



IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CIVIL APPEAL NO. 50 OF 2015

(Being High Court (Commercial Division) Commercial Case No. 182 of 2013)

BETWEEN

BAZUKA MICHAEL KALWEFU MHANGOAPPLICANT

AND

NEW BUILDING SOCIETY BANK LIMITEDRESPONDENT

CORAM: Justice Anthony Kamanga, SC, JA
Theu of Counsel for the Appellant
Mpaka of Counsel for the Respondent
Minikwa Recording Officer

RULING

Justice Anthony Kamanga, SC, JA

1. Introduction

1.1 This matter has had a troubling history, and first came before me on 20th April, 2016. On that occasion the Applicant had filed an application for leave to appeal, pursuant to section 21 of the Supreme Court of Appeal Act as read with O. III r. 3 of the Supreme Court of Appeal Rules, in relation to proceedings in Commercial Case No. 182 of 2013 in the High Court – Commercial Division - in Blantyre. At the time I noted and indicated, among other things, that the Applicant's application was at variance with the relief sought by the Applicant in the affidavit filed in support of the application; that whereas the application was for leave to appeal against a decision of the court below, the prayer in the Applicant's affidavit sought a stay of the proceedings in the court below pending the hearing of an appeal. I also noted and indicated that it was not clear from the documents that had been filed whether, in terms of O. I r. 18 of the Supreme Court of Appeal Rules, leave to appeal had been sought from, but denied by, the court below. I, accordingly, refused to entertain the application.

1.2 When the Applicant's application again came before me on 27th April, 2016, the hearing of the application could not proceed principally because Counsel for the Applicant who appeared before me on that day had not had sufficient time to prepare , and requested for an adjournment to enable him to prepare, and also to consider and reply to an affidavit in opposition to the Applicant's application which had been filed on behalf of the Respondent. The matter was, accordingly, adjourned to 3rd May, 2016.

1.3 After the hearing of the Applicant's application on 3rd May, 2016, I, among other things, ordered that, in accordance with O. I r 18 of the Supreme Court of Appeal Rules, the Applicant should first seek leave to appeal from the court below, and that if, and only if, the court below refuses to grant the Applicant leave to appeal, may the Applicant apply for leave to appeal in this Court.

1.4 On 11th May, 2016, the Applicant filed the present *inter partes* motion for an application for leave to appeal, and stay of the proceedings in the court below, pending the hearing and determination of an appeal. Apparently, the court below, on 6th May, 2016, refused to grant the Applicant's application for leave to appeal; the court below apparently did not make a "formal order" in that regard, but indicated that "a formal order will be circulated" later. The Applicant's application for a stay of the proceedings in the court below, pending the hearing and determination of an appeal was apparently also refused on 6th May, 2016, by the court below.

1.5 The Applicant's application for leave to appeal, and stay of the proceedings in the court below, pending the hearing and determination of an appeal against the decision of the court below, is premised on several grounds of appeal set out in the notice of intention to appeal, exhibit BKM 12, filed by the Applicant on 24th March, 2016. The notice of intention to appeal was filed in advance of obtaining leave to appeal as is permitted by the proviso to O. III r 3 (2) of the Supreme Court of Appeal Rules, and the grounds of appeal set out therein are as follows-

"3. GROUNDS OF APPEAL

3.1 *The learned Judge erred in law and in fact in refusing to hear the Appellant's application to strike off the defence for non-compliance and directing that [the] preliminary notice motion will be dealt with in the course of the trial which holding defeats the purpose of the application, the interests of the parties and the administration of justice.*

3.2 *The learned Judge erred in law by dispensing with mandatory mediation which decision was contrary to the initial directions dated 28th November, 2013 and to the parties agreed compromise to submit to mediation in lieu of pursuing an appeal and directed by the order of stay of the Supreme Court of Appeal of 1st October, 2015 and further order dated 10th March, 2016.*

3.3 *The learned Judge was wrong in principle to cling on to the case which ought properly to have proceeded through mandatory mediation and thereafter passed on to another Judge for trial and final disposal.*

3.4 *The learned Judge deliberately misdirected himself in failing to assign a date of hearing to the Appellant's summons to strike off the defence and doing nothing about it, notwithstanding that the summons had duly been issued by the court on 10th March, 2016.*

3.5 *The learned Judge erred in directing the matter to proceed to trial without hearing the Appellant's preliminary application thereby implicitly dismissing the said application without hearing the parties on it.*

4. RELIEFS SOUGHT FROM THE COURT

4.1 *An order reversing the lower Court's decision in its totality.*

4.2 *An order directing that [the] court do hear the preliminary application of the Appellant.*

4.3 *An order that the parties' respective position as contained in their consent order of 16th December, 2015 be respected, and that the matter should go through mediation and proceed to trial only if mediation fails... ”.*

2. Background

2.1 The genesis of the Applicant's present application for leave to appeal, and stay of proceedings in the court below dates back to a similar application, sought and granted, in the same proceedings in the court below, on 1st October, 2015 by Justice Mwaungulu, JA.

2.2 On 1st October, 2015, Justice Mwaungulu, JA, granted an application by the Applicant for leave to appeal, and stay of the proceedings in the court below, pending the hearing and determination of an appeal of the Applicant in relation to a decision of the court below to dispense with mediation and proceed to trial in proceedings before the court below. Justice Mwaungulu JA at the time indicated that that he would give the reasons for his decision later. In an elaborate formal order delivered on 10th March, 2016, Justice Mwaungulu, JA, among other things, observed that-

“.....the lower court's decision to proceed with the hearing obfuscates mediation and now doubt, on appeal, matters as discussed in this order come for consideration. Without predicating where the hammer might fall, continuing the proceedings in the face of this appeal is not a proper thing to do. There is no guarantee that this case, passing through the different stages, would be held immediately and be disposed of in a short time. Even if that was the case mediation might actually provide the solution to a quick and speedy trial even after determination by this Court. I can only order that, in view of this stay, the appeal may be expedited.”.

2.3 On 15th December, 2015, **before** Justice Mwaungulu, JA, delivered his formal order, the Applicant filed in the Supreme Court of Appeal “a motion for directions for an application for mediation”. The gist of that application was that, for the sake of facilitating progress in the resolution of the proceedings before the court below, the parties preferred to proceed with mediation. That application was heard on 18th December, 2015 by Justice Dr Ansah, JA. The court record of the proceedings on that day indicate as follows-

*“**Makwinja:** I am appearing on behalf of applt holding a brief for Zolomphi & Co. This is an application for directions, there is an affidavit sworn by Mr Bazuka. The parties have consented to a consent order being drawn up as exhibited in the affidavit of Mr Mhango Exh. BMK5. Basically the parties have agreed that the matter should go back to the commercial court for mediation. The gist is that the appeal which is before the court is not proceeded with to give room for mediation. The parties have agreed that mandatory mediation be done. If the*

court gives directions, it is the prayer of the applt that the time limits should start running in January, 2016.

Nyanda: *I am for the Respt. We have no objection. We feel if the matter proceeds in the suggested manner, it will be disposed of quickly. That is all.*

Court: *This is the applt's appeal. The court below terminated negotiations. The Judge had given a date for trial; that is when the applt lodged this appeal and stayed proceedings in the High Court. So in essence the remedy which the applt is seeking is that the matter should proceed to mediation before trial. While we do not see anything wrong with the Judge's dispensing with mediation we hope and believe the consent matter will be able to dispose the matter quickly rather than contesting the appeal on an interlocutory matter.*

Makwinja: *In essence we are withdrawing the appeal. As you said we have drawn up the consent order which we would like the court to endorse.*

Court: *I have heard both Counsel on the application. The prayer is granted. I order that the matter been taken back to the High Court for mediation as per consent order of the parties and directions therein."*

2.4 The Consent Order dated 16th December, 2015 duly signed on behalf of the parties and endorsed by Justice Dr Ansah, JA, was in the following terms-

*"...CONSENT ORDER TO SETTLE APPEAL FOR THE SAKE OF PROGRESS
IN THE CASE BEFORE THE COMMERCIAL COURT*

BY CONSENT of the parties it is hereby agreed to proceed with mandatory mediation process in lieu of proceeding with the above mentioned Appeal.

IT IS FURTHER AGREED that the condition[s] listed shall be incorporated and form part of the consent order.

***Condition 1.** That further amendment to the statement of claim be permitted with leave for the parties to plead back within 7 days and 3 days respectively for parties to serve their further amended pleadings, if any.*

***Condition 2.** Within 4 days from the time limited by condition (1) above, the parties shall exchange statements of factual and legal issues indicating their interest thereon.*

***Condition 3.** Within 3 days from the time limited by condition (2) above, parties shall isolate issues raised in amended pleadings in Commercial Case No. 182 of 2013 and agree on issues to go for trial, if mediation were to fail.*

***Condition 4.** Within 5 days from the time limited under condition (3) above, fresh scheduling Conference shall be held in accordance with the High Court (Commercial Division) Rules, 2007.*

***Condition 5.** Costs for this consent order in the cause. ..".*

3. Applicant's application for leave to appeal and stay proceedings in the court below, pending the hearing and determination of an appeal

3.1 As indicated in paragraph 1.4, the Applicant on 11th May, 2016 filed the present *inter partes* application for leave to appeal and stay of proceedings in the court below, pending the hearing and determination of an appeal against the certain decisions of the court below, after the court below has refused to grant the Applicant's application. The hearing of the Applicant's application was set down for 17th May, 2016, but had to be moved to 18th May, 2016, principally due to late filing of documents.

3.2 During the hearing of the Applicant's application on 18th May, 2016, Counsel for the Applicant adopted the affidavit of the Applicant as well as the skeleton arguments which had been filed in support of the application. In addition, Counsel for the Applicant made submissions in relation to the application for leave to appeal which may conveniently be summarized as follows-

3.2.1 That the Applicant's previous application to this Court for leave to appeal and application for a stay of the proceedings in the court below, pending the hearing and determination of an appeal, had been refused by this Court because no such application had been made to the court below; and that on 6th May, 2016 the court below had refused to grant both the Applicant's application for leave to appeal and a stay of the proceedings in court below, pending the hearing and determination of an appeal.

3.2.3 That, in accordance with the Consent Order of 16th December, 2015, the parties exchanged amended pleadings; and that the Respondent's amended defence was served on the Applicant on 8th January, 2016.

3.3.3 That despite the Consent Order of 16th December, 2015, the court below had ignored the agreement of the parties to proceed with mediation, and on 29th January, 2016 set down the matter for hearing on 14th March, 2016.

3.3.4. That on 8th February, 2016, the Applicant reminded the Respondent about the mediation and requested the Respondent to comply with the mediation requirements by filing and serving the necessary documents; that the Respondent ignored the Applicant's request and instead, on 19th February, 2016, applied for summary judgment to dispose of the proceedings on points of law, and that the Respondent's application was given a date of return of 14th March, 2016 – the same date that the court below had set for trial.

3.3.5. That on 1st March, 2016, the Applicant filed summons for an application to strike out the Respondent's defence and enter judgment on account of the Respondent's failure to comply with mediation requirements; that the Applicant's summons were issued by the Registrar but, unlike the Respondent's application of 19th February, 2016, to dispose of the proceedings on points of law, the Applicant's summons to strike out the Respondent's defence and enter judgment was not given a return date.

3.3.6 That on 10th May, 2016, the Applicant filed a notice of "preliminary application" in line with the summons filed on 1st March, 2016, to strike out the Respondent's defence and enter judgment, but on 14th March, 2016, the court below refused to deal with the matter and instead directed that matter would be dealt with in the course of the trial.

3.3.7 That on 14th March, 2016, the court below issued directions for trial – scheduling a pre-trial conference for 18th April (subsequently moved to 6th May, 2016) and trial on 17th and 18th May, 2016.

3.3.8 That the Applicant thus seeks leave to appeal against the directions of the court below which, it is claimed, effectively dispensed with mediation, contrary to the terms of the Consent Order dated 16th December, 2015 which was endorsed by the Supreme Court of Appeal by Justice Dr Ansah, JA.

3.4 With respect to the application for a stay of the proceedings in the court below, pending the hearing and determination of an appeal, Counsel for the Applicant argued and submitted that any favourable order that may ensue upon the hearing and determination of an appeal (as an effective remedy) will be of no practical consequence or value, unless the proceedings in the court below are stayed, pending the hearing and determination of the appeal; and Counsel for the Applicant specifically submitted that it would be impossible to revert to mediation after the trial in the court below has concluded; that the parties would have been denied the benefit of mediation, which has a real potential to resolve the matter with considerable savings on resources in terms of expense, cost and time to both parties, as well as the justice system; and further that the parties would also have lost the opportunity to foster a continued business relationship by settling the matter amicably and by compromise through mediation.

3.4.1 Counsel for the Applicant also argued and submitted that failure to stay the proceedings in the lower court would “entail a denial of the right to an effective remedy against the unfair manner in which the court below is proceeding by dispensing with mandatory mediation as willingly agreed between the parties and endorsed by a single Justice of Appeal of this Court; and emphasized that the right to an effective remedy was guaranteed under section 41 (3) of the Constitution.

4. Respondent’s response to Applicant’s application for leave to appeal and stay of proceedings in the court below, pending the hearing and determination of an appeal

4.1. The Respondent did not file any specific response to the Applicant’s application for leave to appeal and stay of proceedings in the court below. Instead, in relation to the present application of the Applicant, the Respondent, on 13th May, 2016, gave notice of intention to rely on documents which were earlier filed in a similar application by the Applicant, namely, an affidavit in opposition sworn by Mercy Mulele and Heads of Argument in opposition to the application for leave to appeal, and case authorities filed on 27th April, 2016, and during the hearing of this application Counsel for Respondent relied on those documents.

4.2 The Respondent’s relevant arguments as may be discerned from the filed affidavit in opposition and Heads of Argument in opposition to the application for leave to appeal and stay of the proceedings in the court below may conveniently be summarized as follows-

4.2.1 That under O. 18 of the High Court (Commercial Division) Rules (Cap. 3:02 *sub. leg. p. 146*) no appeal lies against a decision of a Judge on an interlocutory matter, and that the Applicant’s notice of intention to appeal does not disclose any appeal known to the law.

4.2.2 That the decision by the court below not to hear the Applicant’s application to strike out the Respondent’s defence gives the Respondent an unconditional right to defend the action at trial and, under section 21 (b) of the Supreme Court of Appeal Act, no appeal can lie against such decision; and further that the Applicant’s notice of intention to appeal does not disclose an appeal that can pass the test of section 21 (b) of the Supreme Court of Appeal Act.

4.2.3 That the circumstances summarized in the affidavit of Mercy Mulele show that the Applicant is not desirous of getting the conclusion of the matter and obtaining a determination

of the parties' final rights; and that the Applicant is acting contrary to the spirit of O. I rr. 2 and 3 of the High Court (Commercial Division) Rules.

4.2.4 That the Consent Order to settle the appeal agreed on 16th December, 2015 was no longer applicable because the Applicant on 14th March, 2016, accepted that the matter should go for trial.

4.3 During the hearing of the Applicant's application on 18th May, 2016, Counsel for the Respondent made the following additional submissions in opposition to the Applicant's application.

4.3.1 That for purposes of purposes of determination the Applicant's application herein, it is important to have regard to the facts of this matter, particularly the proceedings of the court below on 14th March, 2016, and Counsel for the Respondent specifically referred this Court to paragraphs 11 and 13 of the affidavit of Mercy Mulele which, it was submitted, reflects the fact that on that day the parties had agreed to proceed with the trial.

4.3.2 That on 14th March, 2016, there were three issues before the court below, namely, whether to proceed with trial; an application to strike out the Respondent's defence; and an application to dispose the case on points of law; and, consequently, the Judge in the court below did not make any decision dispensing with mediation.

5. Whether the Applicant's application for leave to appeal and stay proceedings in the court below, pending the hearing and determination of an appeal, should be granted

5.1 Before I consider the merits of the Applicant's application for leave to appeal, and stay of the proceedings in the court below, pending the hearing and determination of an appeal, I wish to take the opportunity to make the following general observations on this matter.

5.1.1 One of the principal challenges posed by the Applicant's application for leave to appeal and stay proceedings, pending the hearing and determination of appeal, is the fact that, at the time of the hearing of this application, the court below had not issued any formal order refusing to grant the Applicant leave to appeal as well as a stay of the of proceedings in the court below, pending the hearing and determination of an appeal; and, as I understand it, no formal order has been issued to date. I also note with much regret that the court below did not give reasons for refusing to grant the Applicant's application for leave to appeal, and stay of the proceedings, pending the hearing and determination of the appeal. Consequently, it is difficult to appreciate the why the court below refused to grant the Applicant's application.

5.1.2 The importance of the requirement for a court to give reasons for a decision or a judgment cannot, in my considered view, be over emphasized; that is one of the ways of holding a judicial officer accountable. Indeed, as was observed in *Battista v Bassano* [2007] EWCA Civ 370 [28]

"... The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6 of the Human Rights Convention. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost."

5.1.3 The reasons for a decision or judgment of a court need not be exhaustive, but must be satisfactory. Thus, while it is not necessary to deal with every point that may have been considered in arriving at the decision, the basis of the decision must be clear. This is particularly

important because it facilitates the smooth operation of our appellate process. Again, as was observed in *Battista v Bassano* [2007] EWCA Civ 370 [57]

“.... If the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence should be identified and explained. But the issues the resolution of which were vital to the judge’s conclusion should be identified and the manner in which he resolved them should be identified. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision.....”.

5.1.4 I have had to opportunity to browse through the case file of the court below for the purposes of better appreciating this matter, in so far as it relates the application for leave to appeal, and stay proceedings pending the hearing and determination of appeal, and note that there is on the case file considerable information relating to the issue of mediation of this matter. It is also clear from the case file that the parties were not *ad idem* on the question of mediation, and the court below seems to have played a rather passive or indecisive role in the process of determining whether, in view of the position taken by the parties after the signing of the Consent Order of 16th December, 2015, the matter should proceed with mediation.

5.1.5 As stated earlier on the wrangle between the parties over mediation in the case before the court below dates back to October, 2015 when the Applicant sought the intervention of Supreme Court of Appeal. It seems to me that when the matter was referred back to the lower court after the Consent Order of 16th December, 2016, and it became obvious that the parties would not see the mediation through, no action or decision was taken by parties or the court to formally terminate the mediation. Whereas the Applicant insisted on mediation, the Respondent resisted mediation, but took no action to initiate the termination of the mediation; and similarly, the court below, without considering whether, in terms of rule 6 (5) or rule 14 (1) of the High Court (Commercial Division) (Mandatory Mediation) Rules, (Cap. 3:02 *sub. leg. p. 203*) the mediation should formally be terminated, went ahead to set down the matter for trial.

5.1.6 Nevertheless, the following record of the proceedings in court below on 14th March, 2016, is particularly telling of the position of the parties and, indeed, the position of the court below, as of that date-

“9.30 am

Chibwana: *Since court has said we are here for trial, I would ask for an adjt so that we can organize ourselves. Say 40 mins or lets meet at 10 am.*

Court: *Ok. We meet at 10 am*

10.04 am

Chibwana: *I have instructions that I should appeal against decision refusing to strike off defence made this morning and that it be put on record that this matter was stayed by SCA and proceeding to trial would flout the Order of Stay- and that there is a consent order that the matter should go for mediation. Also there is plfs application for further directions.... Issues of compromise are of the parties not the court – the parties agreed to go for mediation – so the order to proceed to trial goes to the root of the case. Applicant’s application filed on*

01/03/16 was not given a date whilst defs was given a date. This goes to the core of justice so it is not interlocutory.

Mpaka: My u/standing of the consent order is that the matter should go to the High Ct ie lifting the stay granted by Mwaungulu JA. Order 13 HCCD Rules-mediation is [within] 14 days of close of pleadings- its long gone.

We cannot really say that we did not w/draw the appeal by signing the consent order- what appeal will they proceed [with]. Further delay of the matter will not serve any purpose – the parties are losing out. O.1/3 HCCD Rules court is entitled to proceed [with] trial. At this day we cannot be talking of the decision of Mwaungulu JA – the language of the Consent Order is clear.- appeal taking too long and that we should proceed with the matter.

May be what the plf is asking for is more time to prepare for the trial. My interpretation of the consent order is that the appeal was settled and that there is no appeal outstanding in the SCA.

Chibwana: My u/standing is that the Consent Order was signed in lieu of proceeding [with] the appeal. Now that mediation will not take place then plf is entitled to pursue the appeal.

We would like to be given a few minutes so that the bar can consult.

Court: Ok. Lets reconvene at 11.05

Case resumed at 11.08 am

Chibwana: Wish to report that we have not yet concluded our discussions. There appears to be good progress. Would appreciate more time.

Mpaka: We need to identify the issues [with] the help of the Ct – say we go into a Sch. Conference.

Chibwana: Plf needs time to consider the pleadings and come up [with] issues rather than doing it haphazardly. We think the matter could proceed to trial after that process is done.

This means that the parties have agreed that the issues I raised earlier about the Ct's lack of jurisdiction to proceed [with] the matter to trial are w/drawn. The parties want to proceed to trial after identifying the issues.

Court: Ok, in that case then we will proceed to trial as suggested by the parties. I give the parties the liberty to agree on the issues they want to take to trial and file a consent order to that effect. If they fail then the trial will proceed on the pleadings. Trial will proceed on Monday 16/05/16 and 17/05/16 at 9 am. Pre-trial conference on 28/04/16 at 8.30 am. Leave to file and serve a supplementary witness for the plf and another witness s/ment is granted. The s/ments to be filed and served [within] 14 days from today. Likewise leave is given to def to file and serve sup w/s/mnts of Rose Kanyandula and S. Nkosi- to be filed and serve [within] 14 days from today Costs in the cause.

Leave is granted to the plf to call an expert on banking... ..

Court adjourned at 11.53 am ”.

5.2 I have carefully considered the arguments and submissions on behalf of both parties, in so far as they relate to the Applicant’s application for leave to appeal, and stay of the proceedings in the court below, pending the hearing and determination of the intended appeal. I bear in mind that the grant or refusal of leave to appeal, and stay of the proceedings in court below, pending the hearing and determination of the appeal is at the discretion of the Court. I have also particularly carefully considered the grounds of appeal which have been filed in advance by the Applicant for the purpose only of satisfying myself that the issues raised for or against the granting of leave to appeal and a stay of the proceedings in the court below justify the exercise of my discretion one way or another, and bearing in mind that my duty at this stage is not to determine the merits of the appeal.

5.2.1 With respect to the Applicant’s complaint set out in paragraph 3.1 of the grounds of appeal, namely, that *“the learned Judge erred in law and in fact in refusing to hear the Appellant’s application to strike off the defence for non-compliance and directing that the preliminary notice motion will be dealt with in the course of the trial which holding defeats the purpose of the application, the interests of the parties and the administration of justice”*, I am of the firm view that the decision by the Judge in the court below in that regard is an interlocutory matter in respect of which O. 18 of the High Court (Commercial Division) Rules applies and no appeal may lie. Consequently, it is doubtful to me whether that is a strong ground of appeal.

5.2.2 With respect to the Applicant’s complaint set out in paragraph 3.2 of the grounds of appeal, namely, that *“the learned Judge erred in law by dispensing with mandatory mediation which decision was contrary to the initial directions dated 28th November, 2013 and to the parties agreed compromise to submit to mediation in lieu of pursuing an appeal and directed by the order of stay of the Supreme Court of Appeal of 1st October, 2015 and further order dated 10th March, 2016”*, I must state I do not understand the reference to “initial directions dated 28th November, 2013”; these directions are not among the documents submitted or referred to by the Applicant in the application.

5.2.2.1 Nevertheless, the gist of the Applicant’s argument and submission during the hearing of this application was that the Judge in the court below effectively dispensed with mediation contrary to the Consent Order dated 16th December, 2015 which was endorsed by the Supreme Court of Appeal by Justice Ansah, JA, and the Applicant faulted the Judge of the court below in that regard. As indicated in paragraph 5.1.6 above, I have had the opportunity to browse the case file of the court below and, in relation to the issue of mediation, it is abundantly clear from the record of the proceedings of 14th March, 2016, that Counsel for Applicant consented to the matter going for trial. It seems to me that the Applicant has conveniently omitted to refer to this fact in his affidavit filed in support of his application. After the resumption of the proceedings at 11.08 am on 14th March, 2016 Counsel for the Applicant, Counsel for the Respondent and the Court are recorded as having stated as follows-

“Case resumed at 11.08 am

Chibwana: *Wish to report that we have not yet concluded our discussions. There appears to be good progress. Would appreciate more time.*

Mpaka: *We need to identify the issues [with] the help of the Ct – say we go into a Sch. Conference.*

rather than doing it haphazardly. We think the matter could proceed to trial after that process is done.

This means that the parties have agreed that the issues I raised earlier about the Ct's lack of jurisdiction to proceed [with] the matter to trial are w/drawn. The parties want to proceed to trial after identifying the issues.

Court: Ok, in that case then we will proceed to trial as suggested by the parties. I give the parties the liberty to agree on the issues they want to take to trial and file a consent order to that effect. If they fail then the trial will proceed on the pleadings. Trial will proceed on Monday 16/05/16 and 17/05/16 at 9 am. Pre-trial conference on 28/04/16 at 8.30 am. Leave to file and serve a supplementary witness for the plf and another witness s/ment is granted. The s/ments to be filed and served [within] 14 days from today. Likewise leave is given to def to file and serve sup w/s/mnts of Rose Kanyandula and S. Nkosi- to be filed and serve [within] 14 days from today Costs in the cause.

Leave is granted to the plf to call an expert on banking.....”.

5.2.2.2 It is clear from the case record referred to above that on 14th March, 2016, both parties agreed that the case in the court below should go for trial, and that the court below set down the case for trial with the agreement of, or at the initiative of the parties. Furthermore, after the agreement of the parties that the case should be proceed to trial, the court gave the parties the liberty to agree on the issues they want to take to trial and file a consent order to that effect, and indicated that if the parties failed to agree on the issues they wish to take for trial then the trial will proceed on the pleadings. The court below also set down the case for trial on Monday 16/05/16 and 17/05/16 at 9 am; directed that the pre-trial conference shall be held on 28/04/16 at 8.30 am, and granted leave to the Applicant to file and serve a supplementary witness and another witness statement; and further that the statements should be filed and served [within] 14 days. Leave was also granted to the Applicant to call an expert on banking. The court below likewise granted leave to Respondent to file and serve within 14 days supplementary witness statements of Rose Kanyandula and S. Nkosi.

5.2.2.3 It is certainly not proper, as in this case, for any litigant to agree to forgo mediation and proceed to trial, and then turn round and challenge the very process to which he or she has agreed to submit. Consequently, I am of the firm view that the intended appeal by the Applicant in relation to the dispensing with mediation and proceeding to trial is not genuine and, if allowed, would amount to an abuse of the legal process.

5.2.3 With respect to the Applicant's complaint set out in paragraph 3.3 of the grounds of appeal, namely, that “*the learned Judge was wrong in principle to cling on to the case which ought properly to have proceeded through mandatory mediation and thereafter passed on to another Judge for trial and final disposal*”, I wish to observe that this complaint is perhaps difficult to appreciate where as in the present case the Applicant agreed to forego mediation and proceed to trial

5.2.4 With respect to the Applicant's complaint set out paragraph in 3.4 of the grounds of appeal, namely, that “*the learned Judge deliberately misdirected himself in failing to assign a date of hearing to the Appellant's summons to strike of the defence and doing nothing about it, notwithstanding that the summons had duly been issued by the court on 1st March, 2016*”, and the Applicant's complaint set out in paragraph 3.5 of the grounds of appeal, namely, that

“the learned Judge erred in directing the matter to proceed to trial without hearing the Appellant’s preliminary application thereby implicitly dismissing the said application without hearing the parties on it”, I wish to observe that these complaints are closely connected with the Applicant’s complaint set out in paragraph 3.1 of the grounds of appeal relating Applicant’s application to strike off the defence for non-compliance and the direction that the preliminary notice motion, which according to the Applicant, the Judge in the court below indicated will be dealt with in the course of the trial. I am of the firm view that the decisions by the Judge in the court below in that regard are interlocutory matters in respect of which O. 18 of the High Court (Commercial Division) Rules applies, against which no appeal may be taken. Consequently, it is doubtful to me whether those complaints constitute strong grounds of appeal.

5.3 For the reasons stated hereinbefore, I am not satisfied that that this is a proper case in which I should exercise my discretion to grant the Applicant’s application for leave to appeal against the several decisions made by the Judge in the court below. I do not find it necessary to specifically deal with the Applicant’s arguments and submissions in relation to the stay of the proceedings in the court below; those arguments and submissions were conditional on leave to appeal being granted, and would have been considered if I were satisfied that this was a proper case for me to grant the Applicant’s application for leave to appeal.

6. Conclusion

6.1 I, accordingly, dismiss the Applicant’s application for leave to appeal and stay of the proceedings in the court below, pending the hearing and determination of the appeal.

6.2 The Applicant is condemned with the costs of this application.

Pronounced in Chambers this 26th day of July, 2016 at Blantyre.


Justice Anthony Kamanga, SC

JUSTICE OF APPEAL