IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL NO. 13 OF 1992

BETWEEN:

MALAWI RAILWAYS LIMITED .....APPLICANTS

- and -

PAUL T K NYASULU.....RESPONDENT

CORAM: TAMBALA, J.
Fachi, of Counsel, for the Applicants
Msaka, of Counsel for the Respondent
Chigaru, Court Clerk

R U L I N G

This is an application for stay of execution of judgment. It is brought by summons supported by an affidavit. It is made to me as a single member of the Malawi Supreme Court of Appeal. It is brought under O.59 rule 14-(1) of the Rules of the Supreme Court. A similar application was made to the trial Judge soon after the judgment was pronounced. It was unsuccessful. The applicants then decided to make this application to a higher judicial forum. Both Counsels, who appeared before me and who have long experience in the legal practice, are in agreement that this is a fresh application; it is not in any way an appeal against the ruling made by the trial Judge. They are further in agreement that I am entitled to subject the application to fresh scrutiny and make my own decision uninfluenced by what transpired when a similar application was considered in the Court below.

A factual background of this application may be pertinent at this point. The respondent was employed by the applicants in October 1969. He was initially employed as an executive trainee. He was promoted several times in the course of the years and in 1986 he rose to the position of Deputy General Manager. On 14th April 1989 he was served with a notice to retire. The notice was for six months. He served it and retired from the service with the applicants on 31st October 1989. It would seem that according to his contract of employment, the respondent's employment could be terminated upon his receiving one month's notice or one month's salary in lieu of such notice.

The respondent became a member of a pension scheme managed by OLD MUTUAL during the time that he was in employment with the applicants. It would seem that both the respondent and his employers used to make contributions into the pension fund. According to the rules of the pension scheme, the respondent would receive his full pension and gratuity if he remained in employment up to the age of 60 years. It was estimated that if he retired at the age of 60 years, his full terminal benefits under the pension fund would be K170,000.00. At the time he was retired he was 48 years old. He had twelve years to go before he earned his full terminal benefits.

After he retired, he was advised by the applicants that his terminal benefits would be in the region of K22,802.28. The respondent rejected that sum of money. He demanded his full pension and gratuity as if he retired at the age of 60 years. He argued that by retiring him prematurely, the applicants precluded him from remaining in employment till he was 60 years old and able to receive his full pension and gratuity. He consequently sued the applicants in the Court below and claimed:

(a) A declaration that his retirement was invalid and was in breach of the Pension Scheme Rules applicable; and

(b) Alternatively, the plaintiff is entitled to his full pension benefits as if he was retired in accordance with the Pension Scheme Rules.

He succeeded. He was awarded a sum of K160,000.00 as damages representing his full terminal benefits which he would have received if he were allowed to remain in employment up to the age of 60 years. He was also awarded costs of the action. This application is directed against the award of the sum of K160,000.00.

This Court has discretion to grant or refuse an application for a stay of execution of judgment pending appeal. In the exercise of such discretion, the Court must, of course, be guided by judicial rules. One such rule is that "The court does not make a 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. It is also recognised that when a party is appealing, exercising his right of appeal, the court must ensure that the appeal, when successful, is not rendered nugatory because the successful litigant has squandered the sums awarded. See paragraph 59/13/1 of the **Supreme Court Practice, 1991 Edn.** and the cases cited therein. I agree with the sentiments expressed by **JERE, J.** in the High Court case of **Stambuli v. Admarc, Civil Cause No. 550 of 1981 (unreported)**. His Lordship said:

> "If the court were as a habit to refuse the enforcement of its own judgment pending the hearing of appeal 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, no doubt, the right to appeal to the appellate court and 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."

Then, I bear in mind that as a general rule, the only ground for a stay of execution is evidence, by affidavit, showing that if the damages were paid there is no reasonable probability of getting them back: see, again, **para 59/13/1 of the Supreme Court Practice** and cases cited thereon. Realising the importance of this rule, Mr Msaka worked very hard and spent much time demonstrating before me that the respondent would not be able to pay back the damages awarded in the event that the appeal would be successful. Mr Fachi fought back with equal vigour and tenacity trying to show that his client has sufficient means and that his ability to raise K160,00.00, at any time in the future should not be in question. I thought that Mr Fachi succeeded in demonstrating that his client has means and ability to pay back the sum awarded in the Court below if the appeal succeeds.

In his sworn affidavit filed both before this Court and in the Court below, the respondent stated that he has trading premises called Tondole Centre and that he keeps goods worth K30,000.00. He has also a maize mill worth K22,000.00, a butchery worth K18,000.00 and a car worth K20,000.00. This comes to a total of K90,000.00. Mr Msaka had, in my view, no credible evidence to contradict the existence and the values of these properties. I was not impressed with his insistence that the respondent should have brought the report of an accountant to prove the value of the properties. I do not think that proof of the value of these properties could only be established by an accountant. Then the respondent told this Court that the plot on which the premises of Tondole Centre are situated is valued at K40,000.00. He also owns Plot No. NM/11/1 in Namiyango in the City of Blantyre. He valued it at K100,000.00. Mr Msaka said that according to the valuation roll of the City of Blantyre, the value of the property is K40,250.00. I am of the view that the value on the City's valuation roll does not always represent the market value. I accept the respondent's valuation of K100,000.00. But even if we take the valuation preferred by Mr Msaka, we shall see that the total value of the properties I have just mentioned comes to K170,250.00.

The list of the respondent's properties goes on. He has a mini bus which he bought on lease hire from Mandala Limited. He said that the value of his interest in the mini bus is K175,246.00. He owns Plot No. BC 712 situate in Sunny Side in the City of Blantyre. There is a house built on it. It was valued by Mr Chirwa at K285,000.00. The property is mortgaged to New Building Society and the balance due to the mortgagee is K151,231.90. He claims an interest valued at K133,760.10. Mr Msaka attacked the valuation by Mr Chirwa. He called this person a mango tree valuer on the ground that he is not registered under the Land Economy, Surveyors, Valuers, Estate Agents and Auctioneers' Act. He contended that Mr Chirwa is not qualified to be registered under the Act and he is not entitled to practise as an estate agent or valuer.

Mr Chirwa testified before me that he practises in the country as an estate agent. He conceded that he is not registered under the Land Economy, Surveyors, Valuers, Estate Agents and Auctioneers' Act. He said that no estate agent in the country has been registered under the Act. He has, however, been practising as estate agent for the past 10 years. I have examined Mr Chirwa's valuation report. I have noted that Plot BC 712 covers 1.45 acres of land in the heart of the City of Blantyre. There is what is described as an executive house built on it. I am myself satisfied that the property on Plot BC 712 would properly be valued at K285,000.00. While I would not comment on the effect of lack of registration under the Act on Mr Chirwa's competence to practise as an estate agent, I am stil of the view that the value which he put on Plot BC 712 is correct.

Mr Msaka submitted further that the successful litigant's ability or inability to pay back the judgment sum awarded is not the sole consideration. He said that even if I find that Mr Nyasulu would be unable to pay back the damages awarded if the appeal succeeds, it would still be within my discretion to refuse this application and the reverse would also be true. I would agree with Mr Msaka's submission. Indeed, Mr Fachi did not contend otherwise. I think Mr Msaka's submission has the support of the view taken by **UNYOLO, J.**, in the case of **City of Blantyre v. E Manda and Others, Civil Cause No. 1131 of 1990 (unreported).** The learned Judge said at page 3:

> "I think it is always proper for the court to start from the viewpoint that a successful litigant ought not to be deprived of the fruits of his litigation and withholding monies to which, **prima facie**, he is entitled. The court should then consider whether there are special circumstances which militate in favour of granting the order for stay and the onus will be on the applicant to prove or show such special circumstances. The case of **Barker v. Lavery**, which I have cited above, seems to suggest that

> evidence showing that there was no probability of getting the damages back if the appeal succeeded, would constitute special circumstances. Broadly, I would agree with this statement, but it is not a closed rule."

It is further supported by what **BANDA, C.J.**, said in **Cilcon Limited v. L K Banda, Civil Cause No. 26 of 1991 (unreported)**. His Lordship said:

> "The court has a wide discretion in granting or refusing a stay."

In the instant case, I must consider the fact that the sum of K160,000.00 awarded is an enormous amount. Although the respondent has adequate means to raise this sum of money and pay it back if the appeal succeeded, he may not willingly do so and the applicants are likely to face considerable difficulties to recover such sum of money.

Then Mr Msaka pointed out that the damages awarded represent terminal benefits which the respondent would have received in the year 2000. He said that the respondent would not suffer anything if he were required to wait for the appellate court's decision in a couple of years. The respondent replied that he would have been earning a salary from the time that he was retired to the time when he would be entitled to receive his full terminal benefits. I do not think that it is right to mix the question of the respondent's salary with that of his terminal benefits. The lower Court thought that he was entitled to nothing for loss of salary. He was only compensated for a future loss. He has, in my view, been compensated for a loss which would have occurred in the year 2000. Mr Msaka here is saying that instead of receiving compensation for this future loss now, the respondent should only wait for a couple of years for the decision of the Supreme Court. I think that Mr Msaka has made a valid point and his request is not unfair. As for the argument that the respondent is deprived of his salary, it must be noted that the respondent is not sitting idle. He is running a business at his Tondole Centre. He is also running a mini bus business. He has given me the impression that his businesses are very successful. He is, obviously, using the time, energy and ability which he would have used to earn a salary in generating profits for his business.

Then from the list of properties owned by the respondent and the values of such properties, it can be seen that he is not a poor man. He will surely not suffer great hardship during the time he will be required to await the decision of the Supreme Court of Appeal.

Having considered the above factors together with the facts of the case which was tried in the Court below and the

judgment appealed against, I am of the view that this is a proper case in which an application for a stay of execution should be granted. I take the view that, despite the fact that there is reasonable probability that the respondent would be able to pay back the damages if the appeal succeeded, there are present in this application special circumstances which would entitle me to exercise my discretion in favour of granting stay of execution.

The application is allowed. Stay of execution of the lower Court's judgment pending the decision of the Supreme Court of Appeal is granted.

MADE in Chambers, this 13th day of August 1992, at Blantyre.

D G Tambala
JUDGE

Both Counsels to address me on the question of costs on Tuesday, 18th day of August 1992, at 08.30 hours.

D G Tambala
JUDGE
13 August 1992

COURT: Case called on 18th August 1992 at 08.30 hours.

MR MSAKA: I have no objection to have the costs paid to the other side.

MR FACHI: The general rule is that the person making the application is condemned to pay the costs. **Merry v. Nickalls, 8 Chancery App. Cases (1872-73), p.205, p.206.**

The party seeking stay of execution is asking for favour. He must therefore pay for the costs in any event. 59/13/5 - As a rule the applicant will be ordered to pay the costs.

These costs must be paid in any event.

MR MSAKA: I do not think that the applicant has to pay these costs in any event. If the appeal succeeds, it would mean that the applicant had very good reason to ask for stay. In that situation, should the respondent benefit to the costs incurred when the applicant was stopping him from getting what he was not entitled to? It is a question of reason. It does not follow logic that he should keep the costs when it is decided later that he was not entitled to the money.

MR FACHI: There are costs in the main action and costs for application. Chance of success is not a principle guiding the Court in exercising its discretion to stay execution. My view is that having been given the favour, they should not be allowed to keep the costs.

COURT: After hearing both Counsels, I would grant the costs of the application to the respondent.

MADE in Chambers this 18th day of August 1992, at Blantyre.

D G Tambala
JUDGE