

IN THE COURT OF APPEAL FOR ZAMBIA
AT THE LUSAKA DISTRICT REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ/08/541/2022

BETWEEN:

SAN HE MANUFACTURING LIMITED

AND

LUNSEFWA HYDRO POWER COMPANY LIMITED Respondent



**Coram: Hon. Lady Justice N.A Sharpe-Phiri in Chambers
on 30 December 2022**

For the Appellant: Ms. Msimuko of Mulilansolo Chambers
For the Respondent: Mr. A. Akapelwa of Messrs Chibasakunda &
Company

R U L I N G

Legislation referred to:

1. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

This is a ruling on an application brought by the appellant on 20th December 2022 for an order for a stay of execution of the ruling of 16th November 2022 pending the determination of an application for leave to file notice of motion out of time. The application was brought pursuant to **Order X Rule 5 of the Court of Appeal Rules 2016.**

In support of the summons, the applicant filed an affidavit on 20th December 2022 deposed to by Lily Tan, the general manager in the appellant company, who deposed that the Court below rendered a judgment on 30th September 2022 and that the Court below subsequently amended the said judgment by way of a Ruling delivered on 16th November 2022. That on 23rd November 2022, the appellant paid the judgment sum awarded to the respondent into Court before the judgment was amended. Further, that the respondent did not serve the ruling on their advocates and that they only had sight of the ruling from the pigeonhole after the 14 days in which to appeal had lapsed.

The deponent further contends that the appellant filed into Court a notice for leave to appeal out of time on 12th December 2022, which appeal has a high chance of success. That the appellant applied for a stay of execution of the judgment dated 30th September 2022, but the Court below denied the application. That it was on this premise that this application for stay of execution of the ruling dated 16th November 2022 pending the determination of an application for leave to file a notice of motion out of time.

It was further deposed that the delay in filing the notice of motion was not deliberate and that the same is because the appellant was attempting to appeal against the ruling dated 16th November 2022, but such efforts were unsuccessful.

The deponent reiterated that if the stay of execution was not granted, it would render the appeal nugatory and academic, and the appellant would be financially ruined.

The matter came up for hearing on 27th December 2022. On the said date, both Counsel for the appellant and respondent were present. However, the Court granted a short adjournment to enable the Respondent file an affidavit in opposition and affidavit in reply by the appellant, if any.

The respondent filed their affidavit in opposition on 28th December 2022 opposing the applicant's application for an order for stay stating that the applicant had not adduced evidence of making the application for stay in the Court below. It was contended in the said affidavit that the exhibit marked 'LH4' in the applicant's affidavit in support does not relate to summons for an order for stay of execution in the Court below, but the said exhibit related to an order to file appeal out of time.

The applicant filed an affidavit in reply on 29th December 2022. The reply was a mere repetition in chronological order of events in the Court below leading up to the applications before this Court as deposed earlier in the affidavit in support of this application.

I have carefully considered the application before me together with the affidavit evidence and arguments on record.

The applicant seeks to stay execution of the ruling of the Court below dated 16th November 2022. In paragraph 9 of its affidavit in support of this application, the applicant contends that it applied for a stay of execution of the judgment of 30th September 2022, but the Court below denied the application. To support this contention, the applicant exhibited a document as 'LT4' which the appellant suggests was a denial of its application for a stay by the Court below. A close review of the said document exhibited as 'LT4' reveals that it is a draft unsigned order of 7th December 2022 which states as follows:

"UPON COUNSEL for the 2nd Defendant making an application for an Order to appeal out of time to the Court of Appeal;

UPON CONSIDERATION of the affidavit in support of the said application;

IT IS HEREBY ORDERED THAT, time to file an appeal out of time to the Court of Appeal BE and IT IS HEREBY GRANTED for the same limited time from the date of this order."

The said draft order is endorsed 'as application declined on 6th December 2022' by the Court below. As afore stated, the deponent in the affidavit in support, purports that the said exhibit is evidence of the Court below declining an application for a stay of execution. As shown above, this is in fact not the position as the document above relates to an application for leave to appeal out of time. This issue was raised by the respondent in paragraph 15 of its affidavit in opposition of 28th December 2022.

Notably, the applicant failed to respond specifically and address this cardinal issue in its affidavit in reply of 29th December 2022. My expectation is that the appellant would have properly addressed this issue in its affidavit in reply and proved to this Court that in fact it had applied for a stay of execution before the lower Court and which application had been declined.

It is my view that the failure by the applicant to take corrective measures so as to give a correct position on whether and when it would have filed an application for stay of execution in the Court below is a deliberate attempt to hoodwink this Court into taking erroneous account of facts in relation to determining the application before me.

Order XIII Rule 12 of the Court of Appeal Rules is instructive on the procedure for bringing an application such as this one before this Court, it provides that:

“Where an application may be made to the Court or the High Court, it shall be made in the first instance to the High Court”.

In the absence of irrefutable evidence that the applicant had first made the application for stay of execution in the Court below, I am unable to consider the application before me as the aforesaid provision only provides that the jurisdiction of this Court would only arise after the application has been made on the first instance in the Court below.

The application for a stay is declined and I accordingly dismiss it with costs to the respondent, to be taxed in default of agreement.

Dated at Lusaka this 30th December 2022.


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE