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**IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE**

MSCA CIVIL APPEAL NO. 17 OF 2008
(Being High Court Civil Cause No. 140 of 2002)

BETWEEN:

HARRY IAN THOMSON APPELLANT

- AND -

C.G.U. INSURANCE LIMITED RESPONDENT

BEFORE: HON. JUSTICE MTAMBO, SC, JA

Msowoya, of Counsel, for the Appellant
Msungama, of Counsel, for the Respondent
Ethel Matunga Chisale, Typesetter
Malani, Court Official

R U L I N G

This is an application by the appellant for an order that the execution of the judgment of the High Court delivered on January 18, 2008 be stayed pending the determination of the appeal against the said judgment. The application is opposed.

There is an affidavit in support of the application. It was sworn by the appellant himself. He depones in paragraphs 20 and 21 thereof that the appeal is likely to succeed and that, in that event, there is no reasonable prospect of recovering the judgment money from the respondent because it no longer

exists, its assets and business having been taken over by NICO General Insurance Company Limited.

There is also an affidavit in opposition. It was sworn by one Eric Chapola who, at all material times, was the General Manager of the Respondent; he is now the General Manager of NICO General Insurance Company Limited. Attached to the affidavit is the "Business Sale Agreement" between the respondent and NICO General Insurance Company Limited.

It is clear from reading the affidavit in opposition and the sale agreement that NICO General Insurance Company Limited purchased the respondent as a going concern, acquiring thereby all its property, assets, rights and liabilities or obligations. There can be no doubt, therefore, that NICO General Insurance Company Limited has become the entity entitled to the benefits under the judgment, and it is also the entity responsible for all liabilities and obligations in connection therewith.

I think this is a convenient stage at which to state the principles governing stay of execution. They are these: (a) the court will not grant a stay unless it is satisfied that there is a good reason for doing so; (b) the court does not "*make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which he is **prima facie** entitled*" pending appeal, and (c) the practice is that a stay will normally be granted only where the applicant satisfies the court that if the judgment money is paid then there will be no reasonable prospect of recovering it in the event of the appeal succeeding. Case authorities, from both within and without the jurisdiction, abound for these principles, which I will bear in mind.

I do not intend to comment on the argument that the appeal is likely to be successful as doing so may be construed as prejudging it. As for the contention that the appeal, if successful, may be rendered nugatory in that there is no reasonable prospect of recovering the money because the

respondent is now defunct, I wish to say this. It is, no doubt, the duty of the court to see to it that it does not come about that a successful appeal is rendered nugatory. And to enable the court to determine whether the appeal, if successful, would be nugatory is a matter of facts or evidence which the appellant must present to court for assessment. The evidence before me points to nothing but to the conclusion that it cannot be said, even for one moment, that the appeal, if successful, would be nugatory. This is because NICO General Insurance Company Limited is more than likely to be able to pay back the judgment money.

In the result, I decline to deprive the respondent, in effect NICO General Insurance Company Limited, of the fruits of its litigation. I dismiss the application with costs.

MADE in Chambers this 15th day of April, 2008 at Blantyre.

I. J. Mtambo, SC,
JUDGE OF APPEAL