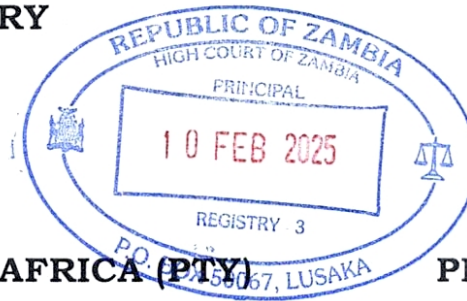


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

2017/HP/2047



BETWEEN:

NEESTRA SERVICE SOUTH AFRICA (PTY) PLAINTIFF

AND

TANGY DRINKS LIMITED DEFENDANT

TINS AND CAN INDUSTRIES LIMITED CLAIMANT

BEFORE THE HONOURABLE LADY JUSTICE A. MALATA-  
ONONUJU IN CHAMBERS ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2025.

*For the Plaintiff:*

*Mr. M. Nkole – Messrs. Kaumbu  
Mwondela Legal Practitioners.*

*For the Defendant:*

*No Appearance.*

*For the Claimant:*

*Mr. A. Chuuni, Mr. K. Ngulube -  
Messrs. Equitas Legal  
Practitioners.*

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### **RULING ON LEAVE TO APPEAL AND STAY OF EXECUTION**

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#### **CASES REFERRED TO:**

- 1. Status Mineral Exploration Limited Vs Oceana Ore Limited and Maggie Musonda 2012/HPC/0174;*
- 2. Nyampala Safaris Zambia Limited and Others Vs Zambia Wildlife Authority and Others SCZ/8/179/2002;*
- 3. Sonny Paul Mulenga and Another Vs Investment Merchant Bank SCZ Judgment No. 15 of 1999;*
- 4. Sata Vs Chanda Chimba III and Others (2011) 1 Z.R.519;*

5. *Watson Nkandu Bowa Vs Fred Mubiana and ZESCO Limited (2012) ZMSC 54;*
6. *Zambia Revenue Authority Vs The Post Newspaper Limited SCZ Judgment No. 18 of 2016;*
7. *Lactalis Zambia Limited and Anor Vs Mukulu Dairies Limited CAZ/08/219/2024;*
8. *Morgan Naik Vs Simon Davis Burgess and 5 Others Appeal No. 45/2020;*
9. *Access Bank (Zambia) Ltd. Vs Group Five/ZCON Business Park Joint Venture (Suing as a firm) SCZ/8/52/2014;*
10. *Muchinka Farm Ltd. Vs The Attorney General Appeal No. 457 of 2017;*
11. *JCN Holdings Limited and 2 Others Vs Development Bank of Zambia SCZ Judgment No. 22 of 2013;*
12. *Bernard Mukupa Chisanga and Others Vs Kabwe Municipal Council HP 1661 of 2017;*
13. *Richard M. Chizyuka and Others Vs Credit Africa Bank Zambia Limited Appeal No. 8/113/99;*
14. *Mother Care Limited Vs Robson Brook Limited FSR 466; and*
15. *Phillip Mutantika and Mulyata Sheal S. Vs Kenneth Chipungu SCZ Judgment No.13 OF 2014.*

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The Court of Appeal Rules Statutory Instrument No. 65 of 2016 of the Laws of Zambia;*
2. *The Rules of the Supreme Court of England, White Book. 1999 Edition*
3. *The High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
4. *Zambian Civil Procedure: Commentary and Cases. Patrick Matibini. LexisNexis, South Africa, 2017.*

**1. INTRODUCTION**

- 1.1 The Claimant, on 10<sup>th</sup> January, 2025, filed, with a Certificate of Urgency, Summons for an Order for Leave to appeal the Ruling of the Court to the Court of Appeal pursuant to **Order X Rule 4(3)**

of the **Court of Appeal Rules Statutory Instrument No 65 of 2016**, and Summons for an Order of Stay of execution of sale of goods subject of execution pending determination of the Application for Leave to appeal the Ruling of this Court pending determination of the Appeal in the Court of Appeal pursuant to **Order X Rule 4(5) of the Court of Appeal Rules Statutory Instrument No. 65 of 2016**.

## **2. BACKGROUND**

2.1 This Court delivered a Ruling on the Sheriff of Zambia's Interpleader Summons dated 21<sup>st</sup> October, 2024, wherein this Court found as follows at R25:

***“9.1. For the avoidance of doubt, the Claimant's Claim fails for none adherence to the Rules of Court as contained in Order 17 Rule 3/7 of the RSC;***

***9.2. Ownership of the property seized in execution of the Consent Judgment and Assessment of Interest remains with the Defendant;***

***9.3. The Sheriff of Zambia is at liberty to execute on the Defendant's seized goods in accordance with the Writ of Fieri Facias and Praeceptum of Fieri Facias filed by the Plaintiff forthwith;***

***9.4. The Sheriff of Zambia is at liberty to recover the Sheriff's commission and other costs for levying execution and interest thereon from the Defendant forthwith; and***

***9.5. Costs for this Application are for the Plaintiff to be taxed in default of agreement.”***

2.2 As the Court did not grant Leave to Appeal in the Ruling aforesaid, the Claimant now seeks Leave to do so. Further to this, the Claimant seeks Stay of execution.

### **3 AFFIDAVIT IN SUPPORT OF SUMMONS FOR LEAVE TO APPEAL**

3.1 The Claimant filed Affidavit in Support on 10<sup>th</sup> January, 2025, and the same is sworn by **MOHAMMED TWAHIR YOUSUF**, a Zambian national and Director in the Claimant Company.

3.2 The Deponent averred that the Claimant filed a Notice of Claim in respect of goods subject of execution in these proceedings and by a Ruling of this Court in Chambers delivered on 21<sup>st</sup> October, 2024, denied to uphold the claims of the Claimant.

3.3 It was deposed that the Claimant is dissatisfied with the Court's Ruling on Interpleader and is desirous of launching an appeal to the Court of Appeal against the whole of the said Ruling on the following grounds:

- i. *The Court below erred in law and fact when it failed to properly determine the issue of ownership of the goods subject of execution in favour of the Appellant despite establishing that the goods were subject of a Deed of Assignment in favour of the Appellant on the mere basis of commonality of directorship between the Claimant and the 2<sup>nd</sup> Respondent, notwithstanding sworn uncontroverted evidence on record to the effect that the commonality was established two years after the Deed of Assignment and was for the purposes of securing the said Deed of Assignment against the 2<sup>nd</sup> Respondent.*

ii. *The Court below erred in law and in fact to the extent that it made a finding that the Appellant's claim was bound to fail for none adherence to the Rules of Court as contained in Order 17 Rule 3/7 of the Rules of the Supreme Court, White Book, when the Interpleader Proceedings by the Sheriff were launched exclusively on the High Court Rules, Cap 27, and indeed, the Sheriff did not comply with the mandatory requirement under the Rules of the Supreme Court to give Notice of the requirement to the Appellant.*

- 3.4 It was deposed that on the instruction of the Claimant, Counsel prepared the requisite Notice of Appeal and Memorandum of Appeal, copies of which are exhibited and marked "**MTY1**" and "**MTY2**", respectively.
- 3.5 That this Application is necessitated by this Court having not granted Leave to Appeal and that based on Counsel advise, the Claimant is of the strong belief that the intended Appeal has reasonable prospects of success.
- 3.6 The Deponent swore that the Claimant did not immediately make the Application before Court in light of the fact that after receiving the Ruling from its previous lawyers, it desired to retain the services of other Counsel and unfortunately, most law firms subsequently went on recess and have now just resumed.
- 3.7 The Deponent avowed that no prejudice will be occasioned to the Respondent should Leave be granted as they will be given an opportunity to respond to the merits of the Intended Appeal.

#### **4 SKELETON ARGUMENTS IN SUPPORT OF SUMMONS FOR LEAVE TO APPEAL**

- 4.1 In the Skeleton Arguments filed, Counsel for the Claimant submitted that the Application is anchored on the provisions of **Order X Rule 4(3)** of the **Court of Appeal Rules Statutory Instrument No. 65 of 2016** which gives this Court the power and jurisdiction to grant leave to appeal upon application by motion or summons.
- 4.2 Counsel cited the case of **Status Mineral Exploration Vs Ocean Ore Limited and Maggie Musonda** <sup>(1)</sup> wherein the provisions of **Order 59 Rule 14(8)** of the **Rules of the Supreme Court of England** were referred to and wherein it was held that Leave to Appeal is required in the case of an appeal against an interlocutory order or interlocutory judgment made or given by the High Court as the *locus classicus* in the Application at hand.
- 4.3 Counsel proceeded to quote **Order 59 Rule 14(8)** of the **Rules of the Supreme Court** and submitted that the Claimant's Appeal bears good prospects of success on the grounds set forth in the exhibited Notice and Memorandum of Appeal. Counsel went on to rehash the said prospects of success of each of the two Grounds which I shall not repeat but have taken note of.
- 4.4 It was Counsel's prayer that the Application for Leave be granted based on the reasons given and that the matter be determined on its merits as dictated by the rules of natural justice. It was Counsel's further prayer that costs be in the cause.

## **5 AFFIDAVIT IN SUPPORT OF STAY OF EXECUTION**

- 5.1 The Affidavit was sworn by **MOHAMMED TWAHIR YOUSUF**, a Zambian national and Director in the Claimant Company.
- 5.2 It was deposed that by the Ruling of this Court delivered on 21<sup>st</sup> October, 2024, this Court denied to uphold the claims of the Claimant and being dissatisfied with this Court's Ruling on Interpleader, the Claimant is desirous of launching an appeal in the Court of Appeal. The deponent proceeded to state the two Grounds of Appeal as above and exhibited copies of the Notice of Appeal and the Memorandum of Appeal marked "**MTY1**" and "**MTY2**", respectively.
- 5.3 The Deponent avowed that notwithstanding the prospects of success of the intended Appeal, there is a danger that the goods may be sold by the Sheriff's office in executing the Ruling of the Court to the detriment of the Claimant.
- 5.4 That if the goods are sold, there is no prospects of recovering the same considering that the 1<sup>st</sup> Respondent Judgment Creditor is also an entity incorporated in a foreign jurisdiction.
- 5.5 The Deponent averred that the Claimant humbly craves this Court's indulgence to Stay the sale of the goods subject of execution pending determination of the Application for Leave to Appeal to the Court of Appeal and determination of the subsequent appeal in the Court of Appeal.

## **6 SKELETON ARGUMENTS IN SUPPORT OF STAY OF EXECUTION**

- 6.1 Counsel for the Claimant submitted that the Application is anchored on **Order X Rule 4(5)** of the **Court of Appeal Rules** and proceeded to cite the cases of **Nyampala Safaris Zambia Limited**

- and Others Vs Zambia Wildlife Authority and Others** <sup>(2)</sup>, **Sonny Paul Mulenga and Another Vs Investment Merchant Bank** <sup>(3)</sup>, and **Sata Vs Chanda Chimba III and Others** <sup>(4)</sup>, which cases summed up the law relating to Stay of execution.
- 6.2 Counsel submitted that in light of the above cited authorities, they remain cognizant of the fact that a successful litigant should not be arbitrarily deprived of the fruits of its judgment. Counsel contended that to this effect, special circumstances must exist to warrant the grant of a Stay of execution, and that such special circumstances do exist in *casu*.
- 6.3 Counsel cited the case of **Watson Nkandu Bowa Vs Fred Mubiana and ZESCO Limited** <sup>(5)</sup> wherein the Supreme Court held that there is a two-fold test that has to be applied when considering an application for Stay of execution of a judgment and similarly a ruling pending an appeal. That firstly, the Court must consider the prospects of the Appeal succeeding and secondly, the irreparable damage if a Stay is not granted.
- 6.4 Counsel further cited the case of **Zambia Revenue Authority Vs The Post Newspaper Limited** <sup>(6)</sup> wherein the Supreme Court stated that of the two tests, the prospect of success is the key consideration as the Court should order a Stay pending a possible victory and not loss.
- 6.5 Counsel contended that the Claimant's Appeal bears good prospects of success on the grounds set forth in the exhibited Notice and Memorandum of Appeal and proceeded to summarise them for each of the two Grounds.

6.6 It was Counsel's prayer that this Court grants the Stay of execution for the reasons set out and that costs for this Application be in the cause.

## **7 AFFIDAVIT IN OPPOSITION TO SUMMONS FOR LEAVE TO APPEAL**

7.1 The Plaintiff filed Affidavit in Opposition to Summons for Leave to Appeal the Ruling of the Court to the Court of Appeal on 29<sup>th</sup> January, 2025, and the same was sworn by **MWINDULA NKOLE**, a Zambian national and Advocate of the High Court for Zambia practicing in the firm of Messrs. Kaumbu Mwendela Legal Practitioners.

7.2 It was deposed that having read the Claimant's Affidavit in Support of Leave to Appeal sworn by Muhammed Twahir Yousuf dated 10<sup>th</sup> January, 2024, it was his response that the Record will show that the Court passed its Ruling on 21<sup>st</sup> October, 2024, on the Interpleader Summons dismissing the Claimant's claim to goods seized in execution and Ordered the Sheriff of Zambia proceed with the sale of the goods.

7.3 The Deponent avowed that on 22<sup>nd</sup> October, 2024, he did cause to be served on the Claimant's Advocates, Nsapato and Company, a copy of the Court's Ruling. A copy of the Letter was exhibited and marked "**MN-1**".

7.4 That the Claimant has had notice of the Ruling for close to three (3) months since its delivery and only brought this Application for Leave to Appeal on 10<sup>th</sup> January, 2025, more that 80 days after the aforementioned Ruling was delivered and served on the Claimant.

- 7.5 The Deponent vied that the Rules of this Court demand that an application for Leave to Appeal ought to be made within 14 days of the Court's delivery of the Ruling and that no application for leave to make the within Application out of time has been made before this Court.
- 7.6 It was deposed that this Court does not have the jurisdiction to entertain this Application under the circumstances. That the Claimant slept on its rights to launch its Appeal and only waited until over 80 days to seek Leave to Appeal.
- 7.7 The deponent averred that the High Court Registries are fully functional during the Christmas Vacation and in any event, the Ruling was served in October, 2024, two months before the beginning of the Christmas Vacation.
- 7.8 The Deponent swore that the Claimant's intended Appeal, as shown by their exhibited Grounds of Appeal, has low prospects of success.
- 7.9 It was vied that this matter, having been before Court since November, 2017, there must be finality to litigation.

## **8 SKELETON ARGUMENTS IN SUPPORT OF AFFIDAVIT IN OPPOSITION TO SUMMONS FOR LEAVE TO APPEAL**

- 8.1 In the Skeleton Arguments filed in opposition to the Claimant's Application for an Order of Leave to Appeal the Court's Ruling, Counsel presented the following issues that appear to be the crux of the Application being firstly, what are the principles underpinning an application to grant an order of leave to appeal? And secondly, whether it is tenable in these circumstances to grant the Claimant the Leave sought?

- 8.2 Pertaining to the law with regard to granting of an Order to appeal, Counsel begun by referring the Court to **Order 59/1A/19** of the **Rules of the Supreme Court** which states that an order that grants relief by way of interpleader is interlocutory. Counsel went on to cite **Order 47** of the **High Court Rules** that provides for civil appeals and submitted that **Rule 2** specifies the limitation of time as regards Interlocutory Orders.
- 8.3 Counsel referred the Court to the Court of Appeal cases of **Lactalis Zambia Limited and Anor Vs Mukulu Dairies Limited** <sup>(7)</sup> and **Naik Vs Burgess and Others** <sup>(8)</sup> as well as the Supreme Court case of **Access Bank (Zambia) Ltd. Vs Group Five/ZCON Business Park Joint Venture (Suing as a firm)** <sup>(9)</sup> which emphasised and guided on the need for adherence to Court Rules on timelines and the consequences of none adherence as well as the jurisdiction of Courts in such circumstances.
- 8.4 Counsel cited the Supreme Court case of **Muchinka Farm Ltd. Vs The Attorney General** <sup>(10)</sup> wherein it was stated as follows:
- “It is also our view that when considering the interests of justice, one must not only look at giving adequate opportunity to the claimant to present his/her case; the defendant's interests must also be considered because the defendant is equally entitled to having any claims against them made in good time.”*
- 8.5 Counsel also referred the Court to the Supreme Court case of **JCN Holdings Limited and 2 Others Vs Development Bank of Zambia** <sup>(11)</sup> where the Court stated with regard to the timelines provided by the Rules of the Court as follows:

***“Also, it is settled law that if a matter is not properly before a court that court has no jurisdiction to make any orders or grant any remedies... It is clear from the Chikuta <sup>(3)</sup> and New Plast Industries <sup>(4)</sup> cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.”***

- 8.6 Counsel submitted that generally, this Court is clothed with jurisdiction to grant an applicant Leave to appeal, but however, the Court’s jurisdiction is limited by the timelines provided by the Rules of Court.
- 8.7 Counsel submitted that in the present instance, the power of the Court to grant the Applicant herein Leave to Appeal could only be exercised within 14 days of the Court’s Ruling on the Interpleader Application. That the law providing for this timeline is couched in mandatory terms and must be strictly adhered to by all parties to an action to ensure justice is done and a failure to adhere to the said Court Rules can and must be held against the defaulting party.
- 8.8 Counsel contended that the Claimants Application in *casu* is over 80 days out of time and no application for Leave to make the said Application out of time has been launched. That the period of over 80 days is unreasonably long. It was Counsel’s submission that the Claimant’s Application having been made on 10<sup>th</sup> January, 2025, as opposed to on or before 4<sup>th</sup> November, 2024, ousts the Court’s jurisdiction to make any Orders regarding the Application for Leave to Appeal. It was submitted that therefore, this Court

has no jurisdiction to hear and/or determine an application for Leave to Appeal in this Matter.

- 8.9 Pertaining to the threshold for granting an Order for Leave to Appeal, Counsel referred to **Order 10 Rule 4** of the **Court of Appeal Rules** and stated that the Order gives this Court the power to hear and determine an application for Leave to appeal upon an application made before it by motion or summons.
- 8.10 Counsel submitted that the **Rules of the Supreme Court** in **Order 59 Rule 14/18**, which he quoted, provides for the circumstances in which Leave will be granted and stated that these principles are upheld in a number of cases, one of which is **Bernard Mukupa Chisanga and Others Vs Kabwe Municipal Council** <sup>(12)</sup> where the Court reiterated the position that the Court will only refuse Leave if satisfied that the applicant has no realistic prospects of succeeding on appeal.
- 8.11 Counsel submitted that in the High Court case of **Status Mineral Exploration Limited Vs Oceana Ore Limited and Another** <sup>(1)</sup>, Judge Mutuna, as he was then, stated the position that Leave to appeal is not granted as a general rule and that the applicant must show that the Grounds of Appeal have realistic prospects of success.
- 8.12 Counsel proceeded to submit on the lack of merit of the two Grounds of Appeal tendered by the Applicant. I have read them and will not repeat them here.
- 8.13 Counsel submitted that there are no prospects of success in the intended Appeal and prayed that this Court declines the

application by the Claimant for Leave to Appeal with costs to the Plaintiff.

## **9 AFFIDAVIT IN OPPOSITION TO SUMMONS FOR AN ORDER OF STAY OF EXECUTION**

- 9.1 The Plaintiff filed Affidavit in Opposition on 29<sup>th</sup> January, 2025, and the same was sworn by **MWINDULA NKOLE**, an Advocate practicing in the firm of Messrs. Kaumbu Mwendela Legal Practitioners.
- 9.2 The Deponent averred that having read the Affidavit in Support of Summons for an Order of Stay of sale of goods subject of execution pending determination of the Application for Leave to appeal Ruling, and if granted, pending determination of the appeal in the Court of Appeal dated 10<sup>th</sup> January, 2025, the Claimant has not demonstrated or substantiated how their Appeal has reasonable prospects of success but has merely stated that it has reasonable prospects of success.
- 9.3 It was deposed that the Claimant's intended appeal lacks merit and has low prospects of success.
- 9.4 The Deponent avowed that the Claimant's Application for Leave to appeal is bound to fail as the same is launched outside the 14 days period prescribed by the Rules of this Court and no application for Leave to appeal out of time has been made by the Claimant.
- 9.5 That this Court lacks the jurisdiction to grant the Application for Leave to appeal and therefore the Application to Stay the sale of goods does not have a leg to stand on.

9.6 The Deponent avowed that the Plaintiff will be highly prejudiced by the granting of this Application as this Matter has been before the Court since November, 2017, and the Deponent verily believes that there must be finality to litigation.

9.7 That it is on the above premise that the Deponent opposes the Claimant's Application to Stay the sale of goods subject to execution.

#### **10 SKELETON ARGUMENTS IN SUPPORT OF AFFIDAVIT IN OPPOSITION TO STAY OF EXECUTION**

10.1 In addressing the general principles regarding the granting of a Stay, Counsel for the Plaintiff referred to the **Court of Appeal Rules** under **Order 10 Rule 5**, and **Order 59 Rule 13** of the **Rules of the Supreme Court** which provide that an appeal shall not operate as a Stay of execution unless Leave is applied for and granted. Further that this Court and the Court of Appeal will not grant a Stay unless satisfied that there are good reasons for doing so; and that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which, *prima facie*, he is entitled to pending an appeal.

10.2 In support of the above, and to emphasise that the granting of a Stay is discretionary and must be exercised judiciously with due regard to the prospects of success of the intended appeal, Counsel referred this Court to the Supreme Court cases of **Sonny Paul Mulenga and Another Vs Chainama Hotels Limited and 2 Others** <sup>(3)</sup>, **Nyampala Safaris Zambia Limited and Others Vs Zambia Wildlife Authority and Others** <sup>(2)</sup>, **Zambia Revenue Authority and Post Newspapers Limited** <sup>(6)</sup>, and **Richard M.**

**Chizyuka and Others Vs Credit Africa Bank Zambia Limited**

(13).

- 10.3 With reference to the holdings in the above authorities, Counsel contended that indeed this Court has the jurisdiction to grant an Order to Stay execution but that this jurisdiction is discretionary and may only be exercised when it is reasonable to do so.
- 10.4 Further to the above, Counsel contended that it is not in good practice to deprive a litigant of the fruits of his judgment except where good and sufficient grounds have been established. That it is pointless to ask for a Stay of execution simply because one has lodged their appeal in an appellate Court; that the applicant must demonstrate to the Court that their appeal has high prospects of success and the application for a Stay should not be granted on merely moral or sympathetic grounds, and the applicant must also raise good and sufficient grounds that would override the Judgment Creditor's right to immediate enjoyment of the fruits of their judgment.
- 10.5 It was Counsel submission that the Claimant has failed to demonstrate to this Court the good and sufficient grounds for Staying execution.
- 10.6 Further to the above, Counsel submitted that the Claimant has brought this Application before this Court eighty (80) days since the date that the Ruling on Interpleader was delivered, which prejudices the Plaintiff who is desirous of recovering the sums claimed at the commencement of this Action.

10.7 Counsel then submitted on reasons why the Claimant's Grounds of Appeal would fail. I will not repeat them suffice to say that they have been well noted.

10.8 It was Counsel's prayer that this Court declines the Application by the Claimant for an Order of Stay of execution pending determination of the Application for Leave to appeal Ruling, and if granted, pending determination of the Appeal in the Court of Appeal.

### **11 AFFIDAVIT IN REPLY**

11.1 The Claimant filed Affidavit in Reply on 30<sup>th</sup> January, 2025, and the same was sworn by **ABEDNEGO CHUNI**, a Legal Practitioner in the employ of Messrs. Equitas Legal Practitioners.

11.2 The Deponent avowed that contrary to the assertions of the Plaintiff in its Affidavit in Opposition, the Claimant has demonstrated good prospects of success in this Matter.

11.3 It was averred that while it is true that the Matter herein was commenced as far back as November, 2017, the Claimant's rights and claims herein only came to light recently when it filed its Notice of Claim.

11.4 That furthermore, it has come to the attention of the Claimant that there is an impending threat of execution as the Sheriff's office has threatened execution and forced entry on the premises of the Defendant. A copy of a letter from the Sheriff's office threatening execution over the same was exhibited and marked "**AC1**".

11.5 Counsel submitted that if the Order for Stay is not granted the Application and everything that may ensue from it will be rendered an academic exercise.

## 12 SKELETON ARGUMENTS IN REPLY

12.1 Counsel for the Claimant begun by submitting that the rules pertaining to a grant of Stay of execution are well founded and have been elucidated in their Arguments in Support of the Application.

12.2 It was submitted that the Plaintiff has proffered that the Claimant has not demonstrated any prospects of success on the intended Appeal, and it has been argued to the contrary. Counsel referred this Court to the case of **Mother Care Limited Vs Robson Brook Limited** <sup>(14)</sup> (citation not given) wherein it was stated as follows:

*“A serious question to be tried connotes a real prospect of succeeding rather than a claim which is not quite so shadowy that it could be regarded as frivolous and vexatious.”*

12.3 Counsel submitted that in line with the above, this Court need not delve into the merits of the Appeal but should merely assess whether or not the Intended Appeal has prospects of success. That in doing so, the Court must conclude that the prospects are neither frivolous, vexatious, nor fanciful; that the Claimant has demonstrated, in its Application, the good prospects of success on appeal.

12.4 Counsel further submitted that **Order 47 Rule 2** cited by the Plaintiff herein does not deal with appeals from the High Court to the Court of Appeal, but rather, from the Magistrates Courts to the High Court. It was contended that the governing Rules for appeals that move from the High Court to the Court of Appeal are the **Court of Appeal Rules**.

12.5 Counsel referred the Court to the learned author, Patrick Matibini in his book, **Zambian Civil Procedure: Commentary and Cases** at pages 1507, which states as follows:

**“As regards appeals from the Subordinate Court to the High Court, it is provided that –**

**(a) *An Application for conditional leave will not be entertained by the Subordinate Court:***

***i. After 14 days from the date of an interlocutory decision; or***

***ii. After one month from the date of a final judgment or decision.”***

12.6 It was Counsel’s contention that it is clear from the above that the Rules as elucidated under **Order 47 Rule 2** are in relation to appeals from the Subordinate Court to the High Court and not from the High Court to the Court of Appeal as is the case before this Court.

12.7 Counsel vehemently submitted that the Application in *casu* is rightly before this Court and prayed that this Court grants the Application for Stay of execution and that costs be in the cause.

### **13 HEARING**

13.1 The Hearing of the Claimant’s Summon for leave to Appeal and Stay of Execution was held on 5<sup>th</sup> February, 2025, with Counsel for the Plaintiff and Claimant present.

13.2 Both Counsels referred to the documents filed in Support, in Opposition and in Reply as presented above.

13.3 Counsel for the Claimant in augmenting emphasised that the Claimant has shown sufficient grounds on which this Court

should act and grant both the Applications and prayed that the Ruling granted by this Court be Stayed and the Claimant be granted Leave to appeal.

- 13.4 Counsel for the Plaintiff in his oral submissions stated that one of the grounds upon which he opposes both Applications is that this Court lacks jurisdiction to hear the same, particularly the Application for Leave to appeal. That the same having been brought outside the mandatory period stated under **Order 47 Rule 2** of the **High Court Rules**, and not being an application for the enlargement of time within which to apply for Leave to appeal, the Court cannot grant the Application.
- 13.5 Further, that with the Application for Leave to appeal not having merit, the Application to Stay execution has no leg to stand on.
- 13.6 To buttress his submission, Counsel referred this Court to the decision of the Court of Appeal in the case of **Morgan Naik Vs Simon Davis Burgess and 5 Others** <sup>(8)</sup> which emphasised that **Order 47 Rule 2** of the **High Court Rules** stipulates the time frame within which one ought to apply for Leave to appeal any interlocutory decision. Counsel referred the Court to the authorities at paragraphs 10.13 and 10.14 of the said judgment.
- 13.7 Counsel argued that the Applications were launched on or around 10<sup>th</sup> January, 2025, which is well over 75 days. Further that in their Affidavit in Opposition to Summons for Leave to appeal, the Plaintiff exhibited that the Ruling was served on the Claimant's Advocates on 22<sup>nd</sup> October, 2024.
- 13.8 It was Counsel's prayer that the Applications be dismissed with costs to the Plaintiff.

13.9 In Reply, Counsel for the Claimant submitted that his understanding of **Order 47 Rule 2** of the **High Court Rules** is that the same applies to appeals originating from the Subordinate Court to the High Court.

13.10 It was submitted that where one seeks to appeal a Ruling of this Court to the Court of Appeal, the relevant Rules to which one must have recourse to are the **Court of Appeal Rules**. To this effect, Counsel submitted that the Plaintiff's argument cannot hold.

13.11 Counsel reiterated the prayer that the two Applications be granted to the Claimant and that the costs be in the cause.

13.12 With regard to the authority cited by the Plaintiff, being the case of **Morgan Naik Vs Simon Davis Burgess and 5 Others** <sup>(8)</sup>, Counsel submitted that he had not had sight of the case and therefore left the same to the consideration of this Court.

13.13 The Matter was then adjourned for Ruling.

#### 14 **ANALYSIS AND DECISION OF THE COURT**

14.1 I am grateful to the submissions filed by Counsel for the Parties, both in writing and orally, as well as the authorities cited which will greatly aid this Court in its decision-making process.

14.2 Based on Counsel's submission, it is apparent that the first issue for determination is whether this Court has jurisdiction to hear the Claimant's Application for Leave to appeal which will impact on this Court's ability to determine the Claimant's Application for Stay of execution.

14.3 Counsel for the Plaintiff submits that the Claimant's Application for Leave to appeal flouts **Order 47 Rule 2** of the **High Court Rules** as the Application has been made beyond the prescribed 14

days from the date of this Court's Ruling on the Interpleader Summons delivered on 21<sup>st</sup> October, 2024, and served on the Claimant's Advocates on 22<sup>nd</sup> October, 2024, thereby rendering this Court devoid of jurisdiction to hear both Applications.

14.4 Counsel for the Claimant responded by contending that **Order 47 Rule 2** applies to applications for Leave to Appeal from the Subordinate Court to the High Court and not applications from the High Court to the Court of Appeal. That the relevant Rules that apply for such applications are the **Court of Appeal Rules**. That therefore, this Court has the jurisdiction to Hear the Application for Leave to appeal.

14.5 I have considered the arguments submitted by both Counsel for the Plaintiff and Counsel for the Claimant.

14.6 This Court delivered the impugned Ruling on the Sheriff of Zambia's Interpleader Summons on 21<sup>st</sup> October, 2024, and whose findings have been set out in Paragraph 2.1 above.

14.7 As correctly submitted by Counsel for the Plaintiff, **Order 59/1A/19** of the **Rules of the Supreme Court** states that an order that grants relief by way of interpleader is interlocutory.

14.8 **Order 47 Rule 2** of the **High Court Rules** under the heading Limitation of Time for Appeal, sets out the time limit for filing Leave to appeal from Interlocutory Orders as follows:

***"2. After fourteen days from the date of any interlocutory decision, application for leave to appeal shall not be entertained."*** (Emphasis mine)

14.9 The use of the word 'shall' in the above provision means that it is a mandatory Rule that cannot be waived by this Court. It is

a Rule that cannot be derogated from and must be strictly adhered to. I am buttressed by the Supreme Court's decision in the case of **Mutantika Vs Chipungu** <sup>(15)</sup> wherein it was stated as follows:

***“Both provisions are couched in mandatory manner as each uses the words “shall”. The two rules are therefore not regulatory as they do not give the Court discretionary power.”***

- 14.10 Counsel for the Claimant's assertions that **Order 47 Rule 2** of the **High Court Rules** only applies to appeals from the Subordinate Court to the High Court and not to appeals from the High Court to the Court of Appeal could not be further from the truth. It is my considered view that **Order 47 Rule 2** of the **High Court Rules** applies to Interlocutory Orders from the High Court to the Court of Appeal. The phrase 'any interlocutory decision' applies to decisions in the Subordinate Court and the High Court.
- 14.11 Counsel for the Plaintiff aptly and ably referred this Court to the Court of Appeal's decision in the case of **Morgan Naik Vs Simon Davis Burgess and 5 Others** <sup>(8)</sup> which lays waste the Claimant's arguments that the time limit set by **Order 47 Rule 2** only applies to appeals from Interlocutory Orders from the Subordinate Court to the High Court.
- 14.12 This case is further pivotal in cementing the Plaintiffs contention that this Court has no jurisdiction to hear the Claimant's Application for Leave to appeal as it is out of time.

- 14.13 In the **Morgan Naik case** *supra*, the Respondents therein, filed a Notice of Motion to Raise a Preliminary Objection to the appeal lodged by the Appellant in the Court of Appeal following the granting of Leave to appeal by the High Court made pursuant to **Order 47 Rule 2** of the **High Court Rules** and sought the dismissal of the appeal in its entirety.
- 14.14 This in *casu*, firstly, confirms that **Order 47 Rule 2** of the **High Court Rules** applies to appeals from Interlocutory Orders from the High Court to the Court of Appeal.
- 14.15 The basis of the Respondents Preliminary Objection in the **Morgan Naik case** was that the High Court's impugned Ruling was delivered on 27<sup>th</sup> September, 2019 and the Appellant's Summons for Leave to appeal was made on 29<sup>th</sup> October, 2019, thirty-two (32) days after the delivery of the said Ruling. That the application for Leave to appeal ought to have been made on or before 11<sup>th</sup> October, 2019. It was the Respondents' Counsel's contention that the Order granting Leave to appeal having been granted thirty-two (32) days beyond the stipulated timeframe was irregular as it was premised on a flawed application.
- 14.16 The Court of Appeal stated as follows with regards to the issue above at 10.13 and 10.14 at pages J26 to J28:
- “10.13 Having considered the arguments proffered by each party, we are of the view that the Respondents raises valid and compelling arguments even in the face of the Appellants strenuous arguments. We say so because Order 47 rule 2 of the Rules of the HCR,***

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categorically stipulates the period for reckoning the time within which to apply for leave to appeal any interlocutory decision. It is patent from the record that that the Appellants ought to have applied for leave to appeal no later than 11<sup>th</sup> October, 2019. To have filed the same on 29<sup>th</sup> October, 2019 and the Court to have granted it on 26<sup>th</sup> November, 2019 is way beyond the stipulated time frame.

10.14 The preliminary objection is not meant to challenge the irregularity of the ex-parte order, but rather the appeal itself which was brought pursuant to an irregular order. This is because the Court had no jurisdiction to grant the order it did after it was presented beyond the stipulated timeframe. We are guided by the cited case of *Crossland Mutinta and Others v. Donovan Chipanda*<sup>7</sup> and the case of *Antonio Ventriglia and Emmanuela Ventriglia v. Finsbury Investments Limited*<sup>10</sup> where the Supreme Court asked the question whether, having regard to the fact that the Respondent had purported to apply for leave to appeal at a time when the applicable period within which they could lawfully have done so had long expired, the decision or outcome of that purported application could possibly stand. Their Lordships and Ladyships response was that it could not stand. The court went on to express the view, based on the Latin maxim translation that: 'out of nothing, comes nothing' and

***held that what the Court of Appeal did in proceeding to hear the Respondent's application in the circumstances amounted to nothing, from the stand point of both the means (i.e. the process) and the end (i.e. the outcome)."***

(Emphasis by the Court of Appeal)

14.17 Based on the above cited authority, this Court, having rendered its Ruling on the Sheriff's Summons for Interpleader on 21<sup>st</sup> October, 2024, and the Claimant having filed its Application for Leave to appeal pursuant to **Order 47 Rule 2** of the **High Court Rules**, on 10<sup>th</sup> January, 2025, being 82 days from the date of the Ruling, instead of on or before 4<sup>th</sup> November, 2024, is well and truly beyond the mandatory prescribed timeframe of 14 days within which to lodge an application for Leave to appeal from an interlocutory order.

14.18 This Court therefore has no jurisdiction to hear, determine and furthermore proceed to issue an Order on the Claimant's Application in *casu*.

14.19 It follows therefore that even the Claimant averments in their Affidavit in Support of Leave to appeal that prejudice will not be occasioned by the Plaintiff should Leave be granted as the Plaintiff will be given an opportunity to respond to the merits of the Intended Appeal as dictated by the rules of natural justice cannot be sustained by this Court as I have no jurisdiction *ab initio*. As rightly pointed out by the Court of Appeal in the **Morgan Naik case, Order 3 Rule 2** of the **High Court Rules** can only be invoked when the proceedings are properly before Court, which in this Matter, they are not.

14.20 I would be remis if I did not speak to the Claimant's averment in their Affidavit in Support of Leave to Appeal that they did not immediately, presumably within the prescribed 14 days, make the Application before Court after receiving the Ruling of this Court from their previous lawyers as it desired to retain the services of other Counsel and that unfortunately, most Firms subsequently went on recess and have just now resumed. The Plaintiff responded that the High Court Registries are fully functional during the Christmas Vacation and in any event, the Ruling was served in October, 2024, two months before the beginning of the Christmas Vacation.

14.21 The Plaintiff's response sums up the fact that the Claimant had sufficient time from the date of this Court's Ruling to put its affairs in order and retain Counsel within the prescribed timeframe and ensure that they operated within Rules of the Court. The Claimant clearly slept on its rights.

14.22 I will reiterate the holding of the Supreme Court in the case cited by Counsel for the Plaintiff of **Access Bank (Zambia) Ltd. Vs Group Five/ZCON Business Park Joint Venture (Suing as a firm)** <sup>(9)</sup> as follows:

***"Matters should, as much as possible, be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion, is what the ends of justice demand. Yet, justice also requires that this court, indeed all courts, must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timelines***

serve to make the process of adjudication fair, just, certain and even-handed." (Emphasis mine)

14.23 Based on my finding above with regard to the Claimant's Application for Leave to appeal, I have no jurisdiction to hear and determine the Claimant's Application for Stay of execution. From nothing, nothing comes.

## 15 CONCLUSION

15.1 For the avoidance of doubt, the Claimant's Summons for an Order for Leave to appeal the Ruling of the Court to the Court of Appeal hereby fails and is dismissed.

15.2 The Claimant's Summons for an Order of Stay of execution of sale of goods subject of execution pending determination of the Application for Leave to appeal the Ruling of this Court pending determination of the Appeal in the Court of Appeal fails and is dismissed.

15.3 Costs for this Application are for the Plaintiff to be taxed in default of agreement.

**DELIVERED AT LUSAKA THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2024**





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