



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO 30 OF 2014
(Being Matter Number IRC PR 93 of 2011)

BETWEEN:

G4S SECURITY SERVICES LIMITEDAPPELLANT

-AND-

CHARLES CHILAMBA..... 1ST RESPONDENT

FRANCIS NKOZOMBA.....2ND RESPONDENT

CORAM:	Mandala:	Assistant Registrar
	Dzimphonje:	Counsel for Respondents
	Ralph and Arnold Associates:	Legal Practitioners for the Appellants
	Chitsulo:	Court Clerk

RULING ON DISMISSAL OF ACTION FOR WANT OF PROSECUTION

This matter was originally in the Industrial Relations Court (Matter Number IRC PR 93 of 2011) as a claim for compensation for unfair dismissal. The Respondents obtained judgment in their favor on 28 March 2014 and were awarded compensation to the tune of MK543,000. The Appellant filed a Notice of Appeal on 17 April 2014 challenging the same. The Appellant further obtained an Order for Stay of Execution Pending Appeal that was granted by the court on 22nd May 2014. On 23 May 2014, the appellant paid the Judgment Sum of MK543,000 into court.

The Respondents filed a Summons to Dismiss Action for Want of Prosecution on the grounds that the Applicant has not done anything to set down the appeal and to prosecute the matter since May 2014.



FACTS

The matter was heard on 20 December 2016 where Counsel Dzimphonje adopted his affidavit in support of the summons which states:

“Inordinate and Inexcusable Delay in Prosecuting the Appeal

7. **THAT I** aver that the elapse of over 2 years without settling down and prosecuting the appeal amounts to an inordinate and excusable delay which highly prejudices the Respondents in the following ways: -

- i) **THAT** it is unfair for the appellant to continue depriving the Respondents of the fruits of their litigation, by the procrastination when there is a standing Judgment confirming that they were unfairly dismissed and ought to be compensated.
- ii) **THAT** the said delay has now resulted in a substantial risk that it will not be possible to have a fair trial in this matter.
- iii) **THAT I** therefore believe that the Appellant are not serious with their Application, but the said application is made to inconvenience the Respondents and prevent them from enjoying the fruits of their litigation.”

In his oral submissions to the court, Counsel Dzimphonje highlighted the facts by stating that the action was commenced on 22 May 2014. The court granted, in accepting the appeal, a stay of execution pending appeal on condition that the appellant pays into court the judgment sum of K543,000. To date the appellant has done nothing to prosecute the appeal. Lack of contention of respondent and inordinate excuse and delay is prejudicial and may lead to the Respondent not to enjoy the fruits of litigation. In the interest of justice, Dzimphonje prayed that the notice of appeal be struck out for want of prosecution under order 59 rule 10(9)(a) of the Rules of the Supreme Court. And that the sums paid into court be paid to the Respondents with the interest they have accrued.

ISSUES

- I Whether the Notice of Appeal should be struck out for failure to set down the Appeal
- II Whether the Appellants appeal should be dismissed for want of prosecution

THE LAW

On Jurisdiction of the Court

Order 59 rule 10(9) of the **Rules of the Supreme Court** (General Powers of the Court) states:

- (9) *In any proceedings incidental to any cause or matter pending before the Court of Appeal, the powers conferred by this rule on the Court may be exercised by a single judge or the registrar.*
Provided that the said powers of the Court of Appeal shall be exercisable only by that Court or a single judge in relation to
- (a) *the grant, variation, discharge or enforcement of an injunction, or an undertaking given in lieu of an injunction*
 - (b) *the grant or lifting of a stay of execution or proceedings.*

Order 59 rule 5 (Setting down appeal) of the **Rules of the Supreme Court** states:

- (1) *Within 7 days after the later of (i) the on which service of the notice of appeal was effected, or (ii) the date on which the judgment or order of the court below was sealed or otherwise perfected, the appellant must set down his appeal by lodging with the registrar –*
- a. *A copy of the said judgment or order, and*
 - b. *Two copies of the notice of appeal, one of which shall be indorsed with the amount of the fee paid, and the other indorsed with a certificate of the date of service of the notice.*
- (2) *Upon the said documents being so lodged, the registrar shall cause the appeal to be entered in the records of the Court and assigned to the appropriate list of appeals.*
- (3) *The appropriate list of appeals for the purpose of paragraph (2) shall be decided by the registrar, without prejudice, however, to any decision of the Court of Appeal on the question whether the judgment or order appealed against is interlocutory or final.*
- (4) *Within 4 days of receipt of notification from the office of the registrar that the appeal has been entered in the records of the Court, the appellant must give notice to that effect to all parties on whom the notice of appeal was served, specifying the Court of Appeal reference allocated to that appeal.*

On Dismissal for Want of Prosecution

Order 34 rule 2 of the **Rules of the Supreme Court** contains the procedure on 'Time for setting down action':

1. *Every order made in an action which provides for trial before a Judge shall, whether the trial is to be with or without a jury and wherever the trial is to take place, fix a period within which the plaintiff is to set down the action for trial.*
2. ***Where the plaintiff does not, within the period fixed under paragraph (1) set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just. (emphasis mine)***
3. *Every order made in an action in the Queen's Bench Division which provides for trial before a Judge (otherwise than in the commercial list or the special paper or any corresponding list which may be specified for the purpose of this paragraph by directions under rule 4) shall contain an estimate of the length of the trial and, if the action is to be tried at the Royal Courts of Justice, shall, subject to any such direction, specify the list in which the action is to be put.*

The leading authority in this matter is ***Allen v Sir Alfred McAlpine & Sons Ltd*** [1968] 1 All ER 543 where Lord Denning MR said:

"The delay of justice is a denial of justice. Magna Carta will have none of it. To no one will we delay or deny the right to justice... To put right this wrong, we will in this court do all in our power to enforce expedition; and, if need be, we will strike out actions when there has been excessive delay.... The principle upon which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to remedy his own solicitor who has brought him to this plight."

ANALYSIS

Counsel for the Respondents cites two main arguments in support of dismissing the matter for want of prosecution, namely: inordinate and inexcusable delay and the Respondents suffering prejudice due to their inability to enjoy the fruits of their litigation pursuant to this appeal.

As rightly put by the Respondents' Counsel, the Appellant has not acted on the file since May 2014. No date has been secured for the appeal nor any directions sought. Meanwhile the

(ii)

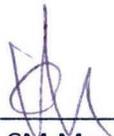
- a. That there has been inordinate and inexcusable delay on the part of the plaintiff; and
- b. That such a delay will give rise to a substantial risk that it is no longer possible to have a fair trial, or is such as is likely to cause serious prejudice to the defendants.

This court believes that in excess of two years is indeed inexcusable and inordinate delay. The Appellant has not acted on its case and this is causing prejudice to the Respondents whose compensation has not been given to them. It would be unfair for the court to entertain any continued delay in this matter. Almost three years have elapsed since any process

ORDER

- 1) The matter is hereby dismissed for want of prosecution.
- 2) The Appellant has the right to restore the matter to the cause list.
- 3) The Respondents must serve the Appellant at their official place of business in addition to service on the Appellant's legal practitioners.
- 4) The money paid into court be released to the Respondents.
- 5) Each party will bear their own costs.

Made on the^{10th} day of^{February}..... 2017



CM Mandala
ASSISTANT REGISTRAR