

I T

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 162 OF 2019

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

FIRST NATIONAL BANK ZAMBIA LIMITED **APPELLANT**

AND

CHIZMANI INVESTMENTS LIMITED	1 st RESPONDENT
WESSEL JOHANNES VILJOEN	2 nd RESPONDENT
WESSEL JOHANNES VILJOEN (JNR)	3 rd RESPONDENT
CARLYN INVESTMENTS LIMITED	4 th RESPONDENT
MKUSHI RIVER RANCH LIMITED	5 th RESPONDENT
SARA RANKIN KINGDOM	6 th RESPONDENT
PAUL DAVID KINGDOM	7 th RESPONDENT



CORAM: Chashi, Lengalenga and Majula, JJA

ON: 12th November 2020 and 13th January 2021

For the Appellant: N/A

For the Respondents: (1) *S. L. Chisulo SC, Messrs Sam Chisulo and Company*
(2) *A. Siwila, Messrs Mambwe, Siwila and Lisimba Advocates*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Luanshya Copper Mines Plc v First Rand Ireland Plc and Other Creditors of Luanshya Copper Mines Plc, Poweng Zambia Limited and the Attorney General- SCZ/8/168/2009 - Ruling**
2. **Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited v Investrust Merchant Bank Limited (1999) ZR, 1**
3. **Nyampala Safaries (Zambia) Limited and Others v Zambia Wildlife Authority and Others - SCZ, No. 8/179/2003**
4. **Sinim Enterprises (Z) Limited and Harry Sinyangwe v Stanbic Bank Zambia Limited - CAZ Appeal No. 169 of 2017**
5. **Dr. JW Billingsley v JA Mundi (1982) ZR, 11**
6. **Gideon Mundanda v Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S Mwiinga (1987) ZR, 30**
7. **Turnkey Properties v Lusaka West Development Company Limited (1984) ZR, 86**
8. **Kitwe City Council v William Nguni (2005) ZR 57**

Rules referred to:

1. **The Supreme Court Practice (White Book) 1999**

Other authorities referred to:

**1. Odgers Principles of Pleading & Practice by D. B. Casson
and I. H. Dennis, 22nd Edition, London, Starens & Sons,
1981**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Honourable Mr. Justice E. L. Musona (Commercial Division) delivered on 4th June, 2019, in which the learned Judge granted stay of execution of three consent Judgments.

2.0 BACKGROUND

2.1 The Appellant, who was the defendant in the court below, arising out of lease financing transactions entered into three consent Judgments, in three different causes with the Respondents; namely Cause Numbers 2018/HPC/0151, 2018/HPC/0156 and 2018/HPC/0231 on diverse dates.

2.2 Subsequently, on 10th May, 2019, the Respondent commenced an action in the High Court by way of writ of summons, claiming the following reliefs:

- i. An Order to set aside the consent Judgments dated 5th October, 9th October and 6th November, 2018 under Cause Numbers 2018/HPC/0151, 2018/HPC/0156 and 2018/HPC/0231 respectively, on account of fraud and mistake.
- ii. A declaration that, the defendants were not entitled to any of the remedies arising from the aforestated consent Judgments.

2.3 Attendant to the writ of summons, the Respondent applied for stay of execution of the consent Judgments, pending determination of the cause, which application was contested by the Appellant.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the affidavit evidence and the arguments by the parties and various authorities, the learned Judge opined that, it was trite law, that in granting a stay, the Court must preview the prospects of the cause succeeding

and therefore, a stay will not be granted as a right, but it is discretionary.

- 3.2 The learned Judge went on to state that the plaintiffs had pleaded fraud and mistake as the basis for trying to set aside the consent Judgments. That however, he was aware that at that stage, the plaintiffs could not be asked to prove fraud or mistake, as that was the matter to be determined at trial.
- 3.3 It was the learned Judge's view, that if the stays were not granted, the main matter would be rendered an academic exercise.

4.0 THE APPEAL

- 4.1 Disenchanted with the Ruling, the Appellant has appealed to this Court advancing five (5) grounds of appeal couched as follows:
 - 4.1.1 That the Honourable Judge in the court below misdirected itself in law and fact, when it failed to consider the circumstances upon which a stay of execution of Judgment is granted, which are the prospects of success

of the appeal, the existence of special circumstances and damages being an adequate remedy.

4.1.2 That the Honourable Judge in the court below misdirected himself in law and fact when, instead of considering the prospects of success of the Respondent's main action, it held that they could not be asked to prove the fraud and mistake.

4.1.2 That the Honourable court erred in law and fact, when it failed to apply itself to the fact that, there were no prospects of success of the Respondent's application, based on their admission that the consent Judgments were properly executed by and through their Counsel and the fraud and mistake alleged were not directly related to the consent Judgments.

4.1.3 That the Honourable Judge misdirected himself in law and fact when he failed to adjudicate on all the Appellant's authorities and submissions before him.

4.1.4 That the Honourable court misdirected itself in law and fact when it failed to consider that the Respondent's loss, if any, is quantifiable and could adequately be

compensated in damages in the event of succeeding in the main action.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant filed a notice of non-appearance on 11th November, 2020 and as such was not in attendance at the hearing of the appeal. We therefore considered the Appellant's appeal premised on their arguments filed into Court on 9th September, 2019.

5.1.1 In arguing the first ground of appeal, it was contended that, there are legally settled principles that ought to be followed when granting a stay of execution and the learned Judge failed to consider the principles and circumstances namely; the prospects of success of the appeal, the existence of sufficient grounds or special circumstances and damages being an adequate remedy.

5.1.2 On the issue of good and sufficient grounds, the Appellant relied on the case of **Luanshya Copper Mines Plc v First Rand Ireland Plc and Other Creditors of Luanshya Copper Mines Plc, Poweng Zambia Limited and the Attorney General**¹ where the Supreme Court dealt with the

principles applicable to the granting of a stay of execution pending appeal. Our attention was also drawn to Order 59/13(2) of **The Rules of the Supreme Court¹ (RSC)** dealing with stays of execution pending appeals to the Court of Appeal.

5.1.3 On the issue of prospects of success of appeal, it was submitted that the court below was entitled to preview the prospects of success of the appeal against the consent Judgments, which appeal was by way of commencement of a new action. That the learned Judge did not do so and proceeded to grant the stay without proffering reasons for doing so. The case of **Sonny Paul Mulenga and Two (2) Others v Investrust Merchant Bank Limited²** was relied upon and submitted that the appeal against consent Judgments has no prospects of success.

5.1.4 It was the Appellant's contention that the fraud and mistake claimed by the Respondent did not relate to the terms of the consent but to the status of Afgri Leasing Services Limited's licence and incorporation, which status has no effect on the determination and agreement on indebtedness and security by the Respondents to the Appellant.

5.1.5 On damages as an adequate remedy, reliance was placed on the case of **Nyampala Safaries (Zambia) Limited and Others v Zambia Wildlife Authority and Others**³ dealing with Interlocutory injunctions and submitted that this was not a proper case for granting of the stays as the Respondent could adequately be atoned through damages.

5.2.1 In respect to the second ground, it was contended that, instead of considering the prospects of success, the learned Judge held that the Respondents could not be asked to prove the fraud and mistake. It was submitted that the court erred because the Appellant had not argued that the Respondent ought to prove fraud and mistake as alleged. That, the Appellant's contention is that the fraud and mistake alleged does not relate to the terms of the consent Judgment or manner in which they were entered and as such does not meet the criteria required for the setting aside of a consent Judgment.

5.3.1 In arguing the third ground, it was submitted that the court erred when it failed to apply itself to the fact that there were no prospects of success based on the

Respondents own admission that the consent Judgments were properly executed by their Counsel and that the fraud and mistake alleged were not directly related to the consent Judgment. The case of **Sinim Enterprises and Harry Sinyangwe v Stanbic Zambia Limited⁴** was cited, which set out grounds on which a consent Judgment can be set aside.

5.4.1 In arguing ground four, it was submitted that the court failed to apply and adjudicate on all the defendant's authorities and submissions before it. That the court did not state what good and sufficient reasons or special circumstances existed nor how it determined that there were prospects of success, that made it necessary to grant the stays.

5.5.1 As regards the fifth ground, it was contended that the court erred by failing to consider that the plaintiff's loss, if any was quantifiable and could be compensated in damages in the event of succeeding in the main action.

5.6.1 According to the Appellant, the appeal has merit and as such the Ruling from the court below should be overturned and the stays of execution discharged.

6.0 ARGUMENTS IN OPPOSING THE APPEAL

6.1 In opposing the first ground of appeal, State Counsel Chisulo, submitted that the consent Judgments in issue also attach to mortgaged properties of the Respondents, hence the Appellant's issuance of writ of possession. That therefore, the court below was in order to grant the stays pending determination of the matter, as not granting the same would have resulted in the Respondent losing their landed properties which cannot be atoned for in damages should the Court find in favour of the Respondents at trial.

6.1.2 It was contended that, by taking out Court process wherein the Respondents are seeking an Order to set aside the consent Judgments on account of fraud and mistake, the Appellant are in essence disputing the indebtedness to the Appellant and challenging the validity of the consent Judgments.

6.1.3 According to State Counsel, the court below did consider and highlighted the ground for exercising its discretion in granting the stays. That the Court stated that by not granting the Order for stays, the cause of action challenging the consent Judgments would be rendered an academic exercise.

6.1.4 As regards the contention that the court below did not preview the prospects of the case, it was submitted that the court cannot be faulted for adopting the approach it did of requiring the Respondents to prove fraud and mistake during the application for stays of execution as that was the matter to be determined at trial. That the court below cited the case of **Dr. J. N. Billingsley v J. A. Mundi⁵** as authority for the approach it took which is sound at law and does not amount to a misdirection. That, to do otherwise would have amounted to determination in finality of the entire cause and a misdirection.

6.1.5 On the issue of damages being an adequate remedy, State Counsel, submitted that, contrary to the Appellant's

assertion that the consent Judgments involved liquidated sums, the consent Judgments also involved landed properties mortgaged as securities and the writs of possession would have been executed and the properties sold, had the Court not granted the stays. That loss of land as was held in the case of **Gideon Mundanda v Timothy Mulwani and Two (2) Others**⁶, cannot be atoned for in damages.

6.2.1 In response to the second ground, it was submitted that as earlier contended, in response to the first ground, the approach the Court took did not amount to a misdirection. It was reiterated that allegations of fraud and mistake concerning the terms and manner in which the consent Judgments were entered into, are issues which require production of evidence at trial and not at interlocutory application stage. That the Court rightly declined to delve into the validity of the consent Judgment as doing so would have gone contrary to the principles of law laid out in the case of **Turnkey Properties v Lusaka West Development Company Limited**⁷ which precludes Courts

hearing interlocutory applications from making comments which have the effect of pre-emptying the decision of the issues which are to be determined on the merits of the trial.

6.3.1 In response to the third ground, State Counsel submitted that, there is nowhere either in the pleadings or affidavit in respect to the record of appeal where the Respondents admit as alleged by the Appellant that the consent Judgments were properly executed.

6.4.1 In response to the fourth ground, it was submitted that the court below gave a reason for exercising its discretion to grant the stays of execution, namely that failure to grant the application would render the matter an academic exercise. According to State Counsel, that was a good and sufficient reason.

6.4.2 As regards the issue of the court below not adjudicating on all the Appellant's authorities and submissions, the case of **Kitwe City Council v William Nguni⁸** was cited, where the Supreme Court held that the Court is not bound

to consider Counsel's submissions because they are only meant to assist the Court in arriving at a Judgment.

6.5.1 In response to the fifth ground, it was submitted that the court below did consider the issue raised by considering various authorities that govern the grant of stays and stating that, it is trite law that in granting a stay, the Court must preview the prospects of the main matter succeeding and that a stay will not be granted as of right but it is discretionary.

7.0 CONSIDERATION AND DECISION OF THE COURT

7.1 We have considered the arguments and the Ruling being impugned. We will consider grounds one, two, three and five together as they are entwined. These grounds touch on the issue of what is required to be taken into consideration in granting a stay of execution pending determination of the main cause. It must be noted from the onset that the application for stays of execution which were in the court below related to stays pending determination of the main cause and not pending an appeal to a superior Court. The considerations involved

are different. We note that the Appellant has referred to Order 59/13 (2) **RSC** dealing with granting of the stay pending appeal to the Court of Appeal. Reference to that rule is misplaced. So are the various authorities cited by the Appellant, which all were dealing with stays of execution pending appeal to the Supreme Court.

- 7.2 Secondly, it must also be pointed out that the issue of the remedy of compensation being adequate to atone for injury is more suited to applications for interlocutory injunctions than applications for stays of execution.
- 7.3 That said, the appropriate rule herein is Order 47/1 **RSC** which states as follows:

"1- (i) Where a Judgment is given or an Order made for payment by any person of money and the court is satisfied, on an application made at the time of the Judgement or Order, or at any time thereafter, by the judgement debtor or other party liable to execution.

- (a) that there are special circumstances which render it inexpedient to enforce the Judgment or Order, or*
- (b) that the applicant is unable from any cause to pay the money, then notwithstanding anything in rule 2 or 3. The Court may by*

*Order Stay execution of the Judgment or
Order by Writ of fieri facias either absolutely
or for such period and subject to such
conditions as the Court thinks fit."*

7.4 The learned author of **ODGERS Principles of Pleading & Practice**¹ at page 367 states as follows:

"Although the Court will not without good reason delay a successful plaintiff in obtaining the fruits of his Judgment, it has power to stay execution if justice requires that the defendant should have the protection... The court has wide powers under the RSC ... Again, in the case of any Judgment or Order to do an act, whether it is to pay money or not, the court has an indirect power to postpone its operation by fixing a time for performance or extending a time already fixed... or if the matters have accrued since Judgment which would make it just to stay execution the court may do so, under Order 45/11 RSC".

7.5 The rule is clear, that the granting of a stay is at the discretion of the court. We note that although the learned Judge in the court below was alive to the fact that, in granting a stay, the court must preview the prospects of the cause succeeding, the learned Judge did not make that preview. We say so, for the following reasons:

7.5.1 It is evident from the statement of claim appearing at page 26 of the record of appeal (the record) that vide a loan agreement dated 8th September 2014, Afgri Financial Services Limited (Afgri) availed the 1st Respondent a credit facility in the sum of USD 660,000.00. In addition, there was also an equipment credit agreement for the sum of USD 271,067.00. The other Respondents executed third party mortgage deeds as security over farm numbers 8446 and 8447 in Central Province as well as fixed charges.

7.5.2 On 30th June 2013 and 29th April 2014, Afgri availed a credit facility to the 4th Respondent for the sum of USD1,825,171.00 and USD 322,700.00 which were secured by a mortgage debenture and agricultural charge.

7.5.3 Subsequently, on or about 29th August 2014, Afgri assigned the debts and securities to the Appellant. The Respondents then defaulted on the repayments. At that stage, the Respondent having been in a business relationship with the Appellants close to four years, commenced mortgage actions under cause numbers 2018/HPC/0151, 2018/HPC/0156 and 2018/HPC/0231 for recovery of the money due as well as the money for possession and sale of the mortgaged

properties. It is the aforestated actions which culminated into the aforestated consent Judgments.

7.5.4 We further note that in the statement of claim, the Respondents are questioning the legal status of Afgri, as according to them it was not registered with the Patents and Companies Registration Agency (PACRA) as a company.

That in addition Afgri made a fraudulent misrepresentation to Bank of Zambia, that it was a registered company, in obtaining a licence in 2009 to operate as a non-deposit taking leasing company.

7.5.5 We further note that the particulars of fraud relate only to Afgri and not the Appellant.

7.5.6 Clearly, had the learned Judge in the court below undertaken a preview, by simply speaking to the claim as contained in the statement of claims, he would have found that the issues which are being alleged and claimed on account of mistake and fraud have nothing to do with the Appellant. Furthermore, they do not touch on or relate to the three consent Judgments in issue.

7.5.7 In that respect, we agree with the Appellant that the allegations of fraud and mistake do not relate to the terms of

the consent Judgments, but to the status of Afgri, which has no effect on the determination and agreement on indebtedness and security of the Respondents to the Appellants.

In any event, Afgri is not even a party to the proceedings which have been brought by the Respondents in attempting to set aside the consent Judgments.

7.5.8 In the view that we have taken, had the learned Judge taken a preview of the cause of action, we have no doubt that he would have found that it had no reasonable prospects of success.

7.9 In **Sonny Paul Mulenga²** case which has been relied upon by both parties, the Supreme Court held *inter alia* as follows:

(1) In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of proposed appeal (cause).

In the present case, the consent order was completed and final when made by the Judge in open court and the arrangement proposed by the appellants provide little prospect if any of the consent Judgment ever being set aside.

(2) The successful party should not be denied immediate enjoyment, of a Judgment unless there are good and sufficient grounds.

7.10 In the **Sonny Paul Mulenga²** case, the Respondent commenced an action to recover a sum of over K300,000,000.00 plus interest, which had been secured by a mortgage over the 3rd Appellants hotel.

Subsequently, the parties entered into a consent Judgment. Thereafter, the appellants applied to a single Judge to stay execution of the consent Judgment on the ground that the Order subsequently drawn up and filed was not counter signed by Counsel for the appellants. The application was refused and the applicant appealed.

7.11 In refusing the application for stay, the Supreme Court opined that there was little prospect, if any, of the consent Judgment itself ever being set aside. That if all that was required was payment by instalments, an appeal purporting to be against the consent Judgment itself was a strange course to choose.

7.12 Applying the aforestated principle and our view earlier alluded to, the attempt by the Respondents to commence an action to set aside the consent Judgment is an ingenious way of trying to

stall the consent Judgments on account of fraud and mistake which cannot be attributed to the Appellant and has no bearing on the consent Judgments. The Respondents have not proffered good and sufficient grounds for us to sustain the stay of execution which was granted in the court below.

7.13 This set of grounds of appeal therefore succeed. Consequently, the Orders for stay of execution which were granted by the learned Judge in the court below are accordingly set aside and discharged.

7.14 As regards the fourth ground, it alleges that the learned Judge failed to apply and adjudicate on all the Appellant's authorities and submissions. As rightly submitted by the Respondents with the aid of the **Kitwe City Council**⁷ case, the Court is not bound to consider Counsel's submissions and authorities because they are only meant to assist the Court. The Courts duty in arriving at its decision is to consider all the issues before it, the evidence and apply the relevant law. This ground of appeal has no merit.

8.0 CONCLUSION

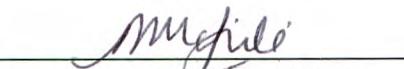
8.1 The appeal having substantially succeeded, we order that costs be awarded to the Appellant to be paid forthwith. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



F. M. LENGALENGA
COURT OF APPEAL JUDGE



Majula
B. M. MAJULA
COURT OF APPEAL