

30 Jan 1992

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 542 OF 1990

DAA

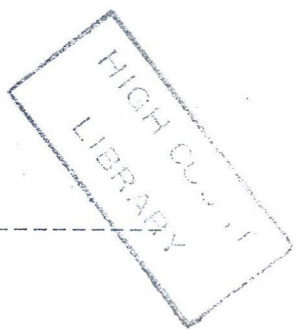


BETWEEN: LEVER BROTHERS (MALAWI) LIMITEDAPPLICANTS

- and -

F. S. LIABUNYA (FEMALE)RESPONDENT

CORAM : TAMBALA, J
Mvula of Counsel for the Applicants
Nakanga of Counsel for the Respondent
Kholowa/Lora, Court Clerk
Gausi, Court Reporter



R U L I N G

This is the defendants' application for stay of execution of judgment pending appeal. It is brought under the provisions of O.59, rule 13, of the Rules of the Supreme Court. Mr. Mvula, Counsel for the applicants, swore an affidavit in support of the application. It is directed only against the damages of K15,523.00 awarded to the respondent.

Mrs. Liabunya, the respondent in this application, succeeded in her action against the applicants. The action was grounded on wrongful dismissal and libel. In a judgment which I delivered on the 20th December, 1991, I awarded her K523.00 and K15,000.00 as damages for wrongful dismissal and libel respectively.

As a general rule, "The court does not make the practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie, he is entitled pending an appeal". Par. 59/3/1 of the Supreme Court Practice, 1988 edn. Mr. Mvula appreciated this rule and submitted that the only ground on which such application can succeed is an affidavit showing that if the damages were paid there is no reasonable probability of getting them back if the appeal succeeds.

In paragraph 4 of the affidavit Mr. Mvula swore that if the damages were paid to the respondent the appeal would be rendered nugatory since she is a mere stores clerk employed by ESCOM and would be unable to pay back the money if the appeal succeeds.

The Affidavit does not show where Counsel obtained the information that the respondent is employed as a stores clerk. In her evidence before this Court, in the main action, she told the Court that she is employed by ESCOM as a Credit Controller. Considering that she is a Diploma graduate in Business Studies from the Malawi Polytechnic and that for six years she worked for the applicants as Assistant Buyer, I am satisfied that she is currently employed by ESCOM as a Credit Controller. The affidavit failed to show the respondent's present salary from which it could be inferred that she would be unable to pay back K15,523.00 in the event that the appeal is allowed.

An appeal from this Court may take two to three years before it is heard and concluded by the Malawi Supreme Court of Appeal. It is very unlikely that whatever salary the respondent is earning at present will remain the same in two or three years' time. She is likely to receive a promotion to a senior position. I think that the affidavit in support of the application is insufficient for the purpose of showing that the respondent is a poor person who would not be able to pay back K15,523.00 if the appeal succeeds.

This Court has discretion to grant or refuse the application. I am mindful that the discretion must be exercised in accordance with the accepted principles of law and justice. In the present case Lever Brothers (Mw) Limited out of malice dismissed and defamed Mrs. Liabunya and thereby put her in a difficult position to get a good job. When they are ordered to pay compensation to her they turn round and say, "she must not get the money now, she is so poor that she will not pay it back if we succeed in our appeal". It would be unjust to accept the plea by Lever Brothers (Mw) Limited.

This Court refused an application for stay of execution of judgment under similar circumstances in the case of H A Stambuli v ADMARC, Civil Cause No. 550 of 1981, cited by Mr. Nakanga, Counsel for the respondent. In that case Stambuli obtained judgment for K4,000.00 against ADMARC, his former employers, for false imprisonment. ADMARC appealed and applied for stay of execution of the judgment on the ground that Stambuli was poor and he would not likely pay back the money if the appeal succeeded. At that time Stambuli was unemployed. Jere, J., as he then was, made the following observations, with which I am in total agreement:

"If the court were as a habit or practice to refuse the enforcement of its own judgment pending the hearing of appeals in the appellate court, this would be against the public policy for it would tend to lengthen the period within which a successful party would collect his damages. It would further bring an element of uncertainty. Hence encouraging parties to take the law into their own hands. However, the courts

do realise that a party who has lost has also undoubted rights to appeal to appellate court and that such appeal should not be pre-empted. It appears to me what is required is to balance between the two views; but the scales are more weighed in favour of a successful party. In this particular case Admarc dismissed Stambuli hence making him poor. Admarc now are asked to pay damages. Can they turn round and say 'oh Mr. Stambuli you are poor'? Such, in my view, would be utterly unjust."

I am satisfied that it would be "utterly unjust" to grant the application. I refuse it and order the applicant to pay costs of the application.

MADE in Chambers this 30th day of January, 1992, at Blantyre.

D. G. Tambala

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JUDGE