IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA Civil Appeal No.09 of 2018

(Being High Court of Malawi, Commercial Division, Lilongwe Registry, Commercial Cause No. 247 of 2017)

Between:

Parliamentary Service Commission.....Appellant

And

SJR Catering Services.....Respondent

Coram:Honourable Justice A.C. Chipeta SC, JA
Soko, of Counsel for Applicant/Prospective Appellant
Kachere, of Counsel for the Respondent
C. Masiyano, Court Clerk

RULING

The appellant, Parliamentary Service Commission, had a summary judgment entered against it on 9th October, 2017 in the High Court Commercial Division in Lilongwe. That was in respect of a breach of contract between it and the respondent, SJR Catering Services. On 6th November, 2017 the appellant approached the said Court with both a notice of appeal against the summary judgment and a motion to stay that judgment as well as to have the leave of the Court to appeal against it. The fact that the appellant so filed its notice of appeal early, even though done within the permissive terms of the proviso to Order III rule 3(2) of the Supreme Court of Appeal Rules, did not mean that it had thereby effectively lodged an appeal. If anything, it had by that act merely filed a tentative appeal. The notice of appeal in question, in the absence of leave to appeal, must

have been filed in anticipation of the intending appellant at some point getting the leave of the Court to appeal through the motion for leave to appeal it had concurrently filed with the said notice. As fate had it, however, the appellant's said motion for leave to appeal was not resolved quickly. Three full months elapsed before it was heard, and on the day it so got heard, i.e on 13th February, 2018, it was dismissed. All that time, therefore, and even after the dismissal, there was no valid appeal lodged, despite the appellant's notice of appeal having been throughout on record since 6th November, 2017.

On 27th March, 2018, however, the motion for leave to appeal I had attended to by virtue of Section 7 proviso (b) of the Supreme Court of Appeal Act, as well as by virtue of Order 1 rule 18 of the Supreme Court of Appeal Rules, yielded the appellant the desired leave. It is thus only since my pronouncement of that ruling that the appellant has a formal and valid appeal to the Supreme Court of Appeal on record in this matter. Effectively, it is this grant of leave to appeal that has brought life to the 6th November, 2017 notice of appeal that was pre-filed in the matter, as it is the one that has enabled the said notice to change status from just being a tentative notice of appeal to being a real notice of appeal.

It so happened that on 19th February, 2018, when the appellant first brought the motion for leave to appeal to this Court, it also brought along two other associated motions. One was a motion to amend the notice of appeal and the defence that was filed and served in the High Court, and the other motion was for orders of interim relief. I readily set down the motion for leave to appeal because in so far as it had been dismissed by a Judge in the Court below, in terms of paragraph (c) of the second proviso to Section 21 of the Supreme Court of Appeal Act, as read with Order III rule 3(1) and Order I rule 18 of the Supreme Court of Appeal Rules, it was very clear to me that it was rightfully next due to be attended to by this Court, matters of leave to appeal being subject to the shared jurisdiction between the High Court and the Supreme Court of Appeal.

However, on that same occasion I hesitated to set down the other two motions. This is because it was not as obvious that they had qualified, or that they had otherwise matured enough, for the attention of the Supreme Court of Appeal. However, not wanting to shut these motions out arbitrarily and abruptly, in case I be the one that was mistaken about their qualification for being brought to this Court, I decided to stop at declining to give them a date of hearing. I otherwise

left the door open for the applying party, in case it be of the view that it could justify why it had so filed these two motions in the Supreme Court of Appeal, to insist that I still set them down for a hearing, at which point it would seize the opportunity to convince me that the motions in question were rightly before this forum.

Indeed, as it turned out, after a good number of days I received a request from the applying party to so set these two motions down, and I accordingly set them down for hearing on 16th March, 2018. By then the motion for leave to appeal, which I had earlier on already set down, was due to be heard on 5th March, 2018. On request of the same party, made on the same day as I was setting down the remaining two motions, I postponed the hearing of the motion for leave to appeal from the date I had initially given to it to the same 16th day of March, 2018. When that date came, however, it once again became impossible for me to conduct a chain hearing of all the three applications that were simultaneously due for hearing that day. Logic made it crucial that I first hear and determine the motion for leave to appeal before I could touch either of the other two motions. This was because without leave to appeal there was not going to be any appeal in place. It followed then that in the absence of an appeal I could not competently handle a motion to, *inter alia,* amend a notice of appeal, or to grant interim relief pending what would be a *non-existent* appeal. I thus only heard the motion for leave to appeal on that day. As I after that hearing decided to adjourn the motion to 27th March, 2018 for a ruling, the remaining two motions had to further wait in limbo. Their hearing, if any was going to take place, needed to wait until I made known the fate of the appellant's motion for leave to appeal.

I delivered the pended ruling on 27th March, 2018. Through it, I granted the applying party leave to appeal. It is only then that hope arose that the motions for the amendments and for the interim reliefs could have a chance to be called for hearing. However, since as early as 19th February, 2018 I had raised preliminary concerns against the fitness of these very motions as business for the Supreme Court of Appeal, it was imperative that the parties should first address me on those concerns before I could decide whether I should indeed proceed into a substantive hearing of the motions.

Vis-à-vis the applicant's filing of the motion regarding amendments in this Court, my concerns were ignited by the fact that the applicant had only attached its

proposed amendments to the motion filed, and nothing more. There was no explanatory supporting affidavit/sworn statement filed along with the said motion and proposed amendments. There was, therefore, no visible justification proffered to my Court to explain why that application had been rushed to this Court, especially when by the time the motion was filed the applicant was still struggling with the issues of securing leave to appeal in the Courts.

My view was that between the filing of a notice of appeal in the Court below, as distinguished from the filing of a tentative notice of appeal as had been done in this case, and the time at which this Court gets seized of both the appeal and of the applications that arise in it, is a clear demarcation as laid out in the rules. I thus felt that in a case where the applicant had not yet even secured the Court's leave to appeal, despite its filing of a notice of appeal in advance, it was too early for that party to lodge a motion for amendments in the Supreme Court of Appeal, with which it had no business except a mere desire to appeal to it. To make my point clear, I cited a few provisions on which I would need to be addressed in relation to this concern in the event of the applicant believing that it was entitled to an audience before this Court.

Further, since in the absence of an affidavit/sworn statement in support of the motion the applicant had left me completely in the dark as to why it had brought its motion for amendments to this Court, I, while groping in that darkness, also wondered whether the applicant might probably have assumed that its said motion was a species of applications on which this Court and the Court below exercise concurrent jurisdiction. In the event, I asked myself whether the applicant might then have brought the motion in question to this Court believing that it was doing so in the fashion it had done in respect of its motion for leave to appeal, i.e as a motion that had first been taken to the Court below, only to face dismissal, and be next due to be heard by this Court. It is in that spirit, therefore, that I lamented that in the documents the applicant had filed the motion with, there was nothing to show that this was the case.

My view, therefore, was that if the appellant was indeed assuming that this was the case, then at the very least it should have bothered to furnish to the Court material that would have enabled it to come to the conclusion that the motion in question was coming under Order 1 rule 18 of the Supreme Court of Appeal Rules. Thus, in my opting not to set the motion down for hearing, and in instead raising

preliminary concerns about the fitness of the motion for this Court's attention in the event of the applicant insisting that it be heard, the impression I held was that in so coming to this Court with the motion without any explanation at all, either the appellant was taking it too much for granted that its motion would be automatically received and entertained, or that it was just trying its luck without really caring whether the motion would get accepted or rejected by this Court.

Concerning the motion to obtain orders of interim relief, as the order I pronounced on it on 19th February, 2018 made it plain, my worries were basically the same as those I expressed in the case of the motion for amendments. This motion too was filed in this Court at a time when the applicant (as it then was), despite filing a notice of appeal in advance, did not have the required leave of the Court to appeal. Further, while the application was based on a number of rules within the Civil Procedure Rules 1998, the applicant had not done anything to demonstrate to the Court that, before its resort to those English Rules, it had searched local law for legal provisions that would make it competent for that party to bring its said motion to this Court. Under Section 8 proviso (b) of the Supreme Court of Appeal Act, it is no secret that in terms of the practice and procedure of this Court before any party, or before even the Court, can resort to the Civil Procedure Rules 1998, the first port of call is the local law that is embodied in the Supreme Court of Appeal Act and in the Supreme Court of Appeal Rules. Thus, regardless of how elaborate the Civil Procedure Rules 1998 may be, they are and they remain a mere default set of rules that are only to be resorted to in situations of real need. Such need only arises when gaps have been observed in the local law and these rules are in a position to supply such gap. Those rules, as I understand it, are neither meant to substitute local law or alternate with it on equal footing nor are they to compete with such local law for superiority.

Bearing in mind, therefore, that under local law there is a clear demarcation of business between the High Court and the Supreme Court of Appeal from the time a party files a valid notice of appeal to the time, in the course of the preparation of the appeal, when the rules recognize that the Supreme Court of Appeal should get seized of both the appeal and of all the interlocutory applications that arise in it, I wondered whether in a matter where a party had as yet not even secured the mandate to appeal such party could have had any platform from which to assume and claim that time was ripe for it to immediately engage the Supreme Court of

Appeal with a motion, such as this, for grant of interim reliefs. The interim reliefs intended were after all indicated to be *pending* appeal, and yet there was no appeal in place. I was thus forced to wonder, as at the time of filing the motion, what the interim reliefs the Supreme Court of Appeal was being asked to consider granting were to *pend* for in the event of them being granted. To me, as by then leave to appeal was still being pursued, then logically if I was going to embrace this motion without any questions, it would have meant that I was going to consider the prayer for those interim reliefs *pending* nothing, despite the motion depicting them as being interim reliefs *pending* an appeal.

Likewise in the case of this motion, as I had done in the case of the motion on amendments, and this was again because the applicant (as it then was) had been economic *vis-à-vis* the giving of an explanation as to why it felt the Supreme Court of Appeal was the right forum for its application, I also wondered rather wildly whether the applicant was assuming the existence of concurrent jurisdiction between this Court and the High Court on this issue, and whether that party had thus intended to bring the motion for interim reliefs as a repeat motion after an initial dismissal of the same in the High Court. Thus, the time I decided to hear the motion for leave to appeal, this motion too was very much affected with the above uncertainty as to whether it would at all see the light of day. Being dependent, as it was, on how the motion for leave to appeal would be determined, it meant that if leave was refused it would die along with the unborn appeal. Only, therefore, if leave to appeal was granted could hope begin about prospects coming its way to be called for a hearing. It is thus by a combination of the applicant's advance filing of a notice of appeal in the matter, and my grant of leave to appeal on 27thMarch, 2018, that this motion started belonging to a pending appeal. However, despite this, the need that I be first addressed on the preliminary concerns I had raised against the motion did not vanish. Accordingly, just as in the case of the motion for amendments, and so also in this motion for interim reliefs, my proceeding to a substantive hearing of the said motions had to further await my determination on the preliminary issues that concerned the motions.

Let me at this point, for the avoidance of any doubt, disclose that I do not intend to issue separate rulings for each of the two motions that I am now dealing with. This ruling will cover both these motions on the subject of the preliminary concerns I raised. Let me also seize the opportunity to offer my profound

gratitude to learned Counsel from both sides of these motions. They addressed me at great length and in admirable detail on the questions I posed. They have, I must acknowledge, through their said arguments and through the case authorities they cited, very clearly depicted the very sorry state of our current precedents and jurisprudence on questions of the type that I am now considering in these two motions. There is this far, as learned Counsel have aptly observed and pointed out, a divergence of views from the different Justices of this Court, and also from the different panels of Justices of Appeal forming the full Court, on issues surrounding the kind of preliminary concerns that are in issue here.

The Court is clearly polarized in its decisions on a number of issues, including on questions such as (a) from what point in time should the parties to a pending appeal start bringing their interlocutory applications to the Supreme Court of Appeal, (b) how should the Supreme Court of Appeal be handling matters that fall under the concurrent jurisdiction of the High Court and itself, when a party to a pending appeal brings to it an application which it should, under the rules, have first brought to the High Court, and (c) from what event in a pending appeal should the parties thereto assume the obligation to file skeleton arguments in the said appeal etc. The big concern expressed by learned Counsel on this development being that these divergent views are not only confusing to the lower bench, but that they are also confusing to them as practitioners of the law, since they do not give any uniform and/or reliable guidance to them on these and related matters, a dire plea was made to the Court for an urgent resolution of this undesirable situation.

Now, while I can assure the parties that this plea did not fall on deaf ears, I must also be frank enough to immediately observe that the reality on the ground is that the problem that has been created by the existing conflicting Supreme Court of Appeal decisions on all these issues is bigger than a single Justice of Appeal can resolve in a ruling like the one I am delivering today. Candidly speaking, these are not issues that can be resolved in a style akin to voting, where you say after this ruling there are now so many Justices of Appeal falling in one camp of determinations while there are only such smaller number of other Judges falling in the opposing camp of determinations, after which you then hand over the trophy to the camp with the greater number of Justices of Appeal. The situation we have is, as I see it, quite a complex one, and it needs to be approached with sober minds and a real commitment to achieve justice.

Actually, the existence of these conflicting decisions is a sign that the Court must yet settle the law. The Justices of Appeal that have made determinations in this area need not be considered as having taken rigid and permanent stances on these matters as they try to close in towards a final resolution of the problem they have found themselves in. The fact, therefore, that a certain Justice or a certain panel of Justices has this day decided one way on such issues, need not mean that if on a different occasion he/they meet with arguments that persuade him/them against his/their earlier stance in a different matter raising similar issues then he/they should never change his/their mind(s). Thus, the way I see it, the situation remains fluid. I do not think we are yet at a stage where we can say the opposing camps have permanent members. Much as they are trying to decide their cases fairly and with finality, with inconsistencies continuing, it means they are all still exploring about what the Law is really saying on these issues. It is only when we finally resolve the uncertainties created by the conflicting precedents and when we pronounce a more uniform and authoritative interpretation of the concerned provisions, that we shall be able to say we are home.

In the scenario we find ourselves in, as already observed by some of my brethren in some of the precedents, we are coming from a background where in the various scenarios that were previously presented to the Court in different cases, these types of questions have been answered in opposing ways (a) by different singe Justices of Appeal in interlocutory applications, (b) by different majority decisions in full Court panels of three Justices of Appeal in the course of hearing and determining appeals or of revisiting the decisions of single Justices of Appeal under Section 7 proviso (b) of the Supreme Court of Appeal Act, and (c) by unanimous decisions in full Court panels of three Justices of Appeal in the hearing of such appeals or reviews. Unpalatable though the resultant situation is, it strikes me from a reading of these varied decisions that the Court cannot be accused of creating this unfortunate scenario deliberately. From the effort the Honourable Justices have put into the decisions they have pronounced, I am convinced that at the core of the conflicting conclusions they have so far reached on some of these matters, whether as single Justices of Appeal or as panels constituting the full Court, is a genuine desire by all of them to achieve a correct interpretation, and a correct application of the law that is in place.

Since, however, to err is human, we cannot rule out that some of them, or that even all of them, may to some degree have erred in their decisions. The fact, therefore, that from all the different compositions of the Court inconsistencies have persistently come up, and that this far no dominant and overarching precedent has emerged yet to subdue the conflicting decisions that are now abound, is a clear sign that the difficulties the Courts have faced in this regard are not as simple as a bird's eye view might reveal. The parties in the two motions before me should, therefore, not bank on the elusive miracle that somehow this ruling, whichever way it goes, will make the problem of conflicting precedents disappear, because this far even three-Judge panels of this Court have failed to bring about such a lasting solution in this area.

Be this as it may, hope for the desired resolution of this sad situation is luckily already here. It has arrived through the medium of Practice Direction No. 1 of 2018, which as from 6th February, 2018 henceforth has declared the constitution of the Supreme Court of Appeal to be the sitting of the Chief Justice and eight other Justices of Appeal. It seems to me, therefore, that until these questions get their chance, whether piecemeal or wholesale, to be exhaustively tested, deliberated upon, and determined by a full panel Court of the Chief Justice and eight other Justices of Appeal when the right kind of case(s) come up, for now we have no choice but to keep oscillating between the conflicting conclusions this Court has so far made available for reference to.

Commenting a little on the existing conflicting precedents that constitute the current reservoir for reference, I am of the mind that for the purposes of determining the fate of the two motions that are now before me, I should temporarily neglect all of them. I have come to this decision because I think it quite possible that either camp of Justices of Appeal falling within the competing schools of thought that the appellant covered in its arguments (me included), might in one way or the other have erred in their various attempts at construing what the available legal instruments are really saying on these issues. It is possible, therefore, that neither camp might be either 100% right or 100% wrong on all the issues it has pronounced on. Doubting, as I do, whether any of these precedents could be 100% correct, in dealing with the motions at hand, I will rather focus on finding the answers I need from the drawing board itself than seeking this guidance from the conflicting precedents, and then having to make a multiple choice as to which one(s)to follow amongst them.

By focusing on the drawing board, I mean that I will go direct to the relevant statute, relevant rules and/or regulations, and/or to relevant Practice Direction(s), as may be applicable to either of the motions before me. My intention in doing so is to proceed with a fresh and separate testing of the doubts I have raised against each of these motions, and to do so against the substantive law and the subsidiary law that I see to be directly applicable to each. Much as I know that in the end this will still lead me to one camp or the other among the existing decisions this Court has pronounced on these issues, my reward I suppose will be that I shall at least have made fresh and deliberate effort to construe the provisions that are in issue in their raw form. This, I believe I must do without at the same time being encumbered with the constraints or with the constrictions of the conflicting precedents that are so far in existence, including mine. After all, precedents must be founded on the provisions of the primary law. They cannot, therefore, be superior to or be better than the law they purport to interpret. I am solely convinced that a retreat to the law as enacted or as promulgated, without being tied down by how I or my colleagues have decided before, is what holds hope for me to find pure and unadulterated answers to the questions that I need to find answers to.

However, let me hasten to say that this does not mean that I hold any existing precedent in contempt. On the contrary, I see the decisions from either camp as highly eye-opening and educative on how we should be approaching an interpretation of the concerned provisions of law. I am, all the same, determined to seize this one chance that I have in this matter to go back to the basic provisions, hopefully with as an unbiased mind as I can manage in the prevailing circumstances, to resolve the business that is before me. As for permanently resolving the conflicting precedents crisis, my hope is that the Supreme Court of Appeal will, when the full Court of nine Justices of Appeal, including the Chief Justice, gets the chance(s) to revisit some of these issues through the right appeal case(s), likewise find it useful to, for a moment, cast a blind eye against the current bank of conflicting precedents, and to, in that moment of isolation, also go back to the drawing board, and analyze the provisions therein in their primary form, before discussing them in a mature way and coming out either in support of or in condemnation of one or the other of the camps of precedents that are currently in existence.

Beginning with the motion on interim reliefs, I must say my task has been made a little easier by the appellant coming forth with the argument that in its view this motion has virtually been brought to this Court in the manner it brought me the motion for leave to appeal. The said motion for leave to appeal, on which the Court below and this Court have concurrent jurisdiction, was only brought to this Court after an initial version of the same had been presented to, and been refused by, the High Court. Despite hinting that the motion for interim reliefs has been brought as a repeat motion following the High Court's refusal to grant it, however, the appellant immediately made it clear that it did not initially exactly bring to the Court below a motion that was for interim reliefs like the one now before this Court. The motion for interim reliefs that is before me, therefore, is a first instance motion in this Court.

By way trying to justify the claim that this motion has been brought to the Supreme Court of Appeal in a scenario akin to Order I rule 18 Supreme Court of Appeal Rules circumstances, the appellant has chosen to draw parallels with a different motion, i.e a motion for stay which it earlier brought to the High Court. Its claim in this regard is that its initial motion for leave to appeal in the High Court was accompanied by a motion for stay of the summary judgment, which it asserts and emphasizes is an interim relief. It further claims that its motion for stay was refused, and that in terms of Order 1 rule 18 of the Supreme Court of Appeal Rules it could, therefore, as of right have been entitled to bring that same motion for stay, an interim relief, to this Court.

According to the appellant, therefore, although the interim reliefs it is now after are somewhat different from a stay of judgment, in that they are meant for the protection of money paid to the respondent on the summary judgment pending appeal, the bottom line is that, like a stay, these interim reliefs too share in the denominator 'interim relief' that covers both these types of motion. The appellant's contention, accordingly, is that there is no harm in it forgoing the filing of a motion for stay in this Court, but in place thereof substituting it with a motion for these interim reliefs. Hence, its request that the Court accept the motion for interim reliefs herein, in lieu of a motion for stay, as if it had been brought under Order 1 rule 18 of the Supreme Court of Appeal Rules.

The appellant did not exactly put it in the way I have done, but loosely summarized, this is the thrust of the argument it advanced as the main reason

why this Court must accept and deal with this motion. Its additional arguments about the public funds that had been paid out requiring the urgent protection of this Court, and/or about this Court being under an obligation to respect the overriding objective of the Court as spelt out in the Civil Procedure Rules 1998, I saw as being merely supplementary to the main argument, and also as meant more for purposes of putting the Court under the pressure to overlook the breaches the appellant had committed in rushing this motion to this Court, so that it may be more readily inclined to exercise its discretion in favour of that party.

What is in issue in respect of the motion for interim reliefs, therefore, is the question whether I should entertain it even though it is a motion that should first have been taken to the High Court but was not, just because (a) the High Court and this Court both have jurisdiction on interim reliefs, and (b) since the motion brought is of the same genus as the motion for stay, which the appellant claims it could have brought as of right to this Court. The appellant's categorization of this motion, I must say, affords me significant help in deciding how to deal with it. To begin with, it is clear from this categorization that the issue before me has nothing to do with me investigating the question from what point in time parties to a pending appeal must start bringing their interlocutory applications to the Supreme Court of Appeal. Further, it is also clear that this motion will not involve me into trying to answer the question from what event in a pending appeal should the parties thereto assume the obligation to file skeleton arguments in it. This is all because the appellant has directly housed the motion under consideration within the question how the Supreme Court of Appeal should be handling matters on which it has concurrent jurisdiction with the High Court, when a party to a pending appeal in one such matter has brought its application directly at first instance to this Court instead of, under the rules, first bringing it to the High Court.

I will start from the point that to me the jurisdiction of a single Justice of Appeal to deal with interlocutory business of a civil nature emanates from Section 7 proviso (b) of the Supreme Court of Appeal Act. This jurisdiction, in my view, is separate and distinct from the jurisdiction Section 21 of this same Act confers on the Court (i.e on the team comprising of the Chief Justice and all other Justices of the Supreme Court of Appeal) when it sits in civil appeals. Section 7 proviso (b), unfortunately, does not spell out when interlocutory applications should start

flocking to the single Justice of Appeal, just as Sections 21 and 23, apart from respectively indicating that appeals from the High Court shall lie to the Supreme Court of Appeal, and also spelling out the periods of time within which to appeal, do not say anything about from what point in time exactly the Supreme Court of Appeal should start getting busy with appeals that have been filed or with the interlocutory matters that are connected to such appeals. I thus believe that it is for this reason that room for promulgating subsidiary legislation was created and left open so that the further and finer details of what other procedures should be followed when obeying the substantive law could be filled in through such subsidiary legislation. Thus, it is provisions like order 1 rule 18 and the like that I would have to look up to, to offer me guidance. They cannot, therefore, be seen as a distraction from the statute-conferred jurisdiction, but rather as aids to the statute provisions, as they adumbrate on details the statute did not elaborate on in relation to the Court's exercise of the jurisdiction it has already given.

Regarding the motion for interim reliefs, which the appellant has decided to parade under the umbrella of Order 1 rule 18 of the Supreme Court of Appeal Rules, therefore, in my view there can be no better way of trying to tackle it than by looking at what that Order and rule say. The provision in question reads: *"Whenever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court."* Granted that the appellant concedes, and it is not in dispute, that in pending appeals and in regard to the interim reliefs the parties might need to obtain, jurisdiction over such indeed rests both in the High Court and in this Court, the truth is that in the way the litigants have always generally gone about it has been to respect the method that has been laid down by the above Order and rule. They first make an application to the High Court, and when that Court has denied them what they want, they then carry forward the failed application to this Court and argue it afresh before a single Justice of Appeal.

The first thing we need to observe about this provision is that it relates to applications that are open to the jurisdiction of both the High Court and this court being first brought to the High Court. The motion for interim relief orders the appellant has brought, as already seen, does not *prima facie* fall into that category of applications, as it was not first taken before the High Court and refused before being brought to this Court. By the appellant not bringing the

motion for interim reliefs first to the High Court, my conclusion cannot be other than that the appellant was by that act alone already in breach of this legal provision. However, even if I were to somehow overlook that breach, it is plain that the provision goes on to point out that applications that are to be brought to the Supreme Court of Appeal for determination once the High Court has refused them must be the same applications that were filed in the High Court, and be the very applications that were refused in that Court. Here, the appellant confesses that the motion it has brought to this Court is not the same as any of the motions it might have earlier brought to the Court below on the basis of a shared jurisdiction between that Court and this Court. The motion brought here is just similar to a motion for stay, which the appellant claims the High Court dismissed. This is a motion for interim relief orders, while the motion the High Court allegedly dismissed was a motion for stay. The similarity the appellant is capitalizing on is one that both can be viewed as motions for interim relief pending appeal.

To be quite honest, in my reading of Order 1 rule 18 of the Supreme Court of Appeal Rules, I see nothing to suggest that a party is at liberty, when using this provision, to choose what application to bring to this Court. Other than allowing the party to bring to this Court the very application that was dismissed by the High Court, I see nothing in the provision to suggest that that party can, at will, co-opt any other application that is similar in nature, and that it feels like replacing the dismissed application with. Incidentally, the appellant has not cited to me any authority that mandated it to read Order 1 rule 18 herein as widely, and as liberally as it did, or to show wherefrom it secured the authority to conclude that if the High Court dismissed its motion for stay of judgment then in place of that motion it could legally under the same Order 1 rule 18 bring into this Court any other motion of its choice as long as the said chosen motion is from the same genus of applications as the replaced one. To me, therefore, this is yet another demonstration that the appellant has brought the motion for interim relief herein in breach of the provision under consideration. My holding, therefore, is that in bringing the motion for interim relief orders to this Court in the wanton manner it has done, the appellant is in clear breach of the Order 1 rule 18 Supreme Court of Appeal Rules it claims to have brought the motion under.

With the appellant so deep in breach, as just shown above, the question now is what I should next do with its motion for interim reliefs. I must say that on this point my exposure to the decisions that disagree with the position I have earlier taken on this issue has been quite beneficial to me. Bearing in mind how my brothers and sister have construed this provision in the environment of the rules it exists in, and upon revisiting the provision and the other Orders and rules it links up with, I now concede that this breach should merely be seen as an irregularity, and not as a fatal error. It is therefore something that can be dealt with in terms of Order V rule 1 of the Supreme Court of Appeal Rules. In the circumstances I have the discretion to waive the breach and hear the motion using the jurisdiction I already share with the Court below on applications for interim reliefs, or to hold the appellant to account by giving it a further opportunity to comply the Order 1 rule 18 of the Supreme Court of Appeal Rules it breached in this case.

From the litany of reasons the appellant has raised against being asked to comply with the requirements of the law by being sent back to the Court below to first move its motion for interim reliefs there, it is clear to me that the appellant does not want me to exercise my discretion that way. The appellant would rather, now that the motion is already in the Supreme Court of Appeal, albeit irregularly, let me waive the breaches that have been committed and proceed to hear the same and determine it. The appellant has, in general, treated the breaches it has committed either as no breaches at all or as being merely minor breaches. It is on this account and on account of arguments such as emphasize or over-emphasize the duty of this Court to pay homage to the overriding objective of the Court, and the duty of the Court to safeguard public funds, if need be, with the short-cut measures of taking on High Court business as an emergency necessity, that it has pleaded with this Court to exercise its discretion only in a way that will allow for this motion to be dealt with here. The respondent is highly opposed to the suggestions the appellant has made, and is of the mind that the appellant is abusing the Court process in that despite defying laid down procedures it wants to be exempted from, so to speak, reaping what it sowed.

I must say that on the surface the reasons the appellant has given sound compelling. I must, however, also say that at the same time I see a disturbing degree of hollowness in them. To begin with, I see the breach of Order 1 rule 18 herein as deliberate. The appellant knew, or ought to have known, that the order

and rule herein talk about first bringing an application that falls within the shared jurisdiction of the High court and this Court to the High Court. The appellant chose to disregard that. The motion he brought here, although indeed a motion on which the High Court and this Court have concurrent jurisdiction, is a motion he did not first bring to the High Court. Next, the order and rule in question talk about bringing to this Court the same application as was brought in the High Court without success. Again the applicant disregarded that, by instead bringing to this Court a motion it felt was merely similar to, or which it felt belonged to the same class of applications as, the one it could have legally brought up to this Court after its having been refused in the Court below.

The appellant, it appears to me, was determined to have this motion heard in the Supreme Court of Appeal regardless of what the law says about these types of applications. I dare say it is not by accident that the appellant brought this motion here. As seen, long before it had secured the leave of the Court to appeal, this party pre-filed a notice of appeal in the matter. Now, while that was quite permissible under the rules, it is also clear that the appellant found it useful to have this tentative notice of appeal in place so as to use it as a launch pad for camping all its upcoming applications in the intended appeal, including his one, in the Supreme Court of Appeal. Thus it drew up its trio of motions and saw to it that when bringing them here it also brought along the lower Court's case file. The record of the Court below was thus taken away from it, and was furnished to this Court together with the three motions at the time of their filing.

In normal circumstances parties with applications to take up in this Court just file the required processes with the Court. If, in the course of reading the filed documents, the Court feels the need to look at, and cross-check, something on the lower Court's file, internal arrangements are made within the Judiciary and the file is sourced through official Court channels. Now, while the appellant's astuteness in bringing the lower Court's file up as it filed this motion and others before the Court had expressed any need to look at it might look innocent, that gesture can easily also be seen as one meant to tie the Court down to hearing the motions that were brought, and to reduce the Court's chances of ordering the said motions to be taken back and be dealt with by the Court below. With the

motions already in this Court together with the High Court's case file, and further with the Court below having been left with nothing of its record of the case except its entries in the register of cases, a sound foundation had been put in place for the appellant to contend that in the circumstances it would not make sense for this Court to send these motions back to the High Court for hearing when it had all the required documentation, and when in some of them, e.g the motion for interim relief it might also have the jurisdiction equivalent to the High Court's to attend to them. Viewed from this angle, therefore, I gain the impression that the appellant's disregard of the requirements of Order 1 rule 18 *vis-à-vis* the motion for interim reliefs was not accidental. It was deliberate and calculated.

From what I have said about the movement of the High Court case file, leaving aside the dangers of Legal Houses undertaking the transportation of Court files from one Court Registry to another, I find the kind of eagerness exhibited here as displaying a peculiar determination on the part of the appellant to, at all costs, press with the agenda to have its motions only transacted in the Supreme Court of Appeal, and this was despite the appellant then not even having the leave of the Court to appeal. I must say that I find this rather disturbing, as in some way I see it as posing a threat to the proper administration of justice. I say so because, assuming this was not a case in which leave to appeal was required, and assuming further that the notice of appeal the appellant pre-filed had been valid as at the date of its filing, the effect of the appellant taking the Court file away from the Court below would have been to totally paralyze the operations of that Court in as far as the preparation of the record of appeal was concerned. To begin with the appellant would have done that without being sanctioned to do so either by this Court or by the Court below. Next, with the file of that Court so taken away from that Court in Lilongwe to the Supreme Court of Appeal in Blantyre just to facilitate the hearing of the motions the appellant had set its mind to prosecute in the Supreme Court of Appeal, the Registrar of the Court below would have been deprived of a file on which to summon the parties for a settlement of the record of appeal. Likewise, the task of the preparing the record of appeal, which rests with the parties under the supervision of the Court below, would have been rendered incapable of starting in the absence of the Court file to compile the said

record from. All that would have had to wait until the appellant was done with its use of the mother file in the Supreme Court of Appeal on the motions it had filed.

Indeed, even as it is now, the High Court file in this matter has been dwelling at the Supreme Court of Appeal since on or about 19th February, 2018 when the then intending appellant brought it together with its three motions. By virtue of that party either not filing affidavits/sworn statements in support of some of those motions, or, where it had filed such affidavits/sworn statements in support, by reason of that party not including therein the basis for bringing some of the said motions to this Court, it strikes me that the appellant had deliberately created a necessity for this Court to depend on the presence of that High Court file for ease of checking what transpired in that Court as it dealt with these motions. Thus, for the appellant to now say that sending back its motion for interim reliefs for hearing in the Court below would occasion an injustice since on such matters this Court has concurrent jurisdiction with the High Court, and since the motion and all relevant documents to enable a hearing are already here, does not sound right to me. Even though in the present scenario a statement like that might make the appellant appear as if it is in a tight corner where it needs the assistance of this Court almost as a matter of emergency, my view is that the appellant is the architect of its own situation. It, therefore, has no one to blame for that, but itself. The decision to file the motion for interim reliefs in this Court against the unambiguous procedure that it chose to ignore, purely rests on the appellant's shoulders. In my judgment, therefore, it cannot represent justice to give the appellant a hearing in this Court on this motion when it is clear that the appellant only got it here through its deliberate defiance of expected procedure.

As for issues of promoting the overriding objective of the Court, as provided for in the Civil Procedure rules 1998, these, to me, should not be taking priority over what local legislation says about how motions of this type should be coming to this Court. It is local law that should instead take priority, and only when it has fallen short of making provision for a situation should resort be had to the default provisions contained in the Civil Procedure Rules 1998 to fill the gaps in local law. I thus do not think that the overriding objective of the Court that is found in those rules is meant to speedily facilitate business that has been improperly brought before the Court. It ought instead to be more nobly used to speedily facilitate business that has procedurally and properly found its way into this Court. Parties, therefore, should not rush to this Court and deliberately or recklessly defy all legal

guidelines on the way in the hope that as long as there is shared jurisdiction between this Court and the High Court over their particular application, and that as long as this Court can be reminded about its overriding objective in dealing with cases, then they will just be accommodated, regardless of the breaches they have committed. Thus, to me, the Civil Procedure Rules 1998 should not be cited in order to compel the Court to condone deliberate defiance of clear procedural rules. The same applies to the argument that the intended interim orders are meant to safeguard public funds that have already been paid to a party that might fail to pay them back in the event of the appeal succeeding, and that this motion therefore deserves urgent attention right in this Court for the early protection of this money. The appellant is aware of grave errors it has committed in getting this motion to this Court. To me, therefore, it is simply raising these arguments to deflect attention away from its wrongs as it still fights to get this motion into this Court.

I am thus sincerely of the mind that although when it skipped the High Court as it brought this motion for interim reliefs straight to this Court the appellant merely committed an irregularity, it is an irregularity that was committed deliberately and in a calculated manner. It does strike me therefore that for some reason, from the moment it decided that it would strive to obtain leave to appeal, the appellant found it convenient to start transacting all its business in the Supreme Court of Appeal, regardless of the fact that some of that could in fact be High Court business, the authorities on the subject not being well settled. In respect of the motion at hand, it made up its mind to exploit the argument about the shared jurisdiction of the two concerned Courts to the limit, just to ensure that the Supreme Court of Appeal feels obligated to take that motion on despite its shortcomings. Now, I tend to think that when the jurisdiction of this Court is being called upon just to serve the convenience of a party, and not necessarily to serve the interests of justice, this Court should, on the spot, put its foot down and say rules are rules and they must be obeyed.

My judgment, therefore, is that the appellant deliberately defied and side-stepped the clear rules of procedure as it rushed the motion herein to this Court. It really, therefore, would be unjust for me to overlook all that defiance and reward that same party with an undeserved hearing in this Court. I will accordingly not hear the appellant's motion for interim reliefs. Instead, I dismiss that motion with costs for being brought so pre-maturely to this Court and in

deliberate breach of a clear rule of practice and procedure. Should the appellant, however, still desire to obtain the interim orders it has enumerated in the motion, it is at liberty to seek them through a motion to be filed in the High Court, as it should have done in the first place.

I now move to the motion for amendments. Based on the documents filed in this motion, and on the arguments I have encountered, the motion to amend notice of appeal and also to amend the defence, unlike the motion just dealt with, is not being paraded as a motion that has come to this Court *via* the route of Order 1 rule 18 of the Supreme Court of Appeal Rules. No indication has been made or hinted at to suggest that the High Court and this Court have concurrent jurisdiction over this motion. Equally, there is no hint that on account of a shared jurisdiction the motion was ever taken before the High Court before the attempt to bring it here. In any event, it is not in every application over which the High Court has jurisdiction that this Court also exercises comparable jurisdiction. It is only in select and specific applications that the law has seen it fit to give co-ordinate jurisdiction to both these Courts even though they operate at different levels. It is therefore only in such instances that an application first taken up in the High Court is entitled to next be brought up to this Court by route of Order I rule 18 once it has been refused in that Court.

The second proviso to Section 21 of the Supreme Court of Appeal Act, and Order III rule 3(2) of the Supreme Court of Appeal Rules stand out as good examples of the select provisions I have just alluded to. They clearly and unequivocally give jurisdiction both to the High Court and to this Court on matters of grant of leave to appeal. This is why in respect of the motion for leave to appeal, which the appellant filed in this Court alongside the two motions now under discussion, the moment I noticed that there had been an initial application for such leave in the High Court and that it had been refused, I did not hesitate to set it down before myself right away. This was because it was as clear as day light to me that the motion had been brought in light of the shared jurisdiction between the High Court and this Court, and that it had been so brought in compliance with Order I rule 18 of the Supreme Court of Appeal Rules.

In the case of amendments such as those proposed by this motion, however, there does not appear to be any like provision, whether in the High Court rules of procedure, or in this Court's rules of procedure, that makes the business of the

High Court in matters of amendment of the documents before it a subject-matter of shared jurisdiction with this Court. If there is any such legal provision available, then at least the appellant did not make any attempt during hearing to point me towards its direction. My own attempt, however, to check that matter out did not yield any results the appellant could have found useful to rely upon even if it had been that party's position that it was bringing this motion through Order I rule 18 of the Supreme Court of Appeal Rules. Thus, when I for instance looked at Order 7 rule 23(2) of the Courts(High Court)(Civil Procedure) Rules 2017, I noticed that in the High Court, after the closure of the statements of case, that rule only allows parties to a case to make amendments either after obtaining the permission of the High Court or after securing each other's consent. In my brief further examination of that material provision, however, I did not see anything in it that would suggest that the Supreme Court of Appeal enjoys any shared jurisdiction with the High Court over the amendment of documents that have been filed in the said Court.

The above notwithstanding, for my present purposes what is important is that it is very clear, as I have earlier acknowledged, that this motion is not in this Court *via* Order 1 rule 18 of the Supreme Court of Appeal Rules. The solution to the fate of the motion for amendments, therefore, does not lie in my interpreting that legal provision or in my spelling out what it stands for. I need not, therefore, repeat the observations I have already made above in relation to that provision *vis-à-vis* applications that fall under its umbrella. Equally, therefore, since this motion must then have been brought as a first instance motion in this Court, I shall not need to once more toil with the tug of war of making a choice on the question whether or not to waive any real or perceived breach by the appellant of Order I rule 18 as I proceed to determine the motion. One other thing that is equally plain to me is that this motion has nothing to do with the issue of filing skeleton arguments in an appeal, which is also a fertile area of conflicting decisions in this Court. In discussing this motion, therefore, there will be no need for me to allude to Practice Direction No. 1 of 2010 on how it relates either to the Supreme Court of Appeal Act or to the Rules that were promulgated under it. From the look of things, therefore, what I need to do in a bid to find an answer to the question whether the motion in question is rightly before me is to explore in what other circumstances, different from the two already discussed, the Supreme Court of Appeal also attends to interlocutory applications in a pending appeal. In line with the preliminary questions I had initially posed, therefore, what I next need to do

vis-à-vis this motion for amendments is to in part seek to answer the question 'from what point in time parties to a pending appeal are expected to start bringing their interlocutory applications to the Supreme Court of Appeal.'

In the case at hand between 6th November, 2017, when the appellant filed both a motion for leave to appeal and a notice of appeal in the High Court, and 27th March, 2018,when this Court granted the appellant leave to appeal, there was no pending appeal. Thus, although for the whole of that period the appellant had a notice of appeal on record, it was in truth merely a tentative notice of appeal, as in all that period of time the appellant did not have *any* leave to appeal. It thus follows that when on 19th February, 2018 the appellant, then as a mere applicant, filed in this Court its motion to amend the notice of appeal and to also amend the defence it had filed and served in the High Court, the said applicant was just taking a chance. There was no pending appeal to this Court and the basis of, for example, applying to amend a High Court defence in the Supreme Court of Appeal, was not made manifest. To me, therefore, for a party who was only hoping that one day it might be granted leave to appeal to the Supreme Court of Appeal, to in advance file this motion for amendments in the Supreme Court of Appeal, it was a bold step that was nothing less than jumping the gun.

The applicant (as it then was) did that, and it did so without any justification. I am certainly not aware of any legal provision that allows any litigant, merely on the basis of a hope to obtain leave to appeal, to start filing its motions in the Supreme Court of Appeal well before securing that leave, and yet that is exactly what the appellant did in this case. In the circumstances, I believe I would well have been within my rights if I had chosen to dismiss this motion on the basis that it was pre-mature right on 19th February, 2018 itself. However, I was reluctant to do so without first affording the filing party the opportunity to justify its said advance filing of the motion. Despite my extending this gesture to the appellant, however, the fact remains that this motion was filed in this Court way too early as it was neither an application the law permits to be filed in this Court before the filing of an appeal, nor an application that could have been said to have been brought under Order I rule 18 of the Supreme Court of Appeal Rules.

It turns out that my saving of this motion from instant dismissal coincidentally helped it to heal. By luck of the ruling I delivered on 27thMarch, 2018, through which I granted the appellant leave to appeal to this Court, a pending appeal was

born since a notice of appeal had already been filed some four months earlier in the Court below. Thus, by virtue of that development the motion for amendments, as from the moment I granted leave to appeal that day, acquired the status of being a motion in a pending appeal. However, as my preliminary concerns in relation to the motion were then still outstanding, need remained for me to investigate whether the mere fact that the motion to amend had now become linked to a pending appeal automatically qualified it to be there and then attended to by the Supreme Court of Appeal.

Just to put it more graphically, the prevailing situation was that before 10.00 am on 27th March, 2018 the motion for amendments herein was a pre-mature motion that was fit for immediate dismissal as it had been filed in the absence of any pending appeal, and without any legal justification for bringing it here in advance of an appeal. However, soon after the delivery of the ruling granting leave to appeal at or about 10.00 am that very day, the motion in question became a motion in a pending appeal. Indeed hereafter within moments of my concluding delivery of that ruling this motion was called for a hearing in this Court. The only thing that stood in the way of my commencing a substantive hearing of this motion, therefore, was the preliminary expression of reservations against its fitness for this court's attention, which concerns had to be addressed first.

Determined to find out most, if not all, scenarios and times in which parties to pending appeals are legally allowed to bring their applications to the Supreme Court of Appeal, so as to ease my task of determining the concerns I have with the two motions herein, I have re-read the Supreme Court of Appeal Act and the Supreme Court of Appeal Rules. I have, in the result, discovered that to the question from what point in a pending appeal the parties thereto can start bringing their interlocutory applications to the Supreme Court of Appeal, there cannot be one answer only. It really will depend on the type of interlocutory application a party has, and on what the law says about it, that the time for bringing such application to the Supreme Court can be determined or otherwise become known.

In some cases, as I have had occasion to observe, the Supreme Court of Appeal can legitimately be called upon to deal with an interlocutory application even before there is any pending appeal in place. A good example of such instance is the very motion for leave to appeal which I determined on 27thMarch, 2018. For

the appellant to become an appellant in this case, it first needed to obtain the leave of the Court to appeal. Leave to appeal, therefore, ought logically to be obtained before an appeal is lodged, and since the provisions I referred to earlier vest both the High Court and the Supreme Court of Appeal with the jurisdiction to grant such leave, that jurisdiction can only be exercised by, *inter alia,* this Court before an appeal has been put in place. Thus, indeed, when the motion for leave to appeal was filed in this Court, and when I heard it, this all happened before there was any appeal pending in this case. Further, as already noted, it is the ruling that flowed from that hearing that created the pending appeal there now is in this matter. Thus, one of the answers to the question I have highlighted above is that in some fitting cases, like in matters of leave to appeal, the Supreme Court of Appeal will start entertaining interlocutory applications even before an appeal has been lodged.

However, not all applications will fall into the category of applications that can be brought to the Supreme Court of Appeal before a pending appeal has come into existence. Only those the law mandates to be so brought will qualify. There are applications, however, which even though like motions of leave appeal depend on the availability of the concurrent jurisdiction of the High Court and the Supreme Court of Appeal to be tabled before this Court *via* the application of Order I rule 18 of the Supreme Court of Appeal Rules, they cannot be brought to this Court before an appeal has been lodged. Motions for interim relief, over which the High Court and this Court also have shared jurisdiction, are a good example of such applications, which must first await the existence of an appeal before they can be taken up and pursued in this Court. A party, for instance, that feels disadvantaged by any determination of the High Court, can only apply to have that determination stayed by this Court, firstly upon showing that it has appealed against the determination in question, secondly upon showing that it sought a stay in the High Court but was not granted one, and thirdly by bringing upto this Court its application for stay that was denied in the Court below, with a plea that it desperately needs to have the said determination stayed *pending* the hearing and the determination of its appeal. Thus, in order for this Court to grant a party an order of stay against a determination of the High Court, apart from checking in terms of Order I rule 18 herein whether that application has first been before the High Court and whether it has indeed not succeeded, it will also check whether the applying party indeed has an appeal that is pending to the Supreme Court and whether that appeal carries any *prima facie* prospects of success.

Interlocutory applications such as these, which parties are entitled to bring to the Supreme Court of Appeal under the terms of Order I rule 18 of the Supreme Court of Appeal rules only after an appeal has been lodged, therefore, constitute yet another category of interlocutory applications that the law permits parties to bring to the Supreme Court of Appeal. They differ from those the law permits to be brought before an appeal has been lodged, in that the relief they pursue must necessarily be dependent on an appeal being in place, and they ought to show that the relief they are after is for purposes of covering the applying party in a safety zone while waiting for the hearing and disposal of its appeal.

Indeed, as already noted, it is not on all interlocutory applications that this Court and the High Court will have concurrent jurisdiction. The motion for amendments herein having already been classified as not falling within the Order 1 rule 18 Supreme Court of Appeal Rules scenario, if at all it is due to be attended to by this Court, then it necessarily must mean that it ought to have been brought in compliance with some other provision(s) that is different from those I have examined this far. It is these provisions, therefore, that I need to turn my attention to in order to see whether there is any provision in existence that would sanctions the bringing of the motion for amendments to this Court in the manner and at the time it was brought. For reasons I have given in respect of the motion I was dealing with earlier, in my determination of the concerns I expressed regarding the suitability of this motion for this Court's attention, I will dwell on the statute, the rule/regulation, and/or the Practice Direction I see to be relevant and applicable to this motion. In doing so I am deliberately avoiding the influence of any conflicting and unsettled precedents.

As seen, Section 21 of the Supreme Court of Appeal Act authorizes the lodging of appeals from the High Court to the Supreme Court of Appeal in civil matters. After that, Section 23(1) of the same Act prescribes the times and the manner in which such civil appeals may be lodged. They are lodged through the filing of a notice of appeal with the Registrar of the High Court. Order III rule 2(1) of the Supreme Court of Appeal Rules, apart from giving finer details about how the notice of appeal should be framed and what it should contain, repeats what Section 23 says about where a notice of appeal should be filed. From what I gather from these provisions, the moment a party to a case decided by the High Court files a valid notice of appeal with the appropriate High Court Registry, it can safely be said

that there is a pending appeal to the Supreme Court of Appeal. In the two statutory provisions (Sections 21 and 23) that are so closely connected with civil appeals to the Supreme Court of Appeal, and even in the order III rule 2(1) that assists them in publicizing the message they are conveying, I see nothing that can be said to be giving a clue about how interlocutory applications should be handled in the pending appeals that flow from use of these provisions.

In the circumstances, I do not think that it can just be assumed from the blues that the moment a notice of appeal has been validly lodged, then the Supreme Court of Appeal is immediately and automatically put on duty to attend to anything or even to attend to everything that the parties raise pertaining to that appeal. It is, therefore, this silence of the two statutory provisions on the issue of interlocutory applications that drives me to look elsewhere for guidance on who should do what and when in the period of time between the lodging of a valid notice of appeal and the hearing and determination of the said appeal. This includes me seeking guidance, since the amendment motion is not an Order 1 rule 18 Supreme Court of Appeal Rules type of application, on whether I can entertain it just like that, considering that it came knocking at my door demanding to be heard from even before the applicant had any leave to appeal.

In the situation at hand, I cannot see a better place to first search for such guidance than the rules that are born from the principal statute. The Statute and these rules, i.e the Supreme Court of Appeal Act and the Supreme Court of Appeal Rules, being the primary legislation on the subject, I cannot rush with excitement to seek answers from the English rules as captured in the Civil procedure Rules 1998 until, in terms of Section 8 proviso (b) of the Supreme Court of Appeal Act, I experience a gap in the available local law. Short of such gap as justification, I do not have to go to those rules at all.

Next, therefore, let me lay bare what I see as the resource vavailable to me for such search in terms of the guidance that I am now looking for. In this exercise, in the Supreme Court of Appeal Rules, the only parts that I find to be irrelevant for my purposes are Order II on the original jurisdiction of this Court, and Order IV on criminal appeals. I otherwise think combing through all the other orders carries prospects of revealing to me the much needed guidance. In part, I must say, I have already visited some of the Orders and rules above in my earlier discussion of the motions herein. What I will be looking for, therefore, are additional

provisions in these same Orders and rules to those that I have already discussed. For clarity's sake, I have already discussed pre-appeal applications that come to the Supreme Court of Appeal, an example of which are applications for leave to appeal that have in part been provided for under Order III rule 3(2) of the Supreme Court of Appeal Rules. I have also already discussed Order I rule 18 applications, which can come both before and after the lodging of an appeal.

Searching, therefore, for additional provisions that might be having a bearing on different applications that can be handled by the Supreme Court of Appeal in a pending appeal, I start by going to Order I of the Supreme Court of Appeal Rules, which contains general rules. The first provision of interest I see in that Order is rule 16 thereof. It empowers a single Justice of Appeal like myself to, through notices of motion, sort out complaints lodged by any person who has been aggrieved by anything done or ordered to be done by the Registrar of this Court, if not so done or so ordered to be done by the direction of the Chief Justice. *Vis-à-vis* this provision, although it has not been spelt out therein at what point single Justices of Appeal must begin dealing with these types of complaints, I guess time is determined by the moment the Registrar of this Court annoys someone through his/her meddling with the pending appeal the complainant in question is concerned with. This being an additional means by which the Supreme Court of Appeal gets interlocutory applications in a pending appeal to the two I have already discussed, to me, it confirms what I said earlier that there cannot be a single, uniform, or omnibus answer to the question at what time the Supreme Court of Appeal should begin entertaining interlocutory applications in a pending appeal. After this provision, from within Order I of the Supreme Court of Appeal Rules, the only other material provision I see on this subject is Order I rule 18, but this has already been discussed at length. I see no further under this Order giving guidance on my subject of interest under this Order.

Going then to Order III of the Supreme Court of Appeal Rules, which are aptly on the subject of civil appeals, I approach it with greater hope since it is of direct relevance to the type of appeal (civil) to which this motion is now attached. Here, the first guide comes through rule 3 of that Order, but it also happens to be a provision I have already discussed along with Section 23(2) of the parent Act. It is on leave to appeal. This being a motion a party must take up before it can appeal, it might somehow be a misnormer to refer to it as an application in a pending appeal. As can be seen, however, the fact that provision has been made for the

Supreme Court of Appeal to deal with some interlocutory applications even when there is no appeal yet confirms the fact that there cannot only be a single and fixed point in time from which the Supreme Court gets empowered to start handling interlocutory applications, be it in a pending appeal or in an appeal that is merely being aspired for. The statute having failed to spell out in advance on the subject of interlocutory applications in pending appeals, as seen so far, there are different rules within the Supreme Court of Appeal Rules that govern when which type of interlocutory application can be received and entertained by the Supreme Court of Appeal. In the absence of a provision like the ones on leave to appeal, however, the motion to effect amendments cannot be said to fit into the category of motions that must precede an appeal, despite the motion herein having been filed before there was any pending appeal in the matter.

Order III rule 4 is the provision that next attracts my attention. It is on enlargement of time within which to appeal. Enlarging time when a party has failed to act within the legally authorized time, being business that does not amount to the hearing and determination of an appeal, again by virtue of Section 7 proviso (b) of the Supreme Court of Appeal Act, it would be work that would fall before a single Justice of Appeal. It would thus be an interlocutory matter in an intended, not in a pending, appeal. Again, by virtue of the of the mandate given to the Court under Section 23(2) of the Supreme Court of Appeal Act to enlarge time to appeal even after the prescribed time has expired, it is an application that must come prior to the filing of a notice of appeal. A motion, however, to *inter alia* amend a notice of appeal ought necessarily to be filed after the notice of appeal has been filed, otherwise how does one ask the Court for authority to amend either an invalid or a non-existent notice of appeal. The motion for amendment of notice of appeal and defence that is before me, therefore, cannot be said to fall among applications that would come to this Court by virtue of Order III rule 4, as it has nothing to do with enlargement of time.

The next attractive provision in line is rule 7 of Order III of the Supreme Court of Appeal Rules. According to my earlier statement, it being that an appeal to the Supreme Court of Appeal exists and starts to be pending the moment a valid notice of appeal has been lodged with the Registrar of the Court below, this provision mandates the said Registrar, even though he/she is not our Registrar, to exercise judicial powers in such a pending appeal. It thus compels this Registrar of the Court below to summon the parties to the pending appeal to appear before

him/her in order to settle the documents that are to be included in the record of appeal. If, therefore, the Registrar of the Court below is so legally bestowed with the power to exercise judicial authority in such an interlocutory matter when the appeal is already pending to come to the Supreme Court of Appeal, it cannot be true that the moment an appeal is lodged in the Court below then the whole appeal and all interlocutory applications that arise in it are the business of the Supreme Court of Appeal. Indeed, the jurisdiction to settle the record of appeal must exclusively be exercised by the Registrar of the Court below. That jurisdiction is not even shared between that Registrar and the Registrar of this Court. I would, therefore, tend to think that the existence of this provision busts the theory that once an appeal has been lodged only the Supreme Court of Appeal has the mandate to exercise jurisdiction over it and over all its interlocutory Applications.

It will be seen that following the settlement of the record comes the job of preparing the record of appeal. This is done in the Court below under the supervision of the Registrar of that Court. Up to this point in time, as can be seen, the Supreme Court of Appeal is basically left out of the picture, and is for all practical purposes not yet actively engaged with the appeal that is already by then pending to come to it. Except for instances where under the some of the rules examined earlier it has been called upon to act e.g on Order I rule 16 scenarios, on Order 1 rule 18 applications, on Order III rule 3 motions, and on Order III rule 4 scenario applications as discussed above, the Supreme Court is largely left idle until the smooth conclusion of the preparatory works that must be accomplished before the appeal is ripe for hearing and determination.

Going deeper into the Order III rules, it will be seen that the rules only next begin to attend to the Supreme Court of Appeal after the record of appeal has been made ready. It is then that under Order III rule 10 that the Registrar of the Court below is under obligation to file the said record in the Supreme Court of Appeal. Once this is done, fresh tasks start popping up for the Supreme Court of Appeal to deal with. The first comes through Order III rule 11, which demands that soon the record of appeal has been so filed in this Court, the Registrar of the Supreme Court of Appeal must serve a notice on all the concerned parties to alert them that the record has been filed. The same provision mandates this Registrar to, in due course, enter the appeal in the cause list, and to then give notice to all the parties concerned of the date of hearing of the appeal. Worthy of note here is the

fact that most of the assignments covered by the rules just discussed are administrative, and that they have specific officers, either in the High Court or in this Court, assigned to deal with them.

Beyond all this, however, I have found that there comes one more provision which tackles the judicial aspect of the Supreme court of Appeal's work in such pending appeal. This is rule 19 of Order III of the Supreme Court of Appeal Rules, which is on the subject of control of proceedings during the pendency of an appeal. I will be seen that before it, there are sporadic provisions dealing with specific types of applications that the Supreme Court of Appeal can handle at pre and post inception stages of an appeal. Unlike these provisions, Order III rule 19 is more general, and it covers a phase of time in the life-cycle of a pending appeal. It reads: *"After an appeal has been entered and until it has finally been 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."*

The way I see it is that, even though an appeal starts to pend from the moment notice thereof has been validly lodged with the Court below, this provision does not start to operate as from that time. It only starts applying from the period of time *after an appeal has been entered* and it so continues to apply *until it [the appeal] has been disposed of.* As I observed above, there is no provision in the parent Act that directly addresses the issue of how to handle the appeal proceedings from the time an appeal starts to pend. The only provisions there are in this regard, as seen feature in the Supreme Court of Appeal Rules, and they tend to deal with specific types of applications that arise in relation to a pending appeal. Order III rule 19, however, is this far the most comprehensive rule in this area, as it throws light not only on control of the appeal proceedings, but also on the control of *every application therein* between the entry of the appeal into the cause list and the disposal of the appeal. My search might have been limited, but so far I do not see Order III rule 19 conflicting with any substantive provision in the parent Act on this subject. The net effect, to me, of the arrival of this provision on the scene is that the peculiar or special applications that have already been provided for under the various rules earlier discussed, will be attended to by the Supreme Court of Appeal at the times and in the style ordained by those rules. However, for all other applications that arise in a pending

appeal *after an appeal has been entered* up to the disposal of the appeal, must be dealt with in line with Order III rule 19 herein.

The motion for amendments not having proved to be compatible with any of the earlier discussed rules that allow interlocutory applications into this Court in an intended or a pending appeal, I have next had to pit this motion against Order III rule 19. The result I get is that this motion does not fit into this provision. The motion for amendments, as already observed, was brought to this Court before leave to appeal had been secured. Certainly by then there was no appeal, and the motion could not be said to have been brought after an appeal had been entered. Now, since Order III rule 19 herein only applies to applications that arise *after an appeal has been entered,* there is no way it could apply to the motion at hand. Even, however, when on 27th March, 2018 leave to appeal was obtained, and so the motion for amendments became attached to a pending appeal, still by then time was distant to the stage that appeal could be entered. Indeed, even though by virtue of the leave to appeal this motion became a motion in a pending appeal, as at that stage the parties were yet to be summoned for settlement of record, the record itself was yet to be prepared, the Registrar of the Court below was still far from filing the record of appeal in the Supreme Court of Appeal, and even the Registrar of this Court was going to wait for a long while before he/she could enter the appeal in the cause list. It is clear, therefore, that this motion cannot qualify to be heard by the Supreme Court of Appeal under the banner of Order III rule 19 of the Supreme Court of Appeal Rules.

At this juncture, I believe I need to take note of the concluding phrase of Order III rule 19. I find it quite instructive. It reads: *"...every application therein shall be made to the Court and not to the Court below."* From this phrase, when read along with the rest of the rule, the first message I get is that applications that fall within the brackets of this provision, i.e between the entry of the appeal in the Supreme Court of Appeal and the final disposal of such appeal are, without a doubt, business for the Supreme Court of Appeal. The next message I get, however, and this is by very clear implication, is that applications in a pending appeal, which *inter alia* emerge before an appeal has been entered, as is the case with this motion for amendments, should not be made in the Supreme Court of Appeal, but rather they should be made in the Court below. I so conclude because before the entry of the appeal into the Supreme Court, applications that should be made to the Supreme Court are isolated in the rules and identified as such.

After the entry of the appeal, apart from the appeal itself, *every application therein* shall be made to that Court *and not to the Court below.* To me, therefore, applications that fit into the category of those which must be made to the Court below include those which arose before the entry of the appeal, but which were not specifically set aside by any rule for the attention of the Supreme Court of Appeal. It follows, in my judgment, that the motion for amendments, (a) not being a motion covered by any of the earlier identified special provisions that enable parties to upcoming appeals to bring specified interlocutory applications to the Supreme Court of Appeal at different stages of a pending appeal, and (b) equally not being a motion covered by the omnibus Order III rule 19 of the Supreme Court of Appeal Rules, it therefore is a motion that does not qualify to be heard by the Supreme Court of Appeal. Rather, it is a motion that qualifies to be dealt with by the High Court.

Just to be on the safe side, I have gone through the balance of Order III. I do not see any other rule that could come to the rescue of the appellant on the amendments it desires to obtain from this Court. What remains to be considered, therefore, is Order V of the Supreme Court of Appeal Rules. This Order has the heading 'miscellaneous' and it only contains one rule. This is the rule I have earlier on alluded to as classifying any party's non-compliance with the rules herein as capable of being waived, if that be in the interests of justice. The rule, however, also gives the Court the option to insist on compliance with the rules by affording the non-compliant party a further opportunity to so comply with them.

Now, reflecting on the discovery I have made above, to the effect that the appellant had no basis at all for taking up the motion for amendments herein in this Court, what has disturbed me and aggravated the situation for the appellant are the various pointers I have detected showing that the appellant's disregard of procedure as it bull-dozed this motion to the Supreme Court of Appeal was not through a simple human error or through an accident. Well knowing it had no right yet to appeal, and therefore no right yet to be a concern of the Supreme Court of Appeal, the appellant left Lilongwe with armed with this motion among a group of three motions and even carried along the case file for the Court below with its mind made up that from then on it was going to use the Supreme Court of Appeal as its chosen forum. Now, supposing the leave it was then still fighting for to be allowed to appeal failed even in this Court, and if that had occurred after this Court had already entertained the motion for amendments, or even the

motion for interim reliefs, all blame would rightly have fallen on the Court's shoulders for either ordering amendments, or granting interim reliefs in an appeal that was non-existent and which was never going to come. Even, however, the time leave to appeal was secured, the appellant still fought tooth and nail to have the Supreme Court of Appeal attend to its motion for amendments in utter disregard of the fact that there was no single rule isolating it as a motion fit for the Supreme Court of Appeal, and also in utter disregard of the fact that even as at that stage the motion in question was still too pre-mature in as far as Order III rule 19 Supreme Court of Appeal Rules is concerned. It will thus not be right for me to waive the non-compliance with the rules the appellant so blatantly committed in this case in respect of this motion. The motion herein having been brought pre-maturely before this Court and being still pre-mature to date, I dismiss it with costs. Meanwhile, should the appellant still be desirous of obtaining Orders to effect the various amendments it listed in this motion, it has the freedom to go back to the High Court as the right forum for this motion to pursue such Orders.

I order accordingly.

Made in Chambers the 13th day of April, 2018 at Blantyre.

A.C. Chipeta SC
JUSTICE OF APPEAL