

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HP/0255**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

CHINA COPPER MINES LIMITED

**PLAINTIFF**

**AND**

TIKUMBE MINING LIMITED

**1<sup>ST</sup> DEFENDANT**

ATTORNEY GENERAL

**2<sup>ND</sup> DEFENDANT**

DONALD'S INVESTMENTS LIMITED

**3<sup>RD</sup> DEFENDANT**

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO  
IN CHAMBERS ON 12<sup>TH</sup> SEPTEMBER, 2017.**

*For the Plaintiff: Mr. J. Zimba and Ms. D. Kapitolo - Makebi*

*Zulu Advocates*

*For the 1<sup>st</sup> Defendant: N/A*

*For the 2<sup>nd</sup> Defendant: N/A*

*For the 3<sup>rd</sup> Defendant: N/A*

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## **R U L I N G**

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**CASE AUTHORITIES REFERRED TO:**

1. *Sonny Paul Mulenga, Vismar Mulenga, Chainama Hotels Limited & Elephant Head Hotel vs. Investrust Merchant Bank Limited (1999) ZR 101;*
2. *Tresford Chali vs. Bwalya Ng'andu - SCZ/8/009/2014;*
3. *Ndola City Council vs. Charles Mwansa SCZ Judgment No. 15 of 1994;*
4. *Emmerson vs. Ind, Coope & Co. (1886) 55 L.J Ch 905;*

**LEGISLATION REFERRED TO:**

1. *The Rules of the Supreme Court, (White Book) 1999 Edition*

This is an application by the Plaintiff for an Order for Stay of Execution of the Ruling dated 26<sup>th</sup> July, 2017 pending the determination of an Appeal in the Court of Appeal made pursuant to **Order 59 Rule 13** of **The Rules of the Supreme Court**<sup>1</sup>. The said order states as follows: -

***"Stay of execution, etc.***

- (1) Except so far as the court below or the Court of Appeal or a single judge may otherwise direct -***
  - (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;***
  - (b) no intermediate act or proceeding shall be invalidated by an appeal.***
- (2) On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court otherwise orders."***

The genesis of this matter, as is relevant to the application before me, is that on 26<sup>th</sup> July, 2017, I delivered a Ruling which dismissed the Plaintiff's action on account of the wrong procedure having been employed, for abusing the Court process and being *Res Judicata*. I further awarded costs to the Defendants, to be taxed in default of agreement. The Plaintiff has since appealed against this Ruling and now seeks to stay execution of the Ruling as it relates to costs.

The application is supported by an Affidavit deposed to by one Yu Wang Ping, the General Manager of the Plaintiff company, where he avers, *inter alia*, as follows: -

1. *That the High Court delivered a Ruling in which the whole matter was dismissed for being an abuse of Court process without hearing the application for review and that the Plaintiff company should pay costs of the proceedings;*
2. *That being dissatisfied with the turn of events, the Plaintiff on the 25<sup>th</sup> day of August, 2017 appealed against the whole Ruling of the High Court to the Court of Appeal;*
3. *That the appeal by the Plaintiff raises serious questions of law and as such needs to be addressed without jeopardising the Plaintiff's interests;*
4. *That the Defendants will in no way be prejudiced by the Plaintiff's appeal and this application as it seeks to settle all issues surrounding this long-standing dispute once and for all; and*
5. *That the Plaintiff has very high prospects of success in the appeal owing to the important questions to be determined.*

At the scheduled hearing the Plaintiff's Advocates orally submitted that the Plaintiff's application for a stay of execution is justified for the reasons averred in the Affidavit in Support, in particular paragraphs 5 to 16. They referred this Court to the case of **Sonny Paul Mulenga, Vismer Mulenga, Chainama Hotels Limited & Elephant Head Hotel vs. Investrust Merchant Bank Limited**<sup>1</sup> and submitted that for an application such as this to be granted, the Court must be given a chance to prove the prospects of the proposed appeal succeeding. It was submitted that the Plaintiff has good prospects of succeeding as can be seen from the grounds set out in the Notice of Appeal and Memorandum of Appeal that had been exhibited in the Affidavit in Support. It is submitted further that if the Court does not stay the Ruling, it will render the

entire appeal nugatory. They emphasised to the Court that the stay of execution is being sought only in relation to the award of costs to the Defendants and not the entire Ruling. On the foregoing, it was also submitted that given the nature of the reliefs that were sought in the matter that now stands dismissed, they are alive to the holding in the case of **Tresford Chali vs. Bwalya Ng'andu**<sup>2</sup>, where it was held that declaratory reliefs cannot be stayed and therefore, they would restrict their application to the award of costs, which they prayed would be stayed pending the final determination of the appeal.

I have considered the application by the Plaintiff to stay execution of the Ruling dated 26<sup>th</sup> July, 2017 as it relates to the award of costs to the Defendants.

It is contended that if the Court does not grant a stay of the costs awarded to the Defendants in the Ruling of 26<sup>th</sup> July, 2017, the appeal would be rendered nugatory. It is also contended that there will be no prejudice occasioned to the Defendants in this matter even if they succeed on appeal they will get their costs and if they do not succeed on appeal, the damage that would have been caused by the payment of costs will not be atoned for in damages.

It is trite that the Court has the power to grant an Order of stay of execution where it is satisfied that there are good and convincing reasons for doing so and where the appeal has prospects of succeeding. An Applicant must demonstrate reasons or an appropriate case to warrant the favourable exercise of the Court's

discretion to stay execution. From the authorities cited by the Parties, it is clear that for an Applicant to succeed in being granted a stay of execution there must exist special or exceptional circumstances showing the balance in his favour. The Plaintiff herein contends that there is merit in the appeal.

I refer to the case of ***Ndola city council vs. Charles Mwansa***<sup>3</sup>, where it was held that: -

***“An appeal does not automatically operate as a stay of execution, it must be applied for and the decision is discretionary.”***

I further refer to the case of ***Emmerson vs. Ind Coope***<sup>4</sup>, where it was held that: -

***“A stay will not be granted save in very exceptional circumstances, such as where execution would destroy the subject matter of the action or deprive the appellant of the means of prosecuting the appeal.”***

In addition, in the case of ***Sonny Paul Mulenga & Others vs. Investrust Bank Limited***<sup>1</sup>, which the Plaintiff referred this Court to, the Supreme Court held that: -

***“In terms of our rules of Court an appeal does not automatically operate as a stay of execution and it is pointless to request for a stay solely because an appeal has been entered. More is required to be advanced to persuade the Court below or this Court that it is desirable, necessary and just to stay a Judgment pending appeal. In exercising its discretion whether to grant a stay or not, the Court is entitled to preview the prospects of the proposed appeal.”***

The above authority also reiterates the necessity of a successful party in litigation to enjoy the fruits of the Judgment. The Plaintiff contends that there will be no prejudice caused to the Defendants, if the stay of execution is granted. In my view, the Plaintiff's contention is made without conviction, considering that the Defendants hold on to an unexecuted Ruling.

I also refer to **Order 59 Rule 13 (7)** of **The Rules of the Supreme Court**<sup>1</sup>, which states as follows: -

***"Terms on which a stay is ordered***

***The court has a discretion whether to impose terms on the grant of a stay... As regards costs, it used to be the practice generally to refuse a stay provided that the solicitor for the successful party was willing to give an undertaking to repay the costs in the event of the appealing being allowed... But that is no longer the practice... In the case of appeals to the Court of Appeal the modern approach is simply to decide, as a matter of discretion, whether to grant a stay on the costs order as well as the other parts of the order, or to grant one subject to an appropriate amount in respect of costs (and/or the judgment debt) being paid into court or otherwise secured, or to refuse a stay.***

***Where the court below has imposed terms, the Court of Appeal will be loath to interfere with its exercise of discretion."***

On the foregoing, I grant a stay, on the award of costs only, on condition that in default of agreement, the same must be taxed and paid into Court forthwith pending the determination of the Appeal. Since this application was heard *Ex Parte*, I make no order as to costs of this application.

Leave to appeal is granted.

**Delivered at Lusaka the 12<sup>th</sup> September, 2017.**

A handwritten signature in black ink, appearing to read 'P. K. Yangailo', written over a horizontal dotted line.

**P. K. YANGAILO  
HIGH COURT JUDGE**