JUDICIARY

IN THE SUPREME COURT OF MALAWI

MSCA Civil Appeal No. 49 of 2015

(Being Civil Cause No. 401of 2009)

BETWEEN

G T CHIPONDA APPELLANT

AND

A B STORE CHILUMBU RESPONDENT

CORAM: JUSTICE D F MWAUNGULU, JA

Kamkwasi, Counsel for the appellants

Kambale/Nakanga

Chintande, Recording Officer

Mwaungulu JA

JUDGMENT

From the cacophony in the statements of truth two things are true, namely, that, for some reason, concerning the parties and the Court, the record of appeal and skeleton arguments remain not filed. The applicant, the claimant in the High Court, applies to this Court for dismissal of the appeal on the former ground; the second ground arises from the record of the Court. The former ground has previously occupied this Court: two perspectives arise based on the duty and responsibilities of this Court, the High Court and respondent on preparation of the record of appeal. There is similar divergence concerning when the parties in the appeal should file skeleton arguments *(Electoral Commission and Another v Mkandawire* (2009) Civil Appeal No 67 (MSCA) (unreported); *Malawi Housing Corporation v Western Construction Company Ltd* (2013) Civil Appeal No 18 (MSCA) (unreported)and *Mato v Sabadia (No 2), Mato v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA); *Blantyre Water Board v Samuel Master and Others(2014)* Civil Appeal No 15 (MSCA) (unreported) and *Standard Bank Limited v Mkandawire* (2014) Civil Appeal No 51(MSCA) (unreported)

On the facts, there was delay. That delay, however, does not on the modern principles and approaches on the question of dismissal of an action or a process for want of prosecution expressed by Lord Justice Neill in *Trill v Sacher* [1993] 1All ER 960, 978 - 980, referred to in the High Court in *Joubertina Furnishers (Property) Ltd t/ a Carnival Furnishers v Lilongwe City Mall* (2013) Misc. Civil Cause No. 41 (HC) (PR) (Unreported), justify dismissal of the action. It is equally unusual, more especially concerning the court's inertia, to issue unless orders against the court. Generally, where there are applications to strike proceedings for want of prosecution, courts will dismiss actions where a party has ignored or disobeyed an unless order.

Dismissal for want of prosecution occurs where, parties, required to take certain courses of action premised on fixed or reasonable time, fail to do so. Dismissals for want of prosecution serve two purposes. First, where they result in dismissal of the whole action, they stop the process which, but for want of dismissal, would be unjust or prejudicial through tardiness or laches. They, with the real threat of dismissal of the action or process and without stalling proceedings, invigorate and spur the sort of actions that further the action to speedy, timely and fair conclusion.

The question for determination in this case is whether there was conduct or omission by the appellant necessitating dismissal of the action for want of prosecution. The applicants, as seen, rely on two components of the facts.

The appellants have not filed skeleton arguments

Paragraph l(a) (i) of Practice Direction No 1of 2010 provides :

> It is notified for general information and guidance to all legal practitioners that with effect from the date of this Practice Direction, parties in any appeal or other matter in the Supreme Court of Appeal shall be required to present skeleton arguments in accordance with this Practice Direction -

1. When presenting skeleton arguments in the Malawi Supreme Court of Appeal -

(a) In all substantive appeals -

(i) The appellant shall file with the court skeleton arguments within fourteen (14) days after filling the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.

(ii) If the appellant fails to comply with sub-paragraph (a) (i) of this paragraph, the appeal shall not be set down for hearing and may at the court's instance be dismissed.

This Court's decisions seem to go into two directions concerning when the parties should file skeleton arguments. The latest decisions in *Blantyre Water Board v Samuel Master and Others* and *Standard Bank Limited v Mkandawire* (2014) Civil Appeal No 51(MSCA) (unreported) should be followed rather than the earlier decisions in *Electoral Commission and Another v Mkandawire* (2009) Civil Appeal No 67 (MSCA) (unreported); *Malawi Housing Corporation v Western Construction Company Ltd* (2013) Civil Appeal No 18 (MSCA) (unreported)and *Mato v Sabadia (No 2), Mato v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA). The first decision, *Electoral Commission and Another v Mkandawire*, never really fully interpreted paragraph 1(a) (i) of Practice Direction No 1of 2010. The subsequent decisions of *Electoral Commission and Another v Mkandawire* (2009) Civil Appeal No *Malawi Housing Corporation v Western Construction Company Ltd* (2013) Civil Appeal No 18 (MSCA) (unreported) and *Mato v Sabadia (No 2), Mato v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA), without interpreting paragraph 1 (a) (i) of Practice Direction No 1 of 2010, followed *Electoral Commission and Another v Mkandawire*

Electoral Commission and Another v Mkandawire was, probably, the first case in which paragraph 1 (a) (i) of Practice Direction No 1of 2010 was considered. The Court's preoccupation with the words 'in this Court' meant that the Court never appreciated the whole clause 'after filing the appeal in this Court ' and never identified the time when skeleton arguments should be filed or the actor in the practice direction. This is what the Court said:

> The court below has not completed its task of preparing the record of appeal. The Registrar has not transmitted the record of appeal to this court. The appeal has not been entered in this court. As at the moment this court has no record of the appeal between the parties. This court is clearly not seized of the appeal about whose prosecution the respondent complains. It would appear that the application is clearly premature and it has been brought in the wrong forum.

The Court then went on to state that which has led to a malpractice that, by default, has become the practice:

> The relevant Practice Direction provides, in paragraph 1 - (a) (i), as follows:-
>
> **the appellant shall file with the court skeleton arguments within fourteen (14) days after filing the appeal <u>in this court.</u>**

> It would appear that for purpose of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the court below. The time stars running after the record of appeal is prepared and the Registrar of the court below has filed the appeal and it is entered in this court, in terms of rule 11 of the Supreme Court of Appeal Rules. The appellants in my view, have not failed to comply with any provision of the Current Practice Direction. As indicated earlier, there is no appeal before this court which the appellants could prosecute. The respondent's application calls upon this Court to dismiss an appeal which is not before this court. It is impossible for this court to do that. The application by the respondent is indeed premature. It lacks merit.

The Court in stating that this Court is not seized of the matter or appeal until the 'record of appeal' is filed under Order 3, rule 11 of the Supreme Court of Appeal Rules, overlooked Order 3, rules 5(3) and 19 of the Supreme Court of Appeal Rules and section 23 (1) of the Supreme Court of Appeal Act. Order 3 rule 11 of the Supreme Court of Appeal Rules. Order 3, rule 11 of the Supreme Court of Appeal Rules that this Court was responsible for determining when the appeal is filed in this Court, provides:

> The Registrar of the Court shall cause to be served on all parties mentioned in the notice of appeal who have filed an address for service a notice that the record has been filed and shall in due course enter the appeal in the cause list and give notice to the parties of the date of hearing.

This rule does not talk about filing the record of appeal or filing the appeal. The rule is about notifying parties that the record of appeal is ready, serving the record of appeal on the parties and the entry of the appeal in the cause list and setting the case down for hearing. The Court of appeal was probably misled by the title to the section which reads 'Notice of Filing.' This is a notification of the filing of the record of appeal. This is not the filing of the appeal. The notification of the appeal is by the notice of appeal. The body of legislation, however, is clear about what the rule is not about.

The use of the word 'enter' in this rule is apposite and it only refers to entering the appeal in the cause list. This provision cannot be used to explain (away) the meaning of the clause 'filing the appeal in this Court.' Neither can the rule comport that filing the 'appeal' means filing the 'record of appeal.' Entering the case in the cause list cannot be filing of the appeal in this Court. This Court is seized of the appeal when the appellant under section 23 (1) of the Supreme Court of Appeal Act files the appeal under Order 3, rule 2 of the Supreme Court of Appeal Rules.

Order 3, rule 19 of the Supreme Court of Appeal Rules informs of when this Court is seized of the matter or appeal:

> After an appeal has been entered and until it has been finally disposed of, the Court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the Court and not to the Court below

Order 3, rule 19 of the Supreme Court of Appeal Rules is clear about what has to be seized by this Court. It is the appeal. It is not the record of appeal. Order 3, rule 19 of the Supreme Court of Appeal Rules is also clear about who is to be seized of the appeal. It is this Court, the Supreme Court of Appeal. It is not the High Court that is or has to be seized of the appeal. The High Court cannot be seized of the appeal. The appeal is from its decision. Consequently, only the Supreme Court can be seized of the appeal.

The words 'after the appeal has been entered' cannot, as is sometimes suggested, mean when the record of appeal is filed by the registrar in Order 3, rule 11 of the Supreme Court of Appeal Rules. If anything, the record of appeal is not filed under Order 3, rule 11 of the Supreme Court of Appeal Rules. The record of appeal is filed under Order 3, rule 10 of the Supreme Court of Appeal Rules:

> The Registrar of the Court below shall file the record in the Court when ready, together with - Civil Form 4
>
> (a) a certificate of service of the notice of appeal;
>
> (b) four copies of the record for the use of the Court;
>
> (c) the docket or file of the case in the Court below containing all papers or documents filed by the parties in connection there

Consequently, the words 'after the appeal is entered' in Order 3, rule 19 cannot mean when the appeal is filed under Order 3, rule 10 of the Supreme Court of Appeal Rules. Order 3, rule 19 of the Supreme Court of Appeal Rules aims to give jurisdiction to the Supreme Court of Appeal to hear all applications that are not within the jurisdiction of the Court below as long as the appeal is pending.

Order 3, rule 19 of the Supreme Court of Appeal Rules, therefore, empowers the Supreme Court of Appeal to handle throughout such applications precisely because it is seized of them. The use of the words 'during the pendency ...' mean that the appeal is actually with the Court and existing. Were it that entering or being seized of the appeal occurs when the registrar of the High Court files a record of proceedings under Order 3, rule 10 of the Supreme Court of Appeal Rules, the Supreme Court would have no jurisdiction until then to hear such applications. The appeal, therefore, is filed with the Court when filed in accordance with the Supreme Court of Appeal Act.

Section 23 (1) of the Supreme Court of Appeal Act provides for the manner in which appeals are made from the High Court to the Supreme Court:

> If a person desires to appeal under this Part from the High Court to the Court, he shall, in such manner as may be prescribed by rules of court, give notice to the Registrar of the High Court of his intention to appeal-
>
> (a) within 14 days of the judgment from which he wishes to appeal if such judgment is an interlocutory order;
>
> (b) within six weeks of the judgment from which he wishes to appeal in any other case.

The appeal is made by a procedure which is in Order 3, rule 2 (1) of the Supreme Court of Appeal Rules:

> All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the Registry of the Court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service.

The appeal, therefore is 'brought' by 'filing' the notice of appeal in the High Court. It is this process which is the 'entering' of the appeal under Order 3, rule 19 of the Supreme Court of Appeal Rules. The Supreme Court in *Electoral Commission and Another v Mkandawire* therefore, was not right to hold that this Court is not seized of the matter until the record of appeal is filed under Order 3, rule 11 of the Supreme Court of Appeal Rules and Order 3, rule 10 of the Supreme Court of Appeal Rules. Such a view is undermine by Order 3, rule 5 (3) of the Supreme Court of Appeal Rules.

Order 3, rule 5 (3) of the Supreme Court of Appeal Rules provides for when the appeal is deemed brought: it is when the appeal is brought under Order 3, rule 2 of the Supreme Court of Appeal Rules:

> An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below.

It cannot, therefore, be that the appeal is filed when the record of appeal is filed under Order 3, rule 10 of the Supreme Court of Appeal Rules or Order 3, rule 11 of the Supreme Court of Appeal Rules.

Yet, this seems to be the view taken since *Electoral Commission and Another v Mkandawire* and in *Malawi Housing Corporation v Western Construction Company Ltd* (2013) Civil Appeal No 18 (MSCA) (unreported) and *Mato v Sabadia (No 2), Mato v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA) decided after it. That this is not the case is deducible from paragraph 1(a) (i) of Practice Direction No 1of 2010:

> It is notified for general information and guidance to all legal practitioners that with effect from the date of this Practice Direction, parties in any appeal or other matter in the Supreme Court of Appeal shall be required to present skeleton arguments in accordance with this Practice Direction -
>
> 1. When presenting skeleton arguments in the Malawi Supreme Court of Appeal -
>
> (b) In all substantive appeals -
>
> (iii) The appellant shall file with the court skeleton arguments within fourteen (14) days after filling the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.

The words to be interpreted are after filing the appeal in this Court.' They are not only 'in this Court,' as portended in *Electoral Commission and Another v Mkandawire.* Let us dispose of words with less controversy, starting with 'this Court.' 'This Court' refers to the Supreme Court of Appeal. The phrase does not mean the High Court. The second word is 'filing.' It is the same word used in Order 3, rule 2 of the Supreme Court of Appeal Rules. It is the same word used in paragraph l(a) (i) of Practice Direction No 1of 2010. In relation to an appeal, this refers to the procedure described under Order 3, rule 2 of the Supreme Court of Appeal Rules.

Let us now consider words that clarify the cloud created by *Electoral Commission and Another v Mkandawire.* As observed, *Malawi Housing Corporation v Western Construction Company Ltd* (2013) Civil Appeal No 18 (MSCA) (unreported)and *Mato v Sabadia (No 2), Mato v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA) never interpreted paragraph 1 (a) (i) of Practice Direction No 1 of 2010. It is only in the cases of *Blantyre Water Board v Samuel M aster and Others* and *Standard Bank Limited v Mkandawire* (2014) Civil Appeal No 51 (MSCA) (unreported) that this Court tries to interpret paragraph 1 (a) (i) of Practice Direction No 1 of 2010. It is unnecessary, therefore, to repeat the discussion on interpreting paragraph 1 (a) (i) of Practice Direction No 1of 2010 according to section 23 (1) of the Supreme Court of Appeal Act, Order 3, rule 2 of the Supreme Court of Appeal Rules, Order 3, rule 5 (3) of the Supreme Court of Appeal Rules and Order 3, rule 19 of the Supreme Court of Appeal Rules. It is vital, however, to interpret other words in paragraph 1 (a) (i) of Practice Direction No 1 of 2010 to demonstrate that the practice advanced in *Electoral Commission and Another v Mkandawire* is not based on paragraph 1 (a) (i) of Practice Direction No 1of 2010.

First, let us discover the task bearer in paragraph 1(a) (i) of Practice Direction No 1of 2010: it is the appellant. Secondly, let us isolate two activities the task bearer performs: filing skeleton arguments and filing the appeal. The first function is obvious. The second function has been misunderstood in *Electoral Commission and Another v Mkandawire.* To better see it, paragraph 1(a) (i) of Practice Direction No 1of 2010 has been ridden of certain words to highlight the function:

> The appellant shall file ... skeleton arguments ... after filing the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.

It is the appellant who files the appeal. *En passant* it should be observed that the appellant is filing the 'appeal,' not the 'record of appeal. When, therefore, is the appellant, the task bearer, supposed to file (the initial) skeleton arguments? It is 'after!' After what? It is after the appellant has filed the appeal. Once it is accepted, which it must, that it is the appeal, not the record of appeal which should to be filed, it is easy to see that it cannot be the record of appeal which has to be filed. The appeal is filed by the appellant, not by the registrar. The registrar is the one who files the record of appeal.

If the directive was intended to make the filing of skeleton arguments based on registrar filing the record of appeal, the words 'after the registrar has filed a record of appeal' would have inserted in place of 'after the filing of the appeal.' To introduce by interpretation or otherwise the words 'after the registrar has filed the record of appeal under Order 3, rule 10 of the Supreme Court of Appeal Rules and/ or Order 3, rule 11 of the Supreme Court of Appeal Rules' is to introduce words in the directive that were not intended or were a necessary inference. The appellant, therefore, under paragraph 1(a) (i) of Practice Direction No 1of 2010, must file skeleton arguments 14 days after the appellant files the notice of appeal

under Order 3, rule 2 of the Supreme Court of Appeal Rules. The words 'after filing the appeal refer to the appellant's actions, not the Registrar's actions.

The advantages of the practice according to this interpretation, discussed at length in *Registered Trustees of Kalibu Ministries T/A Kalibu Academy v Anglia Book Distributors Limited* (2015) Misc Civil No 54 (MSCA) (unreported), outweigh the advantage in postponing the filing the skeleton arguments to the stage not prescribed by paragraph l (a) (i) of Practice Direction No 1 of 2010. Consequently, it is the decisions in *Blantyre Water Board v Samuel Master and Others*, *Standard Bank Limited v Mkandawire* and *Registered Trustees of Kalibu Ministries T/A Kalibu Academy v Anglia Book Distributors Limited* that must be followed. They are the latest in time in interpreting paragraph 1 (a) (i) of Practice Direction No 1 of 2010 after, of course, reviewing previous decisions to the contrary.

Actually, in *Electoral Commission and Another v Mkandawire* this Court, without fully interpreting paragraph 1(a) (i) of Practice Direction No 1of 2010, said that, "It would appear that for purpose of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the court below." Had the Court then interpreted paragraph 1(a) (i) of Practice Direction No 1of 2010, it would not have appeared that the appellant should file skeleton arguments at the stage suggested. After *Electoral Commission and Another v Mkandawire* this Court decided *Malawi Housing Corporation v Western Construction Company Ltd* In *Malawi Housing Corporation v Western Construction Company Lt* this Court, again without interpreting paragraph 1(a) (i) of Practice Direction No 1of 2010, said 'Ideally ...' The use of the word 'ideally' suggests that the law was other than the ideal. If that was the case, the proposition cannot be binding. The rule needed changing, that could not be done by legislation by a Judge acting *ex cathedra* a Judge. The directive requires skeleton arguments to be filed 14 days after filing the appeal. Skelton arguments should, therefore, have been filed 14 days after filing the notice of appeal.

The duty to pre pare the record

In this case, much like the many coming to this Court, all task bearers share responsibility for the situation in which this case finds itself. The parties much earlier on agreed on documents the Registrar for inclusion in the record of appeal. Whatever variance between the applicant's and the respondent's accounts in statements of truth on what happened, we are where the record of appeal remains undone at the time of their supplication. Neither the parties nor the court avoid responsibility. The only controversy, may be from this Court's perspective, is doubt whether the court and respondent have any responsibility and what is the scope of that responsibility.

First, there are those who think that the High Court and, more especially, the Supreme Court, have no responsibility at all. They base that stance on Order 3, rule 8 (3) of the Supreme Court of Appeal Rules:

> The appellant shall be responsible for the preparation of the record which shall be certified as correct by the Registrar of the Court below.

The applicant proceeds based on that this section is prescriptive and proscriptive. The appellant thinks that Order 3, rule 8 (3) of the Supreme Court of Appeal Rules prescribes, to the exclusion of any other, the one who is responsible for preparation of the record and that prescription is the registrar . May be it does; may be it does not. Order 3, rule 8 (3) of the Supreme Court of Appeal Rules is, however, not proscriptive,

excluding, more especially the respondent, from being involved in the preparation of the record . It certainly does not proscribe the High Court or the Judge of that court. Order 3, rule 8 (2)

> The preparation of the record shall be subject to the supervision of the Court below and the parties may submit any disputed question to the decision of a Judge of the Court below in chambers who shall give such directions thereon as the justice of the case may require.

Order 3, rule 8 (2) of the Supreme Court of Appeal Rules puts the responsibility of superv1s1on of the preparation of the record on the High Court and the Judge. Order 3, rule 8 (2) of the Supreme Court of Appeal Rules also puts the responsibility on the respondent.

As earlier discussed, Order 3, rule 8 (3) of the Supreme Court of Appeal Rules does not by itself exclude the respondent from responsibility concerning the record. The respondent has further duties and functions The respondent, under order 3, rule 8 (2) is required to recognise and benefit from the High Court's and High Court Judge's supervisory powers. The respondent's duties are now adumbrated for the High Court by Parts 1.4 and 1.6 of the Civil Procedure Rules 1998 as reinforced by 2004 amendment to section 29 of the Courts Act. The principles of case management were coming in the Common law jurisdictions well before the Civil Procedure Rules.

An idle party cannot any more just spring up on an application for dismissal for want of prosecution. Where, therefore, the applicant could have done more or better, the court on an application for dismissal for want of prosecution, the court may exercise discretion with this in mind. Days when a defendant or respondent waits for a claimant to delay in order that the defendant can apply to dismiss the action are yester. Courts now want the defendant to be more active in pushing the case to its speedy and fat conclusion. This is not just because of the current propelled by the Woolf Reports and subsequent Civil Procedure Rules 1998, amended substantially in 2000. Decisions well before the Woolf Reports and the Civil Procedure Rules harbingered the path.

Lord Woolf in *Gravit and Others-v- Doctor and Others* [1997] 2 All ER 419 started with this overview of the situation as it was then and announces the advent of the Civil Procedure Rules 1998:

> "The period which has elapsed since Lord Griffith's speech has not seen any improvement in the problems caused by delay in the conduct of civil proceedings. In the county court a response to the corrosive effect of delay has been to introduce the automatic strike-out (C.C.R. Ord. 17, r. 11(9)). However this has proved to be a crude remedy the effects of which have not been wholly beneficial. It has funded an industry of satellite litigation. Furthermore, there is now on the horizon the introduction of the sort of process of reform to the rules of procedure which Lord Griffiths thought was required. In this situation it is at least open to question whether it is not preferable to await the outcome of the implementation of the new rules before making a substantial inroad on the principles endorsed by Lord Diplock in Birkett v. James [1978] A.C. 297. They should by case management prevent the delay happening. If delays do happen they could provide the court with wider powers to mitigate the consequences."

Lord Woolf, as we see in the next passage, was in no doubt that, even without the advancing reforms, courts with the parties had the withal to reduce delay:

> In the meantime both the court and defendants have the means to achieve greater control over delay. Defendants do not need to wait until there has been inordinate delay before apply for peremptory orders (although they are under no obligation to do this). The courts should more readily make "unless orders." That is orders that an action should be struck out unless certain steps are taken at certain times. The advantage of such an order is that it places the onus on the plaintiff to justify the action being allowed to continue whereas in the case of an application to strike out the onus is on the defendant to show the action should be struck out.

This was on 5 March 1997. In 2004 in *Hately v Morris and Another* (2004) 1 BCLC 582 the Court said:

> I have in mind the passage from Asiansky, set out above, which points out that it is not always appropriate for defendants to let sleeping dogs lie. This was not a case where the next step in the action was in the sole province of the petitioner to carry out. Nor is it a case in which there has been an express order with which the petitioner failed to comply. The next step required in the after 9 April 2002 was a further CMC (court management conference). The respondents could themselves have applied to re-fix the date, even though it might be said that the responsibility lay more naturally with the petitioner because it was his petition. They did not do so . . .

In 2009, additionally, the court even required that the defendant send some request to the claimant to do the needful. In *Eckman v Sidem International Limited and Another* [2009] JR 233, the court said:

> In our view, similar sentiments now apply in this jurisdiction and in the light of Esteem and the practice direction, it is not always appropriate for defendants to let sleeping dogs lie. Issuing a summons for directions was not within the sole province of the plaintiff. The second defendant was in a position to issue such a summons or at least to have formally warned the plaintiff that failure to do so could lead to a summons for dismissal being issued. Such a warning, unheeded by the plaintiff without good excuse, could assist in tipping the balance of justice towards dismissal being the just and proportionate remedy."

Closer at home, *Duplessis and another v Viljoen In re Viljoen v Duplessis v another* 2010 1 BLR 500 involved a court order. The Botswana Court of Appeal remitted a matter to the High Court for a party to explain delay in the prosecution of a matter. Nine months later, the matter not set down, the respondent applied for dismissal for want of prosecution, the applicant and his attorney not setting the matter down believing they were under no duty. Makhwade J said:

> "It is clear from the record that the applicants did not take any action to have the matter placed on the roll after the judgment of the Court of Appeal. It appears that they only sprang into action to apply for the dismissal of the action. While it was incumbent upon the respondent, who is the *dominus litis* in this case, to have taken the initiative, the applicants, who are parties to this action, should not sit back and do nothing. They too have an interest in ensuring that the litigation comes to an end. The applicants, having observed the resoluteness of the respondent to pursue this matter by taking it to the Court of Appeal, should have

> taken action to have it listed. While the reasons for failure to act on behalf of the respondent were legally flawed, I am of the view that in the circumstances of this case the door should not be shut by dismissing the application. This is the more so because there was communication between the parties with a view to resolving the dispute."

Order 3, rule 19 of the Rules of the Supreme Court implies such a power. The title to the section is 'Control of proceedings during pendency of appeal.' As long as appeal proceedings are pending before it, this Court has control to ensure that they are disposed fairly, speedily and timely. This control and supervision also bases on Civil Procedure Rules 1998 imported in our law by sections 8 (b) of the Supreme Court of Appeal Act and order 3, rule 34 of the Supreme Court of Appeal Act.

Should this matter be dismissed for want of want of prosecution?

The principles on dismissal of an action or process for want of prosecution are now summarised in the fourteen steps by Lord Justice Neill in *Trill v Sacher* [1993] 1All E.R. 961, 978 - 980. The principles, however, must adjust because the matter is on appeal. Consequently, only those principles that is relevant on appeal need consideration. One principle, however, is of general application, namely, that the onus is, as it should be on the party applying for dismissal for want of prosecution to prove that dismissal merited.

On the first principle, Lord Justice Neill suggests that there are probably two circumstances where dismissal of an action for want of prosecution can be had: where there is intentional and contumelious default and where there is inordinate and inexcusable delay. Lord Justice Neill said:

> "From these and the other relevant authorities, I would extract the following principles and guidelines for use on an application to strike out for want of prosecution where it is not suggested that the plaintiff has been guilty of intentional and contumelious default.
> *(1)* The basic rule is that an action may be struck out where the court is satisfied"
>
> > '(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party' (See Birkett v James [1977] 2 All ER 801 at 805; [1978] AC 297 at 318).

The appellant's actions were by no means intentional. If anything, they indicate indolence. They are by no means contumelious. Contumely comports insolence, rudeness, impertinence, discourtesy, inexorable conduct. There was delay. The question is whether there was inordinate or excusable delay. On this, Lord Justice Neill said:

> 'Inordinate' delay cannot be precisely defined. 'What is or is not inordinate delay must depend on the facts of each particular case' (see Allen's case [1968] 1All ER 543 at 561, [1968] 2 QB 229 at 229 at 268). It is clear, however, (a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action and (b) that delay in issuing the writ cannot be classified as 'inordinate' provided the writ is issued within the relevant period of limitation.

Skeleton arguments have been filed on 25 November 2013. There is, therefore, inordinate delay in this respect. There is room for discussion on whether the delay on the preparation of the record is inordinate. I think it should be taken as good practice that, except for lengthy proceedings, the record must be ready within sixty (60) days. There should be effort corporately or individually to have the typescript of the evidence within a few days after the close of the hearing. There was, based on this, inordinate delay in the preparation of the record.

The further point that Lord Justice Neill makes is valid on appeal. Where there is inordinate delay, it is inexcusable:

> Delay which is inordinate is prima fade inexcusable (see Allen's case [1968] credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.

The action or process should invariable be dismissed unless it is excused. Lord Neill suggests an excuse which does not obtain in this case. I would think however, that it is an excuse to inordinate delay that, in respects of this case, another, who should have push the process forward, omitted or neglected to do their part.

In this case as the Supreme Court observed in *Electoral Commission and Another v Mkandawire* the appellant cannot be penalized for inertia of the High Court. In my judgment, it was sufficient that there was a consent order for document to be included in the record of appeal. It was up to the Registrar to set in place a process of ensuring that the registry and court reporters prepared the typescript to complete the record of appeal. Indeed, the appellant was supposed to entreat the High Court to ensure that the typescript was ready. That, however was not any different from what Order 3 rule 8 (5) of the Supreme Court of Appeal Rules required for the Registrar and Judge of the High Court. The Supreme Court, as we have seen, should also have exercised control and supervision of the High Court to ensure, under its management powers, that the appeal was prosecuted speedily, timely and fairly. In this regard, I accept the appellant's contention that it did exert on the registry. The respondent, moreover, cannot escape responsibility from the state of affairs.

The respondent should, knowing that the appellant promptly filed a notice of appeal, either as a way of making show that the appellant prosecuted the appeal quickly or by way of ensuring that the respondent was not a victim of the respondents dilatory, should have ensured that the record of appeal was ready. This, in a way, is what Lord Justice Neill suggests in the next comment

> A defendant cannot rely on a period of delay if at the end of the period he 'so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay...' (See Allen's case [1968] 1All ER 543 at 556, [1968] 2 QB 229 at 260).
>
> It has been said that this rule is based on waiver or acquiescence, but the better view appears to be that the defendant is estopped (see County and District Properties Ltd v Lyell (1977) [1968] 2 QB 229 at 260.)

The consequences of delay on appeal are, obviously, different from ones on appeal. Lord Justice Neill says:

> The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eye witness or of witness who will testify to the words used when an oral representation

> was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents. A defendant may also suffer some prejudice from prolonged delay in an action which involves imputations against his reputation, though this factor by itself is unlikely to provide a ground for striking out.

In this matter, on appeal, although it took too long for the case to be heard, we are in a situation where the evidence is already before the court. The only prejudice might be delay in the respondent in realizing the fruit of litigation. It is to this end that the appellant want the stay of execution lifted. In the circumstances of this case however given the multifaceted omissions from all duty bearers, the prejudice is subsumed.

Lord Justice Neill actually anticipates this when considering prejudice that may arise from inordinate and inexcusable delay:

> When considering the question or prejudice and, if it is raised, the question whether there is a substantial risk that it will not be possible to have a fair trial of the issues in the action, the court will look at all the circumstances. It will look at the periods of inordinate and inexcusable delay for which the plaintiff or his advises are responsible and will then seek no answer the questions: has this delay caused or is it likely to cause serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action? As Slade LJ stressed in *Rath's* case [1991] 3 All ER 679 at 688, [1991]1 WLR 399 at 410:
> '.....a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.'

> I would, therefore, dismiss the application for dismissal of the action for want of prosecution and, in the same vent, refuse the application to stay execution of the judgment. The respondent's application, however, is the only way to spur all duty bearers, including the appellant. It is his application on which I make the following orders. Based on this, the respondent should have the cost of this application.

Filing the record of appeal

The Registrar of the High Court should file the record of appeal under Order 3, rule 10 of the Supreme Court of Appeal Rules by 12 August 2016.

Entering the appeal on the cause list

The Registrar of the Supreme Court should under Order 3, rule 11 enter the appeal in the cause list on 12 August 2016

Notice of filing of the record

The Registrar under Order 3, rule 11 of the Supreme Court of Appeal Rules shall notify the parties that the appeal record is ready by 19 August 2016

Service of the record of appeals

The Registrar of the Supreme Court under Order 3, rule 11 of the Supreme Court of Appeal Rules should serve the parties with the record of appeal by 19 August 2016.

Setting dawn the appeal for hearing

Registrar of the Supreme Court should under section 3, rule 11of the Supreme Court of Appeal Rules set down the case after not earlier than 30 September 2016.

Appeal skeletons

Appeal skeletons are optional. Parties can serve them by 12 September 2016

Replacement skeleton arguments

Replacement skeleton arguments shall be served 14 days before the date set for hearing.

Supplementary skeleton arguments

Application for leave to file supplementary skeleton arguments should be made so that they are filed seven days before the hearing.

Made this 4th day of June 2016

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D F Mwaungulu
JUSTICE OF APPEAL