matter upon which a stay of proceedings can be entertained and relied on an excerpt from **Halsbury’s Laws of England 4th Edition, Vol 37 pages 330-332** where the learned authors stated as follows:

“The stay of proceedings is a serious, grave fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless proceedings beyond reasonable doubt should not be allowed to continue.”

4.14. The Plaintiffs have brought to the attention of this Court, Kenyan authorities which I have taken note of for persuasive value.

4.15. The Plaintiffs further submit that all the authorities cited by the Defendant relate to stay of execution where matters were decided on merit which is not the same as this case and that the Defendants application is fanciful and has no real legal anchoring and the same should be dismissed.

5. COURTS DECISION

5.1. It is trite that the High Court has inherent jurisdiction to stay proceedings and that an appeal or intended appeal shall not operate as a stay of execution or proceedings under the judgment or decision appealed against unless the Court considers that there are good reasons to grant a stay of execution or proceedings.

Order 47 Rule 5 of The High Court Rules provides as follows:

“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”.

- 5.2. It is the Plaintiffs contend that this matter is not fit for staying as there is no appeal. I wish to state that the application incasu is properly before this Court and I am guided by the authority in the Court of Appeal case of **LC and DK Limited (In receivership) and Another v Lovemore Chikuni Chinyama CAZ Appeal 270 of 2020**⁶ in which the Court stated as follows:

“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.

- 5.3. In considering the principles to be followed when granting an Order to stay proceedings, the High Court in the case of **Director**

of Public prosecutions V Esther Nyawa Tembo Lungu 2023

/HPEF / 23⁶ stated that:

“There is a plethora of decided cases where the superior Courts have laid out the principles that the Courts have established for the grant of Stay of Proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. Some of the principles laid down are as follows: -

- 1. There must be an appeal pending before the higher Court;*
- 2. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;*
- 3. The Applicant must demonstrate that the Appeal would be rendered nugatory if the Stay of Proceedings is not granted;*
- 4. The Applicant must demonstrate that there are exceptional circumstances which make the Stay of Proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and*
- 5. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.*

5.4. The Court in the **Esther Nyawa Tembo Lungu** case further stated that:

“The Stay of Proceedings is a serious, grave and fundamental interruption in the right that a Party has

to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore, the Court's general practice is that a Stay of Proceedings should not be imposed lightly unless one is satisfied to a high degree that should indeed be the case and suspend the matter from continuing. This is a power which, it has been emphasised, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. Accordingly, the Interested Party, who has applied for a Stay of Proceedings pending appeal, must show not merely that the Applicant might not, or probably would not, succeed but that he could not possibly succeed on the basis of the evidence and the facts of this case”.

- 5.5. Furthermore, the Constitutional Court in the case of **Wang Ying v Youjun Zhuang and Others 2020/CCZ/01557** held as follows:

“The alleged special or exceptional circumstances should be weighed against the right of other parties to proceed to exercise their rights in going ahead with their action. This usually includes the consideration weighing the strength of the applicant’s case.... However, this cannot be granted routinely as a matter of right. Even without delving into the merits of the case, an applicant must show prima facie that the matter in issue is a matter where a stay is warranted”.

- 5.6. Having reviewed the parties arguments and on perusal of the Court record, the Defendant has a pending motion for leave to appeal as per **LC and DK Limited** case⁶ and the application for stay was made without delay. However, I am of the considered opinion that the intended appeal does not reveal prospects of success. It is my opinion that the Judgment of the Court of Appeal dated June 28th, 2024 cements the position that the Defendant's appeal does not reveal any prospects of success.
- 5.7. I am of the considered view that the Plaintiffs present a cause of action and I am of the firm opinion that granting a stay of proceedings in this matter will be an interruption of the Plaintiffs right to have their matter heard and decided on its merits.
- 5.8. I am satisfied that the Defendant has failed to demonstrate that there are exceptional circumstances to warrant a Stay of Proceedings and I accordingly dismiss the Defendant's application.

6. CONCLUSION

- 6.1. For the foregoing reasons, **I ORDER** that the Defendant's application **BE** and **IS HEREBY** dismissed.
- 6.2. Costs for the Plaintiffs to be taxed in default of agreement.
- 6.3. This matter shall stand adjourned to February 18th, 2025 at 09:00hrs for Scheduling Conference.

Delivered at Lusaka on the 21st day of January, 2025.



S. CHOCHO

HIGH COURT JUDGE

