



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 50 OF 2017

BETWEEN:

CHIBUKU PRODUCTS LIMITED

APPLICANT

AND

JOHN MILLER

RESPONDENT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR BRIGHT THEU, COUNSEL FOR THE APPLICANT

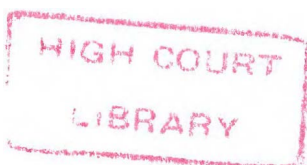
MR BRUNO MATUMBI, COUNSEL FOR THE DEFENDANT

MR KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

ORDER

Before me is the applicant's application for stay of costs order pending appeal that was made by the Chairperson of the Industrial Relations Court. The application is supported by an affidavit sworn by counsel for the applicant and skeletal arguments. Suffice to mention that counsel adopted both the affidavit in support and skeletal



arguments. Initially, this application was made ex parte. Upon perusal of the supporting documents, I ordered that the same be brought inter partes. During the hearing of the inter partes summons for stay, counsel for the respondent relied on his affidavit in opposition which he adopted. Let me also mention that before the hearing of the application for stay, both counsel addressed me on the preliminary objection to the affidavit of Bruno Matumbi that was brought by counsel for the applicant. At the end of the hearing on that preliminary objection, the parties agreed to remove certain issues from the affidavit and the preliminary objection was therefore settled.

FACTS OF THE CASE

Facts of the case are that the respondent commenced proceedings in the Industrial Relations Court (IRC) claiming remedies for what he called constructive dismissal. It is said that a pre-hearing conference was held on 17th November 2016. It is stated that the parties did not agree, sign and file minutes of the pre-hearing conference as required by Rule 13 of the IRC Rules of Procedure. Counsel exhibited a bundle of copies of correspondences between the parties evidencing lack of agreement, marked as **BMT 1**. Each party then filed what they considered minutes of the pre-hearing conference. It is said that unclear as to what constituted minutes of the pre-hearing conference, the applicant wrote the registrar seeking direction but no response came from the registrar. Counsel exhibited copies of the correspondences to the registrar marked as **BMT 2**.

The matter was subsequently scheduled for trial whereupon many issues arose as contained in the affidavit in support. One of the issues was the delay to commence proceedings on that day occasioned by the court itself. It is submitted that when the court convened at 3pm, the Chairperson sought views from the parties on how to proceed, bearing in mind that he was supposed to deliver a

judgment at the Magistrate Court on the same day and time. In fact, the Chairperson explained to the parties that he delayed because he was working on his judgment to be translated into Portuguese. However, the issue forming subject matter of the present application for stay is that the applicant raised a preliminary objection concerning trial. The objection was that the matter was not ready for trial in the absence of pre-hearing minutes which were supposed to be drawn up, signed and filed by the parties in terms of Rule 13 of the IRC's Rules of Procedure. Counsel highlighted to the court that each party had filed what they perceived as minutes of the pre-hearing conference. Counsel addressed the court that in the absence of agreed and signed pre-hearing conference minutes, he thought that there was no proper pre-hearing conference and that it might be necessary to conduct another pre-hearing conference to address multiple issues before the case could proceed to trial. Counsel indicated to the court that though he was appointed three days before the appointed date for trial, he was ready to proceed with trial if the court will not uphold the objection.

It is stated that after hearing both parties on the objection, the court perused the file and came across short hand notes of the pre-hearing conference as recorded by the registrar who conducted the pre-hearing conference. The court concluded that it was disrespectful to contend that no proper pre-hearing conference took place when the registrar's notes on the court file showed that a conference had been conducted and the registrar noted the issue proceeding to trial as constrictive dismissal. The court dismissed the objection subsequently, noting that the same was a wastage of time for trial and ordered the respondent to immediately pay costs of the day's attendance before adjourning the trial *sine die*. Counsel for the applicant therefore sought leave to appeal against the cost order and for stay of the same. The court granted leave to appeal but declined to stay the cost order. Counsel for the applicant stated

that the ground for the appeal is that the court (IRC) is prohibited to award or make a costs' order except in clearly stipulated circumstances under the Labour Relations Act for which no finding had been made that the objection fell within those circumstances. Basically, it is the order for costs that was made by the court that prompted the applicant to file the present application for stay pending substantive appeal. Counsel for the applicant stated that the applicant has lodged the appeal against the order as **BMT 3** will show (a notice of appeal).

THE APPLICANT'S CASE

Suffice to mention that the applicant's case can be extracted from the skeletal arguments and the oral submissions made during the interpartes hearing. The applicant contends that the grant of stay of an order pending appeal is a matter for the discretion of the court and he cited the case of **Mulli Brothers Ltd V Malawi Savings Bank¹**. Counsel submitted that the discretion is exercised on the interests of justice taking into account two competing considerations namely that the court does not make it the practice of depriving a litigant fruits of litigation and that a court will ensure that a successful appeal is not rendered nugatory if the order appealed against will have been complied with or enforced and it is not possible to reverse the situation. He also submitted that in exercising the above considerations, the court considers all the circumstances of the case including the prospects of success of the appeal.

He submitted that the appeal against the cost order has strong prospects of success. He said in making the order the court acted diametrically against the prohibition to make such an order. He stated that the court is prohibited to make a costs order except in limited circumstances which are clearly stipulated as: failure to attend a conciliation meeting or where the matter involved is

¹ MSCA, Civil Appeal NO.48 of 2014.

frivolous and vexatious. He submitted that the first exception does not arise herein. On the second ground, counsel submitted that the court did not make any finding that the preliminary objection was frivolous and vexatious as to warrant an order for costs.

Counsel for the applicant also submitted that the trial did not take place because of the objection but rather because the Chairperson was rushing to deliver a ruling at the Magistrate Court. He states that it was apparent from the outset before the court was in session that the trial was ill-fated on that particular day as the Chairperson sought the parties' views on the way forward in view of his engagements at the Magistrate Court. He submits that in the premises, the costs order against the applicant offends any conception of justice, the trial having failed and the applicant having been put to expense in turning up for trial by the court's own other engagements. Counsel submits therefore that the appeal has every prospect of success.

Counsel also submitted that the respondent is now resident in South Africa. He states that since he quit his job with the applicant, there is no information about his means nor whether he is now in any gainful employment or running a business. He submitted that lack of information on his means renders it more likely that the money would not be recovered if it is paid to him and later the appeal succeeds. He submits that the appeal would end up being nugatory in the circumstances.

THE RESPONDENT'S CASE

Again, the respondent's case is well stated in the affidavit in opposition and oral submissions made during the interpartes hearing. The respondent submitted that the lower court has jurisdiction to make an order for costs as per Section 72 (2) of the Labour Relations Act. He submitted that there is no express prohibition on the part of

the court not to make any order as to costs. He submitted that the objection by the applicant was frivolous and vexatious, thereby falling under the law. On whether the appeal will be rendered nugatory, counsel submitted that the appeal will not be rendered nugatory by mere payment of costs. He said that the applicant has to show evidence that the respondent has no means. Counsel submitted that employment is not only source of income as one may have other sources such as inheritance. Counsel submitted that the respondent travelled to Malawi to attend to the trial, hence he has shown that he has means. Counsel reminded the court that a successful litigant, like the respondent, should not be deprived of his fruits of litigation, by an application for stay pending appeal. He therefore applied for dismissal of the application.

In reply, counsel for the applicant submitted that the appeal has a chance of success as admitted by the respondent counsel who put the chances of success at 50 percent. Counsel submits that the lower court is prohibited from making an order for costs. On the appeal being rendered nugatory, counsel submitted that the respondent is now resident outside Malawi and without any gainful employment. He submitted that nobody including his counsel knows his other sources of income. Basing on these arguments, counsel concluded that once the order for costs is complied with, he is of the considered view that the money will not be refunded once the appeal is successful. Counsel submitted that if the respondent has the means, he could have said so. Counsel submitted that the respondent's travel to Malawi and payment of legal fees is not enough evidence that the respondent has the means as these may be sponsored. Counsel therefore prayed to this court to grant a stay pending an appeal.

THE LAW

The law on stay of execution pending appeal has been well settled in many local cases. The general principle is that a court of law should not make it a practice to deprive a successful litigant fruits of his litigation in anticipation of the outcome of the appeal as pronounced in **Annot Lyle**² In the case of **Speaker of the National Assembly, Ex-parte v Hon. John Tembo**³, the following principles were laid down:

“Stay of execution of judgment pending appeal has become common place in our courts and over the years clear principles for consideration have emerged. The guiding principles however are in Order 53 r. 13/1 of the rules of the Supreme Court. That Order cites a number of cases specifically dealing with stay of execution of judgments. Some of the cases have been referred to by counsel in this matter from which the following cardinal principles resonate:

- i. The court does not make the practice of depriving a successful litigant fruits of his judgment.
- ii. The court should then consider whether there are special circumstances which militate in favour of granting the order of stay and the onus will be on the applicant to prove or show such special circumstances.

² (1886) 11 PD 114

³ MSCA, Civil Appeal Number 27 of 2010 (unreported)

The court would likely grant stay where the appeal would otherwise be rendered nugatory or the appellant would suffer loss which would not be compensated in damages.

iv. Where the appeal is against an award of damages the established practice is that stay will normally be granted where the appellant satisfies the court that if the damages were paid, then there will be no reasonable prospect of recovering them in the event of the appeal succeeding”.

In the case of **Mike Appel & Gatto Limited V Saulos Chilima**⁴, commenting on these principles, the court observed as follows:

“Once an applicant has brought forward solid grounds for seeking stay, the court is then called upon to weigh the risks inherent in granting a stay and the risks inherent in refusing stay. This balancing process is what is here referred to as the court's discretion. Much as the court will start from the premise that courts will not make the practice of depriving successful litigants fruits of their judgment and much as the mere filing of an appeal and probability of success will not qualify as stay of execution; while a court will be concerned about the appeal not being rendered nugatory, ultimately it is about how the court weighs these considerations and what they translate to in the particular case”.

⁴ [2014] MLR 231 at 238. See also **In re: Citizen Insurance Company Limited and the Registrar of Financial Services, Act, 2010, [2012] MLR 138.**

In the case of **The Minister of Finance and the Secretary to the Treasury V Hon. Bazuka Mhango MP and Others⁵**, the court had the following to say on principles governing applications of this nature:

“My understanding of these principles is that successful litigant may not be deprived of the fruits of his litigation without a good reason and that normally the only good reason to do so is when it appears to the court that there are not reasonable prospects of recovering the money in the event that the appeal succeeds. The justness of this is in the fact that while it is the duty of the court to see to it that the successful litigant should access the fruits of his litigation as quickly as possible, it is also the court's duty to ensure that it does not come about that a successful appeal is (not) rendered nugatory. And in order for the court to be able to determine whether or not an appeal, if successful would be nugatory by reason that there is no reasonable probability of the appellant getting the money back is a matter of facts which must be presented to the court for assessment.”

The above, in a nutshell, is what has been stated to be the law governing stay of a judgment or order pending appeal.

⁵ MSCA Appeal Case No 17 of 2009

ANALYSIS OF THE EVIDENCE

The cardinal principle as stated above is that courts will not deprive a successful litigant fruits of his litigation. At the same time, courts will see to it that once an appeal has been lodged, which is a right to the appellant, that appeal should not be rendered nugatory. It is stated that the court has to use its discretion whether to grant a stay or not depending on special circumstances that have been advanced by the applicant.

In the present case, the applicant states that the appeal has a greater chance of success as the lower court has no jurisdiction to make an order for costs in total disregard of the law. Counsel for the applicant also submitted that he is fearing that once the order for costs is complied, the appeal will be rendered nugatory as it will be difficult for the respondent to refund the same. Counsel submitted that the respondent is a person of no means as of now as his known employment with the applicant was terminated. He also submitted that nobody know his sources of income as he is now back to his home country, South Africa. The respondent, in response, submitted that the applicant has failed to show that the respondent is of no means. Counsel for the respondent submitted that the respondent managed to attend the trial and paid legal fees, a sign that he has means and that the appeal will not be rendered nugatory.

I have seriously considered what the law says on this issue as outlined above, and have taken into consideration the submissions of both counsel herein. I have to state that I am grateful to both counsel for their submissions. Having said that, I am of the considered view that in the circumstances of the present case, the respondent, I agree, with the applicant, has no any sources of income after his termination of the employment with the applicant. I am of the considered view that as it is now, it is difficult to decipher that the respondent has other sources of income in South Africa where he is

currently staying. I am of the view that in these circumstances, to avoid rendering the appeal nugatory, a stay order be granted against the cost order made by the lower court. I have warned myself of the general principle not to deprive the respondent herein fruits of his litigation. I am also mindful of the principle as outlined above that an appeal that has greater chances of success does not automatically mean that a stay be granted. I am inclined to believe and I hold that taking into consideration all matters regarding how the order was made by the lower court, it is fair and just that a stay be granted so that both parties are heard on the correct interpretation of the law as contained in Section 72 (1) and (2) of the Labour Relations Act. I therefore grant a stay of the costs' order pending appeal. I order that the appeal be expedited.

Costs are in the discretion of the court. I therefore order that each party should bear its own costs.

**MADE IN CHAMBERS THIS 22ND DAY OF MAY 2017 AT BLANTYRE IN THE
REPUBLIC OF MALAWI.**


JOSEPH CHIGONA
JUDGE.