

**SONNY PAUL MULENGA & VISMER MULENGA (Both personally & Practising as SP
Mulenga International) AND CHAINAMA HOTELS LIMITED AND ELEPHANTS
HEAD HOTEL LIMITED AND INVESTRUST MERCHANT BANK LIMITED**

SUPREME COURT
NGULUBE, SAKALA AND CHIRWA, JJ.S
10TH JUNE AND 14TH JULY, 1999
(S.C.Z. JUDGMENT NO. 15 OF 1999)

Flynote

Civil procedure - Appeal - Whether it can operate as a Stay of Execution

Headnote

A single judge had refused to stay execution of the judgment of the High Court pending appeal, resulting in this motion.

Held:

- (i) An appeal does not automatically operate as a stay of execution and it is pointless to ask for a stay solely because an appeal has been entered.

For the applicants: Mr. J.M.Chimbembe, of JMC and Associates

For the respondent: Mr. L.P. Mwanawasa, SC., of Mwanawasa and Company

Judgment

NGULUBE, C.J.: delivered the ruling of the court.

On 10th June, 1999, when we heard this application, we refused it and said we would give our reasons later. This we now do.

The application was ill-fated from the start. A single judge had refused to stay execution of the judgment of the High Court pending appeal and so prompting the motion before us which in substance is a rehearing by the full court of the application which was unsuccessful. In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask 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. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds.

Counsel for the applicants here came very close to asking for a stay as of right based on the bare fact that a notice of appeal had been lodged. It transpired that the proposed appeal was against a judgment made by consent of the parties and there was not even any evidence that leave had been sought and obtained in order to overcome the restriction in Section 24 of the Supreme Court of Zambia Act, Cap.25 of the 1995 Edition of the Laws. In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal. Here, the respondent launched an action to recover a sum of over K300 Million plus interest which had been secured by a mortgage over the third applicant's hotel in Kabwe. At the hearing before the learned trial judge counsel for the plaintiff proposed that there be a consent judgment the terms of which were spelt out and recorded by the Judge. Counsel then representing the applicants – the defendants in the case – informed the court that he agreed; whereupon the learned trial judge ordered that there be a consent judgment in the terms agreed to by the parties through their learned professional agents. Counsel for the plaintiff subsequently drew up and filed a formal order for signature by the court and for use. Mr. Chimembe informed us that the applicants wished to appeal against the consent judgment on the ground that the order subsequently drawn up and filed was not countersigned by counsel for the defendants! The consent order was complete and final when made by the judge in open court and the argument now proposed is a non-starter. When pressed to clarify, we were informed that what the defendants really wanted was time within which to pay by reasonable instalments, instead of losing their property at Kabwe possession of which had

already been taken by the Judgment creditor who was in process of selling it. From the arguments and submissions, there was little prospect, if any, of the consent judgment itself ever being set aside. If all that was required was payment by instalments, an appeal purporting to be against the consent judgment itself was as a strange course to choose.

It was for these reasons that we refused the application. Costs follow the event and will be taxed if not agreed.
