

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2020/CCZ/0015

HOLDEN AT LUSAKA

IN THE MATTER OF: ARTICLES 1 (1), 1(2), 1(5), 122(2), 122(4) AND 128(1)(a), 128(1)(b), 128 (3) AND 134 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT 2016

IN THE MATTER OF: THE CONSENT ORDER DATED 21ST APRIL, 2020 UNDER CAUSE No. 2020/HB/15 PLACING KINGPHAR COMPANY ZAMBIA LIMITED UNDER SUPERVISION AND COMMENCEMENT OF BUSINESS RESCUE PROCEEDINGS.

IN THE MATTER OF: AN ACTION UNDER CAUSE NO. 2020/HB/23 TO SET ASIDE THE CONSENT ORDER DATED 21ST APRIL, 2020 PLACING KINGPHAR COMPANY ZAMBIA LIMITED UNDER SUPERVISION AND COMMENENCMENT OF BUSINESS RESCUE PROCEEDINGS

IN THE MATTER OF: SECTIONS 2, 23, 24,38, AND 37 OF THE CORPORATE INSOLVENCY ACT No. 9 OF 2017 IN RESPECT OF CAUSE NO.s 2020/HB/015 AND 2020/HB/023 AS READ TOGETHER WITH ARTICLES 1(1), 1(2), 1(5), 122(2), 122(4), 128(1)(a), 128 (1)(b), 128(2), 128(3) AND 134 OF THE CONSITUTION OF ZAMBIA (AMENDMENT) ACT 2016

BETWEEN:

WANG YING



PETITIONER

AND

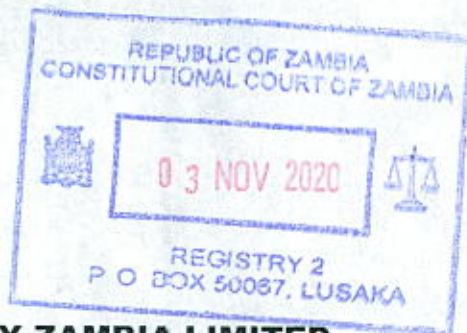
YOUJUN ZHUANG

WANG QINGHAI

KINGPHAR COMPANY ZAMBIA LIMITED

BUMU GENERAL TRADING FZE

THE ATTORNEY GENERAL



1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

Before the Honourable Mrs. Justice M. S. Mulenga on 3rd November, 2020

For the Petitioner : Captain I.M. Chooka (Rtd), MessrsMilimo Chooka & Associates

For the 1st and 2nd Respondent : Mr. G. Phiri, PNP Advocates
Mr. K. Mweemba, Keich Mweemba Advocates

For the 3rd Respondent : Mr. P. Chola, Lewis Nathan Advocates

For the 4th Respondent : Mr. N. Yalenga, Nganga Yalenga and Associates
Mr. S. K. Simwanza, Lungu Simwanza and Associates

For the 5th Respondent : Mr. F.K. Mwale and Ms. D.M. Mwewa, The Attorney General's Chambers

R U L I N G

Cited cases

- 1. Zambia Seed Company Limited v Chartered International (Pvt) Limited (1999) ZR 151 (SC)**

- 2. Lusaka West Development Company, BSK Chiti (Receiver), Zambia State Insurance Corporation Limited v Turnkey Properties Limited, SCZ Judgment No. 1. of 1990**
- 3. London Ngoma and Others v LCM Company Limited and Another (1999) ZR 75 (SC)**
- 4. Chenda v Satkaam Limited (1979) ZR 119**
- 5. Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited S.C.Z Judgment No .3 of 1997**
- 6. Optima Business Consultants Limited and Platinum Gold Equity Limited v Platinum Investments SCZ Appeal No. 195 of 2016**

Legislation referred to

- 1. Constitution of Zambia (Amendment) Act No. 2 of 2016**
- 2. Corporate Insolvency Act No. 9 of 2017**
- 3. Constitutional Court Rules Statutory Instrument No. 37 of 2016**

Works referred to:

- 1. Halsbury's Laws of England, Fourth Edition Reissue Volume 37**

This is a ruling on an application by the Petitioner, filed on 28th September, 2020 for a stay of proceedings in the High Court action under cause number 2020/HE/023 pending the determination of this Petition. The application is made pursuant to Order X of Rule 2 of the Constitutional Court Rules (CCR).

The brief background to this application is outlined in both the affidavit in support by the Petitioner and the affidavit in opposition

by Wenxiu Pan a director of the 4th Respondent. The common facts are that the 1st, 2nd and 3rd Respondents, through their respective Counsel, executed a Consent Order on 21st April, 2020 under cause number 2020/HB/015 directing that the matters under cause numbers 2020/HPC/165 and 2020/HPC/015 be consolidated to cause number 2020/HB/015; the 3rd Respondent be placed under supervision and begin business rescue proceedings; and Lewis Chisanga Moshosho, the provisional liquidator of the 3rd Respondent under cause number 2020/HPC/165, be appointed as its Business Rescue Administrator under the Corporate Insolvency Act. Thereafter, the business rescue proceedings commenced.

On 11th May, 2020, the 4th Respondent, as one of the shareholders in the 3rd Respondent, commenced an action under cause number 2020/HB/023 to among others, challenge the Consent Order and terminate the business rescue proceedings under cause number 2020/HB/015. On 13th May, the 4th Respondent joined cause number 2020/HB/015 as an Interested Party and filed an application to stay the business rescue

proceedings pending the determination of its action under cause number 2020/HB/023.

On 5th June, 2020, the 1st Respondent applied under cause number 2020/HB/015 for referral of some questions to the Constitutional Court and to consequently stay the proceedings pending the determination of the referral. The questions in the referral relate to whether the proceedings under cause number 2020/HB/023 interfere with or undermine the judicial functions and powers of another High Court Judge under cause number 2020/HB/015 and the constitutionality of the parties commencing the proceedings under the two causes before the different Judges over the same matter.

This application for referral was granted through the Ruling of 12th June, 2020. The 1st Respondent then applied under cause number 2020/HB/023 to stay those proceedings pending the determination of the referral to the Constitutional Court under cause number 2020/HB/015. However, this application was denied and

the proceedings continued and the matter is now pending the delivery of Judgment. On 22nd September, 2020 the 1st, 2nd and 3rd Respondents obtained a stay of proceedings under cause No. 2020/HB/023 in the Court of Appeal pending an inter partie shearing of an application on 28th October, 2020.

Apart from these undisputed facts, the affidavits contained further averments as outlined below.

The Petitioner in the affidavit in support further avers that the two matters are before different Judges of equal jurisdiction and that cause number 2020/HB/023 seeking the termination of business rescue proceedings will interfere with and undermine the judicial functions and independence of the Judge under cause number 2020/HB/015. That this raises constitutional issues as regards the constitutionality of the proceedings under cause number 2020/HB/023.

In the affidavit in opposition, Wenxiu Pan averred that the 4th Respondent commenced the action under cause number

2020/HB/023 to challenge and impugn the Consent Order under cause number 2020/HB/015 which was used to place the 3rd Respondent under business rescue and supervision and that this challenge does not amount to interference with the judicial functions of another Judge. That a fresh action was required to challenge the Consent Order as per established jurisprudence and hence there was no constitutional issue raised for determination. Further, that the admission by the Petitioner that there is a referral to the Constitutional Court under cause number 2020/HB/015 seeking to determine the same issues sought herein amounts to abuse of court process and is prejudicial to the 3rd Respondent. It was concluded that the Petitioner was not a party to cause number 2020/HB/015 and thus has no *locus standi* to move this Court to defend the Consent Order to which she is not a party.

In the skeleton arguments in support of this application, the Petitioner submitted that pursuant to Order X rule 2 of the CCR, this Court has jurisdiction to grant the stay of proceedings as an interim order. Further, that the continued hearing and determination of

cause number 2020/HB/023 is likely to render the proceeding before this Court nugatory and a mere academic exercise. It was argued that the Petition before this Court is to determine *inter alia* whether the continued hearing of cause number 2020/HB/023 does not constitute interference with and/or supervision of a Judge contrary to Articles 122 (1) and (2) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). Hence, that cause number 2020/HB/023 would be concluded before important constitutional issues herein are determined. In augmenting the skeleton arguments, Counsel for the Petitioner added that this Court has its own jurisdiction to grant a stay despite the one granted by the Court of Appeal.

It was the Petitioner's further submission that no prejudice will be suffered by any of the parties under cause number 2020/HB/023 once it is stayed. However, that the matters herein directly affect the subject High Court matter which would be brought to its logical conclusion once the constitutional issues, which must be given priority, are heard and determined. In augmenting the skeleton

arguments Counsel for the Petitioner added that this Court has its own jurisdiction to grant stay despite the one granted by the Court of Appeal.

In the skeleton arguments in opposition, the 4th Respondent submitted that pursuant to section 24 (2)(a)(i) of the Corporate Insolvency Act, business rescue proceedings may be terminated when the court sets aside the resolution order that began the proceedings. The case of **Zambia Seed Company Limited v Chartered International (Pvt) Limited**¹ was cited as providing guidance on the ways a consent judgment can be challenged as follows:

By law, the only way to set aside a Judgment by consent would be to start a fresh action specifically to challenge the consent order.

Further, that in the case of **Lusaka West Development Company, BSK Chiti (Receiver), Zambia State Insurance Corporation Limited v Turnkey Properties Limited**², the Supreme Court held that the consent judgment could only be set aside by a party to the action. Hence, that the 4th Respondent joined the case under cause number 2020/HB/015 in line with the Supreme Court holding in the case of

London Ngoma and Others v LCM Company limited and Another³ that a party may be joined to an action even after a consent judgment had been granted once sufficient interest is demonstrated.

It was the 4th Respondent's position that upon being joined to cause number 2020/HB/015, it acquired *locus standi* to challenge the Consent Order. And that since the challenge could only be done through commencement of a fresh action, this was done under cause number 2020/HB/023 in line with section 24(2)(a)(i) of the Corporate Insolvency Act. Hence, that due to the fact that this was done in line with the rules, there was no interference with the judicial functions of the Judge under the earlier matter and no constitutional issue. The High Court decision of **Edson Chenda v Satkaam Limited**⁴ was cited as persuasive good law wherein it was said to have been held that a stay of proceedings would only be granted on a bonafide application which satisfies the court that there is a defence on the merits. That in this case, the Petitioner has failed to demonstrate a constitutional issue warranting the stay of proceedings under cause number 2020/HB/023 when the

process employed by the 4th Respondent was within the law and consistent with the Constitution.

Furthermore, that the 1st and 2nd Respondents have since obtained a stay of proceedings in the Court of Appeal. In augmenting the skeleton arguments, both Counsel for the 4th Respondent questioned whether granting another stay would not amount to duplicity. It was submitted that the Petitioner's application be dismissed with costs.

I have considered the affidavits in support and in opposition as well as the skeleton arguments which were augmented by the parties at the hearing. The 1st, 2nd, 3rd, and 5th Respondents did not file any submissions but stated that they supported the Petitioner's application for a stay of proceedings.

The main issue for determination is whether or not a stay of proceedings under cause number 2020/HB/023 ought to be granted on the basis of an alleged constitutional violation.

The Petitioner contends that the proceedings commenced under cause number 2020/HB/023 violate Article 122 of the Constitution. The provisions relating to interference in the exercise of judicial authority are under Article 122(1) and (2) which state:

(1) In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.

(2) A person and a person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer.

It is clear that Article 122 (2) refers to a person and a person holding public office interfering with the performance of a judicial function by a judge.

The facts of this case relate to the commencement of two actions concerning the same subject matter. The record will show that the 3rd Respondent is a company which has been placed under supervision and the business rescue proceedings were commenced by way of a Consent Order dated 21st April, 2020 under cause number 2020/HB/015. The 4th Respondent commenced a fresh action under cause number 2020/HB/023 challenging the Consent

Order in relation to the 3rd Respondent with a view to terminating the business rescue proceedings in the earlier matter. The 4th Respondent also subsequently joined the earlier matter under cause number 2020/HB/015 and sought to stay that matter pending the determination of its action under cause number 2020/HB/023.

The Petitioner indicated that this Court has jurisdiction to hear and determine this application for an order to stay the proceedings under cause number 2020/HB/023 on account of its jurisdiction under Article 128. Article 128 sets out the jurisdiction of the Constitutional Court and in particular sub article (1)(b) provides for matters relating to a violation or contravention of the Constitution. The Petitioner alleges that the second case filed by the 4th Respondent contravenes Article 122 on the functional independence of the Judiciary, in particular, that of the Judge in the earlier case.

The Petitioner has brought this application pursuant to Order X rule 2 of the CCR which provides in part as follows:

2. (1) Despite any provision to the contrary, the Court may hear and determine an application for an interim order.

It is further provided that such an order may be made on the terms the Court may consider reasonable. In this case, the Petitioner is seeking an order to stay proceedings in the High Court action under cause number 2020/HB/023. The Constitutional Court Rules do not have provisions specific to a stay of proceedings and hence this application falls under the Court's inherent jurisdiction to grant interim orders.

The Court has discretion to grant the stay of proceedings. As in all matters of discretion, the same has to be exercised judiciously. This means that the Court must satisfy itself that there are proper and reasonable grounds to warrant the exercise of the discretion.

On the issue of stay of proceedings, Halsbury's laws of England Fourth Edition at paragraphs 926 and 930 state as follows in part:

926. 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 the court at the stage which they have then 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 claim 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 process. The order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances. (emphasis added)

930. 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 on his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

What therefore falls to be considered is whether the stay of proceedings under cause number 2020/HB/023 should be granted in the circumstances of this case. Put differently, has the Petitioner

satisfied the conditions for the grant of the stay of proceedings or are there special circumstances to warrant the same?

The alleged special or exceptional circumstances should be weighed against the right of the 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. The need for such a stay especially where there is a constitutional matter pending that has a significant bearing on the case is cardinal. However, this cannot be granted routinely or 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.

The ground advanced for the stay application by the Petitioner is essentially that the proceedings should be stayed pending the challenge of the constitutionality of cause number 2020/HB/023 as it allegedly interferes with the functions and powers of another Judge in the earlier action under cause number 2020/HB/015. Further,

that this Court should be given opportunity to determine the constitutionality of commencing proceedings before different judges over the same subject matter.

The argument in opposition by the 4th Respondent is that there is no constitutional issue regarding the commencement of proceedings under cause number 2020/HB/023 because the said action was commenced in line with the rules as guided by court decisions on the manner in which a consent order or judgment may be challenged.

Further that granting a stay would prejudice the 4th Respondent and that there is already a referral before this Court raising the same issues of the constitutionality of cause number 2020/HB/023 in relation to cause number 2020/HB/015.

I have duly considered the arguments by the parties including the position taken by the rest of the Respondents that the stay should be granted pending the determination of this Petition and

that not granting a stay might render the determination of the Petition academic.

At this interlocutory stage, I am mindful not to comment on the merits of the Petition as to whether or not it raises constitutional issues along the lines of the arguments advanced by the parties. I have considered whether there are compelling circumstances or reasons to grant the stay of proceedings.

What is apparent to me as central is the issue of the 4th Respondent commencing an action under cause number 2020/HB/023 to challenge the Consent Order placing the 3rd Respondent under business rescue proceedings under cause number 2020/HB/015. The Petitioner's contention is that the 4th Respondent's subsequent action interferes with or challenges the powers and judicial functions of the Judge in the earlier cause. This is what the Petitioner says raises the issue of the constitutionality of the second action. Without getting into further details on this, I note that it is common cause that there is an earlier referral to the

Constitutional Court under cause number 2020/HB/015 raising basically the same issue of the constitutionality of the High Court Judge, under cause number 2020/HP/023, proceeding to hear the matter and thereby allegedly interfering with the functions and powers of the Judge hearing cause number 2020/HB/015. Hence, this Petition and the referral both relate to whether or not cause number 2020/HB/023 is constitutional.

At the core of this matter is apparently a contention regarding alleged multiplicity of actions and how a consent order may be challenged. In this jurisdiction we have well developed jurisprudence on how multiplicity of proceedings or actions as well as consent orders or judgments, are to be challenged or handled. This also extends to the role of the appellate courts in resolving or correcting trial courts where there has been misdirection even at the stage where judgment has already been delivered.

I must add that where the court rules, such as the High Court Rules, and settled jurisprudence have procedures for dealing with

an issue such as multiplicity of actions or consent orders or other procedures and applications, those procedures should be followed by the parties. I will hence not comment on the opposing arguments by the parties regarding which procedures ought to be followed in order to challenge the Consent Order.

Further, I note that there is currently a stay of proceedings under cause number 2020/HB/023 granted by the Court of Appeal. The argument by the Petitioner is that even with this status, this Court should still grant another stay of proceedings of the same cause number 2020/HB/023 pending the hearing of the Petition. The Petitioner essentially seeks to have two stay of proceedings from two Courts over the same matter, under cause number 2020/HB/023, and at the same time. I do not find this argument compelling based on the particular facts in this case.

In light of all that has been discussed above, I am not satisfied that the Petitioner has advanced any compelling or sufficient reasons for the grant of a stay of proceedings under cause number

2020/HB/023 in the circumstances of this case. There must be reasonable grounds to warrant the grant of the stay of proceedings. It is not sufficient to only proffer that it should be granted on the basis that the Petition would likely be rendered academic.

This application fails for lack of proper and sufficient grounds for the grant of the stay of proceedings and I hereby dismiss it.

Each party will bear its own costs of this application.

Delivered at Lusaka this 3rd day of November, 2020.



M.S. Mulenga
Constitutional Court Judge