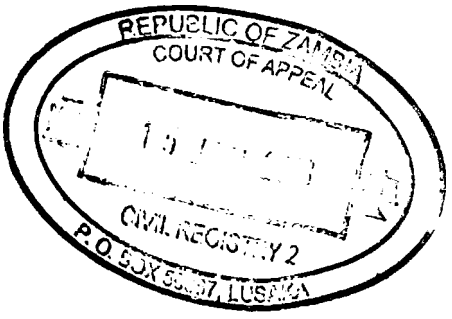
IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/273/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

MIRRIAM CHIVASA **APPLICANT**

AND

INTERNATIONAL GAMING AFRICA
(T/A LUSAKA ROYALE CASINO) **RESPONDENT**

Before the Hon. Mrs. Justice J.Z. Mulongoti
on the 15th day of January, 2018.

For the Applicant: *Mrs. M. Marabesa – Mwenya, Legal Aid Counsel*

For the Respondent: *Mr. Z. Simposya of MSK Advocates*

R U L I N G

Cases referred to:

1. *John Mumba, Danny Museteka and others v. Zambia Red Cross Society (2006) ZR 137*
2. *Shell & B.P. (Z) Limited v. Conidaris and others (1975) ZR 174*
3. *Sonny Paul Mulenga and another v. Chainama Hotels and another (1999) ZR 101*
4. *Linotype – Hell Finance v. Baker (1992) 4 ALL ER 887*
5. *Nyampala Safaris (Z) Limited and others v. Zambia Wildlife Authority and others (2004) ZR 49*

Legislation referred to:

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

2. The High Court Rules, Cap 27 of the Laws of Zambia.

This is a ruling pertaining to the applicant's application for stay of execution of the ruling of the High Court Industrial Relations Division dated 21st September, 2017, pending appeal.

The background of the matter giving rise to this application is that on 30th June, 2017, the applicant sued the respondent in the High Court for wrongful and unfair dismissal. On 11th July, 2017, the applicant obtained an Order of interim injunction to restrain the respondent from evicting her from the company house and repossessing her work permit. The injunction was granted on the basis that the application was not contested and that the respondent was absent at the hearing without an excuse. On 14th July, 2017, the respondent applied for review of the ruling by which the interim injunction was granted. By a ruling dated 18th September, 2017, the High Court reviewed its ruling on the premise that the respondent had provided an explanation for its absence on the day the interim injunction was granted. The High Court then discharged the interim injunction.

On 21st September, 2017, the applicant applied for review of the ruling that discharged the interim injunction pursuant to Order XXXIX of the High Court Rules. The High Court dismissed the application on ground that the supporting affidavit showed that the issues raised were grounds for appeal and not review. On 4th October, 2017, the applicant took out summons for an order to stay the ruling of 21st September, 2017. The High Court refused to grant the stay pending appeal on ground that there is nothing to stay. The Court relied on the case of **John Mumba, Danny Museteka and others v. Zambia Red Cross Society.**[1]

The applicant then applied to this Court for stay of execution of the ruling dated 21st September, 2017 pending appeal pursuant to Order X rule 5 of the Court of Appeal Rules (CAR) and Order 59 of the Rules of the Supreme Court, 1999 edition (white book). The application is supported by an affidavit sworn by the applicant, Mirriam Chivasa, who is a Zimbabwean national. The gist of her affidavit is that if the stay is not granted, her appeal will be rendered academic. That if the respondent executes the ruling, she will suffer irreparable damage because she will have no funds to travel back to Zimbabwe since the respondents have not paid her repatriation allowance and other allowances due to her upon termination of employment.

The respondent did not file an affidavit in opposition.

At the hearing, Mrs. Mwenya represented the applicant while Mr. Simposya represented the respondent. Mrs. Mwenya relied on the affidavit in support of the application dated 18th October, 2017. She argued that the ruling should be stayed pending appeal as the respondent has not complied with the Employment Act Cap 268 of the Laws of Zambia and the Immigration and Deportation Act No. 18 of 2010. She further submitted that section 28 (8) of the Immigration and Deportation Act demands that an employer must pay a foreign employee repatriation allowance upon termination of employment. Therefore, if the stay is not granted, the applicant will be adversely affected once she is evicted from the respondent's house as she is a foreigner who has no relatives in Zambia.

The respondent's counsel, Mr. Simposya, opposed the application on points of law. He submitted that the law on the grant of stay is settled. Citing the case of **Shell & B.P. (Z) Limited v. Conidaris and others**[2],

counsel submitted that the primary question is whether or not damages would suffice for any injury that an applicant would suffer. It is argued that the applicant's case is for a money judgment. Therefore, an award of damages would repair any injury suffered. Further, that the respondent has never refused to pay the applicant repatriation allowance but what is in dispute is the amount due.

I have considered the affidavit evidence and the arguments advanced by counsel. The application is made pursuant to Order X rule 5 CAR which provides that-

> *"An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed against unless the High Court, quasi-judicial body or the Court so orders and no intermediate act or proceeding shall be invalidated, except so far as the Court may direct."*

The question whether or not to grant a stay of execution is entirely in the discretion of the Court. The power should be exercised judiciously to ensure justice and fairness to both parties. In making the decision whether to grant a stay, the court is entitled to preview the grounds advanced for the appeal in order to determine whether the appeal has prospects of success. I have perused the memorandum of appeal filed by the applicant. The applicant's ground of appeal is that the trial court erred in law and fact when it held that the issues raised in the affidavit were grounds for appeal and not review. The record shows, in the Notice of Appeal, that the applicant seeks the indulgence of this court to stay the ruling dated 21st September, 2017, pending appeal. After the application for review was refused by the High Court, the status of the matter remained as it was before the application, that is, with no interim injunction against the respondent. The High Court did not make any order in the ruling which

the applicant seeks to be stayed that could adversely affect her. I have carefully perused the record and find that there is no order against the applicant that can be halted by means of a stay. The High Court rightly observed that there is nothing to stay. As guided by the Supreme Court in the case of **John Mumba, Danny Museteka and others v. Zambia Red Cross Society,** supra, cited by the High Court, the pertinent question the Court must ask itself before granting a stay is whether there is anything to stay. In that case, when the *ex parte* injunction was discharged, the parties retained their original status which could not be stayed by the court and so there was nothing to stay. Similarly, when the High Court discharged the interim injunction and later refused to review its ruling, the parties in this matter remained in the same position as they were before the injunction. There is nothing to stay which could be enforced as a court order if the stay is not granted. It is a trite principle of law that a stay cannot be granted simply because an appeal has been lodged. I am guided by the decision of the Supreme Court in **Sonny Paul Mulenga and another v. Chainama Hotels and another**[3] that 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 that it is desirable, necessary and just to stay a judgment pending appeal.

Furthermore, the applicant contends that if the stay is not granted, she will be adversely affected. As earlier alluded to the consideration for the court faced with an application for a stay is the prospects of success and whether the applicant will suffer irreparable injury. It must be demonstrated that the applicant will be ruined if the stay is not granted. It has been submitted that the applicant will suffer irreparable damage the ruling is executed as she will have no funds to travel back to Zimbabwe since the respondents will not have paid her the repatriation allowance

and other allowances due to her. I am of the considered view that the reasons advanced by the applicant are not sufficient to demonstrate that she will suffer irreparable injury if the stay is not granted. As earlier stated in this ruling, the stay which the applicant seeks is against a ruling which has no order that can be executed against the applicant. Consequently, she will not suffer ruin if the stay is not granted. I am persuaded by the English case of **Linotype – Hell Finance v. Baker.**[4] Further, as enunciated by the Supreme Court in **Nyampala Safaris (Z) Limited and others v. Zambia Wildlife Authority and others**[5], a stay of execution is only granted on good and convincing reasons. The application must clearly demonstrate the basis on which a stay should be granted. Unfortunately, the applicant has failed to do furnish sufficient reasons to persuade this Court to exercise its discretion in favour of granting the stay.

In sum, the applicant's application for stay of execution of the ruling of 21st September, 2017 pending appeal is unsuccessful. It is accordingly dismissed with costs to the respondent to be taxed failing agreement.

Delivered at Lusaka this 15th day of January, 2018.

J.Z. Mulongoti
Court of Appeal Judge