JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 2903B OF 2006

BETWEEN:

FRED KING NKHWAZI ……..…….APPLICANT

- AND -

FINANCE BANK ……...…….RESPONDENT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
K. Chidothe, of the Counsel for the applicant
Mr Mpaka, of the Counsel for the respondent
Mrs Phombeya – Official Interpreter

R U L I N G

Twea, J

This is a troubled case. As was observed earlier by Honourable Justice Chipeta who said

> I fear that in this case we might be approaching the danger zone of extending large quantities of time, so to speak, on pampering the "child"; interlocutory applications, more than respecting his "parent"; substantive appeal, if we should continue to devote the kind of time we have so far devoted to jumping from one preliminary application to the other. I tend to believe that an early resolution of the main issues at stake in these proceedings, could bring about early

peace or joy or both to and between the two combatants in the matter."

The Judge was reacting to the numerous preliminary issues that kept arising in this case and thereby delaying the settlement of the dispute of the matters in issue.

In this case the defendant was a commercial bank, now under voluntary liquidation. The plaintiff was it's former employee. In the course of the winding up the bank the liquidator determined the emoluments due to the plaintiff. The plaintiff was not happy with the determination. He referred the matter to his lawyers.

There were letters and meetings between the plaintiffs lawyers and the liquidator's office. Some adjustments were made but still did not satisfy the plaintiff. The parties reached a statement.

On 5th October 2006, the plaintiff wrote the liquidator a letter which read:

> **"TERMINAL BENEFITS FOR MR F.K. NKHWAZI**
> We refer you to the meeting of 25th September 2006 at Umoyo House between Mr Kapeta and Mr Harawa where it was agreed that the liquidator would review Mr Nkhwazi's claim and communicate his final decision on the matter. We have not heard from you.
> Our instructions are that if we do not hear from you by close of business on Wednesday 11th October 2006 we proceed on the understanding that there is no more room for discussion and that the Liquidator's final decision on Mr Nkhwazis claim as at that date is that:
>
> i. Mr Nkhwazi is not entitled to all salary and benefits for the full duration of his contract of employment with the Finance Bank; and
> ii. Mr Nkhwazi is, in the event that he is only entitled to notice of termination, still not entitled to benefits from the provisions of Section 30 and 35 of the Employment Act (Number 6 of 2000)
>
> We accordingly put you under notice."

The Liquidator responded to this by his letter of 12th October, 2006, as follows:

"Re: Terminal Benefits for Mr F. K. Nkhwazi

> We are looking into your claim as discussed. We should be in a position to send a reply on or before 19th October 2006."

It would appear that there was no further correspondence thereafter.

On 23rd October, 2006, the plaintiff filed an appeal by way of Notice of Motion under Order 55 rule 3 of the Rules of Supreme Court. The Notice of motion stated that the appeal was against the decision of Liquidator as cited in the letter of 5th October. The Notice of Motion was supported by an affidavit sworn by Mr Vipya Harawa of Counsel, for the appellant and a supplementary affidavit sworn by the appellant on 13th November, 2006.

In spite of all the preliminary application made by the respondent in this case, one which was to transfer the case to the Industrial Relations Court, which failed, the respondent raised yet, another preliminary objection, filed on 19th June 2007. This was not heard.

The appeal was set down for hearing on 8th February, 2008. When the case was called the parties decided not to tackle the substantive appeal. They elected to argue the preliminary issues only.

The preliminary issue on record was in respect of the grounds of appeal. It was argued that since the Notice of Motion did not have grounds of appeal it was not therefore competently brought before the court and should be dismissed.

Over and above the preliminary issue on record, the respondent added two more objections. Firstly, they submitted that the affidavit sworn by Mr Harawa, of Counsel for the appellant, referred to matters which were with in his personal knowledge. Consequently, the affidavit sworn by the appellant in person which adopted the affidavit of Mr Harawa was defective, It was argued that the appellant could not swear to issues personally known by his counsel. Further, that the jurat to Mr Harawa's affidavit was not dated. This affidavit therefore should not be used as it was contrary to Order 41 r 5 of the Rules of Supreme Court. Lastly, the respondent submitted that the

matters in issue are commercial in nature the case therefore ought to be transferred to the Commercial Court Division of the High Court. It was argued that this is the only court that has jurisdiction over such cases. The respondent prayed that the case be strike off.

The appellant naturally opposed the preliminary objections. I need not specifically layout the objections. It is sufficient to note that they countered the submissions of the respondent. These will be dealt with as I proceed.

To begin with, I acknowledge that the respondent did not give notice of the other preliminary issues and thereby took the appellant by surprise. I, however, did not interfere in order to expedite the case since there was no objection.

Let me now go back to the issues.

This appeal is from the decision of the Liquidator in accordance with Section 275 of the Company Act.

According to Order 55 r 1(1) which states:

> "1 – (1) Subject to paragraphs (2) (3) and (4) this order shall apply to every appeal which by or under any enactment lies to the High Court from any Court, tribunal or person."

Section 275 of the Company's Act is clear. A party aggrieved by the decision of a Liquidator may have recourse to the High Court. The proper forum being the High Court, the mode of filing the appeal is therefore determined by Order 55 r 1(1) Order 55 r 3 states:

> "3 – (1) An appeal to which this order applies shall be by way of rehearing and must be brought by originating motion.
>
> (2) Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and, if the appeal is against a judgment, order or other decision of a court, must state whether the appeal is against the whole or a part of that decision and, if against part only, must specify the part."

The rules stipulate that the grounds of appeal should state the reason why a decision is contested. It specifically provides that it is not sufficient to set out the conclusion which the High Court is being invited to reach: See Order 55 r 3(2). Order 55 governs statutory appeals to the High Court from, as we have seen, judgment, order or decision of the court, tribunal or a person. To put light on the issue we need to have recourse to Order 55 r 4. This determines who must be served and the time within which service must be effected. Time runs from the date after the decision, judgment, order or determination. This must be within 28 days. However, Order 55/4/1 acknowledges that there is uncertainty about the meaning of "given" where an order is sent. Whether 'given' refers to the time the order was sent or the time it was received. This begs the question, how was the order given?

In the present case, there was a stalement. On 5th October, 2006 the appellant wrote the respondent giving notice of a deemed final position of the parties. The letter was acknowledged after time of the notice ran and did not give the final position according to the respondent. In these circumstances the appellant assumed the "deemed position" and appealed against that. The respondents are not pleading lack of finality or specificity. They plead that there were no grounds of appeal. The question is who was under a duty to make a decision? The respondent was, and never did. The appellant assumed a deemed respondent's decision which they went on to challenge. There is no ambiguity in the challenge. In the absence of any final decision from the respondent I find that the grounds of appeal are clear. There is no merit in the objection.

On the affidavit, we need to have recourse to Order 41. Ordinarily, the one who swears an affidavit is the one who is in a position to prove the facts averred. Counsel should only swear an affidavit on behalf of a client if the client is unable to do so, and this must be made clear in the affidavit. In this case I noted that both Counsels had fallen into the error of swearing affidavits for their clients without any proper application. This position has, in most respects, been regularised. I do not think it would be equitable to allow the respondent to use this default to its advantage now. I will therefore use my discretion to uphold the affidavits in accordance with Order 41 r 4.

In respect if the jurat I do not think the lack of dates is fatal. Order 41/1/7 puts emphasis on full address and identification of the person before whom it was sworn and the place where it was sworn. Irregularities cannot be

waived subject to Order 41 r 4 above stated. I find no ambiguity about where and before whom the affidavit was sworn: Videlia Chibisa, Attorney - at – Law, Commissioner for Oaths of Knight and Knight P.O. Box 1450, Blantyre. The office and address of the Commissioning person therefore is unassailable and is in conformity with of the Oaths Affirmations and Declarations Act. I therefore find that the defect as to the date is not fatal. I, again find no merit in the objection.

Lastly, the respondent contends that this case should be brought before the Commercial Court Division of the High Court which is the only court which has jurisdiction over such matters.

To begin with it was put to Counsel for the respondent whether or not he had any views in respect of Order 22 r 5(2) which stipulates that any case not transferred within six months after the Commercial Court Division starts operating will cease to be eligible for transfer. Such a case would therefore, be concluded in the General Division at the Principal Registry or any other registries where it was registered. Counsel did not prefer any certain position on the issue. He still sought a transfer to the Commercial Court Division on account of jurisdiction,

It must be pointed out that the High Court (Commercial Division) Rules, 2007 do not create a court. They are rules respecting the conduct of cases relating to commercial matters. Commercial matters are defined in Order 1 rule 5.

Jurisdiction is determined by Order 1 rule 6 which is ***subject to the rules and any other written Law***. This rule stipulates that the Commercial Court shall determine cases relating to commercial matters whereby the value exceeds K1, 000, 000. However, cases of bankruptcy and winding up of companies shall be determined by it notwithstanding, the value thereof.

The rules were made to promote access to justice and expediency by creating a separate registry for a particular kind of cases; commercial matters. It does not mean that the other High Court General Division cannot try such cases. This is evident from Order 22 r 5 (2) and Order 1 r 6 itself which fixed period within which to effect transfers and a threshold for exclusive jurisdiction respectively.

The argument of Counsel for the plaintiff therefore cannot be sustained.

Lastly, in accordance with Order 22 r 5(2) this case is no longer eligible for transfer. It was open to the respondent to apply for a transfer before time ran however, the respondent wrongfully sought a transfer the case to the Industrial Relations Court. I, once again, find no merit in the respondent's objection.

It is my ruling therefore that the respondents preliminary objections have no merit, and I overrule them with costs to the applicant.

Let may echo Justice Chipeta, the respondent has come up with all sorts of preliminary objections that the real case has now become obscure. It is time to realise that it is in the interest of justice that litigations must come to an end. I was of the view that the respondent should be penalised with paying immediate costs but in the interest of time I have refrained from so ordering. As was said by Justice Chipeta the decision, despite of being a deemed decision so far, of the Liquidator may be confirmed, quashed or modified. It is in the interest of both parties that this matter must be speedily disposed of. I so order.

Pronounced in Chambers this 14th day of February, 2008 at Blantyre.

E. B. Twea
JUDGE