IN THE SUPREME COURT OF ZAMBIA **SCZ/8/21/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

BARCLAYS BANK ZAMBIA PLC **APPLICANT**

AND

JEREMIAH NJOVU AND 41 OTHERS **RESPONDENT**

Before Hon. Justice Dr. Mumba Malila in chambers on 19th June, 2019 and 23rd June, 2020.

For the Appellant:	Mr. V. B. Malambo SC with Mr. C. Sianondo of Malambo & Co; Mr. M. Sakala of Corpus Legal Practitioners and Mrs. Kasanda – Legal Counsel – Barclays Bank.
For the Respondent:	Mrs. NBK Mutti with Mr. M. Chitambala of Lukona Chambers; Mr. M. Katolo with Mr. P. Katupisha of Milner & Paul Advocates

RULING

Cases referred to:

1. *Sonny Paul Mulenga & Others v. Investrust Merchant Bank Ltd (1999) ZR 101*
2. *Sub-Sahara Management Consultants (Pvt) Ltd v. Sirituta Investments (Pvt) Ltd & Others (HH-249-12)*
3. *Michael Sata v. Chanda Chimba & Others (2011)(2) ZR 445*
4. *Linotype-Hell Finance Limited v. Baker (1992) 4 ALL ER 88*

5. *Nyutu Agrovet Ltd v. Airtel Network Kenya Ltd (Application No. 61 of 2012).*
6. *Costain Simamba v. AMDAC Carmichael (SCZ/8/93/2013)*
7. *Finsbury Investments Limited v. A Ventrigria & Another (2013) (2) ZR 412*
8. *Barclays Bank v. ZUFIAWU (2007) ZR 106*
9. *Zambia Consolidated Copper Mines Ltd. v. Patrick Mulemwa (1995-97) ZR 99*
10. *Nyimba Investments v. Nico Insurance (Zambia) Ltd (Appeal No. 130/2016)*
11. *Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Part Joint Venture (suing as a firm) (Appeal No. 76 of 2014)*
12. *Trinity Engineering (Pvt) Ltd. v. Zambia National Commercial Bank (1995-1997) ZR 189*
13. *Road Transport and Safety Agency v. First National Bank Zambia Limited and Josephine Milambo (Appeal No. 127 of 2016)*
14. *Meanwood General Insurance Ltd. v. MTN (Zambia) Ltd (SCZ/8/151/2015)*
15. *Mutantika & Another v. Chipungu (Appeal No. 94 of 2012)*
16. *Zambia Revenue Authority v. Post Newspapers Limited (Appeal No. 36 of 2016)*
17. *Mukumbuta Mukumbuta & Others v. Lubinga & Others (2003) ZR 55*
18. *Nyampala Safaris (Z) Ltd. & 4 Others v. Zambia Wildlife Authority & 6 Others (SCZ/8/179/2013)*
19. *Metal Fabrication of Zambia v. Washington Mwenya Zimba (SCZ/8/170/2000)*
20. *Zambia Railways Ltd. v. David Kellis Makalu & 11 Other (SCZ/181/04/2005)*
21. *Wilson v. Church (No. 2) (1879) 12Ch. D 454*
22. *Monk v. Bartram (1881) 1QB 346*
23. *John Kunda (Suing as country director of an on behalf of the Adventist Development & Aging (ADRA) v. Karen Motors (Z) Ltd (2011)(1) ZR 451*
24. *Bidvest Food Zambia Ltd & Others v. CAA Import and Export Ltd (Appeal No. 56 of 2017)*
25. *Kekelwa Samuel Kongwa & Meamui Georgina Kongwa (SCZ/8/05/2019)*
26. *Savenda Management Services Ltd v. Stanbic Bank (Z) Ltd (Selected Judgment No. 10 of 2018)*

Legislation referred to:

1. *Supreme Court Act, Chapter 25 of the Laws of Zambia*
2. *Rules of the Supreme Court, Chapter 25 of the Laws of Zambia*
3. *Court of Appeal Act, No. 7 of 2016*
4. *Court of Appeal Rules, No. 65 of 2016*
5. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
6. *Employment Act, No. 3 of 2019*

I sincerely regret the long delay in delivering this ruling. This is due to a combination of hostile factors beyond my control.

The present application is for a stay of execution of a judgment of the Industrial Relations Court (now the Labour Division of the High Court) given on 23rd August, 2011 pending the hearing and determination of an application for leave to appeal to the Supreme Court. It is made pursuant to section 4 of the Supreme Court Act and rule 48 and 51 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia.

The application is sequel to an order I had, not without hesitation, granted *ex parte* in favour of the applicant on 4th June, 2019.

Two affidavits, both sworn by the applicant's Company Secretary, Ms. Mwape Mondoloka, were filed in support of the application. The first was filed on 31st May, 2019 while the second was filed on 17th June,

2019. Mr. Sakala, learned counsel for the applicant, intimated that the applicant was placing reliance on both of those affidavits.

Additionally, the applicant also relied on two sets of heads of arguments – one in support of the application and the other in reply to the respondent's heads of argument in opposition to the application.

In the affidavit in support of summons for an order of stay, the background facts are set out. The short of it is that the applicant was unhappy with the judgment of the Industrial Relations Court delivered in favour of the respondents on 23rd August, 2011. It appealed that judgment to the Supreme Court. That appeal was, regrettably for the applicant, dismissed by the Supreme Court on a technical ground in June of 2018. That technical basis for the dismissal of the appeal was that the record of appeal had been refiled outside the prescribed period without the leave of court.

Following the dismissal of the appeal, the applicant has been desirous of refiling the appeal so as to have it heard and determined on its merits and in finality. The applicant thus decided to restart

the process of appeal all over again. This time around, however, the Court of Appeal had been created as an intermediate appeal court.

According to the affidavit in support, following the Supreme Court's dismissal of the appeal, the applicant approached the High Court (Industrial Division) so as to obtain leave to file the appeal against the judgment of the Industrial Relations Court out of time, granted that all the steps taken by the applicant since that judgment, entailed a loss of a considerable amount of time. The applicant had also earlier filed before the same court an application to stay execution of the judgment.

A judge of the High Court subsequently delivered his combined ruling on the two applications on 20th November, 2018. He dismissed both applications. The applicant then renewed its applications for leave to file appeal out of time and for a stay of execution before a single judge of the Court of Appeal. This was on 21st November, 2018. On the 30th January, 2019, the single judge of the Court of Appeal delivered her ruling, dismissing both the application for stay of execution and that for leave to file appeal out of time.

The applicant was undeterred by all these developments. On 6th February 2019, it filed in the Court of Appeal a notice of motion for leave to appeal out of time and a motion for stay of execution of judgment. The respondent raised a counter motion for determination of the applicant's motion on questions of law or construction. The Court of Appeal upheld the respondent's motion, which effectively meant that the applicant's two motions before it collapsed.

The applicant, still desirous of appealing the Industrial Relations Court judgment has now, by way of a renewed application, applied by summons before me for a stay of execution and for leave to appeal. The deponent of the affidavit in support of the applications states that the intended appeal is meritorious and raises novel questions of law which should be determined by the Supreme Court.

The affidavit in support sets out a number of reasons why the applicant believes leave to appeal should be granted. These includes the following:

> (a) [The appeal] raises novel questions of law such as whether a matter dismissed on a technicality by the Supreme Court for failure to obtain leave to appeal out of time can be reopened in the Supreme Court by applying for extension of time within which to appeal despite there

being no cause of action in the Supreme Court following the dismissal of the appeal.

(b) The appeal raises a point of law of public importance, that question being whether it was appropriate for the Court of Appeal to refuse and or decline to consider the applicant's application for leave to appeal despite the fact that the respondents motion (in objection) was incompetent having been taken out under a wrong rule or provision.

(c) The Court of Appeal, having determined that the respondents' motion was brought pursuant to a wrong authority, whether it was competent for the court to then proceed to entertain the respondents' motion.

It was the appellant's apprehension that there was a real and imminent threat of execution if the judgment was not stayed as the respondents had taken the position that the judgment sum involved in quantifiable and there was no need for further assessment proceedings. The applicant, being a financial institution and an important player in the financial system, should be saved from execution which could paralyse the applicant's operations, adversely affect customers, stakeholders and employees as much as it would harm the economy.

It is on this factual basis that the application for stay of execution before me was made.

In the heads of argument filed in support of the application for an order to stay execution of the judgment pending the determination of the application for leave to appeal, it was contended that if a stay of execution of the judgment was not granted, the application for leave to appeal, now pending, will be rendered nugatory. The applicant will also suffer irreparable damage and prejudice. All circumstances considered, the applicant was confident that the application for leave to appeal, as well as the appeal itself, have real prospects of success.

Counsel next turned to expatiating on the principles governing the grant of stay of execution orders. The powers of a single judge as set out in section 4 of the Supreme Court Act, Chapter 25 of the Laws of Zambia, were referred to. Counsel also recited rule 51 of the Supreme Court Rules, which states that an appeal shall not operate as a stay of execution of the decision appealed against.

Counsel acknowledged that for an application for a stay of execution to be granted, the applicant must show that an application for leave to appeal and the appeal itself has merit. Additionally, that the applicant must demonstrate that there is something more which

makes it just and necessary for a stay to be granted pending the hearing of an application for leave to appeal.

The case of *Sonny Paul Mulenga & Others v. Investrust Merchant Bank Ltd*[1] was cited as authority for the submission that counsel made. Other authorities cited were *Sub-Sahara Management Consultants (Pvt) Ltd v. Sirituta Investments (Pvt) Ltd & Others*[2], *Michael Sata v. Chanda Chimba & Others*[3], *Linotype-Hell Finance Limited v. Baker*[4] and *Nyutu Agrovet Ltd v. Airtel Network Kenya Ltd*[5].

The learned counsel then made a case for the necessity of a stay in the present circumstances, having regard to the exigencies of the situation. It was contended that the Court of Appeal had jurisdiction to grant an extension of time within which to appeal or to stay execution of a judgment of the Industrial Relations Court even if the matter had escalated to the Supreme Court. The case of *Costain Simamba v. AMDAC Carmichael Limited & Another*[6] was cited as authority for that submission.

The contents of the affidavit and the heads of argument filed on behalf of the applicant were supplemented orally at the hearing of the application.

In addressing me on the issues for determination, State Counsel Malambo began by giving background arguments supporting the propriety of the pending application for leave to appeal, starting with an explanation of the import of section 13 of the Court of Appeal Act. He submitted that the proposed appeal in this case raises weighty issues because the common thread running through all the previous rulings, namely that of the High Court, that of the single judge of the Court of Appeal and that of the full Court of Appeal, is that of jurisdiction. The judges felt that they had no jurisdiction because the Supreme Court had ruled on the matter when it dismissed the appeal on a technicality.

According to State Counsel Malambo, this in itself presents a legal issue of public importance namely, whether a litigant who loses an appeal in the Supreme Court on the basis of a procedural technicality is permanently deprived of the opportunity to rectify such a procedural lapse.

According to State Counsel, the position taken by the Court of Appeal suggests that this should be so. This, according to State Counsel, however, flies in the face of the established legal position that the

Supreme Court may, in appropriate circumstances, reopen a case that it had decided previously.

State Counsel referred me to rule 17 of the Supreme Court Rules which provides that whenever an application may be made to the Supreme Court it shall be made in the first place to the High Court. He wondered whether a party who follows the provisions of that rule, which is couched in mandatory terms, violates their own right to seek to be heard on the merits of their case. Unless answered by the Supreme Court conclusively, this question will, in State Counsel's submission, pose procedural difficulties for parties who lose appeals in the Supreme Court owing to procedural errors.

Turning to the provisions of section 13(3)(c) of the Court of Appeal Act regarding prospects of success, State Counsel Malambo submitted that there had been no hearing of the present matter on the merits. The Court of Appeal determined the matter on the basis of a preliminary application. A request to the Supreme Court that the matter be heard on the merits is not too much to ask. He submitted that on the whole, the matter carries prospects of success.

Mr. Malambo SC, cited the case of *Costain Simamba v. AMDAC Carmichael*[6] in support of the submission that a party may rectify a procedural error that leads to a dismissal of an action and relaunch an application. The fact that the matter had been before the Supreme Court and had collapsed on a procedural technicality does not bar its reopening. He went on to submit that in *Finsbury Investments Limited v. Ventrigria & Another*[7], the Supreme Court decided that even a matter that had been heard on the merits could be reopened in certain circumstances.

Turning specifically to the stay of the judgment of the Industrial Relations Court, State Counsel Malambo, pointed out that there are principles that govern the grant or refusal of an order of stay of proceedings or of execution of judgment. One of these is the need to forestall irreparable prejudice. Another, according to State Counsel, is to avert injustice being suffered by a party. And yet another has to do with the prospects of success.

Referring me to the affidavit in support of the application from paragraph 23 onwards, State Counsel recounted what the respondents' claim is all about and submitted that some monies in

relation to that claim had already been received by the respondents. The appeal is restricted to one issue only, that is whether or not section 26B is applicable to the respondents. The award on which the appeal is being made was anchored on that section and its applicability. State Counsel went on to submit that in *Barclays Bank v. ZUFIAWU*[8] it was held that section 26B does not apply to persons in the category of the respondents.

Mr. Malambo SC also contended that the balance of convenience weighs in favour of the applicant who is likely to suffer more hardship than the respondents would if the application is rejected. The colossal sum being claimed, which may be legally not payable, is likely to cause hardship to the applicant. The stay is necessary until the Supreme Court considers whether the Court of Appeal was right in the position it took. He urged me to uphold the application.

The application was strenuously opposed. In response to the submissions made on behalf of the applicant, Mr. Chitambala intimated that the respondents were relying on the affidavit in opposition deposed to by Raphael Chisupa, on his own behalf and on behalf of the other respondents, which was filed on the 12th June

2018. He particularly relied on paragraphs 4 to 25. He also relied on the respondents' heads of argument in opposition.

The affidavit in opposition also narrates the background facts leading to the present application. Additionally, however, the affidavit sets out several significant areas of disagreement and departure from the common ground. In some instances, the affidavit took more of the characters of submissions on legal points. The deponent avers, for example, that his information from the respondents' advocates, the verity of which he believes, is that the application to stay should have been made under Appeal No. 140 of 2015 which was dismissed by the Supreme Court and cannot be raised for determination before me.

It was also averred on behalf of the respondents that the applicant, having lodged its appeal before the Supreme Court under Appeal No. 107 of 2012 and Appeal No. 140 of 2015 and the said appeals having been withdrawn and dismissed respectively, cannot again appeal against any part of the judgment of the then Industrial Relations Court dated 23rd August, 2011; that the dismissal of Appeal No. 140 of 2015 by the Supreme Court is final in so far as the dispute between

the parties is concerned. There is no other right to appeal available to the applicant.

It was also deposed that the application for leave to appeal out of time, which was lodged in the High Court, was opposed and the court in dismissing both the application for leave to appeal and that for an order of stay of execution, reasoned that the two applications were intertwined. The subsequent application for the same relief before a single judge of the Court of Appeal and later before the full Court of Appeal were all opposed and, according to the respondents' counsel, rightly rejected by the Court.

It was further stated in the opposing affidavit that the application for a stay of execution is not properly before me as the application for leave to appeal has no prospects of success because (a) the preliminary points of law raised by the respondent before the Court of Appeal were properly raised, (b) the Court of Appeal had no jurisdiction to hear and determine the applicant's motion and (c) the lower court, being lower in the hierarchy to the Supreme Court, is bound by the final decision of the Supreme Court dated 21st June, 2018 dismissing the appeal.

In the affidavit in opposition, Mr. Chisupa, further deposed that from the information obtained from his advocates, in a proper case, within appeal proceeding in the Supreme Court, curable defects can only be cured by the Supreme Court itself unless it otherwise orders.

The respondents denied the assertion by the appellants that the Court of Appeal had made any determination that the points of law which were raised before it by the respondents, were brought pursuant to a wrong authority. In any case the Court of Appeal was, according to the deponent of the affidavit, entitled to determine the issue of jurisdiction before determining the applicants' motion or anything else for that matter.

The affidavit in opposition also made reference to 'a without prejudice' letter exhibited in the affidavit in support of the application, stating that the letter in question was made in the course of negotiations and should be expunged. I did earlier at the hearing of this matter, considered that objection as a preliminary point and had ordered that the said letter shall stand expunged from the record.

It was further stated that, contrary to the assertions in the affidavit in support, there are no additional special circumstances warranting the grant of an order for stay of execution to the applicant. Also, that the applicant cannot hide behind the veil of being a financial institution to disrespect or disregard judgments of the court. Furthermore, the deponent averred that no material evidence had been produced before the court by the applicant to substantiate the claim that the recovery of amounts due to the respondents would adversely affect its operations, customers, stakeholders, employees and the economy.

Additionally, the deponent claimed that the applicant had made provision for contingent liabilities in its Financial Statements for 2018. Despite doing so, the applicant refused to disclose the amount provided to cover full liability under the judgment dated 23rd August, 2011 as read with the ruling of the Supreme Court dated 21st June, 2018 in Appeal No. 140 of 2015.

It was further averred that there is no appeal in relation to the judgement of the Industrial Relations Court pending before the Supreme Court to warrant the assertion by the applicant that the

applicant may succeed on the appeal. It is, therefore, not in the interests of justice to maintain the stay of execution.

The deponent also stated that the applicant had taken to endlessly making applications for stay of execution. He tabulated the instances of such applications in various courts.

To compliment the contents of the affidavit in opposition, copious heads of argument in opposition were filed on 12th June, 2019. In those heads of argument the respondents' counsel identified the issues for determination as being the following:

(i) **Does this honourable court have jurisdiction to determine the Applicant's application for stay of execution together with its predicate application for leave to appeal to the Supreme Court?**

In the alternative,

(ii) **Whether the application for stay of execution is properly or competently before this honourable court?**

(iii) **Whether the Applicant's application for stay of execution does not constitute an abuse of court process or re-litigation of the matter?**

(iv) **Whether the circumstances of the Applicant's application for stay of execution warrants the exercise of judicial discretion in favour of granting it?**

The first line of argument pursued by counsel for the respondent was that I lacked jurisdiction to deal with an application for stay of execution as the ruling of the Supreme Court, given in June, 2018, dismissing the applicant's appeal was made by the full court. That decision is final and binding. Counsel quoted Article 128 of the Constitution which states that the Supreme Court is the final court of appeal. They also quoted Article 125(3) which states that save for the limited instances stipulated, the Supreme Court is bound by its decisions.

Counsel also stressed the point that decisions of the Supreme Court are binding on all courts subordinate to it. The case of *Zambia Consolidated Copper Mines Ltd. v. Patrick Mulemwa*[9] was cited to buttress the point.

It was contended that the present application is intended merely to nullify or undermine the effect of the full court's decision dismissing the appeal. Reference was made to the Supreme Court ruling on a motion in *Nyimba Investments v. Nico Insurance (Zambia) Ltd*[10] where the court stated, among other things, that its judgments were final

not because the court was infallible but in order to avoid the spectre of repeated efforts at re-litigation.

Counsel also reiterated that as the decision of the full court dismissing the appeal was final I, sitting as a single judge, had no jurisdiction to entertain the present application in terms of section 3(1) of the Supreme Court Act.

The learned counsel drew parallels between this case and *Access Bank (Zambia) Ltd. v. Group Five/ZCON Business Part Joint Venture*[11] where the Supreme Court dismissed the appellant's appeal in finality on the basis of a defective record of appeal and declined to reopen the matter following a motion by the applicant for the court to do so.

Counsel spent a considerable amount of time discussing the need for finality of litigation and the concept of *res judicata*. A multitude of case authorities were cited, with generous quotations being lifted from many of those authorities. I have taken full note of those case authorities which I find unnecessary to reproduce here.

The argument on jurisdiction took a slightly different angle. The point counsel made was that the judgment of the Industrial Relations Court dated 23rd August, 2011 is not amenable to stay of execution

as that decision was overtaken by the judgment of the Supreme Court on appeal. To stay the judgment of the Industrial Relations Court would in effect be to stay the decision of the Supreme Court. This, according to counsel, is untenable in law as was held by the Supreme Court in *Trinity Engineering (Pvt) Ltd. v. Zambia National Commercial Bank*[12].

It was also contended, on a somewhat technical note, that the application for a stay before me was incompetent as the summons for an order for leave to appeal upon which the application for stay is predicated, shows that no appeal in relation to the said judgment of the Industrial Relations Court is pending before the Supreme Court to warrant the grant of a stay even assuming I had power to stay execution of the said judgment.

Counsel cited the cases of *Road Transport and Safety Agency v. First National Bank Zambia Limited and Josephine Milambo*[13] as well as that of *Meanwood General Insurance Ltd. v. MTN (Zambia) Ltd*[14] on the importance of the endorsement of the relief being sought in any process of court. In the latter case, a single judge held that an endorsement for an application for a stay of execution should only be

made when there is a pending appeal and will be incompetent where no such appeal is pending.

Another argument put forth by the learned counsel to oppose the application relates to discretion. It was submitted that I have discretion to hear and determine applications for leave to appeal and to stay execution generally. However, that discretion must be exercised judiciously as was stated in the case of *Mutantika & Another v. Chipungu*[15].

According to counsel, the memorandum of appeal containing grounds intended to be raised in the appeal as set out in the affidavit in support of the application for stay, clearly shows that those grounds have no chance of success. The learned counsel then went on to demonstrate by way of legal arguments, complete with authorities, why they thought each of the grounds of appeal had no merit and could thus not succeed.

I will, of course, not bother here to consider the merits or lack thereof of the grounds of appeal in the way the respondents invited me to do through their submission, for I am not sitting here to determine the merits of the appeal.

The final set of argument made by the respondents' counsel centred on the principles governing the grant of stay of execution. First, they argued that in exercising its discretion whether or not to grant a stay of execution, a court must preview the prospects of success. On such preview, it will be evident that the present appeal has no prospects of success. The second is that the judgment must be stayable, and the third is the need to have regard to finality of litigation.

Relying on the case of *Zambia Revenue Authority v. Post Newspapers Limited*[16] counsel contended that the judgment of the Industrial Relations Court, given over 7 years ago, is not stayable. The application before the court is, in any case, inconsistent with the notion of finality and is clearly an abuse of court process and should be dismissed.

Counsel prayed that the application be dismissed with costs to be borne by the applicant and its counsel as per decision in *Mukumbuta Mukumbuta & Others v. Lubinga & Others*[17] since counsel is complicit in pursuing a hopelessly unjustified cause.

Mr. Chitambala made oral arguments to supplement and highlight the written arguments. He argued that a perusal of the summons for an order for leave to appeal discloses that the application for leave to appeal is being made in respect t of the ruling of the Court of Appeal refusing leave to appeal dated 24th May, 2019. That ruling is not by law appealable in terms of order 11 rule 1 subrule 4 of the Court of Appeal Rules.

Counsel went on to argue that where the Court of Appeal refused leave to appeal against its decision, an application for leave is renewable before a single judge of the Supreme Court. The refusal is not appealable. The application for leave to appeal being in respect of a ruling which is not appealable, is incompetent.

Mr. Chitambala also pointed to what may appear to be legal and logical inconsistences in the applicant's case. He argued that the endorsement on the summons for leave to appeal is inconsistent with the proposed grounds of appeal in the affidavit in support of the application for stay in that those grounds seem to relate to the ruling of the Court of Appeal dated 15th May 2019 which is not the subject of the application for leave to appeal.

He went on to submit that a perusal of the *ex parte* order for stay of execution which I gave on the 4th June 2019, shows that what the applicant is seeking to stay is the judgment of the then Industrial Relations Court given on 23rd August 2011. However, an examination of the summons for stay, as well as the affidavit in support, discloses that there is neither an appeal nor an application for leave to appeal the judgment of the Industrial Relations Court dated 23rd August, 2011. The point counsel stressed is that the Industrial Relations Court judgment is not a subject of an appeal or any proceedings before this court.

Counsel also submitted that the application before me is also incompetent because both the ruling of the Court of Appeal dated 15th May, 2019 and that dated 24th May, 2019 are not stayable. He relied in this regard on the case of *Zambia Revenue Authority v. Post Newspapers Limited*[16] which was referred to in the heads of argument.

The next issue debated by Mr. Chitambala relates to jurisdiction. He contended that although a single judge of this court ordinarily has jurisdiction to hear applications for stay of execution as well as for

leave to appeal, the circumstances of the applications now under consideration are such that I have no jurisdiction to entertain the applications. The objective of the applications, according to Mr. Chitambala, is to undermine or challenge the final decision of the Supreme Court dismissing the applicant's appeal under Appeal No. 140 of 2015. Counsel submitted that the dismissal of Appeal No. 140 of 2015 is similar to the dismissal of the appeal in *Access Bank (Zambia) Ltd v. Group Five/ZCON Business Part Joint Venture*[11] and the decisions should not be any different.

Turning specifically to the application for stay of execution, counsel contended that only the full court has power to reopen matters determined in a final judgment of the court. This jurisdiction is exercisable in very exceptional cases, and even then, the full court must be properly moved. In the present case, there is no such application made or pending. It follows, according to Mr. Chitambala, that all the arguments of State Counsel Malambo around section 26B of the Employment Act do not arise.

Counsel next dealt with the principles for the grant of stays of execution or proceedings. He submitted that in the present case there is no pending appeal to justify the grant of an order of stay.

Regarding the prospects of success counsel reiterated that a preview of the proposed grounds of appeal will show that the appeal would have no prospects of success and is thus unmeritorious. Even if this court forms the view that it has jurisdiction, the prospects of success of the intended appeal are very dim indeed. The learned counsel then zeroed into the individual proposed grounds of appeal in order to demonstrate in what respects he considered them unlikely to succeed.

Counsel concluded by submitting that an examination of the affidavit in support reveals that the applicant does not show the basis upon which the court should exercise its discretion to grant a stay.

Mr. Katupisha, learned co-counsel for the respondents, added that the exhibit "MM12" in the affidavit in support of the application, should be compared with the *ex parte* order of stay. The notice of appeal refers to the ruling delivered by the Court of Appeal while the *ex parte* order refers to the judgment of the Industrial Relations

Court. He submitted that the judgment of the Industrial Relations Court cannot be stayed. The ruling of the Court of Appeal is not stayable either. He ended by reiterating the respondents' prayer that the application for stay of execution be dismissed.

The applicant filed an affidavit in reply on the 17th June, 2019. In it the deponent clarified that only one appeal to the Supreme Court was lodged on 5th September, 2011 under Appeal No. 107 of 2012. Following a ruling of the Supreme Court, the appeal was refiled and was numbered Appeal No. 140 of 2015. Subsequent documents, therefore, carried that later appeal number. The appeal was never heard on the merit and it is, therefore, not true to allege, as the respondents do, that the applicant prosecuted its appeal in the Supreme Court.

The deponent averred that she believed that the dismissal by the Supreme Court of the appeal did not put closure to the applicant's right to take the steps it has taken to ensure that the appeal is heard on the merits.

The affidavit also rehashed many of the averments made in the affidavit in support.

In briefly replying to the arguments of counsel for the respondents, Mr. Sianondo, learned co-counsel for the applicant, focused his effort on order 11 rule 1 of the Court of Appeal Rules which provides that a judgment of the Court of Appeal is only appealable to the Supreme Court with the leave of that court. He then adverted to section 2 of the Court of Appeal Act on the definition of judgment, and concluded that any decision decree or ruling of the Court of Appeal requires the leave of that court to be granted before it can be appealed. In his view that position is reinforced by section 24 of the Supreme Court Act as amended in 2016. He thus submitted that the application for a stay is competently before me.

Mr. Sakala, learned co-counsel for the applicant, submitted in reply that a perusal of the summons filed on 31st May, 2019 shows that the appellant's appeal is not against the ruling of the Court of Appeal dated 24th May, 2019. It was a renewed application.

With regard to jurisdiction, he submitted that while the judgment of the Supreme Court dated 21st June, 2018 was final, and the applicant is not seeking a reversal of that judgment, the judgment itself identified a procedural defect on the part of the appellant which

led to the dismissal of the appeal without the appeal being heard on the merits. In order to rectify that defect, the approach taken by the applicant is to seek leave to relaunch a fresh appeal. The point of law of public importance in that appeal is whether that avenue is not available to the applicant whose appeal was dismissed on the procedural lapse. He submitted that the point of law raised needed not be argued at this stage. A stay of execution, however needs, in the meantime, to be granted.

In Mr. Sakala's submission, the reference to the *Nyimba*[10] case by the respondents' counsel, was inappropriate because in that case what the applicant sought to do was to have the court reverse its decision. In this case, the applicant is not asking for anything of the sort. All the applicant is attempting to do is to obtain leave to have an opportunity to present its appeal on the merits.

As regards the argument that because there is no appeal or leave against the Industrial Relations Court judgment, the applicant is not entitled to a stay, Mr. Sakala submitted that the application for leave relates to a decision of the Court of Appeal that dismissed the application for leave to appeal against the Industrial Relations Court

judgment. There is no appeal or application for leave to appeal that can be filed until the decision of the Court of Appeal of 16th May, 2018 is vacated or reversed. The single judge does thus have jurisdiction to grant a stay.

Counsel ended by urging me to grant the application.

I am grateful to counsel for both sides for their efforts. The application before me is simply one for an order for a stay of a judgment pending the determination of the renewed application for leave to appeal.

I am, as a matter of fact, astonished that the predicate application has been framed as one for leave of appeal. As will be evident from the narrative in the different affidavits before me, the initial applications before the High Court were for leave for an order to appeal out of time and for a stay of execution of the judgment. Those were the two applications that were dismissed by the High Court, and later by a single judge of Court of Appeal and finally by the full Court of Appeal.

Before me, the application for leave upon which the application for an order of stay is anchored, changed its character. It was no longer an application for leave to file the appeal out of time; it was now merely an application for leave to appeal. It seems that both parties have now ignored the requirement for the leave of the court to be obtained to file the application for leave out of time. As it is, the applicant filed an application for leave to appeal without in the first place obtaining from any court, leave to file that application out of time. I will revert to this issue later in this ruling.

Although the issues agitated in the application are plain, the learned counsel for the parties went to considerable lengths submitting extensively. As a courtesy to counsel's exertions, I have deliberately set out in full the long-winded arguments counsel made, touching on many issues which, in the view I take, bear little obvious connection to the real question for determination. Both parties are agreed that there is no appeal presently pending in the Supreme Court.

The Supreme Court has been consistent in its position that orders staying execution or proceedings shall not be routinely granted as they often have the effect of either denying successful parties of the

benefits of their judgments or unduly delaying conclusion of matters to attain the much-needed finality to litigation.

An applicant who desires to obtain a stay pending appeal must show that the appeal or intended appeal is arguable and has prospects of success. He must also show that unless the order of stay is granted, the appeal or intended appeal would be rendered academic.

As the Supreme Court pointed out in *Sonny Paul Mulenga & Others v. Investrust Merchant Bank Ltd*[1], in exercising its discretion whether or not to grant a stay, a court dealing with an application is entitled and in fact obliged to preview the prospects of success in the pending proceedings. In *Nyampala Safaris (Z) Ltd. & 4 Others v. Zambia Wildlife Authority & 6 Others*[18], the Supreme Court articulated the position thus:

> **The position of the law is very clear. A stay of execution is only granted on good and convincing reasons. The rationale for this position is clear, which is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. The applicant for a stay must, therefore, demonstrate the basis on which a stay should be granted.**

The Supreme Court expressed similar views in the case of *Metal Fabrication of Zambia v. Washington Mwenya Zimba*[19] and in *Zambia Railways Ltd. v. David Kellis Makalu & 11 Other*[20].

A critical issue in this application, as I see it, is that of jurisdiction. I should thus deal in the first place with the issue of jurisdiction to stay proceedings in the manner prayed for. In the scheme of the present application, that is the elephant in the room, so to say.

It is beyond argument that jurisdiction is the lifeblood of any court proceedings so that where I have no jurisdiction, the decision that I make beyond determining the jurisdictional question would amount to nothing. And so, I ask myself the question: do I, as a single judge of the Supreme Court, have jurisdiction to entertain the present application for a stay?

To recap the arguments of the learned counsel for the respondents on this issue, they posit that I have no jurisdiction to deal with the application for a stay of execution for principally three reasons. First, that the full court (Supreme Court) delivered its final ruling in June, 2018 dismissing the applicant's appeal. The present application is intended to, in effect, undermine that Supreme Court decision which

is final and binding. Second, that the judgment of the Industrial Relations Court given in August, 2011 is not amenable to be stayed because it was overtaken by the subsequent judgment of the Supreme Court dismissing the applicant's case: third, that as there is no appeal pending, with only an application for leave to appeal now pending, there is no basis for the present application to be entertained.

To answer the question what the applicant exactly intends to have stayed, the *ex-parte* Summons filed on the 31st May, 2019 is instructive. It states clearly that it is the judgment of Justice G. C. Chawatama given in the Industrial Relations Court on the 23rd August, 2011 that is the subject of the stay application. The affidavit in support equally refers to the judgment of the Industrial Relations Court. Likewise, the *ex-parte* order I granted on 31st May, 2019 relates specifically to the judgment of the Industrial Relations Court.

Doubtless, therefore, the judgment sought to be stayed is one of the Industrial Relations Court, not that of the Supreme Court as suggested by counsel for the respondents. Yet, I understand the argument being made that the effect of a stay of the Industrial

Relations Court judgment will be to stay the Supreme Court decision of June, 2018.

I must, of course, state in very clear terms that a Supreme Court judgment is not easily amenable to a stay order and least of all, an order of a single judge. Section 4 of the Supreme Court Act, Chapter 25 of the Laws of Zambia, does circumscribe the power of a single judge to exercise the powers vested in the court to only interlocutory matters not involving the decision of an appeal or a final decision of the court. Thus, I have no power beyond determining interlocutory applications. By necessary extension, I have no jurisdiction to entertain a matter determined by the full court.

As regards the power to order a stay of a judgment of the full court, the Supreme Court has been very loud in its pronouncement that its final decisions are not generally stayable, let alone by a single judge. In *Trinity Engineering (Pvt) Ltd. v. Zambia National Commercial Bank Ltd*[12] the court observed as follows:

> **As we see it, the question is not whether or not the High Court has jurisdiction to order a stay of execution of the court's decision, but whether there can be a stay of execution of this final judgment, judgments of this court are final and there can be no stay. It is for**

this reason that the single judge of this court discharged the *ex parte* order...

If the Supreme Court has held that it is benefit of the power to stay its own judgments, it follows that a single judge of the court has not a modicum of power to stay a judgment of the full court.

The real question in the present application is whether what is sought to be stayed is the judgment of the full court given in June, 2018 dismissing the appeal. I have already demonstrated that it is not. Rather it is the judgment of the Industrial Relations Court given in August 2011. I do not, therefore, agree with the argument of the learned counsel for the respondents that I have no jurisdiction because what is intended to be stayed is the judgment of the Supreme Court given in June, 2018. The matter is factual. It is plain.

Although the full court dismissed the appeal on account of failure to obtain leave to file the record out of time, the applicant went back to the original court to start the process of appeal afresh. The original appeal having ceased to exist following its dismissal, I do not see how the decision of the Supreme Court will be affected given that the dismissal of the appeal was on a technical point. Had the Supreme Court decided the appeal on its merits, the argument of counsel that

any subsequent attempt to reopen the appeal would be abusive of the process of court, would be valid. I see a distinction between reopening an appeal and restarting the appeal process.

Is the judgment of the Industrial Relations Court not amenable to be stayed because it was overtaken by the judgment of the Supreme Court? I think not. My understanding is that what the Supreme Court dismissed was the appeal as a process; not the merits of the grounds of appeal. With this distinction in mind, I do not think that the argument that the stay was overtaken by the dismissal of the appeal has merit.

I am, therefore, satisfied that I have jurisdiction to consider the application before me for an order to stay the judgment of the Industrial Relations Court. I am thus not precluded from determining that application on its merits.

I thus now turn to the merits of the application itself. In the present case, the applicant applies for a stay pending determination of the application for leave to appeal. There is no appeal presently pending. Had an appeal been pending, I would be enjoined to preview the prospects of success of such appeal. In doing that, I would not be

expected to delve into the actual merits of the appeal which is properly in the domain of the appellate court.

By parity of reasoning, I should in the present situation appraise the reasons advanced for seeking leave to appeal and to consider whether indeed the application for leave to appeal itself enjoys real prospects of success. In doing so, I should not lose sight of the fact that leave to lodge that application out of time was not obtained.

The principles which a court faced with an application to stay execution of a judgment ought to follow are not in dispute and counsel for both parties have correctly articulated them. In *Wilson v. Church*[21] Cotton LJ, stated that when a party is exercising his undoubted right to appeal, the court ought to see to it that the appeal, if successful, is not rendered nugatory. In *Monk v. Bartram*[22] it was held that where an applicant has shown that special circumstances exist on which to grant a stay, a court should grant it. In *Linotype-Hell Finance v. Baker*[4] it was held that where an applicant can show that the appeal has some prospects of succeeding and that without a stay the applicant stands to be ruined or suffer irreparable injury, it is legitimate to grant an order for stay.

Equally in *Michael Sata v. Chanda Chimba & Others*[3], the Supreme Court observed that:

> **When a party is appealing, exercising his undoubted right of appeal, a court ought to see to it that if there is a real likelihood that the party might succeed, it should not be rendered nugatory.**

In *John Kunda (Suing as country director of an on behalf of the Adventist Development & Aging (ADRA) v. Karen Motors (Z) Ltd*[23], the Supreme Court stated as follows:

> **The argument in ground three flies in the teeth of our decision in *Sonny Mulenga & Others v. Investrust Merchant Bank Limited*[1], where we reiterated the necessity of a successful party in litigation to enjoy the fruits of the judgment. To say there is no prejudice when the successful party holds on to an unexecuted judgment, is a statement made without conviction.**

The basis of the present application is that there is another pending renewed application for leave to appeal following the Court of Appeal's rejection of the application for leave. The present application for a stay naturally presupposes that the application for leave will be granted. And so, it is inevitable to consider whether the application for leave to appeal does itself have prospects of success.

State Counsel Malambo, on behalf of the applicant, argued that the proposed appeal raises weighty issues. He identified the point of law of public importance raised by the intended appeal as being whether a litigant who has lost an appeal in the Supreme Court on the basis of a procedural technicality is permanently deprived of the opportunity to rectify it. This issue, according to State Counsel, has engendered much confusion with the lower courts all consistently holding that such an appellant does lose the opportunity to correct the error.

The point about a point of law of public importance is, of course, set out as one of the qualifying criteria for the grant of leave to appeal under section 13(3)(a) of the Court of Appeal Act. In our recent judgment in *Bidvest Food Zambia Ltd & Others v. CAA Import and Export Ltd*[24], we took time to explain the meaning of a point of law of public importance as used in section 13(3)(a) of the Court of Appeal Act. The Supreme Court agreed with a single judge of this court in *Kekelwa Samuel Kongwa & Meamui Georgina Kongwa*[25] that for a legal question to be treated as a point of law of public importance, it must have a public or general character rather than one that merely

affects the private rights or interest of the parties to a particular dispute. The court stated in that case that:

> **The legal point in issue should relate to a widespread concern in the body politic the determination of which should naturally have effect beyond the private interest of the parties to the appeal.**

In *Savenda Management Services Ltd v. Stanbic Bank (Z) Ltd*[26] the Supreme Court stated that a novel point may in some instances constitute a point of law of public importance within the intendment of section 13(3)(a) of the Court of Appeal Act.

State Counsel Malambo, went further in his submission to point out that the decision of the High Court and the Court of Appeal on the question he identified as constituting a point of law of public importance fit for determination by this court on appeal, is in fact contrary to existing precedents on the matter. He cited the case of *Finsbury Investments Limited v. Ventigria & Another*[7] and *Costain Simamba v. AMDAC Carmichael*[6] to support is submission that a party may rectify a procedural error and relaunch his appeal and that an appeal that has collapsed on a procedural technicality could be reopened. This, to me, confirms that what State Counsel viewed as

a point of law of public importance is not after all an unprecedented legal question.

My view is that when weighed against the authorities that have been cited, the point of law that State Counsel Malambo submitted was one of public importance, does not in fact fit in the criteria set out in section 13(3)(a) of the Court of Appeal Act. It has not been demonstrated how the issue in the intended appeal snowballs into the public realm from being a purely private matter between the disputants.

The applicant's other point is that the application for leave to appeal as well as the intended appeal itself have prospect of success because there was no hearing on the merit when the appeal was dismissed and also because the Court of Appeal dismissed the matter on the basis of a preliminary application.

In the *Bidvest Foods*[24] case, we held that section 13(3)(c) of the Court of Appeal, dealing with prospects of success, provides a stand-alone basis for granting leave to appeal. It should, however, be resorted to very sparingly. It is not every appeal that stands a nominal or

notional chance of success that qualifies to be heard by the Supreme Court. It must have real prospects of success.

My view is that the proposed appeal does not present sufficient prospects of real, eventual success to justify the intervention of the Supreme Court. I accordingly, consider that the reasons given for the application for leave to appeal are not sufficiently cogent. Leave to appeal is unlikely to be granted. This is exacerbated by the fact that no leave to file the application for leave to appeal out of time has ever been granted. It follows that the application for a stay premised on the expectation that leave would be granted stands on shaky ground. I, in this connection, agree with the submission of counsel for the respondents.

Given the foregoing, I decline to grant the application. The *ex parte* order I granted on the 4th of June, 2019 is hereby vacated.

As regards the issue of costs, counsel for the respondents suggested that the learned counsel for the applicant be personally condemned to bear the costs. I do not think, however, that the arguments they have put up in this application as I have captured them are frivolous, nor has their conduct been wanting in the way suggested.

I order costs against the applicant.

Dr. Mumba Malila SC
SUPREME COURT JUDGE