



REPUBLIC OF MALAWI



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

MSCA CIVIL APPEAL NO 43 OF 2016

BETWEEN

NBS BANK LIMITED

APPELLANT

-AND-

CAPITAL OIL REFINING INDUSTRIES LIMITED

1ST RESPONDENT

IPONGA COTTON COMPANY LIMITED

2ND RESPONDENT

Coram: HON. JUSTICE MZIKAMANDA SC, JA

Burton Mhango/Majamanda Counsel for the Appellant

Latif SC, Namisango Counsel for the Respondent

Minikwa Recording Officer

RULING

On 20th July, 2016 I granted an interim order of stay of execution of an order of assessment of interest pending the hearing of an inter parte application. This ruling



follows the hearing of the inter parte application for stay of execution pending the hearing of an appeal.

The background of the matter shows that on 7th July 2015 Justice Dr. Kachale gave judgment in favour of the respondent in Commercial Case No. 38 of 2013 at the Blantyre Registry of the High Court, Commercial Division. On the question of interest the Honourable Judge stated that:

“The entire transaction arising within a commercial context the Court further awards interest on the outstanding sum at the rate of 0.1 % above National Bank of Malawi lending rate from 30th June 2012 until date of full settlement of the judgment debt.”

There is evidence on record that the judgment debt was duly settled through a cheque sent to the respondent on 14th July, 2015. As for the interest awarded the parties were to have calculation without the need for a Court assessment. It is not clear what happened thereafter.

It is common case that after some time the respondent, Capital Oil Refining Industries Limited, took out a notice of assessment of interest pursuant to the judgment of 7th July 2015. The assessment was set down for 19th July 2016. The day before the date of hearing, Counsel seized of the matter agreed between themselves to have the hearing adjourned to Friday 22nd July, 2016 because Mr. Nkhono SC had travelled to South Africa on an emergency. The adjournment sought by Mr. Nkhono SC was to be formally applied for on 19th July 2016 by Counsel specifically assigned to do so. On 19th July 2016 the Assistant Registrar refused to grant the adjournment and proceeded to hear the assessment, much to the discomfort of Counsel who had only been asked to apply for an adjournment. The interest was assessed at K1, 117, 383, 560.29, even though a witness brought in by Latif SC was not cross examined. The respondent proceeded to arrange for execution of the order of assessment of interest.

In this application, NBS Bank Limited seeks to stay the execution of the order hearing of an appeal filed against it. The application is premised on the refusal by the Assistant Registrar to grant an adjournment so that Mr. Patrice Nkhono SC would be

appeal has already been given a date and there will be no prejudice should stay be granted.

Senior Counsel Latif submitted that it was for the appellant to show special circumstances what the Court should, through an order of stay of execution, deprive the first respondent of fruits of litigation. It was argued that the appellant has not done that. On the refusal by the Assistant Registrar to grant adjournment even though both Counsel had agreed to have the assessment adjourned to a specific date, it was contended that such refusal was within the exercise of discretion any power the Court. The earliest dates the Court would have had were following October and yet the parties had agreed to a short adjournment. Counsel submitted that the Assistant Registrar had reasonably and judicially exercised discretion when she refused the adjournment. Regarding the argument that the first respondent would not be able to repay the sum in the event of a successful appeal, it was incumbent on the applicant to bring evidence to show that the first respondent would not be in a position to repay the sum. The applicant has not done so.

Senior Counsel concluded by saying that the first respondent was prepared to make an undertaking to pay back any sum that may have to be paid should a subsequent assessment result in the need to repay some sums.

Now, I bear in mind that there is an appeal pending before a Judge in Chambers challenging the order of assessment of interest. In determining this application I endeavour to steer clear of matters that should be best left to the hearing of that appeal. I would avoid to create an appearance of prejudging the appeal. That appeal must be left to run its full course.

There is no dispute about the principles that governs the grant or refusal of an order of stay of execution of a court order or judgment. The balancing between upholding the right of a successful litigant to enjoy the fruits of his or her litigation on the one hand and ensuring that any appeal should not be rendered nugatory by the fact that execution has been done before the conclusion of the appeal on the other hand requires the exercise of discretion. Yet an appeal does not operate as an automatic stay of execution of judgment. These principles, and others, relating to an application for stay

available for the assessment of interest. It was contended that the appellant was prejudiced in the manner the assessment proceeded in that it was not expected that the junior counsel that was present would effectively conduct a cross examination of the witness.

The application is opposed. Senior Counsel Latif contends on behalf of the respondent that the Assistant Registrar correctly and judiciously exercised her discretion in refusing the adjournment notwithstanding agreement between the parties. He argued that since the filing of the substantive appeal, no steps have been taken by the appellant to prosecute it. In any event, there are no prospects of success. Further that the appeal to a Judge in Chamber against the refusal to adjourn the hearing of the summons for assessment of interest has no prospects of being set aside. There is no evidence produced to show that if the judgment was satisfied, the respondent would fail to pay back any sum or that the appeal would be nugatory. There have not been shown any special circumstances to support the application for stay of execution pending appeal. The balance of justice requires that the first respondent should not be denied the fruits of litigation and judgment should therefore not be stayed.

In arguing the application in this Court, Counsel for the applicant made an impassioned plea for the grant of order of stay of execution of the assessed interest made by the Assistant Registrar. This pends the hearing of an appeal to a Judge in Chambers. It was contended that this is an unusual appeal in that it will seek to set aside a decision of a lower court, not on the merits of the order but on procedural impropriety. The appellant is not challenging the merits of the assessment, but that the exercise of judicial discretion should have militated in favour of granting an adjournment for the assessment. The challenge is that the decision was made in default of cross examination of the respondents' witness. There was no grant of real right to cross examine but an illusory relief. It was suggested that Mr. Latif SC went against the spirit of the agreement he had with Mr. Nkhono SC on an adjournment. The order of K1.117 billion in interest was done without formal hearing. It was argued that the application had a real chance to have the order of assessment set aside and it is unconscionable for Counsel on the other side to insist on the order being enforced. The

of execution have become so much of our daily business that they require no supporting authority. Indeed even as the principles appear to evolve they only seek to clarify the need to maintain the balance of justice in any given case.

Counsel for the applicant have sought to persuade me to view the present application as unique. It has been contended that what the application is about is to ensure that the order of assessment of interest be eventually set aside, not on question of merit but on the ground of improper exercise of discretion on the part of the Assistant Registrar in refusing an adjournment. I think that question must be left to the appeal Judge. I have always found it painstaking to attempt to weigh the prospects of an appeal without running the risk of prejudging the appeal.

What is important at this stage is for me to weigh the circumstances of the case as they are and determine where the balance of justice lies regarding the application for stay of execution of the order. In doing so I have considered the fact that judgment in this case was rendered on 7th July, 2015 and by the 14th July, 2015 the judgment debt was settled. It was taken a little more than twelve months before the issue of interest got anywhere near resolution. Yet the award of interest was clear and in specific terms. It was for a specific period at 0.1 % above the bank rate of National Bank of Malawi for that period. With that type of specificity, it should have been fairly easy for the parties to determine the interest. It is clear from the judgment of the Court below that the interest was tied to commercial activity. I have also borne in mind that there has neither been proof of special circumstances, nor the inability of the respondent to repay any amount that it may have to after a final assessment, should the Court order one. Indeed it was incumbent upon the applicant to prove these matters to persuade this Court to grant the order of stay. I have considered the fact that the respondent has gone the extra step of showing preparedness to make an undertaking to repay any sum that may be required after the disposal of the appeal. I think Capital Oil Industries Limited is large business enterprise which should be able to repay the sums, should the need arise. In all these circumstances I think the balance of justice tilts in favour of my refusal to grant the Order of stay of execution. This application must fail and it is dismissed. The respondent shall make the undertaking it showed preparedness to do.

I must add that I had spirited arguments from both sides. Many of the arguments are suitable for the hearing of the appeal. The question whether the Assistant Registrar properly exercised her discretion in refusing an adjournment is precisely what the Judge in Chambers will have to determine. It will also be for that Judge to determine whether any of the Counsel went back on their word regarding an agreement to seek adjournment, and whether the Assistant Registrar was bound to accept a date that parties had agreed upon. These and other matters relevant to the hearing of the assessment of interest need to be raised before the Judge in Chambers for his/her determination.

This matter is on-going and I order that costs be in the cause.

Made in Chambers this 31st day of August 2016 at Blantyre



R.R. Mzikamanda SC
JUSTICE OF APPEAL