

IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE
MSCA CIVIL APPEAL NO. 67 OF 2017
(Being High Court of Malawi – (Lilongwe District Registry) – Commercial Case No. 132 of 2016)
BETWEEN
ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED.....APPELLANT
AND
SAMSON EVANCE KONDOWE t/a SAVEMAN INVESTMENT.....RESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA
Roka of Counsel for the Appellant
Mvalo of Counsel for the Respondent
Minikwa Recording Officer

RULING

Justice Anthony Kamanga, SC, JA

1. Introduction

1.1 On 30th November, 2017, I declined to grant an application herein filed, on behalf of the Electricity Supply Corporation of Malawi Limited, (the “Appellant”), for a stay of proceedings in the High Court (Commercial Division) Lilongwe District Registry, in Commercial Case No. 37 of 2016, pending the hearing and determination of an appeal against the judgment of the court below delivered on 8th October, 2017. I indicated at the time that I would deliver a formal ruling, giving detailed reasons, in due course; and I now deliver the following ruling.

1.2 On 8th November, 2017, the Appellant issued summons for an application for a stay of the proceedings in the court below, pending the hearing and determination of an appeal against the judgment of the court below. The application for a stay of the proceedings was lodged pursuant to Order I r. 18 of the Supreme Court of Appeal Rules as read with O. 59 r. 13 of the Rules of the Supreme Court.

2. Background

2.1 In order to appreciate the basis of the application for stay of the proceedings, it is necessary to briefly outline the relevant facts in this matter.

2.1.1 On 23rd March, 2016, the Respondent commenced proceedings against the Appellant for alleged negligence resulting from a fire which destroyed the Respondent’s bakery, including various equipment at the bakery. The Respondent’s case revolved around an apparent

“defective” electricity meter supplied and installed by the Appellant at the Respondent’s bakery.

2.1.2 On 27th April, 2016, the Appellant filed a defence to the Respondent’s claim denying liability.

2.1.3 On 9th October, 2017, the court below delivered its judgment. The court below, among other things, held that the Appellant was in breach of an implied warranty to supply to the Respondent a meter which was of merchantable quality. The court below, accordingly, found the Appellant liable for the loss occasioned to the Respondent as a result of the fire, and ordered that the loss or damages should be assessed by the Registrar.

3. The Appellant’s appeal against the decision of the court below

3.1 On 18th October, 2017, the Appellant filed a notice of appeal, pursuant to section 21 of the Supreme Court of Appeal Act and Order III r 2 of the Supreme Court of Appeal Rules, against the decision of the court below.

3.2 The grounds of appeal, as set out in the Notice of Appeal, are as follows-

“3.1 The [court below] erred in holding that the [Appellant] breached an implied warranty to supply goods of merchantable quality (being a meter) to the [Respondent] when the issue of breach of warranty was not pleaded.

3.2 The [court below] erred in finding the [Appellant] liable for all losses occasioned to the [Respondent] despite finding/holding that there was no negligence on the part of the [Appellant];

3.3 The decision of [court below] erred is against the weight of the evidence.”.

4. The Appellant’s application for stay of proceedings in the court below

4.1 On 20th October, 2017, the Appellant filed summons in the court below for an application of stay of the proceedings in this matter, pending the hearing and determination of an appeal against the judgment. The Appellant’s application was dismissed by the court below, apparently on the grounds that “there are no proceedings to be stayed since judgment was delivered”.

4.2 The Appellant now comes to this Court by its application lodged on 8th November, 2017 to stay the proceedings in the court below. The application is essentially to stay the assessment of damages by the Registrar, pending the hearing and determination of the appeal against the judgment entered by the court below.

5. Submissions on behalf of the Appellant

5.1 During the hearing of this application on 30th November, 2017, Counsel for the Appellant adopted the affidavit that had been sworn in support of the application as well as the skeleton arguments that had been filed in support of the application.

5.2 The gist of the arguments and submissions for the Appellant in support of the application to stay the proceedings are contained in the following paragraphs of the affidavit filed in support of the application-

“13. The Appellant strongly believes that the likelihood of success of the appeal is very high considering that the issue of breach of warranty to supply goods of

merchantable quality which was the basis for the finding of liability against the Appellant was not pleaded by either of the parties.

14. The [Appellant] verily believes should the proceedings in the [court below] proceed and the damages and costs to be paid to the [Respondent] are assessed and paid out before the determination of the appeal, the [Respondent] will not be able [to] repay the same to the [Appellant] in the event that the appeal is successful.”.

6. *Respondent’s affidavit in opposition and submissions on behalf of the Respondent*

6.1 The Respondent disputes the Appellant’s assertion that-

(a) the likelihood of success of the appeal is very high; and

(b) should the proceedings in the [court below] proceed and the damages and costs to be paid to the [Respondent] are assessed and paid out before the determination of the appeal, the [Respondent] will not be able [to] repay the same to the [Appellant] in the event that the appeal is successful.

6.2 In relation to paragraph 6.1 (b), it is argued and submitted, on behalf of the Respondent, that the Respondent has several businesses and would not be unable to repay the any assessed damages paid to him, if the appeal succeeds.

6.3 The Respondent submits that the application to stay proceedings pending the hearing and determination of the appeal is without merit and should be dismissed with costs.

7. *Refusal by court below to grant application to stay proceedings pending hearing and determination of the appeal*

7.1 As indicated in paragraph 4.1, on 20th October, 2017, the Appellant filed summons in the court below for an application for a stay of the proceedings in this matter, pending the hearing determination of an appeal against the judgment. The Appellant’s application was dismissed by the court below, apparently on the grounds that “there are no proceedings to be stayed since judgment was delivered”.

7.2 In my opinion, the judgment of the court below is an interlocutory judgment; by its nature an interlocutory judgment envisages an assessment of damages. An interlocutory judgment is final on liability except that certain aspects of the judgment such as value, damages, or interest, require ascertainment or further determination. However, until the assessment of damages is done, it seems to me that the court below was still seized of the matter; the process of assessment of damages was certainly still to be done in the court below, albeit by the Registrar. There certainly still were in the court below proceedings which could have been stayed, if the court below deemed it appropriate to do so.

7.3 Indeed, Order I rule 18 of the Supreme Court of Appeal Rules anticipates that in all cases the court below would have jurisdiction to hear applications for stay, and actually requires that any such application must first be lodged in, and determined by, the court below; and further that only if the court below refuses to grant the application may an applicant be entitled to have the application determined by this Court.

7.4 Consequently, the application to stay proceedings lodged in the court below on 20th October, 2017 should have been considered by the court below in the context that it was still seized of the matter, and had jurisdiction to hear and determine the application for stay of the

proceedings; and the application should not have been considered and determined in the context that there were no proceedings before the court below to stay.

8. Assessment of Damages

8.1 During the hearing of this application on 30th November, 2017, both Counsel for the Appellant and Counsel for Respondent indicated that the assessment of damages in this matter had already started; that the parties had appeared before the Registrar in court below on several occasions; and that the assessment was scheduled to be completed on 4th December, 2017.

9. Whether the proceedings should be stayed pending the determination of the appeal

9.1 I have carefully considered the arguments and submissions on behalf of both parties, as well as the case authorities referred to by both Counsel in their skeleton arguments and cited in the course of their submissions. I am most grateful to both Counsel.

9.2 I bear in mind that the grant or refusal of stay of proceedings is at the discretion of the Court. I also bear in mind that my duty at this stage is not to determine the merits of the appeal. However, I need to be satisfied that the issues raised for or against the granting of a stay of the proceedings are sufficient to justify the exercise of my discretion one way or another. (See: *Attorney General v Sunrise Pharmaceuticals and Chombe Foods Products MSCA Civil Appeal 11 of 2013*).

9.3 The cardinal principle in determining a stay of proceedings, pending the hearing and determination of an appeal should, in my considered view, be the same as the principle applicable to stay of execution of a judgment, pending the determination of an appeal, namely, that a successful litigant should not be deprived of the fruits of litigation, unless there are sufficient reasons for doing so.

9.3.1 For a long time, until the decision of the Supreme Court of Appeal in *Mike Appel & Gatto Ltd v Saulos Chilima* MSCA Civil Appeal No 20 of 2013, our courts were guided by the following principles: that the court does not make it a practice to deprive a successful litigant of the fruits of litigation; that the court will consider whether there are special circumstances which mitigate in favour of granting the order of stay of execution of judgment, and the onus is on the applicant to prove or show such special circumstances; that the court would likely grant a stay of execution of judgment where the appeal would be otherwise rendered nugatory, or the appellant would suffer loss which would not be compensated in damages; that where an appeal is against an award of damages, stay of execution of a judgment would normally be granted if the applicant satisfies the court that if the damages were paid, there will be no reasonable prospect of recovering the damages in the event of the appeal succeeding; and that whether or not an appeal has a good chance of success is not a ground upon which a court will order a stay of execution of a judgment.

9.4 In *Mike Appel & Gatto Ltd v Saulos Chilima* the Supreme Court of Appeal, while accepting the principles outlined above, noted that there was no reason why the discretion of the court should be fettered by the straight jacketed application of special circumstances, and the Court advocated the approach adopted in the English cases of *Hammond Suddards Solicitors v Agrichem International Holdings* 2002 EWCA Civ. 2065 and *Moat Housing Group-South Ltd v Harris* The Times January, 13 2005 CA.

9.4.1 In *Hammond Suddards Solicitors v Agrichem International Holdings* it was held that “...the court has discretion whether or not to grant a stay”; that “whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or the other or to both parties

if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any moneys paid to the respondent....”.

9.4.2 In *Moat Housing Group-South Ltd v Harris* it was held that in determining whether to grant a stay of execution of judgment, regard must be had, among other things, to the potential prejudice to the parties; the paramount consideration in granting or refusing to grant a stay of execution of judgment is the potential prejudice to either or both of the parties, and the risk of injustice to one or both of the parties.

10. Counsel for the Appellant has submitted that the good prospects of success of the appeal in this matter is a ground for a stay of the proceedings. Indeed, as rightly pointed out by Twea, JA in *Attorney General v Sunrise Pharmaceuticals and Chombe Foods Products* (supra), *“when one takes the broad view of “sufficiency” of reasons or the “frivolity” of [applications] which are argued before this court all the time one can see that such arguments call on the court to assess the strength of the case. ...”*. However, that is not and cannot be the only consideration.

10.1 Counsel for the Appellant has also submitted that should the proceedings in the court below proceed and the damages and costs to be paid to the Respondent are assessed and paid out before the hearing and determination of the appeal, the Respondent will not be able to repay the same to the Appellant in the event that the appeal is successful. However, it is not sufficient to assert that the Respondent would not be able to repay any assessed damages; the burden is on the Appellant to show that the Respondent would be unable to repay any assessed damages. It does not appear to me that, on a balance of probabilities, the Appellant has shown that the Respondent would be unable to repay any damages that may awarded to the Respondent if the appeal succeeds.

11. The issue which arises in this application is, having regard to all the circumstances obtaining in this matter, what is the risk of injustice to one or the other party in these proceedings if a stay of the proceedings, pending the hearing and determination of the appeal, is granted or refused; alternatively, what is the potential prejudice or risk of injustice to either of the parties if a stay of the proceedings, pending the hearing and determination of the appeal, is granted or refused.

11.1 The Appellant’s application to stay the proceedings in the court below, pending the hearing and determination of the appeal against the judgment of the court below, is essentially to stay the assessment of damages by the Registrar. After the court below delivered its judgment, the next logical process in this matter is assessment of damages by the Registrar. It is this logical process which the Appellant wishes stay. Yet, as confirmed by both parties, the process of finalising the assessment of damages has almost been completed, if not by now finalized.

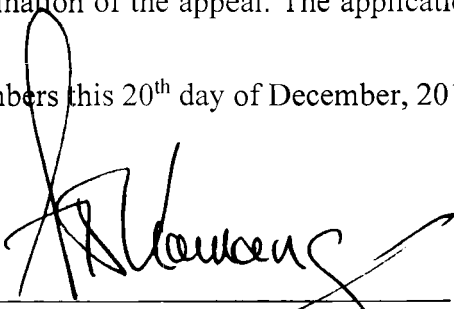
11.2 If the assessment of damages has indeed been finalised then there is no process to stay. If, on the other hand, the process, which both parties confirm has reached an advanced stage, is yet to be finalised, what is or should be the justification for staying the process. In other words what is the risk of injustice to one or the other party in these proceedings if a stay of the proceedings, pending the hearing and determination of the appeal, is granted or refused; alternatively, what is the potential prejudice or risk of injustice to either of the parties if a stay of the proceedings, pending the hearing and determination of the appeal, is granted or refused.

12. On the face of it, the proceedings in the court below appear to be regular. In my view, the assessment of damages in this matter is the logical process through which the Respondent would realise his fruits of litigation. I see no justice, but injustice and prejudice, to the Respondent to deprive him of the logical process of realising his fruits of litigation in the absence of justifying reasons. In my considered view, it would be utterly unjust and unconscionable to deprive the Respondent of his right to have damages assessed in this matter.

12.1 In any event, it seems to me that the Appellant's application may be premature, if not misconceived. If the intention was to stay the enforcement or execution of the judgment, in the sense of staying payment of damages to the Respondent (and the arguments and submissions of Counsel for the Appellant during the hearing of the application seems to support the view that this was the intention), then the Appellant should allow the logical process of assessment of damages by the Registrar to finish, and lodge an appropriate application after the assessment of damages by the Registrar. It does not seem logical to me stay payment of damages which are yet to be assessed. Furthermore, where as in this case, the intention is to stay the enforcement or execution of the judgment, in the sense of staying payment of damages, an application to stay to proceedings does not achieve that intention. The appropriate application would, perhaps, be an application to stay execution of a judgment after the assessment of damages by the Registrar.

12.2 I, accordingly, decline to grant the Appellant's application for a stay of proceedings, pending the hearing and determination of the appeal. The application is dismissed with costs to the Respondent.

Pronounced in Chambers this 20th day of December, 2017 at Blantyre.



Justice Anthony Kamanga, SC

JUSTICE OF APPEAL