IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MSCA Civil Appeal Nos. 48 of 2014

(Being High Court of Malawi (Commercial Division) Commercial Cause No. 162 of 2012)

BETWEEN:

MULLI BORTHERS LIMITED ……

APPELLANT

-and-

MALAWI SAVINGDS BANK LIMITED ……

RESPONDENT

CORAM : HONOURABLE JUSTICE MBENDERA SC, JA

: HONOURABLE JUSTICE FE KAPANDA, JA

: HONOURABLE JUSTICE DF MWAUNGULU, JA

M'meta, Gondwe and Mapemba, Counsel for the Appellant

Kauka, Counsel for the Respondent

Minikwa, Recording Officer/ Official Interpreter

Date of hearing of application: 18 May 2015

Date of judgment: 3 July 2015

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JUDGMENT

Kapanda JA: (with Justice of Appeal Mbendera, SC concurring and Justice of Appeal Mwaungulu dissenting):

Introduction

Mulli Brothers Limited, the appellant, obtained various loans from the respondent bank, Malawi Savings Bank. The appellant was failing to service the repayments of the loans. It was then decided by the parties herein that these loans be amalgamated. Malawi Savings Bank, the respondent bank, in consultation with the appellant consolidated these loans. There is in evidence that the amalgamated and restructured loan came up to somewhere in the region of MK 3,300,000,OOO/= due to the non-repayment of the loan but at the same time the appellant then decided to sue the bank claiming that the bank had acted unfairly. There was a counterclaim by the respondent bank. At the end of trial the court in quo dismissed the appellant's case but sustained the respondent's counterclaim.

The respondent's desire to enforce and execute the judgment was met by an application by the appellant. It was an application for stay of execution. A single member of this court granted the appellant a stay. There were two applications heard by a single member of this court. These were an ex-parte as well as an inter-partes application. The respondent wants the decision by the single member of this court vacated so that it can enforce the judgement it obtained against the appellant. It is well to point out that the respondent bank has taken out an application under Section 7 (b) of the Supreme Court of Appeal Act. Accordingly, the application before us is a rehearing of the earlier issues that were before the single member of this Court.

The Application

As said earlier, this application concerns the propriety of staying the enforcement of Judgment against the appellant by the respondent. Further, as stated above, the application is on the question whether or not Honourable Justice Chinangwa SC, JA, was right in staying the enforcement of the Judgment in favour of the appellant. It is the argument of the respondent that there was no case made out for staying the judgment pending an appeal. It is submitted that the appellant's contention that Mulli Brothers Limited would be ruined if no stay was granted was not made out on the evidence of the founding affidavit of Dick Chagwanjira in paragraph 11 of the affidavit in support of the application of stay. The respondent further denies that it is in the interest of justice that there be a stay of execution of judgment. Further, the respondent argues that there is no prospect of the appeal succeeding. It is argued that the basis on which the single member of this court grounded his decision, i.e. that lower court did not take into account payment of the sum of MK 625,210,986.14, has no prospect of being confirmed or succeeding on appeal. Thus, it is said that the lower court actually took into account this payment at page two of its judgment. Further, the respondent also raise the argument that the single member of this court was wrong and improperly exercised his discretion in staying the execution on the grounds advanced by the appellant and accepted by the judge. Indeed, as we understand it, the respondents have formulated issues, which when paraphrased, for consideration by this Court are that they want an order reversing the decision of Chinangwa SC, JA, sitting as a single member of the court, refusing to order that the order for stay of execution made by him on 19 September 2014 be vacated. The prayer is with costs. The long and short of it is that the respondent argues that it should be allowed to enforce the judgment of the court below whilst waiting for the hearing of the appeal.

The appellant is naturally of a different view and wants the order of stay continued or confirmed. It is submitted that since the amount of the judgment is colossal, and therefore capable of putting the appellant under insolvency, the interests of justice would require prolongation of the stay of judgment pending an appeal. Further, the appellants repeat their earlier argument that the appeal has prospects of succeeding. Thus, my lords, we are called upon to affirm the decision of Chinangwa SC, JA by maintaining the order of stay of execution.

The Law and Discussion

Powers of this Court under Section 7 of the Supreme Court of Appeal Act[1].

The application we are dealing with is taken under Section 7 of the Supreme Court of Appeal Act. This section deals with the power of this court either where there is a single judge sitting or the Court has a three member or more panel to deal with business. Section 7 of the Supreme Court of Appeal Act provides as follows:

> "Powers of a single member
>
> A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:
>
> Provided that—....
>
> (b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court." (Emphasis supplied by us)

Thus, if this Court is satisfied that the order of the single member ought not to have been granted it has the power to either vary, or discharge or reverse it. Accordingly, it is a rehearing of the stay of execution that was heard by the single member of this Court.

Stay

As we understand it, a stay is the act of temporarily stopping a judicial proceeding through the order of a court. It is a suspension of a case or a suspension of a particular proceeding within a case. A judge may grant a stay on the motion of a party to the case or issue a stay sua sponte, without the request of a party. Courts will grant a stay in a case when it is necessary to secure the rights of a party. It is important that we say something about the types of stay that might obtain in a proceeding so that we are not confused or we are not seen to be confusing what we

[1] Chapter 3:01 of the Laws of Malawi

are dealing with in the matter before us. In saying this we are alive to the fact that the consequences of the types of stay are different.

There are two main types of stays: a stay of execution and a stay of proceedings. These two denote two different things. A stay of execution defers the enforcement of a judgment against a litigant who has lost a case, called the Judgment Debtor. In other words, if a civil litigant wins money damages or some other form of relief, he may not collect the damages or receive the relief if the court issues a stay. This is what we are dealing with in the matter before us between Mulli Brothers Limited and Malawi Savings Bank Limited.

However, a stay of proceedings is the stoppage of an entire case or a specific proceeding within a case. This type of stay is issued to postpone a case until a party complies with a court order or procedure. For instance, if a party is required to deposit collateral with the court before a case begins, the court may order the proceedings stayed for a certain period of time or until the money or property is delivered to the court. Further, a court may stay a proceeding for a number of reasons. One common reason is that another action is under way that may affect the case or the rights of the parties in the case. We are sure that the subject matter of this application is not this latter type of stay. Indeed, calling upon a party to deposit any collateral in whatever form, or whatever name, whilst awaiting for the hearing of the appeal, is neither what we are rehearing nor what we should concern ourselves with.

Finally, it is well to put it here that a **stay of execution** is a court order to temporarily suspend the **execution** of a court judgment or other court order. And, for this to happen certain legal principles must be followed.

The principles pertinent to an application for stay of execution

As stated earlier, a stay of execution is a court order to temporarily suspend the execution of a court judgment or other court order. Accordingly, certain legal principles apply if a stay of execution is to be properly founded in the law. And, in **Trad v Harbour Radio Pty Ltd [2010]**

NSWCA 41[2] Tobias JA said the following which is instructive respecting the relevant principles applicable to a stay of execution application:

> "Secondly, although courts approaching applications for a stay will not generally speculate about the appellant's prospects of success, given that argument concerning the substance of the appeal is typically and necessarily attenuated, this does not prevent them considering the specific terms of a stay that will be appropriate fairly to adjust the interest of the parties, from making some preliminary assessment about whether the appellant has an arguable case. This consideration is protective of the position of a judgment creditor where it may be plain that an appeal, which does not require leave, has been lodged without any real prospect of success and simply in the hope of gaining a respite against immediate execution upon the judgment."[3]

It is our judgment that the above dictum ably captures what should inform an appellate court when considering an application for stay of execution from a court below it. We have seen that the appellant thinks that the court erred in not taking into account the payments that were made in satisfaction of the debt. However, it has been understood that the respondent's claim took into account all the payments made by the appellant. Thus, it is doubtful that the appeal has been lodged with any real prospect of success. In our judgement it has been lodged merely in the hope of gaining a break against immediate execution upon the judgment.

We must add and put it here by way of observation that the comment by the Court in the passage which we have recorded above is illuminating. It indicates that there is no necessary requirement that the Court determines whether there is an arguable case on the appeal although it may be relevant in determining whether it is appropriate to grant a stay. This is the case as in the present legal climate, where legal practitioners have an obligation not to bring proceedings that do not have reasonable prospects of success. Thus, this particular consideration may be one that the courts can approach with less scrutiny. It will depend upon

[2] http://robertsheldon.com.au/trad-v-harbour-radio-pty-ltd-2010-nswca-41/ last visited 19 May 2015

[3] See also **Alexander v Cambridge Credit Corporation Ltd (Receivers appointed)** (1985) 2 NSWLR 685 at 693-695. Per Kirby P, Hope and McHugh JJA

the circumstances of the particular case. The court will always be concerned to ensure that its processes are not used inappropriately, for example, by permitting a defendant from keeping a successful plaintiff out of the fruits of his/her litigation victory by seeking a stay in respect of a hopeless appeal. The primary consideration in the court's determination will be whether the applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay.

Hence, the question that has exercised (or should exercise) our mind is whether there are reasonable prospects of success of the appeal lodged by the appellant. We find and conclude that the answer to this question is in the negative. It is obvious that the appellant's argument that the lower court did not take into account the payment of the sum of MK 625,210,986.14/= is not made out. There is cogent evidence although not put explicitly that the judge in the court below did take into account some payments that were made to settle the account. Thus, the premise upon which the single judge based his decision to allow stay execution of the judgement as the parties wait for a determination on this issue falls. It must be pointed out though that this court is aware that it is no part of its function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. As we understand it, these are matters to be dealt with at the appeal. Indeed, this was the position taken by the Supreme Court in Australia in **Laboratoire Pentagone Ltée v. Parke, Davis & Co. [1968] SCR 269**, where in a patent case in the Supreme Court it refused a stay of execution pending appeal. The said Supreme Court in Australia aptly observed that where an appellate court is being asked to suspend the operation of a judgment delivered after full consideration of the merits the burden upon the appellant is much greater than it would be otherwise. In such a case where there has been no full consideration of the merits the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. This argument is particularly compelling where the appeal turns on a point on which the trial judge is owed deference. But even on a point of claim construction, the point argued in *Phostech*, the considered opinion of a trial judge after a full trial on the merits, must surely count for something. It is accordingly found and concluded that

the trial judge's finding respecting the inclusion of MK 625,210,986.14/= cannot be faulted in this stay of execution application rehearing. And, the argument that we ought to stay the execution of judgment as not doing so will make the appeal nugatory cannot stand. It cannot stand as the principle argument that the lower court did not take into account some payments therefore calling upon us to stay the execution of the judgment is just hot air.

Further, the Court of Appeal in Australia in **Vosebe Pty Ltd trading as Batemans Bay Window and Glass v Bakavgas**[4] [2008] NSWCA 55 through McColl JA put it like this as regards the principles concerning an application for stay of execution which this court has been following:

The principles concerning an application for stay of execution are well known, the overriding principle being to determine what the interests of justice require, the court tending in favour of granting a stay where there is a risk that the appeal will prove abortive if the applicant succeeds and a stay is not granted[5].

The principle that the Court tends to be in favour of granting a stay where there is a risk that the appeal will prove abortive if the applicant succeeds and a stay is not granted is highlighted in so many Malawian cases. Indeed, that is the current jurisprudence on the matter. We wish to admonish the profession and say that we can only express regret that a stay of execution was granted in this case pending the hearing of the appeal. It was never suggested that the appellant ran any risk of insolvency. The insolvency argument only came out during the hearing of this application. It is well to add that any loss of the benefit of a judgment in his favour on appeal by being prevented from enforcing it does not arise. Indeed, this Court regularly stays execution on judgments pending an appeal where there is a risk that the opposing party will be unable to repay the money without difficulty or delay or that it will be with a risk that the

[4] http://robertsheldon.com.au/vosebe-pty-ltd-trading-as-batemans-bay-window-and-glass-v-bakavgas-2008-nswca-55/

[5] See also Alexander v Cambridge Credit Corporation Limited (1985) 2 NSWLR 685; New South Wales Bar Association v Stevens [2003] NSWCA 95 per Spigelman CJ (at [83]). http://robertsheldon.com.au/vosebe-pty-ltd-trading-as-batemans-bay-window-and-glass-v-bakavgas-2008-nswca-55/

appellant will be made bankrupt without the claimant recovering its money from the respondent if the appeal were to succeed. It is regretted that such has not been demonstrated herein and we did not see any evidence of it before us.

We also find it appropriate to observe as follows: a judgment debtor may think that he can stop the execution of a writ of *fieri facias* (fi fa) simply by applying for a stay of execution (i.e. a request for an order to stop the judgment from being enforced). As it were, a judgment debtor may think that he can stop the execution of a writ of *fieri facias* on any ground including fear of financial ruin. However, he may well find this harder than he thinks, as stays of execution may only be granted in limited circumstances: where there are special circumstances which render it inexpedient to enforce the judgment; when the judgement debtor is unable in any way to pay the money owed; and when the defendant has lodged an appeal (he has to be able to demonstrate valid grounds for his appeal).[6]

It is neither the case that the judgement debtor (the appellant) is unable in any way to pay the money owed nor that there are special circumstances which render it inexpedient to enforce the judgment. Further, there is no evidence to suggest that having lodged an appeal the appellant has demonstrated valid grounds for its appeal succeeding.

Preventing a stay of execution

There are measures the judgment creditor can take to prevent the defendant from having grounds for a stay. These include: ensuring that papers are properly served; checking ownership of goods to be seized as thoroughly as possible to prevent interpleader action; and being open to payment by instalments so that the defendant is unable to claim he is unable to pay. It is a fact that the respondent had been open to payment by instalments when the loans were restructured but the appellant failed to honour its side of the bargain. Therefore, the legal suit

[6] http://www.thesheriffsoffice.com/articles/can_your_debtor_pay/ last visited 19 May 2015

and the eventual desire on the part of the respondent to have the judgment herein fully enforced. We must add that even if a stay of execution is granted, this is frequently only a delay while the court checks through the case. In many cases, once the stay is lifted, successful execution will then take place.[7] It remains with the judgment creditor to choose which method of enforcement to use. This Court cannot start to prescribe to the respondent the mode of enforcement of the judgment it obtained in the court in quo.

In Malawi the case of **Stanbic Bank Ltd v Phiri**[8] is instructive on stay of execution generally. It was stated in that case that the law is settled that it lies within the discretion of the court whether to grant or refuse an application for stay of execution[9]. Further, respecting a stay pending an appeal our mind should be drawn to the case of **Chilambe and another v Kavwenje**[10] where Chimasula J, as he then was, said that the case of the Malawi Supreme Court of Appeal in **AR Osman and Co v Nyirenda**[11] authoritatively lays down the law and the practice to be followed when considering applications similar to the one at hand. In **AR Osman and Co v Nyirenda**[12] the learned Justices of Appeal had this to say which is instructive and is accordingly adopted:

> "The general principle governing the execution of judgments is that the Court does not make a practice of depriving a successful litigant of the fruits of his litigation, pending an appeal. But against this principle is the consideration that when a party has appealed, which is a right, the Court should see to it that the appeal, if successful, is not rendered nugatory. See Anne Lyle [1886] 11 PD 114 and also Wilson v Church (No. 2) [1879] 12 Ch D 454. The Court should try and strike a balance between these two considerations in exercising its discretion as to whether it should grant a stay or not. In Attorney General v

[7] http://www.thesheriffsoffice.com/articles/can_your_debtor_pay/ last visited 19 May 2015

[8] [2005] MLR 410 (HC)

[9] Order 59 and 13 of the Rules of the Supreme Court

[10] [1995] 1 MLR 70 (HC)

[11] [1995] 1 MLR 13 delivered on 10 January 1995

[12] Ibid.

Emerson [1889] 23 QBD 56 it was stated that in exercising its discretion the Court should consider whether there are 'special circumstances' which speak in favour or against granting a stay. Evidence showing that there was no probability of getting back money awarded under the judgment, if the money so awarded was paid to the respondent, has been held to constitute 'special circumstances' which could influence the court to grant a stay. But as was stated in Nyasulu v Malawi Railways Ltd MSCA Civil Appeal No. 4 of 1993 (unreported) the mere fact that the respondent would not be able to pay back the money cannot in all cases operate as a stay of execution of a judgment. It is open to the Court to refuse a stay if on the facts of the particular case it would be 'utterly unjust' or 'unconscionable' or 'inexpedient' not to do so. See Stambuli v ADMARC Civil Cause No. 550 of 1991 (unreported)."

There are no special 'special circumstances' which speak in favour of granting a stay in the matter before us. If anything there is evidence showing, indeed this has been admitted by the appellant, that the amount of the judgment debt is so huge and accumulating interest. It is doubtful that the appellant will be able to pay it if the appeal goes in favour of the Malawi Savings Bank. The balance of convenience would militate against granting a stay and then allow more interest to accrue. It would be better that what is owed now is settled before the situation becomes unbearable. There is a danger that with accumulation of interest the appellant's properties might not even be adequate to satisfy the debt herein which judgment debt keeps on increasing with each passing day.

When are Stays Available?

A person ordered to pay a sum imposed by a court order may apply for a stay of the court's judgment or order on the basis that it would cause injustice to the debtor if execution were to proceed unless halted or delayed by the court. Stays are available both before and after a writ of execution has been issued. Nevertheless, it is settled law that, and therefore there is no need to cite an authority for it, stays are not automatic when an appeal has been filed. However, it must be added that there is nothing to prevent an appeal court ordering one where the justice

of the case requires. Further, a stay of execution is a court order that prevents further steps being taken to enforce an order or judgment to the litigation to which it relates, pending further order of the court or a satisfaction of conditions. A court has the power to stay the whole or part of any part of litigation before it, which includes execution. Stays of execution are usually sought by judgment debtors to delay, inter alia, the making of a charging order, third party debt order, writ of control or equitable execution pending the result of some further step such as an appeal of the decision which gave rise to the judgment debt, or on some other basis which the justice of the case requires.

At law applications for stays of execution may be made whether or not the judgment debtor has played any part in the litigation leading to the judgment or order imposing the judgment. In order to obtain a stay for a judgment to pay money, special circumstances must exist to make it inexpedient to enforce the judgment or order, or a person liable to pay a sum of money is unable to pay the sum from any source. In the latter circumstances, the debtor will be required to disclose its income, the value and nature of any property owned, as well its liabilities.

In the matter before us, the appellant is saying that it is unable to pay as the sums are colossal. However, the appellant has neither shown any special circumstances nor has it disclosed its income, the value and nature of any property owned, as well its liabilities. Accordingly, the order of stay cannot be made available to it. We so find and conclude.

As well as the above, it is a settled principle of law that the judgment debtor must show why the judgment creditor should not be entitled to the fruits of the judgment. We were addressed at length on principles of law governing stay but nothing on why the judgment creditor should not be entitled to the fruits of the judgment. We are alive to the fact that stays may be made subject to conditions or be absolute. For instance, a stay may be imposed preventing execution of the judgment provided that the debtor pays regular instalments to diminish the overall value of the judgment; in the event of default the stay may provide that the stay is automatically

lifted, without further order of the court. Sadly, the appellant does not say that it wants to diminish the overall value of the judgment. It just does not want to pay.

The court also has a discretion to extend the period of time for payment as it thinks fit. During the course of considering an application, the court will consider the balance between the needs of the judgment debtor, and whether those needs displace the judgment creditor's ordinary entitlement to prompt satisfaction of the judgment. Stays are able to be revoked unless the order is made absolute. And, having considered between the needs of the judgment debtor, and whether those needs displace the judgment creditor's ordinary entitlement to prompt satisfaction of the judgment, we find and conclude that the needs of the appellant herein are inadequate. They have fallen short of the judgment creditor's ordinary entitlement to prompt satisfaction of the judgment.

Effect of an appeal

It is a known principle of law that an appeal of a judgment by the unsuccessful litigant does not prevent the successful party executing the judgment immediately. Ideally, the unsuccessful party should apply for a stay of execution after judgment is delivered, at the same time as seeking permission of the court to appeal the decision. Further, in **Kevythalli Design v Ice Associates (2009)**[13], Mr Justice Akenhead explained the effect of an appeal in the context of a stay of execution. It was said that if the Court of Appeal decides that the appeal should be dismissed, it will effectively confirm that there was a debt due and payable [awarded in a judgment from the Court below], at least from the date of the lower court judgment, if not before. If, however, it finds that the appeal should be allowed, then it will be held that there is no judgment debt because there will be no judgment as it will have been set aside. Indeed, one should not build into a relatively simple expression such as "stay of execution" an intellectual exegesis which the words were probably not intended to create. All it really means is that execution, whatever form it takes, is to be suspended. If, for instance, execution has already

[13] http://www.bailii.org/ew/cases/EWHC/TCC/2009/3676.html last visited 20 May 2015

taken place, in part or in full, it does not mean to say that really the execution is in some way set aside.

What should the court do when there is an application for stay pending an appeal?

It would appear that the factors that the court should consider when faced with the question whether or not to stay execution of a money judgment pending an appeal is where the balance of convenience lies. This is what the courts in England do. We find and conclude that that should be the position even here. What then obtains in this matter before us?

Stay of Execution Pending Appeal

This application has been made returnable before us while there is an appeal pending. We must say though that not much progress has been made as regards the prosecution of the appeal. Indeed, it would appear that it is the respondent who is desirous of moving the process as evidenced by the fact that the settlement of record was pushed by the respondent. Be that as it may, we wish to consider the principles of law that must guide us as the appeal is pending. Indeed, we are alive to the arguments by the appellant and the respondent on the matter of whether the appeal will be rendered nugatory if this stay is not continued or that since the amount of the judgment is colossal, and therefore capable of putting the appellant under insolvency, the interests of justice would require prolongation of the stay of judgment pending an appeal. Further, the appellants repeat their earlier argument that the appeal has prospects of succeeding. Thus, we are called upon to affirm the decision of Chinangwa SC, JA by maintaining the order of stay of execution.

The question that then arises for consideration is whether or not as a result of the debt being huge it is in the interest of justice that we affirm the decision of Chinangwa SC, JA by maintaining the order of stay of execution. It would be interesting to contrast the matter at hand with that of another comparable jurisdiction too as Australia. We believe that that approach will inform our decision. In Australia in **Phostech Lithium Inc v Valence Technology,**

Inc. 2011 FCA 107 the Court of Appeal granted a stay pending appeal of the judgment from the lower court. It is interesting to compare this decision with that of England and Wales Court of Appeal (UK) in **Virgin Atlantic v Premium Aircraft [2009] EWCA: Civil 1513** where the court granted a partial stay (a "carve-out") pending a decision on an application for leave to appeal to the UK Supreme Court.

The major difference between these two cases is that the Australian Court in **Phostech** applied the *Cyanamid* threshold of "a serious issue to be tried" on the merits portion of the test, while in **Virgin Atlantic v Premium Aircraft** the England and Wales Court of Appeal (UK) did not. The Court of Appeal observed that it should be noted the question is not the same when one is considering what to do on an application pending trial. In an application pending trial the applicant has yet to establish his right, whereas after successful trial he has prima facie done just that. As it were, as is the case in the instant case, after trial there are no more serious issues to be tried. Surely this is a compelling argument. The reason given by Lord Denning in *American Cynamid* for lowering the old threshold of "a prima facie case" to "a serious question to be tried" was that:

> "[I]t is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial"[14].

It follows directly that once the matter has been decided at trial, it is not legitimate to consider the principles of law applicable pending trial. Indeed, this was the position taken by the Supreme Court in Canada in **Laboratoire Pentagone Ltée v. Parke, Davis & Co.**[15] **[1968] SCR 269**, a patent case in which the Canadian Supreme Court refused a stay of execution pending appeal where it surmised that the burden upon the appellant is much greater than it would be if trial was pending. In a matter where trial is pending the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. The converse is true. Thus, in the present case we are being asked to suspend the operation of a

[14] [1975] AC 396, 407

[15] http://www.canlii.org/en/ca/scc/doc/1968/1968canlii88/1968canlii88.html

judgment of the High Court Commercial Division, delivered after full consideration of the merits. The balance of convenience test or approach would not be ideal. In any event, whatever the reason for either decision, it is time to address these questions afresh on a principled basis, rather than continuing to torture the 35 year old *Cyanamid* decision in conditions it was never meant to endure. We find therefore that the approach should be whether the appeal has merits.

This argument is particularly compelling where the appeal turns on a point on which the trial judge is owed deference. But even on a point of claim construction, the point argued in **Phostech**, the considered opinion of a trial judge after a full trial on the merits, must surely count for something. We have observed elsewhere that the main point being raised by the appellant, which point was also put before the single member of this Court, is that it believes that it has a meritorious case as the lower court did not take into account some payments. Thus, they want a stay lest their appeal be rendered nugatory. However, we have seen that: firstly, the appellant is not disputing owing the respondent. Secondly, it has been put in evidence that actually the sum of MK 625,210,986.14/= which it thought had not been taken into was actually taken into account before the legal suit was commenced.

In our view, the England and Wales Court of Appeal (UK) has a better position as a matter of principle. Even at the interlocutory stage the *Cyanamid* position that the merits are to be ignored has been subject to strong criticism, and is often honored in the breach. Further, as we see it, the correct principle, on seeing the merits of appeal was well articulated by Hoffmann J in **Films Rover International Ltd v. Cannon Film Sales Ltd**.[16]where he said that: "A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong.'[17]

This is also the position we independently advocate. If this approach is adopted, the merits are

[16] [1986] 3 All E.R. 772

[17] Ibid. at 780 (Ch.)

relevant, though the weight will vary depending on the confidence that can be placed on such an assessment. On this view it was right in *American Cynamid* to downplay the importance of the merits because it was an interlocutory motion in a complex patent case and it was not reasonable to make a sufficient assessment of the merits in a brief proceeding. Conversely though, after a full trial, the view of the trial judge must be given some weight, though that weight may depend on the nature of the issue. This is not to say that the other decisions made before **Films Rover International Ltd v. Cannon Film Sales Ltd**[18] were wrong on their facts. It is clear that even after a decision on the merits a stay should not automatically be refused. As Jacob LJ said in **Virgin Airlines v Premium Aircraft [2009] EWCA: Civil 1513** :"The question, however, remains one of a balance of convenience." (Or, as Hoffmann J would have it, the balance of risk).

Further, in **Janssen Inc. v. AbbVie Corporation**[19] **2014 FCA 112** there is to be found an illuminating exposition of what principles to follow on stay of execution. This decision by the Federal Court of Appeal of Canada raises basic issues regarding the proper approach to a stay of the remedies phase of a split trial pending appeal of the liability decision. It is well to add that we understand the law to be that the test whether a stay should be granted is the three-part test from **RJR-MacDonald Inc.**[20] [1994] 1 SCR 311 that also governs an interlocutory injunction: a serious issue to be tried, irreparable harm, and the balance of convenience. The Court in the Canadian Federal Court of Appeal held that each of these tests is a separate threshold, so that each must be answered in the affirmative in order for a stay to be granted. Stratas JA pointed out that "[e]ach branch of the test adds something important". While that is true, it does not follow that each must be satisfied individually. The alternative is that all are balanced together. That balancing approach has been endorsed by Sask CA in **Mosaic v PCS 2011 SKCA 120**[21] and by Hoffmann J in **Films Rover International Ltd v. Cannon Film Sales Ltd. [1986] 3 All ER 772 at 780 (Ch),** who was explaining about the principal dilemma about the grant of interlocutory injunctions but his views equally apply to stay of executions. He opined that there is a risk that

[18] Ibid.

[19] http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/71434/index.do last visited 8 June 2015

[20] http://www.canlii.org/en/ca/scc/doc/1994/1994canlii117/1994canlii117.html last visited 8 June 2015

[21] http://www.sufficientdescription.com/2011/12/sask-ca-disagrees-with-fca-on.html last visited 8 June 2015

the court may make the 'wrong' decision. Accordingly, the advice was that the fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong.' Further, Stratas JA pointed out that it would be strange if a stay could be granted "in the face of a laughably weak or hopeless case," or on the basis of "if vague assumptions and bald assertions" (sic). That is true, but that does not justify a threshold approach; a laughably weak case, and vague assumptions, would not support a stay under a balancing approach either, as they would be given very little weight. Stratas JA reviewed a number of cases which use the irreparable harm requirement as a threshold test. Having decided that each step is separate, the Canadian Federal Court of Appeal refused the stay based solely on the irreparable harm branch. However, it must be added that notwithstanding that the court in **RJR-MacDonald** did equate the test for a stay and an interlocutory injunction, the two situations may in certain circumstances be said to be quite different. In an application for an interlocutory injunction, the court has only summary information on which to base any assessment of the merits. That is what led the House of Lords in **Cyanamid**[22] **[1975] UKHL 1** to downplay the importance of the merits in an interlocutory injunction application. There is a strong argument to be made that in an appropriate case the merits deserve more weight than *Cyanamid* would give them, but that is a different issue. In contrast, on an application for a stay, the court has a fully reasoned decision of a trial judge on a full evidentiary record. In **Virgin Atlantic**[23] **[2009] EWCA Civil 1513**, Lord Justice Jacob of the England and Wales Court of Appeal (UK) noted as much. The question, however, remains one of a balance of convenience.

In the instant case, the appellant has not raised the three tests but only one i.e. the amount being colossal which is close to saying there will be irreparable harm. This argument does not strike us as persuasive. As we understand it, an order for stay must be founded on the presence of all three test viz. a serious issue to be tried, irreparable harm, and the balance of convenience.

[22] http://www.bailii.org/uk/cases/UKHL/1975/1.html last visited 8 June 2015
[23] http://www.bailii.org/ew/cases/EWCA/Civ/2009/1513.html last visited 8 June 2015

Further, the general rule is that a successful claimant is entitled to enforce a judgment even if there is a possibility of an appeal. He normally does so at his own risk as to costs if the decision is reversed on appeal. While we are not familiar with the Canadian practice on this point, this approach which also obtains in the UK approach does strike us as a sensible one. Furthermore, in **Phostech Lithium Inc. v Valence Technology, Inc 2011 FCA 107** there is also an instructive discussion of stay pending appeal. In **Phostech v Valence 2011 FCA 107** Pelletier JA granted a stay pending appeal of a judgment. It is interesting to contrast this decision with that of the England and Wales Court of Appeal (UK) in **Virgin Atlantic v Premium Aircraft [2009] EWCA: Civ 1513** [24] which granted a partial stay (a "carve-out") pending a decision on an application for leave to appeal to the UK Supreme Court. The major difference is that the Federal Court of Appeal of Canada in **Phostech** applied the **Cyanamid** threshold of "a serious issue to be tried" on the merits portion of the test, while the **England and Wales Court of Appeal** (UK) did not, saying:

> "It should be noted the question is not the same when one is considering what to do on an application for an interim injunction pending trial. In that case the patentee has yet to establish his right, whereas after successful trial he has prima facie done just that. "

Surely this is a compelling argument. The reason given by Lord Denning in **American Cynamid** for lowering the old threshold of "a prima facie case" to "a serious question to be tried" was that:

> "[I]t is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial"[25].

It follows directly that once the matter has been decided at trial, it is legitimate to consider the merits. Indeed, this was the position taken by the Supreme Court of Canada in **Laboratoire Pentagone Ltée v. Parke, Davis & Co**. [1968] SCR 269, a patent case in which the Supreme Court refused a stay of execution pending appeal and observed thus:

[24] http://www.bailii.org/ew/cases/EWCA/Civ/2009/1513.html last visited on 8 June 2015
[25] [1975] AC 396, 407

"The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits."

As stated earlier, this argument is principally persuasive where the appeal turns on a point on which the trial judge is owed deference. Nevertheless, even on a point of claim construction, as again put in *Phostech*, the opinion of a trial judge after a full trial on the merits, must certainly be considered. It will accordingly be seen to be considered if the judgment of a lower court after full trial is allowed to be enforced and not stayed on account of rickety reasons.

Conclusion

For the reasons given above, this application succeeds. Accordingly, the following orders are hereby made:

1. The stay of execution order by the single judge made on 3 December 2013 and confirmed in an inter partes application made on 4 February 2015 is set aside. We must say that this Court prefers the opinion of holding straightforwardly that the single member of this Court had not exercised his discretion correctly or judiciously.
2. The respondents, Malawi Savings Bank, are given unconditional authorisation to enforce the judgment of the court in quo as they wish.
3. Both parties advised us that they are not averse to us hearing the appeal. We however think that it will not be right that, having made some opinion on an issue that is central to this appeal that we sit in judgment in the substantive matter. For that reason, we direct that the appeal in this matter proceeds to full expeditious hearing but it will have to be before another panel on a date to be set by the Registrar within this session.

4. It is recorded that the Respondents, Malawi Savings Bank, have effectively succeeded in this application. Thus, they are not liable for any costs and that the appellants shall and are hereby condemned to pay the costs of this application in this Court.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Blantyre on 3 July 2015.

Signed: .....

HONOURABLE JUSTICE M. M. MBENDERA SC, JA

Signed: .....

HONOURABLE JUSTICE F. E. KAPANDA, JA

Signed: .....

Mwaungulu, JA

JUDGMENT (Dissenting)

My Lords, since my judgment differs from the majority, I may have more to say and say it more succinctly. The situation where Mulli Brothers Ltd and Malawi Savings Bank Ltd, as borrower and lender, respectively, repeat themselves severally in the court below and by a trickle in this court. Among other things, lenders and borrowers, find themselves, as a natural consequence, that monies lent earlier attract double interest rates because the Reserve Bank, under powers conferred it by the Reserve Bank Act, raises interest rates. Counsel, courts, lenders and borrowers look for solutions which, on the principle of winner takes all exuding from judicial decisions, may prove, in the short and long run unhelpful especially where bankers and borrowers have been or are likely to be in continuing business relationships. In certain circumstances, certain decisions may ruin either or both.

I say this not as a reason for a court not to do what it is supposed to do, adjudicate according to law and facts. Where the Constitution, the general law, practice and procedure encourage settlement of disputes, it makes more sense to me that where, like here, parties have reached a compromise well before a judge delivers the judgment and they have informed the court accordingly, persistence to deliver the judgment, which will not affect the compromise, should be in the limited circumstances and for the established purposes in the general law.

In the first place, since there was a compromise, this Court has no jurisdiction, because of section 21 of the Supreme Court of Appeal Act, to entertain the appeal, where leave of this court or the court below was not sought. Secondly, the judgment appealed from cannot be the one that the judge of the court below delivered. The judgment pervading is the compromise. The appellant, therefore, could not appeal against the judgment appealed from. On the judgment by consent, leave of the court below was needed and the matter goes to jurisdiction. There cannot, therefore, be an application for stay of execution of a judgment pending an appeal that never was. Assuming that there was such a judgment, on principles espoused recently in this court and the court below, on balance of justice, there should be stay of execution pending appeal, if any, on condition that until the judgment of this court, if it comes to that, the appellant should pay by instalments under the agreement.

Since, in my judgment, execution can only be for the under the compromise, the appellant, if the compromise does not contain ways of executing it, can apply for stay of execution normally under the Civil Procedure Rules 1999 or apply for an order for payment by instalments, the consequence of which would, as prayed, stay execution of the judgment. The respondent can still proceed with the known means of execution, first of course against chattels.

It must be remembered, though, that execution against immovable property, can only be as under sections 25 to 45 of the Sheriffs Act, depending, of course, on whether the land is registered under the Registered Land Act. A sale, therefore, can only be by leave of the court. Since, the mortgagee's power of sale was not part of the action and the mortgagees

counterclaim was only for the money, the High Court Commercial Division, could not order for sale of the mortgaged property. The application, therefore, is, pending appeal, for stay of execution on movable property.

I must also state at the outset, essentially my dissent, apart from principles I espouse at length later, premises on that your Lordships, like the single member of our court, proceeded without considering matters the appellant raised in the affidavit in support of the application. Much ink poured on the grounds and notice of appeal to the exclusion of two cardinal points the appellant raised in the affidavit in support of the application for stay of execution: (a) that the lower court proceeded to give judgment when there was; and, (b) that the appellant would be ruined if the respondent executed the judgment. Once, there is a triable issue and the appellant says that execution of the judgment will ruin the appellant, there should be stay of execution.

The discretion to stay execution can only, as you concede, be based on consideration of all factors. The single member of your court exercised the discretion wrongly in basing it on the single fact that your Lordships canvass thoroughly in your judgment. On the other hand, your Lordships failure to consider the two matters the appellant raises in the affidavit, are similarly placed.

The facts leading to where we are need no repetition and are succinctly covered in your majority opinion except, of course, for two cardinal considerations mentioned earlier appearing in the affidavit in support of the application critical to the decision that I take. The first consideration appears on page 4 of the judgment of the High Court (Commercial Division) where the judge said:

> *"At the last day of hearing on 18th August, 2014, I gave counsel for the Plaintiff two weeks to file submissions in line with order 19 rule 2 of the High Court Commercial Division Rules. Mr Kauka for the Defendant duly complied with this directive. However, Mr. Gondwe for the Plaintiff did not. The court was then surprised when in the afternoon of 17th September, 2014 Mr Gondwe brought a strange summons for this Court to stay delivery of its judgment pending the recording of a consent judgment between the*

parties. The Court declined to issue this summons. I must say that the conduct of the Plaintiff's attorneys in these proceedings has been far from impressive. As observed by the Supreme Court of Appeal, these attorneys do not seem to be advising their client properly. Perhaps it is the lay client who is advising the lawyers on matters of law. This is very unfortunate."

In the affidavit in support of the application the appellant deposes:

"That the plaintiff applied for stay of execution of the Judgment soon after the delivery of the Judgment and to inform the Court of possible settlement arrangements but the court declined to stay the execution."

The second consideration is that the appellant in its affidavit pleads that it would be ruined if execution pending appeal is refused. At paragraph 10 of the affidavit in support of the application, the appellant deposes:

"That the appellant plaintiff shall be ruined if no order for stay of execution is granted and the interests of justice favour a stay of execution of the judgment rather than allowing execution and it later transpires that it was proper to grant an order for stay."

Moreover, the court below never resolved the question whether the respondent was not forcing the appellant into liquidation. The judge does records that the defendant's defence was only to equitability and unfairness as to the liquidation measure:

"It denies inequitably and unfairly, or otherwise, to have made advertisements for the sale of the Plaintiff's properties charged as security for the loan, or to have taken any steps to have the Plaintiff Company liquidated, and puts the Plaintiff to strict proof of the allegations continued in paragraph 8 of its Statement of Claim."

Clearly, at the time Mulli Brothers Ltd made the application, the Judge, awaiting submissions, was aware of the compromise. It is unclear whether the judgment was ready at that time. Secondly, the parties, who reached a compromise, informed the court of settlement.

Thirdly, the parties never wanted the judge to deliver the judgment because of the settlement. Fourthly, parties wanted to record the consent judgment.

Consequently, certainly, on well entrenched principles, Mulli Brothers Ltd's application was not unusual: it is the actions of the High Court (Commercial Division) that are, with due respect, unusual. "It is elementary," said Brooks L.J., in *Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* [2000] EWCA Civ 172.. "that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose (see Foskett, The Law and Practice of Compromise (4th Edition 1996), p 90, citing Plumley v Horrells (1869) 20 LT 473 per Lord Romilly MR; and Knowles v Roberts (1888) 38 Ch D 263 per Bowen LJ at p 272)." The High Court Commercial Division refused the application which was actually an opportunity to do the needful and actually follow what, if Counsel had submitted or been requested to submit, was the correct approach where, like here, parties have reached a compromise before a court delivers judgment.

The compromise recorded by the court settled the dispute. The court below should have entered the consent judgment and still delivered its judgment, if justified. The court below, however, in refusing the application for stay of execution, missed the opportunity to justify delivery of the judgment which, probably, was already written at the time of the notice. The delivered judgment has no consequences on the compromise. In this case, it is very clear that the Court below was informed, by an application, before delivering judgment of a settlement between the appellant and the respondent. The Court below did not circulate the judgment under Practice Statement (Supreme Court: Judgments) [1998] 1 WLR 825. The judgment could not, therefore, have influenced the compromise.

The court below and indeed this Court are under a duty under section 14 of the Constitution to under section 13 (l) of the Constitution to strive to adopt mechanisms by which differences are settled through negotiation, good offices, mediation, conciliation and arbitration, The court below, under . Order 1, rule 1(4) of the High Court (Commercial Division Rules), was obliged to allow the parties to 'help the Court to further the overriding objectives'

by, under Order 1, rule 3 (2) of the High Court (Commercial Division Rules) , under its duty to manage cases, encourage parties to cooperate with each other in the conduct of proceedings (Order 1, rule 3 (2) (a)), encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure (Order 1, rule 3 (2) (e) and, more importantly, helping the parties to settle the whole or part of the case(Order 1, rule 3 (2) (f)). This court is similarly placed because of Parts 1-3 of the Civil Procedure Rules 1998 because of section 8 (b) of the Supreme Court of Appeal Act and Order 3, rule 34 of the Supreme Court of Appeal Rules.

In *Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* [2000] EWCA Civ 172 Brook, L.J., mentions the duty of the court faced with a compromise;

> *"If they presented a consent order to the court, the court would normally not be concerned to approve or disapprove its terms before directing that it should be entered (see Noel v Becker [1971] 1 WLR 355 and Bruce v Worthing DC (1994) 26 HLR 223)."*

In *Noel v Becker* Judge Brown in the court below was informed by counsel for the complaint and for the plaintiff that they had agreed terms of a compromise as set out in the schedule to an order. The Judge refused to make the order. On appeal to the Court of Appeals, Davies, LJ, with who Edmund Davies and Karminski, LJJ, agreed, said:

> *"Our attention was called to Practice Direction (Minutes of Order) [1960] 1 W.L.R. 1168. The second paragraph is not in view unimportant in this context. It read:* "In the case of terms scheduled to a consent order these terms represent an arrangement between the parties, and the registrar is not concerned to approve them, although he may properly offer suggestions upon them if it appears to him that they may cause some difficulty."
>
> *I think that that applies to the present case. These terms were scheduled to the consent order and, speaking for myself, I do not think that the judge was concerned to approve them or disapprove them. There is nothing in the order which the court was asked to make which is outside the jurisdiction of the court; and, without more ado, I would say*

that the county court judge fell into error here and ought to have made the order agreed upon between the parties.

Edmund Davies LJ., added:

"The county court judge appears to have taken upon himself a duty of scrutiny and vigilance in relation to the tomlin order drawn up by the parties which he was not called upon to exercise. He fell into that error and as a result this appeal has had to be brought. I agree, both parties concurring, that the appeal should be allowed in the manner directed by Davies L. J."

One must, of course, start from the premise that any litigation is within the control of the parties who retain the power to settle it at any stage before a court delivers judgment. That settlement is determinate whatever judgment, a court, if it has to, may want to give or the court has given. Parties retain the right and, I guess, the power, to compromise the action before a court delivers judgment. Where parties have reached a settlement, a court may, in its discretion and without affecting the compromise, still deliver a judgment but only for espousing a legal principle or address a public interest concern. The starting point is *Don Pasquale (A firm) v Customs and Excise Commissioners* [1990] 1 WLR 1108.

In that case, the dispute between the VAT taxpayer and the Commissioners was settled and, consequently, therefore, there was no issue between the parties to the appeal. The head note to the report reads:

"Where an appeal, which has become academic because the parties have settled, raises a matter of procedure in the administration of justice that is unlikely to come before the Court of Appeal in another case, the court will in the exceptional exercise of its jurisdiction permit the appeal to proceed."

Lord Justice Donaldson, MR, with who Leggatt and Sir Roualeyn Cumming-Bruce LJJ, agreed cited the decision of the same court in *William v Fawcett* [1986] QB 604. That case was on appeal. The appeal was not even heard. The Court of Appeal, now the England and Wales Court of Appeal, nevertheless, allowed the hearing and having the matter determined, not on

the compromised settlement, but only the principle. The Master of Rolls said, at pages 1109-1110:

"..."

In this case, when the parties, in a purely private law matter, compromised the action and informed the court of it, there was no live issue between the parties; the matter had turned academic except, of course, if there were other points of law or matters of public interest. There were none.

In *Barclays Bank PLC v Nylon Capital LL*P [2000] EWCA Civ 172, a decision of the England and Wales Court of Appeal, Lord Neuberger, MR., said:

> *"I turn now to deal with a very different issue. After Thomas LJ had prepared his judgment in draft, and circulated it to Etherton LJ and me, the parties notified the court that they had reached agreement and effectively requested the court not to give judgment.*
>
> *Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment <u>despite the matter having been disposed of between the parties</u>* [emphasis supplied]. *Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest."*

It is quite clear from this statement that, the judgment that is to be delivered is where, without affecting the settlement or compromise, the court wants to express itself on some point of law or public interest. The MR of Rolls refers to another consideration, the stage at which the judgment is to be delivered:

"It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given."

In this case, parties had not even completed submissions the court requested. The Judge was informed or became aware of the compromise a day or two before judgment was delivered. The judge could, of course, have proceeded to deliver the judgment, if there were reasons. The reason the judge gave for delivering the judgment is very unconvincing. He did so because he derided Counsel's conduct in bringing the application. The appellant was entitled, even at that late hour, to record the consent order. There was, therefore, nothing strange with the appellant's actions. The discretion to continue to write and deliver judgment was wrongly used. Even so, the judgment never affected the compromise..

The Master of Rolls further confirms that in deciding whether to deliver the already written judgment, the court may regard the wishes of the parties, express or implied:

"The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish (or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them)."

In this case, the parties clearly intended the judgment no to be given, the reason being that they were going to sign a consent order to be filed with the court. The Judge, without reason and, obviously unaware of the principles enunciated by the authorities cited here, overlooked the parties interests and concerns.

Where factors weigh equally, the desire of the parties for not having the judgment tilt the balance:

> *"Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to that desire."*

The Master of Rolls then proceeded to consider the situation in the case:

> *"In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we are doing so on a rather different basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment."*

In *Barclays Bank PLC v Nylon Capital LL*, only the Master of Rolls considered the matter. The Master of Rolls never referred to an earlier decision of the same court of *Prudential Assurance Company Ltd v McBain Cooper (A firm) and others* [2000] EWCA Civ 172. This was an appeal by the defendants, supported by the claimants, against a ruling by Judge Havery QC sitting in the Technology and Construction Court that he would hand down his written judgment in this action notwithstanding the fact that the parties had compromised their dispute shortly before he was originally due to hand down his judgment. The judge tried the matter between 22nd and 29th June 1999. The judge completed the draft written judgment on 14th September and signed and dated it before sending it to parties under Practice Statement

(Supreme Court: Judgments) [1998] 1 WLR 825. The day for handing down the judgment in open court was fixed for Monday 18th October 1999. The judge imposed an embargo on the notification of the terms of the judgment to the parties until 4pm on Friday 15th October 1999. Just before the judge was to deliver judgment on 18th October, the parties asked the judge to adjourn hearing for him to make Tomlin order on a paper application they would be making to him. The England and Wales Court of Appeal determined that the judge below could deliver the judgment because it was written and there was an issue of public interest necessitating delivery of the judgment. Brook, L.J., stated the principles which would apply where, like here, judgment is not given in advance and the judgment is not under the Practice Direction:

> *"Before I consider the terms of that practice statement, so far as they are material, it will be convenient to set out the governing principles of law which would have been applied in a case not affected by this new practice, where judgment was given orally, in the traditional manner, or was handed down in writing without any prior notice. "It is elementary that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose (see Foskett, The Law and Practice of Compromise (4th Edition 1996), p 90, citing* Plumley v Horrells *(1869) 20 LT 473 per Lord Romilly MR; and* Knowles v Roberts *(1888) 38 Ch D 263 per Bowen LJ at p 272).*
>
> *The House of Lords has on occasion declined to hear an appeal in the context of private litigation once it has perceived that the original lis between the parties is at an end, whether by virtue of a compromise or because, as in* Ainsbury v Millington *[1987] 1 WLR 379, there has been such a change in the underlying factual situation that the remedy sought by the appellant no longer raises any live issues. In Sun Life Assurance Company of Canada v Jervis [1944] AC 111 Viscount Simon LC set out the governing principles in these terms at pp 113-114:*
>
> > *"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an*

academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties ... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

Brooks, L.J., considers some known exceptions:

"In Ainsbury v Millington *[1987] 1 WLR 379, after restating this principle, Lord Bridge of Harwich added at p 318:*

"Different considerations may arise in relation to what are called 'friendly actions' and conceivably in relation to proceedings instituted specifically as a test case... Again litigation may sometimes be properly continued for the purpose of resolving an issue as to costs when all other matters in dispute have been resolved."

In the recent case of R v Home Secretary ex p Salem *[1999] 1 AC 450 the House of Lords recognised that different principles applied in cases where there was an issue involving a public authority as to a question of public law. In such a case there was a discretion to hear disputes, but Lord Slynn of Hadley said at p 457A that this discretion had to be exercised with caution. He then explained the circumstances at p 457A-B in which there might be a good reason in the public interest for proceeding to hear an appeal even though it was "academic between the parties*".

It is clear, however, that in a private law matter, that if at any time before judgment was entered the parties told the court that they had compromised their dispute, that was the end of the matter, unless the parties wished the court to take steps to assist them to put their compromise into effect. If they presented a consent order to the court, the court would normally not be concerned to approve or disapprove its terms before directing that it should be

entered (see *Noel v Becker* [1971] 1 WLR 355 and *Bruce v Worthing DC* (1994) 26 HLR 223). In this matter, therefore, the High Court (Commercial Division), informed by the application that parties compromised, was supposed to facilitate the same. There was, certainly, an end to the matter between Mulli Brothers Ltd and Malawi Savings Bank Ltd. Brook, L.J., then considered the situation under the Practice Direction:

> *"It is clear to me that the resolution of this appeal turns on the nature of the exercise that is being performed from the moment the draft judgment is delivered to the parties in accordance with the new practice. There is no indication in the practice statement that its purpose is to allow the parties to have more material available to them to help them to settle their dispute. Its purpose is to introduce an orderly procedure for the delivery of reserved judgments, whereby the parties' lawyers can have time to consider and agree the terms of any consequential orders they may invite the court to make and the process of delivering judgment can be abbreviated by avoiding the need for the judge to read the judgment orally in court.*
>
> *It follows that under the new practice the process of delivering judgment is initiated when the judge sends a copy of it to the parties' legal advisers. Provided there is a lis in being at that stage, it will be in the discretion of the judge to decide whether to continue that process by handing down the judgment in open court or to abort it at the parties' request. I agree with the judge that there may well be a public interest in continuing the process, notwithstanding the parties' wishes that he should not do so, and that there can be no question of a judge being deprived of the power to decide whether or not to do so simply because the parties have decided to settle their dispute after reading the judgment which has been sent to them in confidence."*
>
> *In my judgment the judge was correct in the way he gave his ruling in this matter, for the reasons he gave. He did possess a discretion to decide whether or not to hand down his judgment, and there are no grounds on which this court could*

interfere with the way in which he in fact decided to exercise his discretion. As I have said, although much of his judgment was of interest only to the immediate parties to the dispute, there were three rulings on points of law which were potentially of wider interest, and a judge sitting in a specialist jurisdiction like the Technology and Construction Court is uniquely well placed to judge whether it would be of value if his judgment was a matter of public record."

Brook, L.J., then proceeded to distinguish this case from *HFC Bank Plc v HSBC Bank Plc* (CAT 10th February 2000), the judge had not even written the judgment and, therefore, there was nothing to deliver..

"I should make it clear that the situation I have been considering in this judgment is quite different from the situation which confronted another division of this court recently in HFC Bank Plc v HSBC Bank Plc *(CAT 10th February 2000). In that case the court had granted an expedited hearing of an appeal at the request of the claimant, and the members of the court then gave priority to preparing their judgments over the preparation of judgments in earlier cases which were not of the same degree of urgency. At the beginning of the third week after the end of the hearing of the appeal counsel's clerks were told that judgment would be given on the Thursday of that week and that copies of the draft judgments would be made available to counsel at midday on the Tuesday. Early on the Tuesday morning, however, the court was told that the parties had come to terms overnight and wished that the appeal should be dismissed. The draft judgments were therefore not made available.*

The parties had therefore not been shown the judgments which were going to be delivered at the time they settled their dispute, and this, in my judgment, makes all the difference. In the circumstances of that case Nourse LJ said at paragraph 9 that the court wished to make it clear that it would always encourage the parties to settle their differences even at a late stage and nothing the court said was intended

to detract from this principle. He went on to express the view of the court that it had been the duty of the parties themselves to inform the court of the possibility of a settlement at any rate on the Thursday of the previous week when arrangements were made for a meeting in the United States in four days' time between representatives of the parties' holding companies with a view to seeing whether the dispute could be compromised even at this very late stage. It was no part of the compromise agreement that the judgments of the Court of Appeal should be suppressed, since neither party had seen the draft judgments at the time they settled their differences."

In this case, it is very clear that the High Court (Commercial Division) was informed, by an application, before judgment was delivered that there was a settlement between Mulli Brothers Ltd and Malawi Savings Bank Ltd. It is unclear whether the judgment was ready then. The judgment was not served under *Practice Direction (Court of Appeal: Handed Down Judgments) [1995] 1 WLR 1055*. It could not, therefore, have influenced the compromise.

The consequences of the parties' actions and the course which the court took bear on the application before your Lordships. For, whatever, the case, the only judgment that can be stayed on this appeal, is the one that the parties themselves agreed on, not the one delivered by the judge. On the principles stated, the only judgment that stands is the agreed by the parties, terms of which we do not have. Even if, there were there were principles of law, despite the compromise, it would be those principles which would be appealable, not the issues the subject of the judgment agreed on by the parties.

I just need to lay a premise for the second aspect raised by the appellant's affidavit in this court. If, there are triable issues, generally, a court will stay execution pending appeal if the appellant says that he will be ruined. On the face of it, the sum of K 3 billion, and counting, will, without other considerations, be a dent on any business opeartion and could be ruinous.

These two considerations affect the application to stay execution which is an application to stay execution pending appeal that your Lordships are considering. The first consideration

which I will only consider in a later judgment on a different application, goes to the jurisdiction of this court. The second consideration goes to the root of the conclusion that your Lordships have drawn and is the basis of why I think that the single member of your Lordship's court never exercised the discretion to stay execution properly. As your Lordships accept, the single member of your court, stayed execution solely on that certain amounts of money were probably excluded from the judgment. Clearly, my Lord's, if the amount suggested by the appellant as excluded was, in fact, excluded, the judgment would be wrong and appealable or subject to rectification. Execution based on the erroneous judgment would be wrong in law and in principle and cannot, therefore, be sanctioned by this court. Your Lordships draw the conclusion that the sum was included on the affidavits from opposing counsel. The affidavits are conflicting on what is in the evidence in the court below. For purposes of this application, we do not have the record of the court below for us to ascertain what was actually said. I, therefore, find it implausible that I would commit myself to one view of the evidence. My Lord, given that this is one cardinal ground of appeal, trying to resolve it by preferring one affidavit, in the absence of the court record and proper finding of fact is tanatamount to resoving the appeal on a process which is interlocutory; that is the function of the appeal hearing.

This is also because the only thing we have for this application, the judgment of the court below, does not disclose the evidence on this conflict and, surprisingly, makes no specific finding on the matter. My Lords, the sum of money suggested to be the difference on a loan of this magnitude at 1% of the base rate of 25% is consequential and, therefore, a judgment without it would be wrong as to be unjust. This, however, even if it be a serious matter, is no reason for a single member of your Lordship's court to exercise this wide discretion by restricting it to the only consideration, namely, that the judgment of the High Court (Commercial Division) was wrong in excluding the amount which the appellant now claims was excluded. The principle on which this discretion is exercised is amply put in the decisions which your Lordships cite in your judgment. Having cited this principle, your Lordships, succumb to the same error as the single member of your Lordships court who, contrary to considering all the circumstances incident and exigent, determined the matter on a single consideration in the face of many issues raised by the affidavit, the action, the judgment and the appeal.

Indeed, as Your Lordships, by accepting decisions essentially from without jurisdiction, on applications for stay of execution pending appeal, the court should apply the decision of the House of Lords, now the United Kingdom Supreme Court of Appeal, in *American Cyanamid Ltd v Ethicon Ltd* [1975] A.C. 396; [1975] 2 W.L.R. 316. On this, my Lords, in our jurisprudence, there is from our jurisprudence a decision of the High Court, in its appellate jurisdiction, of *Matupa v Matupa* (2013) Matrimonial Appeal Cause No 23 (HC) (PR) (unreported) where most decisions your Lordships cite and were in counsel skeletal arguments are reviewed. That decision was approved by your Lordship's court in *Chitawira Shopping Centre v H.M.S. Foods & Grains Limited* (2015) Civil Appeal No 30 (M.S.C.A.) (unreported). In *Matupa v Matupa* (2013), the court said:

> *"On stay of execution, the law, as stated in the introduction, has evolved from traditional conceptions. The Supreme Court and this Court are slow to deprive a successful litigant of fruits of a successful litigation; they avoid making a successful appeal nugatory (*Stambuli v ADMARC *(1991) Civil Cause No 550 MSCA) (unreported);* Nyasulu v Malawi Railways *(1993) Civil Cause No 4 (M.S.C.A.) (unreported);* Dangwe and another v Banda *[1993] 16 (2) M.L.R. 509;* A.R Osman & Co v Nyirenda *[1995] 1 M.L.R 13 15;* National Bank of Malawi v Nkhoma t/a Nyala Investments *(2005) Civil Cause No. 6 (M.S.C.A.) (Unreported);* Cane Products Limited v National Bank of Malawi v Presscane Limited *(2006) Civil Cause No 1 (M.S.C.A) (unreported);* Bridgeview Investments v Chichiri Shopping Mall Centre *(2006) Civil Cause No 2446 (M.S.C.A) M(unreported);* Mangulama et al v Speaker of the National Assembly *[2007] M.L.R. 139;* Malawi Housing Corporation v Nyasulu *[2007] M.L.R. 214;* Woodworth v Chitakale Plantations Company Limited *[2008] M.L.R. 159;* Minister of Finance et al, ex p Mhan*go [2009] M.L.R. 362;* Attorney General v Nanthambwe t/a Manole Building Contractors *(2009) Civil Cause No. 29 (M.S.C.A.) (Unreported);* Malawi Communications Regulatory Authority v Joy Radio *(2009) Civil Cause No. 59 (M.S.C.A) (Unreported);* Auction Holdings Limited v Sangwani Judge Hewa et al *(2009) Civil Cause No. 69 (M.S.C.A) (Unreported);* Speaker of the National Assembly v Tembo *(2010) Civil Cause No. 27 (M.S.C.A) (Unreported);* Minjale v Minj*ale (2011) Civil Cause No. 30*

(M.S.C.A) (Unreported); The State et al v Phiri *(2011) Civil Cause No. 47 (M.S.C.A) (Unreported);* In the Matter of Citizen Insurance Company Ltd and in the matter of the Registrar of Financial Services ex-parte the Registrar of Financial Institutions, *(2012) Civil Cause No. (M.S.C.A) (Unreported);* Chichiri Shopping Centre Ltd v Bridgeview Investments *(2012) Civil Cause No. 30 (M.S.C.A) (Unreported);* Mike Appel & Gatto Ltd v Saulos Chilima et a*l (2013) Civil Cause No. 20 (M.S.C.A) (Unreported).*"

In *Dangwe et al v Banda*, a decision of a single member of your court, this Court approved *Ann v Lyle*, *The* [1886] 11 PD 114*;* and *Wilson v Church No (2) (1879) 12 Ch. D. 454*, decisions of the English Appeal Court, now the English and Wales Court of Appeal. Mtegha, J.A., in the *Dangwe case* said*:*

> *"Order 59/13/1 of the Rules of the Supreme Court discusses circumstances where the Court will or will not grant this order. 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 – The Ann Lyle (1886)11 PD 114. It has also been said, however, and this is also a correct statement of the law, that "when a party is appealing, exercising his undoubted right of appeal, this, Court ought to see that the appeal, if successful, is not nugatory" – Wilson v Church (No 2) (1879) 12 Ch D 454 at 458."*

A.R. Osman & Co v Nyirenda, however, was a decision of the full Supreme Court, Unyolo, Mtegha and Kalaile JJA, sitting. The Court said:

> *"It is open to the Court to refuse a stay if on the facts of the particular case it would be "utterly unjust" or "unconscionable" or "inexpedient" not to do so. See* Stambuli v ADMARC *Civil Cause No. 550 of 1991(unreported)."*

This Court, citing the two principles in the English Court of Appeal, mentioned earlier, nevertheless, decided that stay of execution pending appeal would be refused or granted where it is unjust, unconscionable or inexpedient. *Bridgeview Investments v Chichiri Shopping Mall Centre* is another decision of this Court where Twea, JA, sitting as a single member of this Court, said:

"*In this respect, the views of Tambala JA and Unyolo J, as then was, in* Anti-corruption Bureau v Atupele Properties Ltd *MSCA Criminal Appeal 27 of 2005 and* City of Blantyre v Manda, *Civil Cause 1131 of 1990 respectively, that where it would be totally unjust to the successful litigant to stay execution, the court will refuse to grant it, even in the face of special circumstances. Justice of the matter therefore must come in. My view is that no matter that the court may stress a particular point, it should not however, lose sight of what would be just and equitable when deciding to grant or refuse a stay.*"

This Court, as these two decisions show, is moving towards balancing justice as between the successful and unsuccessful party.

This Court in *Nyirenda v AR Osman and Co; The State et al v Phiri* decided, correctly in my view, that refusal and stay of execution cannot be resolved, at least, not solely, on the prospect of success of the appeal. Chatsika, J., in *Nyirenda v Osman*, 403, said:

"*I would like to say what I have said in other cases of this nature, that whether or not an appeal has good chances of success is not a ground upon which a court may order a stay of the execution of a judgment.*"

Certainly, if prospect of success is considered a ground, meaning a reason, for refusing or accepting stay of execution, the statement is accurate, and only just. If the statement, however, means that the prospect of success should not be considered at all, it contradicts the discretion, very wide, of this Court in the rules of court and its inherent jurisdiction. The discretion in the rules of court and this court's inherent jurisdiction comports that in balancing justice the court must consider all circumstances, including the prospect of success. Chatsika, JA, justified the proposition on this statement:

"*"A judgment of a court of competent jurisdiction remains enforceable regardless of the fact that there are good grounds that an appeal against the judgment will succeed.*"

Of course, the judgment remains enforceable. It also remains appealable. A party unhappy with a lower court judgment has a statutory right to appeal subject to leave of court, in some cases, and, therefore, in the interests of justice, an equivalent power to suspend its enforcement

while pursuing rights in a higher court. In *Matupa v Matupa* the court below described any court's power to stay execution as follows:

> *"As the Supreme Court repeatedly states, stay of execution is, indeed, in a court's discretion. It is in the nature of discretion that it must be unfettered and, consequently, meet the ends of justice. It is, in my judgment, to fetter discretion to start from the premise that a litigant, in matters of justice and fairness, has a headway against an unsuccessful litigant, based on the initial success. It is salutary that even the full Supreme Court, even on the extended premises of "utterly unjust" or "unconscionable" or "inexpedient", looked at it only in terms of "utterly unjust" or "unconscionable" or "inexpedient" to the successful litigant. There are bound to be cases where refusal to stay execution would be "utterly unjust" or "unconscionable" or inexpedient" to an unsuccessful litigant and justice militate towards refusing stay of execution. Equally, appeal nugatory considerations should be even handed in that they are a two-edged sword, working for stay of execution where the successful litigant is affected and working for refusal of stay where the unsuccessful litigant is affected. For, indeed, prospects of appeal succeeding are not equally determinative. This is correct and it is not a ground for granting or refusing a stay precisely because it is not in itself determinative of the issue. There could be instances where even if there is a chance that the appeal may succeed, it would be unjust to refuse a stay, for example, where the appeal will succeed partly and/or where the successful litigant will be able to pay."*

This Court came to the same conclusion in *The State and another v Phiri v Others*, where Singini, J.A., after quoting the two passages by Chatsika, J.A., said:

> *"…[W]hile I agree that good grounds of appeal are not on their own a factor for granting a stay, in a proper case, they could inform the decision of the court, as part of the special circumstances of the case, whether or not to grant a stay."*

In *Matupa v Matupa* the court below said;

In my judgment, when the stay is sought pending appeal, a factor, to warrant inclusion, need not be special. If the circumstances are relevant, their exclusion, without reason, may be a wrong exercise of discretion. For the discretion must be exercised judicially, comporting that the power exercising jurisdiction must regard all relevant factors (Malawi Communications Regulatory Authority v Joy Radio *[2009] M.L.R.328).*

Moreover, the power exercising discretion must give proper weight or consideration to a factor. Underrating, exaggerating or overlooking a material factor is a wrong exercise of discretion. In a sense, requiring special circumstances is tantamount to fettering the discretion."

Undoubtedly, proof of special circumstances are critical where stay of execution is necessary where there is no appeal (Order 47, rule (1) (1) (a) and (b) of the Civil Procedure Rules 1998; Rules of the Supreme Court 1965). In my judgment proof of special circumstances is unnecessary because primarily it fetters discretion and proliferates satellite litigation as to what are and are not special circumstances. Courts have from time to time to determine whether a factor is special and whether in a particular case any such circumstance exists. The list of circumstances may be very long and, at best, endless and at times with a real risk that some may be unreasonably excluded and others inadvertently included.

Competition between factors arose in *Mike Appel & Gatto Limited v Chilima et al* (2013) Civil Cause No. 20 (M.S.C.A) (unreported) and, sitting as a single Judge of the Supreme Court, Chipeta, J.A., thought that, in the conflict, the dominant is the successful litigant principle:

"*In my reading and analysis of the various principles the case authorities discuss, I am satisfied that what emerges is that although there is an undeniable tug of war between, on the one hand* The Annot Lyle *principle that as a general rule a Court of Law should not make it a practice to deprive the successful litigant of the fruits of his litigation while an appeal is pending, and on the other hand the* Church v Wilson (2) *principle that when a party exercises his right to appeal his said appeal, if successful, should not be rendered nugatory, in the discretion the Court has in the circumstances to exercise (see* Attorney General v Emerson*) about which way to go*

between the opposite directions these principles pull it towards, it ought to attach greater weight to the principle that the successful litigant should reap the fruits of his labour."

There is no conflict between the two principles, if they be principles. Stay of execution is for a court discretionary. The court must, as it must be, account for all factors informing the discretion. Consequently, a court must, in all such cases regard both factors seriatim and not antagonistically. Among other things, in deciding refusal or allowing stay of execution, the court must consider that in fact the respondent won the case and, therefore, must not without reason, be deprived of that right and also consider that the appeal must not be rendered nugatory with the consequence that, even though a litigant is successful, the court could refuse stay if, on balance, allowing execution would, on germane grounds, render the appeal nugatory. Conversely, where one party has succeeded, absent good grounds, a court may, in its discretion, refuse stay. The secret is in taking into account all circumstances of the case, including a litigant's success and that a stay or its refusal could render proceedings nugatory. All this, however, is in the context of avoiding injustice and promoting justice.

The decisions, however, of *The Ann Lyle, Wilson v Church* and *Winchester Cigarettes Machinery Limited v (Payne No 2)* (1993) The Times December 15 the Supreme Court relies on were Court of Appeal decisions. In the latter case, the Court of Appeal stated the principles:

"[A] stay should only be granted where there are good reasons for departing from the starting principle that a successful party should not be deprived from the fruits of the judgment in his favour."

The England and Wales Court of Appeal, without any reference to The Ann Lyle, Wilson v Church and Winchester Cigarettes Machinery Limited v (Payne No2, considered the principles for stay of execution recently in Hammond Suddards' Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915; and Contract Facilities Limited v Estates of Rees (Deceased) & Others [2003] EWCA Civ 465) and in England, like here, there is movement towards expanding justice and ameliorating injustice when granting or refusing stay of execution pending appeal. In Contract Facilities Limited v Estates of gees (Deceased) & others [2003]

EWCA Civ 465, Waller LJ considers the evidence and circumstances for granting stay of execution:

> *"The normal rule is neatly summarised in paragraph 21 of the judgment in* Hammond Suddards' Solicitors v Agrichem International Holdings Ltd *[2001] EWCA Civ 1915:"By CPR rule 52.7, unless the appeal court or the court below orders otherwise, an appeal does not operate as a stay of execution of the orders of the court below. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or 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 monies paid from the respondent?"*

In *Minnesota Mining and Manufacturing Company v Johnson and Johnson* [1976] RPC 671, 676, followed recently in *Virgin Atlantic v Premium Aircraft* [2009] E.W.C.A Civ 513, Buckley, and L.J., said:

> *""It is not in dispute that where a plaintiff has at first instance established a right to a perpetual injunction, the court has a discretion to stay the operation of the injunction pending an appeal by the defendant against the judgment. On what principles ought such a discretion to be exercised. The object, where it can be fairly achieve, must surely be so to arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be. Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis of the trial judge's findings of fact and his application of the*

law. This is, however, subject to the defendant's right of appeal. If the defendant in good faith proposes to appeal, challenging either the trialjudge's findings or his law, and has a genuine chance of success on his appeal, the plaintiff's entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of. In some cases the putting of an injunction into effect pending appeal may very severely damage the defendant in such a way that he will have no remedy against the plaintiff if he, the defendant, succeeds on his appeal. On the other hand, the postponement of putting an injunction into effect pending appeal may severely damage the plaintiff. In such a case a plaintiff may be able to recover some remedy against the defendant in the appellate court in respect of his damage in the event of the appeal failing, but the amount of this damage may be difficult to assess and the remedy available in the appellate court may not amount to a complete indemnity. It may be possible to do justice by staying the injunction pending the appeal, the plaintiff's position being suitably safeguarded. On the other hand it may, in some circumstances, be fair to allow the injunction to operate on condition that the plaintiff gives an undertaking in damages or otherwise protects the defendant's rights, should he succeed on his appeal. In some cases it may be impossible to devise any method of ensuring perfect justice in any event, but the court may nevertheless be able to devise an interlocutory remedy pending the decision of the appeal which will achieve the highest available measure of fairness. The appropriate course must depend upon the particular facts of each case."”

Courts in staying execution or refusing stay are animated by the quest to do justice and avoid injustice on antagonistic parties with competing entitlements. It is not really a question of equity; it is a question of justice. Emphasis is on justice or injustice on the parties rather than success of a litigant:

“Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis of the trial judge's findings of fact and his application of the

law. This is, however, subject to the defendant's right of appeal. If the defendant in good faith proposes to appeal, challenging either the trial judge's findings or his law, and has a genuine chance of success on his appeal, the plaintiff's entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of."

Department for Environment, Food and Rural Affairs v Georgina Downs [2009] EWCA Civ 257, is more recent and Sullivan LJ restated the dominant principles:

"A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted … It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

Hammond Suddards' Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915; *Contract Facilities Limited v Estates of Rees (Deceased) & others* also account for the nugatory principle, but, even that is pegged to injustice. In the latter case, Waller, L.J., said:

"The real question in this case, accordingly, is whether the refusal of a stay would risk stifling the appeal. On the question as to whether there might be a stifling of the appeal, again a further paragraph of Agrichem is material. That is paragraph 18. All I need to quote from that paragraph is that the court made it clear that where somebody seeks to

stay orders what they need to do is: "produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal."

It is clear, therefore, from the English common law that whether to grant or refuse a stay of execution pending appeal, courts, like in Malawi, aim to escalate justice and ameliorate injustice. There is a balancing act much like when considering whether or not to grant an interim injunction. There is no doubt, however, that balancing of justice involves a similar process.

The Canadian common law is more banal. In *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., [1987] 1 S.C.R. 110, Beetz J., in the Canadian Supreme Court applied Lord Diplock's principles on interim injunctions in *American Cyanamid v Ethicon*:

> "*A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.*"

In *RJR -- MacDonald Inc. v. Canada (Attorney General*) [1994] 1 SCR 311, the Federal Supreme Court of Canada said:

> *"As indicated in* Metropolitan Stores, *the three-part* American Cyanamid *test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.*"

The England and Wales Supreme Court has not, however, gone so far as to suggest that the principles in *American Cyanamid v Ethicon* apply. The approach, however, has significantly shifted from the traditional approaches as *Dewdney & others v Brown-Parsons & Another* (Supreme Court of the Judicature of Jamaica Claim No 2004 HCV 421,

http://supremecourt.gov.jm/sites/default/files/judgments/Dewdney,%20Albertha%20et%20al%20v%20Enid%20Louise%20Brown-Parsons,%20Clive%20Newman.pdf):

> *"Traditionally, there have been two principles which must be borne in mind at all times, when considering a stay of execution. The primary one is that a successful litigant should not be deprived of the fruits of his judgment* (The Annot Lyle *(1986) 11P. 141 at p. 146). The second is that the court ought to see that a party exercising his right to appeal does not have his appeal, if successful, rendered nugatory. (See* Wilson v Church *(No 2) (1979) 12 Ch. D 454 at p. 458-9).*
>
> *In recent years the approach of the court, has been more holistic. In* Winchester Cigarette Machinery Ltd. v Payne and Anor *(No 2) TLR (15th January 1993), it was held that it is now a matter of applying common sense and the balance of advantage. The starting point, however, will be the first traditional principle stated above. In Hammond Suddard, cited by Miss Archer, the English Court of Appeal stated, at paragraph 22, that in approaching the issue, the court should look at all the circumstances of the case and make a decision which will avoid injustice. Clarke, L.J. said:* "Whether the court will 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 other or 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 judgement? 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 monies paid from the respondent?"

\ Apparently, the Supreme Court of the Judicature of Jamaica never read Lord Justice Straughton's remarks in Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887, 888. There is decisive departure from the 19th century principles that have dominated our jurisprudence on stay of execution pending appeal. "In The Supreme Court Practice 1991 vol. 1, para 59/13/1,"Stautghton LJ., said, " there are a large number of nineteenth century cases cited as

to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice."

It is, therefore, for me only to apply the methodology in *American Cyanamid Ltd v Ethicon Ltd* in this case. Before doing so, let me consider a matter addressed by the court below and covered by the judgment of the High Court Commercial Division. We are dealing with stay of execution of the money judgment against the appellant. As noted earlier, the single member of your Lordship's court stayed execution solely on that the judgment of the court below excluded certain payments made by the appellant. My Lords, this was not a proper exercise of the discretion for, as we have seen, this discretion, like any other discretion, must, as your Lordships clearly state in your majority judgment, be exercised after considering all pertinent and consequential factors and circumstances pertinent to the use of the discretion. It does appear, reading from your judgment, though, that having recognised the principle, you pursue the same approach, refusing stay on the single and heavily contested matter.

The first consideration is whether there are serious issues to be decided on appeal On this consideration the court is not dealing with all the matters of law and fact that the lower court consider in the judgment it arrived at that is for the appeal court when hearing the appeal. On this consideration, the court is considering just the points raised by the judgment and the grounds of appeal which put the judgment of the lower court at askance. As indicated earlier the court looks at all aspects of the case. In this matter, the appellant is appealing against the whole judgment. Consequently, there cannot be, as is intimated by your Lordships, restriction only to the grounds of appeal raised. In any case, under order Order 3, rule (2) (6) of the Supreme Court of Appeal Rules, provided parties are appraised, the court on appeal is not restricted to grounds an appellant raised:

> *"(6) Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:*

Provided that the Court shall not if it allows the appeal rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

Moreover, the sumptuous powers of this court are replete in Order 3, rule 26 of the Supreme Court of Appeal Rules, the title to which reads, 'Power of Court to give any judgment and make any order':

"The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision."

The first consideration, therefore, is whether there is a serious issue to go to appeal. Even at this stage, one must guard against having a mini appeal where matters that should be resolved by a substantive hearing are exhausted at what, for all intents and purposes, is an interlocutory process. Seriousness of an issue for appeal, however, is a soigné and condign consideration for it defies common sense and all sense of justice that execution of a judgment should be allowed or refused where clearly the appeal would be, respectively, unsuccessful or unsuccessful. In this particular case, although grounds are it is clear from the body of the notice of appeal that the appellant is dissatisfied with the whole of the judgment. This is buttressed by the last ground of appeal which intimates that the whole finding of the court below is unsupported by evidence.

The brief record of appeal prepared for purposes of this application excludes the record of evidence, pleadings and documents that informed the decision of the court below. One can, however, by reading the judgment clearly see that the court below never considered and made findings on some, if not critical, aspects of the appellant's claim. This, in itself is a stolid reason for the matter going to appeal. It is important to reproduce the lower court's summary of the appellant's action:

"The Plaintiff asserts that in arriving at the figure of K3.2 billion, the Defendant simply added up outstanding balances in various bank accounts which had not been verified by the Plaintiff and/or independently; that the restructured loan was offered haphazardly and agreed under duress by the Plaintiff as the Defendant had stopped granting banking facilities and bonds to the Plaintiff who was pushed to a corner to the extent that the Plaintiff agreed to the amalgamated sum without verification; that the free will of the Plaintiff in entering into such a loan agreement was vitiated by the Defendant's high handed manner in which they negotiated the loan agreement through duress. The particulars of duress are stated to be:

1. *That by suspending all facilities in line accounts including bonds, the Plaintiff's business was paralyzed and in a bid to normalize the situation the Plaintiff agreed to a loan comprising those amounts that were not independently verified.*
2. *That by simply adding up the various accounts balances, the Defendant's conduct was not compliant with prudential lending rules as issued by the Registrar of Financial Institutions under the Financial Services Act as some of these account balances were off balance booking of the Defendant in terms of such rules as they should have been written off. On the ground of unfair conduct, the Plaintiff alleges that the loan facility never provided for default terms and penalties in the event that there were breaches in the repayment up until 2016, the time the duration of the facility would come to an end and that the Defendant reneged on an assurance that the loan would be repaid from the proceeds of sale of tea from the Plaintiff's tea estate which tea is a seasonal crop and that payments would thus be staggered in relation to the tea season."*

The court below, as I have said, makes no specific findings on the matters pleaded. It, however, addresses some issues raised in the skeletal arguments and, certainly, on those matters, there are issues that must seriously be considered on appeal. First, as can be seen

from the judgment of the court below, the appellant vehemently questions the respondent for just lumping together various claims from different accounts. The court below makes no specific finding. It, however, records various payments paid on different times. The court below does not consider if these payments were for the same accounts. There is doubt, unless one reads the record, whether, all these different accounts were subject of the mortgage or were payments for one or more accounts. Secondly, there is a suggestion in the judgment that the mortgage did not cater for what would happen if the loan was not payable by 2016. One gets the impression that the mortgage provided for either periodic instalments which the appellant breached or the loan was in any event fully payable in 2016 even though the appellant was making periodic payments. The court on appeal will have to investigate this from the mortgage and the loan agreement.

Secondly, the lower court seems to have considered the plea of economic duress rather a little bit simply. The lower court's approach was linear. Relying on its own decisions, *Mwalwanda v Sipedi* [1990] 13 MLR 278; and *Speedy's Ltd v Finance Bank Of Malawi Ltd* [2001-2007] MLR 373, the court concluded that the interest rates agreed between Mulli Brothers Ltd and Malawi Savings Bank Ltd were not exorbitant. The approach is that as long as a bank charges a certain amount of interests above the base rate, the interest rates are not exorbitant. That is only one aspect. On the other hand, low interests, even if concessionary, on a huge borrowing may be exorbitant. On both aspects, in my judgment, the court would reopen the transaction under section 3 of the Loan Recovery Act, postulated in the judgment. Once one accepts, as the court below did, that under the Loan Recovery Act an agreement may be reopened, the Supreme Court has to reconcile the suggestion by the lower court that the appellant's request was, because of *Littlewways Building Contractors v Mike Appeal & Gatto Ltd* (2010) Commercial Cause No 108 (HC) (Comm.) (unreported), for the court rewriting a contract.

Thirdly, it is unclear how the court below actually dealt with the plea of economic duress. There is certainly nothing in the judgment on it. The court below just records generally that the appellant's first witness supports the defendant's case. More is required when

considering economic duress that does not come through in the judgment. To appreciate the point, I may only have to quote an extensive analysis by McHugh JA in Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40, 45-46:

> *"The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate:* Universe Tankships Inc of Monrovia v International Transport Workers Federation *[1983] 1 `AC 366 at 384 per Lord Diplock. As his Lordship pointed out, the consequence is that the "consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind" (at 384). In the same case Lord Scarman declared (at 400) that the authorities show that there are two elements in the realm of duress: (a) pressure amounting to compulsion of the will of the victim and (b) the illegitimacy of the pressure exerted. "There must be pressure", said Lord Scarman "the practical effect of which is compulsion or the absence of choice".*
>
> *The reference in* Universe Tankships Inc of Monrovia v International Transport Workers Federation *and other cases to compulsion "of the will" of the victim is unfortunate. They appear to have overlooked that in* Director of Public Prosecutions for Northern Ireland v Lynch *[1975] AC 653, a case concerned with duress as a defence to a criminal proceeding, the House of Lords rejected the notion that duress is concerned with overbearing the will of the accused. The Law Lords were unanimous in coming to the conclusion, perhaps best expressed (at 695) in the speech of Lord Simon of Glaisdale "that duress is not inconsistent with act and will, the will being deflected, not destroyed". Indeed, if the true basis of duress is that the will is overborne, a contract entered into under duress should be void. Yet the accepted doctrine is that the contract is merely voidable.*
>
> *In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows ` only too well what he is doing. But he*

chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress. In their dissenting advice in Barton v Armstrong *[1973] 2 NSWLR 598; [1976] AC 104, Lord Wilberforce and Lord Simon of Glaisdale pointed out (at 634; 121):*

"... in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law; for this the pressure must be one of a kind which the law does not regard as illegitimate. Thus, out of the various means by which consent may be obtained - advice, persuasion, influence, inducement, representation, commercial pressure - the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion." In Pao On v Lau Yiu Long *[1980] AC 614, the Judicial Committee accepted (at 635) that the observations of Lord Wilberforce and Lord Simon in* Barton v Armstrong *were consistent with the majority judgment in that case and represented the law relating to duress.*

It is unnecessary, however, for the victim to prove that the illegitimate pressure was the sole reason for him entering into the contract. It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the agreement. Once the evidence establishes that the pressure exerted on the victim was illegitimate, the onus lies on the person applying the pressure to show that it made no contribution to the victim entering into the agreement: Barton v Armstrong *(at 633; 120) per Lord Cross."*

Finally, as discussed, the court, on appeal will consider the whole matter from a compromise reached very earlier well before the judge in the court below commenced writing the judgment. All these are serious matters on appeal. It does not follow, however, that courts will, as matter of courses, that if there are serious matters on appeal, stay execution of a judgment. All matters must be considered and chiefly, the next consideration which is whether damages in this matter would be adequate remedies

The question whether damages are an adequate remedy has two strands. The first one is whether damages satisfy losses consequent on stay. Generally, therefore, where damages are monetary, losses are monetary and, therefore, recoverable as damages. The second is damages are inadequate remedy where a party cannot pay them. On the first strand, there is no doubt in my mind that damages would be an adequate remedy. The losses between now and judgment would be interest on the loans. There are, however, issues with whether the parties would be able to pay them. In relation to the appellant, there is no cogent evidence or information for this court to assess its financial capability. There is need, on such an application, need for full and frank disclosure on both the respondent and, more especially, on the applicant for stay of execution. This court, moreover, would take judicial notice of the difficulties that the institution is undergoing at the moment. These difficulties are reasons why the court insists for full disclosure for the successful and unsuccessful litigant to enable the court to properly exercise its discretion.

While I am cognizant of the circumstances of Malawi Savings Ltd, the appeallant contends that it could be ruined if execution was not stayed. It must, therefore, be understood that failure to pay damages is one among many factors that a court would consider in deciding whether to allow or refuse an application for stay of execution. The rationale for this premise must be obvious. Justice, if all turned out on capacity to pay, would always favour the rich: the poor and the indigent would see the affluent, after stay or refusal of stay of execution, dissipate assets before judgment with no power in the poor to stop the process. It must be, therefore,

that failure to pay may have to be regarded with other factors. This entails balancing justice and avoiding the risk of injustice on either the successful or loosing litigant.

It must, however, be understood that failure by a party to pay damages is not conclusive on the discretion that the court must exercise. Where, like here, damage considerations are equal or unresolved, a court must proceed to consider the balance of justice.

In considering whether stay or refusal of stay of execution better serves justice and ameliorates in justice one major consideration is whether maintaining the status quo is the fair and just thing to do. This requirement comports the requirement that a successful litigant must not be deprived of the fruits of litigation. The status quo, therefore advocated is that the successful litigant must be allowed to execute the judgment. On close analysis, it must be that situations could arise where this would not be the just and fair thing to do. It must, therefore, be that considerations that successful litigant must not be prevented from reaping fruits of litigation is not conclusive and it, like other factors, is one of the considerations. A losing litigant, therefore, who, for purposes of conversation shows that there is a serious issue to be tried may successfully oppose an application for stay based on the relative strength of the case.

One other consideration is whether the decision to stay or not to stay can be resolved by the relative strength of the parties' cases. In balancing justice, a court may have, where other considerations are not conclusive, mindful that this is not a mini trial, to consider the relative strength of the parties. This is inevitable because refusing or allowing stay of execution in the direction of the party with a better prospect of success better and greatly maximizes justice and better and greatly minimizes injustice irrespective of the outcome of the appeal. In recent decisions consideration of the relative strength of the parties' cases is considered very circumspectively. "It is in my judgment inappropriate," said Lord Bridge in England and Wales Court of Appeal (Civil Division) Decisions in *Sunico A/S & Ors v Revenue And Customs* [2014] EWCA Civ 1108 (30 July 2014) "to address the merits or significance of a pending appeal as a weighty factor in the balancing exercise relevant to the imposition of a payment condition or

the grant or refusal of a stay. Generally, the court's approach is to avoid such assessments because of their propensity to generate satellite litigation. I am not persuaded that this case justifies any exception to that healthy self-denying ordinance." It seems from recent decisions that stay of execution may very well be granted no sooner than it is proved that there are serious issues on appeal. This is clear from the decision of the England and Wales in *Sunico A/S & Ors v Revenue and Customs*.

The court below records very clearly that the appellant's action were perpetrated by a fear that Mulli Brothers Ltd would be ruined because, among other things, Malawi Savings Bank Ltd contemplated its winding up. It is speculative whether Malawi Savings Bank is best served by sending Mulli Brothers Ltd into liquidation. Mulli Brothers Ltd, however, repeated in its affidavit in support of the application that it would be ruined if execution is not stayed. As indicated, Mulli Brothers Ltd barely, if at all, made a full and frank disclosure. I am also aware of the statement of Lord Bridge in *Sunico A/S & Ors v Revenue and Customs* that "a corporate appellant is unlikely to persuade the court that an appeal will be stifled by an order for payment or security merely by reference to its own assets. The court will wish to consider whether the company's backers or supporters have the resources and motivation with which to assist: see Calltel Telecom Limited v Revenue and Customs Commissioners [2008] STC3246, at paragraph 13". This, notwithstanding, in *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887, 888, Staughton LJ. Said:

> "It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in *The Supreme Court Practice* from *Atkins v Great Western Rly co* (1886) 2 TLR 400, "As a general ruled the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds" seems to be far too stringent a test today."

Jamaican jurisprudence discusses *Linotype-Hell Finance Ltd v Baker* extensively. In *Flowers Foliage and Plants of Jamaica Ltd et al v Jamaica Citizens Bank Limited* SCCA No 42/1997 delivered 29 September 1997, the Court of Appeal of Jamaica approved of the principle as stated in *Linotype-Hell* and granted a stay of execution of the judgment. There, the court accepted that the applicant would be ruined financially if the judgment against her were not stayed and also accepted that there were triable issues which had not been determined in the judgment of the learned trial judge (page 10). [13] In *Beverley Levy v Ken Sales Ltd* SCCA N0 81/2005 delivered 22 February 2007 Harris JA referred to Flowers and stated that any applicant seeking to have a judgment stayed must demonstrate that he has a realistic prospect of success on appeal and that he would be ruined if the stay is not granted. She referred to what she described as a general rule that a successful litigant should not be deprived of the fruits of his litigation whilst the appeal is pending (page 8). The learned judge of appeal refused to stay the execution of the judgment but imposed a condition on the respondent to repay the costs if required so to do, because the liabilities of the respondent and the value of their assets were unknown. She stated that: "A court, taking into account all the circumstances of the case, ought to conduct a balancing test by weighing up the intrinsic dangers in granting or refusing a stay." (page 9) The learned judge of appeal referred to *Hammond Suddard Solicitors* where Clarke LJ said: "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 other or both parties if it grants or refuses a stay." (par.22) [14] In *Jamalco (Clarendon Alumina Works) v Lunette Dennie* [2010] JMCA App 25 McIntosh JA (Ag) (as she then was) examined some of the current authorities including *Linotype-Hell and Flowers* and stated that she had found "no authority establishing that the ruin approach is to be followed to the exclusion of other legitimate grounds" (para [42]). The learned judge of appeal concluded that: "[f]financial ruin or inability to repay the judgment sum on a successful appeal, after enforcement, are but factors for consideration in seeking to determine where the justice of the particular case lies." [par.42] [15].

The Jamaica Supreme Court of Appeal reviewed all these cases in *Caribbean Cement Company Ltd and Freight Management Ltd* (2013) Civil Appeal No 12 of 2013 in the course of which, Lawrence-Beswick, JA., (Ag.) said:

> *"These authorities show that in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to: (a) the applicant's prospect of success in the pending appeal. (b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal. (c) The financial hardship to be suffered by the applicant if the judgment is enforced."*

In considering this aspect it must be conceded that, on the appellant's own admission, certain monies, not ascertainable, are owed the respondent. It must also be conceded that, probably, for germane reasons, mostly political, the appellant is unable to pay. That in ability may very well be liquidity rather than a liquidation problem. From the time of the loan the Reserve Bank has more than doubled the base rate. It is quite clear from the lower courts judgment that Mulli Brothers Ltd was going a difficult patch where the insolvency practice should have been more helpful.

The appellant really wanted the court below to reschedule the debt, the lower court's contention that it does not write or rewrite contracts for the parties, is apposite. On the other hand, on the circumstances and tenor of events, it could very well be that the appellant wanted some form of debt relief which was complicated by the respondent's action. The lower court recorded the preceding events as follows:

> *"In view of the plaintiff's default, the defendant called upon the securities and the secured properties were advertised for sale. The plaintiff then obtained an injunction*

against the sale of the properties and took out an action against the defendant accusing it of wrongfully, in breach of agreement, and inequitably and unfairly proceeding to advertise for sale the plaintiff's properties as well as taking steps to wind-up the plaintiff. The plaintiff asks this court to restructure the loan"

Clearly the bank was not for suing for the debt. The bank was swiftly moving to recover the loan and interest by recourse to the appellant's securities and properties. It is unclear whether the securities were debentures and the properties were subject of mortgages or charges. If the respondent had sued for the debt, the appellant had a few options, the critical one being a court's order to pay the debt by installments, the consequence of which would have been to stay execution of the judgment. By the respondent recourse to non-litigious methods, it was out of the appellant's power to evoke an order for instalments with the consequences just described.

The appellant, fortuitously or advisedly, opted to sue and prompted the respondent's counterclaim for the amount owing. We now know that the court below entered judgment for the respondent. Having obtained judgment from the respondent's on the sum claimed, it was open to the respondent's to execute the judgment using the appropriate method in the plethora of methods of enforcing judgment. One option available to the respondent was issuing a judgment debtor summons which, with the requirement of full and frank disclosure, would have enabled the respondent to determine whether, if at all to use the enforcements warrants or consider or accept the appellant's offer to pay by instalments. On the other hand, it was open for the appellant to apply under … to pay by instalments. The consequences of an order for payment by instalments, whether under a judgment debtor sums or a summons to pay by instalments are the same: execution of judgment is stayed. While, therefore, the court probably does not have power to reschedule dates, it certainly has got power to order payment by instalments with the consequence that execution of judgment is stayed.

The grant of stay of execution in this matter does not fully dispose of the respondent's right to pursue the appeal. For, certainly, if unsuccessful, the appellant will be required to pay the debt and interest due. Conversely, if the appellant is unsuccessful, the respondent has all rights on the securities and property irrespective of whether the loan was unsecured.

In this matter however, the balance of justice is in favour of staying execution of the judgment on conditions. Where, like here, the appellant has, as pointed out by the respondents' counsel, not been paying the loan and interest for a long time, it is incongruent to justice and fairness that execution of judgment be stayed without any conditions as to payment in between now and the determination of the appeal. One major consideration, in my judgment, in balancing justice when considering stay of execution of a judgment must be reconsideration of the impact of such stay on the judgment creditor.

In relation to banks, the consideration is more critical. It must always be remembered that money banks lend to debtors comprises of shareholder capital and depositors' money. Debt repayment default can lead to collapse of the bank and cause considerable losses to shareholders and debtors alike. It must also be realized that interest charged by the bank goes to bank operations and payment of interest on depositors' money. Any default on payment of interest, therefore, affects bank operations and depositors interest. It is arguable that the principal sum is subject to risk considerations; certainly failure to pay interest has dire consequences on the banks' operations and depositors' interest. In this particular case, it seems to the court that there are strong elements to suggest that the court below accounted for the K …that the appellant claims were excluded. Based on this, the appellant, without repaying the principal instrument, must pay the monthly interest on the judgment sum up to the conclusion of the appeal. I would, therefore, stay the execution of the judgment on this condition.

This situation, in my judgment is akin to what was said in *Virgin Atlantic v Premium Aircraft* [2009] E.W.C.A Civ 513, by Buckley, L.J.:

"In some cases it may be impossible to devise any method of ensuring perfect justice in any event, but the court may nevertheless be able to devise an interlocutory remedy pending the decision of the appeal which will achieve the highest available measure of fairness. The appropriate course must depend upon the particular facts of each case."

My Lords, the courts may not have to devise any method of ensuring perfect justice where, like here, parties have reached a compromise. The balance of justice is achieved by allowing parties to abide by their agreements, taken, of course after negotiations, consideration of risks, and possibility of a longer business and commercial relationships. On appeal, no doubt, the compromise, not the judgment of the court below, has a real possibility of surviving.

I would, therefore, grant stay of execution of judgment pending appeal, of course for more and better reasons advanced by a single member of your court

This is a case where, on a balance of justice, there should be a quick disposal of the appeal. It is unclear that the record of appeal is ready. I would, therefore, leave it to the parties to apply for it and I order that the Registrar be magnanimous during such an application.

DELIVERED in Open Court at the Supreme Court of Appeal, sitting at Blantyre on 3 July 2015.

HONOURABLE JUSTICE D.F. MWAUNGULU, JA

Signed: .....