IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL CASE NUMBER 29 OF 2018

[BEING HIGH COURT OF MALAWI, COMMERCIAL DIVISION BLANTYRE REGISTRY, COMMERCIAL CASE NUMBER 314 OF 2016]

BETWEEN:

STELLA CHAPINGA T/A MATECHANGA MOTEL & ENTERPRISES APPELLANT

AND

NATIONAL BANK OF MALAWI LTD RESPONDENT

CORAM: THE HON THE CHIEF JUSTICE A K C NYIRENDA SC, JA
HON. JUSTICE E B TWEA SC, JA
HON. JUSTICE[DR.] J M ANSAH SC, JA
HON. JUSTICE R R MZIKAMANDA SC, JA
HON. JUSTICE A C CHIPETA SC, JA
HON. JUSTICE L. P. CHIKOPA SC, JA.
HON. JUSTICE F E KAPANDA SC, JA
HON. JUSTICE D F MWAUNGULU SC. JA
HON JUSTICE A D KAMANGA SC, JA
Mpaka of Counsel for the appellant
Mwangomba of Counsel for the Respondent
Masiyano[Ms.] Court Clerk

JUDGMENT

BACKGROUND

This matter was originally between the respondent and one Adam H. Osman. The latter had successfully tendered for the purchase of a motor vehicle which turned out to have been offered as security for a financial facility extended by the respondent to the appellant. When the appellant could not meet her

obligations under the facility the respondent advertised the motor vehicle for sale. The abovementioned Osman then successfully tendered to buy the motor vehicle at the price of K20,500,000.00. The purchase price was actually paid to the respondent.

The motor vehicle was however not delivered to Osman. It turned out that the appellant, in between the tender sale and expected delivery of the truck to Osman successfully redeemed the same from the jaws of the money lender. Osman then took out an originating summons against the respondent. He, *inter alia*, sought specific performance of the contract in the alternative damages for breach of contract and loss of use of the above motor vehicle.

At the conclusion of the matter in the court below Mr. Osman was awarded the sums of K20, 500,000.00 being a refund of the sum he paid to purchase the truck and K24,500,000.00 being damages for breach of contract making a total of K45, 000,000.00.

Not being best impressed with the turn of events the respondent took out a third party notice against the appellant. It is dated April 21, 2017. Courtesy thereof the respondent wanted the appellant to indemnify it in respect of the damages, in the sum of K24,500,000.00, awarded to Mr. Osman for loss of use of the motor vehicle. This claim was allegedly pursuant to some agreement entered into between the parties hereto in relation to the redemption of the motor vehicle.

The third party notice was after a few hiccups and mutual accommodations set down for hearing on February 6, 2018. The notice of hearing in respect thereof is dated November 17, 2018 and was served on the appellant on November 18, 2018.

On February 1, 2018 the appellant's lawyers were served with a notice from the respondent indicating its intention to cross-examine the appellant. On February 5th, 2018 the appellant's lawyers wrote the court below informing it and the respondent that they would not be available on the 6th. They would be attending to another matter before Hon Manda, J. of the Commercial Court in Lilongwe.

And thus appeared before the court below on 6th February on behalf of the appellant counsel other than Mr. Mpaka. He was seeking an adjournment. He claimed that Counsel actually seized of the matter[the above-mentioned Mr. Mpaka] was not available. He was, as stated in the letter of February 5th abovementioned, appearing before Honourable Manda, J. in Lilongwe.

The respondent opposed the adjournment. It was of the view that the appellant and her counsels were abusing the court process. Seeking needless adjournments for no sound reason or at all.

The court below sided with the respondent. It thought counsel for the appellant's conduct indeed amounted to an abuse of process. It dismissed the application for an adjournment and proceeded to enter judgment against the third party in the sum of K24,500,000.00 being the indemnity sought by the respondent in respect of the damages awarded to Mr. Osman.

The appellant was dissatisfied with the decision. She has appealed to this court.

THE GROUNDS OF APPEAL

Four grounds of appeal were filed. The first two allege that the court below erred in law and fact by entering judgment for the respondent without hearing her in relation thereto. The third contends that the court below wrongfully exercised its discretion when it refused to grant the adjournment sought by the appellant in the said court and lastly that the decision of the court below is against the weight of the evidence adduced for and against the third party action.

THE ARGUMENTS

The Appellant

She contended that the court below wrongly exercised its discretion when it declined to adjourn the matter on February 6, 1918. In her opinion there was good enough reasons for granting the adjournment. Her counsel was attending to a senior judge in Lilongwe. More than that the hearing would have been

aborted anyway seeing as through no fault of hers she could not avail herself before court to be cross-examined by the respondent.

It was her conclusion therefore that the court below should have granted the adjournment and allowed the matter to be determined on the merits. The judgment herein predicated as, in her opinion, it was on a wrongfully denied adjournment should itself be set aside.

About the judgment itself she contended it was entered in error. It was entered in blatant disregard of lawful procedure. When the matter was called on February 6, 2018 the first question before the court below was whether or not an adjournment should be granted. Not to determine the substance of the Third Party Notice which was the appellant's alleged liability to the respondent. The court below having therefore dismissed the application for an adjournment should have proceeded to hear the parties on the Third Party Notice. It never did so. Instead it, without further ado, proceeded to enter judgment against the appellant as prayed for by the respondent.

In the view of the appellant the court below thereby erred. It did not follow due process. It entered judgment without hearing if not both parties then most certainly the appellant who is the party against whom an adverse decision was made. The error was compounded by court below's failure to pronounce itself on the appellant's counterclaim.

Lastly the appellant claims that the judgment is untenable for being against the weight of the evidence before the court below. The gist of the argument is that in entering judgment the said court gave no indication that it considered the evidence adduced by the parties. Arguing, as we understand the appellant, not only that the trial court erred in not considering the evidence before it but also that it would not have come to the conclusion it did had it been minded to do so.

On the basis of the above arguments the appellant believes the judgment herein is untenable. It should be set aside and the matter remitted back to the court below for a hearing.

The Respondent

It opposes the appeal. In its view the court below properly exercised its discretion in refusing to adjourn the matter. The appellant's counsel only notified the court and the respondent a day before the date of hearing of its inability to attend court on February 6. It had however been aware of the matter in Lilongwe since December 17, 2017 when it was served with a notice for such hearing. In between it could have shifted one of the cases to a different date and avoided the debacle that occurred in court on February 6. Not having done so the appellant should not cry foul now that the court below chose, in due exercise of its discretion, to dismiss its application for an adjournment. The court below in this instance correctly and judiciously exercised its discretion.

About the judgment the respondent was certain that the court below was, having dismissed the request for an adjournment, entitled to enter the said judgment. The allegations of a want of a hearing are unfounded. This matter proceeded on affidavits. There was therefore no need to hear the parties *viva voce*. And the court having entered a judgment it must be presumed to have considered the parties' respective positions as advanced in the affidavits.

The respondent therefore contends that this appeal is without merit. It must be dismissed with costs.

THE ISSUES

There are two central questions. First is whether the court below properly and correctly exercised its discretion when it refused to adjourn the matter before it on February 6, 2018 and secondly whether the judgment herein was entered in error as alleged or at all. There is also the other, maybe peripheral, question of whether on the evidence before it the court below came to the correct decision.

THE LAW

It is necessary that we restate some of the principles of law engaged in this appeal.

First is that appeals in this Court proceeds by way of rehearing. See Order III Rule 2[1] of the Rules of the Supreme Court of Appeal. See also the case of **Dr A P Mutharika & Electoral Commission v Dr Saulosi K Chilima & Dr Lazarus M Chakwera** Constitutional Appeal Case Number 1 of 2020[unreported][The Elections Case] where the cases of **Steven Changwalu & DHL International v Redson Chabuka & Hastings Magwirani** [2007] MLR 382 and **Coghlan v Cumberland** (1898) 1 Ch. 704 were cited with approval.

In the former the *Court said:*

> *'we bear in mind that an appeal to this court is by way of rehearing which basically means that the appeal court considers the whole of the evidence in the court below and the whole course of the trial; it is as a general rule a rehearing on the documents including a record of the evidence'.*

In the latter Lindsay MR said:

> *'even when the appeal turns on a question of fact the court has to bear in mind that it is its duty to rehear the case and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong'.*

Second is that an appellate court should be slow to set aside a discretionary order unless the exercise of discretion appealed against is perverse. In that regard the case of **Finance Bank of Malawi v Tembo** [2007] MLR 99 held that a court's exercise of discretion will only be impeached if it is shown that such exercise was under a mistake of the law or in disregard of principle or under a misapprehension of the facts. See also the case of **Minister of Finance & Others v Mhango & Others**[2011] MLR 174 where it was held that where a

tribunal has exercised its discretion to refuse an adjournment such a decision should only be reversed on appeal if it can be said that the exercise discretion was perverse.

Thirdly and now speaking about adjournments the case of **Ngwalo V Unitrans Malawi Ltd** [2000-2001] MLR 352 held that an adjournment is not granted as a matter of course. There must be good reasons for the court to order one.

THIS COURT'S CONSIDERATION OF THE ISSUES

The Adjournment

The law and practice relating to adjournments is, in our view, clear. Parties are entitled to apply for an adjournment. They however have no right to the adjournment itself. Whether or not an adjournment will be granted is in the discretion of the court before whom the application for one is made. And such court will only favourably exercise its discretion to grant an adjournment for good cause.

Secondly it is clear from the case law cited hereinabove that an appellate court, which this court is, can only set aside an exercise of discretion if such exercise is perverse, mistaken in law, wrong in principle or done under a misapprehension of facts.

The question now before us therefore is whether in the circumstances of the present case the Court below properly exercised its discretion when it declined to grant the adjournment sought by the appellant.

On the facts the conclusion is inescapable. There was no good enough reason[s] for the court below to adjourn the matter on February 6, 2018. True counsel for the appellant had two applications set down for hearing on this very day. True that it was physically impossible for him to be present at both hearings. But clearly equally true is the fact that the situation would not have degenerated into what it did if counsel for the appellant had conducted himself in the manner of a reasonable counsel. He could for instance upon being advised in December 2017 that he had another application in Lilongwe on February 6th have rescheduled the appearances. He could, in advance, also

have notified one court that he would not be available. In the alternative he could have made arrangements to have one of the applications handled by another counsel. That in our judgment would have done away with the adjournment in so far as it was based on Counsel's double engagement. Without, we feel obliged to say, the unnecessary reference to Hon. Manda, J. as being senior to Hon. Sikwese, J. Unnecessary costs in time, treasury and inconvenience would also have been avoided. And perhaps most importantly it would have avoided exposing the appellant's Counsel to the unfortunate suggestions that he did not by his above referred to conduct show both the Bench and the Bar sufficient respect.

We are aware of the appellant's argument that the matter would have been adjourned anyway in view of the respondent's request to cross-examine the appellant and the appellant's obvious failure to attend Court on February 6. The appellant is clearly grasping at straws. Asking us to consider what might have happened while at the same time disregarding what actually happened. True the appellant did not turn up for cross-examination. But that does not mean that the matter would automatically have failed to take place. It would have still been up to the respondent to decide whether or not to proceed without the cross-examination. As matters turned out the appellant's counsel did not turn up. And there was no good enough reason for such failure except that the said counsel was attending to a latter appointment in Lilongwe. It cannot be said, whichever way you look at it, that the Court below wrongly exercised its discretion when it declined to grant the appellant's application for an adjournment on February 6, 2018.

The Judgment

We will not belabor the issues. The court below erred in entering it. Like has been said above the business of the court on this day was to first hear an application for an adjournment. Upon its dismissal the Court below should have, in our view, then proceeded to deal with the Third Party Notice by way of hearing and thereafter rendering its decision. It did not do so. It instead

dismissed the application for an adjournment and thereupon determined the Third Party Notice saying '*I disallow the application and order that judgment be entered against the 3rd party as prayed*'. There is no record of either party having addressed the court on anything other than the adjournment. On having been heard on the merits/demerits of the Third Party Notice. The court thereby erred. We agree with the appellant that after disposing of the adjournment it should have notified the parties of its intention to henceforth hear and determine the Third Party Notice. It should actually have heard the parties *viva voce* or in the alternative informed them that it would proceed on the affidavits/written arguments which the parties had previously filed with it. And the court would have done even better if in its conclusion it indicated that it had in doing so taken into account the contents of the parties' affidavits/written arguments.

DETERMINATION

There was nothing wrong about the adjournment. The court below properly exercised its discretion in declining to grant it.

The same cannot however be said about the judgment herein. The parties, more especially the appellant against whom adverse orders were made, were clearly not heard. The judgment cannot stand. It is hereby set aside for having been made in disregard of due process. The matter will be remitted to the High Court Commercial Division, Blantyre Registry where the Judge in Charge will place the same before a Judge other than the one whose decision is now under consideration. The said new Judge will proceed to determine the matter on the merits in a manner provided for by the law.

COSTS

Costs are in the discretion of the Court. They usually follow the event. In the instant case the appellant has succeeded but it must be remembered that we would probably not be here if she had conducted herself properly in the matter of the adjournment. Each party will therefore bear its own costs in this Court.

The costs in the court below will be determined at the conclusion of the matter in that court.

Mwaungulu, JA

Precis

The story leading to the decision of the Court below being appealed from are ably and aptly put by my noble friend, Chikopa, J A. I need not repeat the story. I, like him and the rest, would also dismiss the appeal. I reluctantly accept the order for costs for reasons appearing later. In every case and in this case in particular, this Court and the Court below, should, when exercising powers - including the power of adjournment under its inherent jurisdiction or under the Rules of Court - must seek to be guided by the overriding principle in the Civil Procedure Rules, 1998, and the Courts (High Court) (Civil Procedure) Rules, 1917, respectively. The essence of the overriding principle is justice - fairness. Under section 9 of the Constitution, a citizen has a right and a court the duty to ensure that there is a fair trial where justice is meted though ascertainment of facts and application of the law to those facts. A court must always consider the consequences of an adjournment to ensure that it does not unnecessarily affect the right to a fair trial and does not, more especially where a party has been excluded from a hearing, result in unnecessary applications to set aside or appeal.

The overriding principle

For this Court, under section 8 (b) of the Supreme Court of Appeal Act, the rules and practice of procedure of the Court are the Act itself, its rules of Court - the Supreme Court of Appeal Rules - and, for matters not specifically provided for, the law, practice and procedure current in the Civil Division of the England Civil Court of Appeal - now the English and Wales Court of Appeals

(Civil Division). In the England and Wales Court of Appeal (Civil Division), the Civil Procedure Rules 1998. Part 1 of the Civil Procedure Rules, 1998, provides for the overriding principle in the Rules. For the Court below the overriding principle contains in Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. Order 16, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 provides for adjournments of trial - which the judgment appealed from was. Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017, provides:

(1) The overriding objective of these Rules shall be to deal with proceedings justly and this includes-

(a) ensuring that the parties are on an equal footing;

(b) saving expenses;

(c) dealing with a proceeding in ways which are proportionate to the-

(i) amount of money involved;

(ii) importance of the proceeding; and

(iii) complexity of the issues;

(d) ensuring that a proceeding is dealt with expeditiously and fairly; and

(e) allocating to a proceeding an appropriate share of the Court's resources, while taking into account the need to allocate resources to other proceedings.

2) The Court shall seek to give effect to the overriding principal objective whenever it —

(a) exercises any power conferred on it by these Rules; or

(b) interprets any written law, rules and regulations.

(3) The parties to any proceeding shall assist the Court to further the overriding objective of these Rules.

(4) The Court shall further the overriding objective of these Rules by active case management.

(5) Active case management shall include —

(a) encouraging the parties to co-operate with each other in the conduct of the proceeding;

(b) identifying the issues for resolution at an early stage;

(c) deciding promptly which issues need full investigation and trial, and accordingly disposing of other issues, summarily;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure, if the Court considers that appropriate, and facilitating the use of such procedure;

(f) assisting the parties to settle the whole or part of the proceeding;

(g) fixing timetables, or otherwise controlling the progress of the proceeding;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the proceeding as the Court can on the same occasion;

(j) making use of technology; and

(k) giving directions to ensure that the trial of a proceeding continues quickly and efficiently.

This is probably the first time when this Court considers the power of the Court below under its inherent jurisdiction and Order 16, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017, to adjourn and the colossal consequences of the overriding principle in Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 stresses the plenipotentiary of the overriding principle. Order 1, rule 5 (2) (a) and (b) of the Courts (High Court) (Civil Procedure) Rules, 2017, require that the Court below to seek to give effect to overriding principle when exercising any power conferred upon it by the Rules and when interpreting any 'written law, rules or regulations.' These principles

apply the more so when a court has, as Chikopa, JA, puts it, to decide whether to adjourn or not to adjourn. In this case, the Court below overlooked, besides the principles laid by the general law, from all consideration Order 1, rule 5 when exercising the power to adjourn under Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. The Court below was ambiguous on how to proceed where a party is, for some reason absent at the hearing or trial date. Moreover, the Court below received a little assistance from Counsel on the established law and principles when deciding whether or not to adjourn the proceedings at trial.

Before the Civil Procedure Rules, 1998 and the Courts (High Court) (Civil Procedure) Rules, 2017

Before the Civil Procedure Rules, 1998, whose principles apply to this Court under section 8 (b) of the Supreme Court of Appeal Act and are incorporated almost verbatim in Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017, the common law developed very solid principles on the decision whether or not to adjourn. Those principles, however elaborate, must, albeit relevant, be understood to have been affected, in relation to this Court, by Part 1 of the Civil Procedure Rules, 1998 and, in relation to the Court below, by Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017.

There is no decision of this Court on this matter. Counsel have not cited any decision - save this one - of the Court below where the overriding principle has been applied or discussed when deciding, suo motu or at the behest of the parties, to adjourn proceedings. The decision in this matter, however, is one where the overriding principle was not even cited or discussed at all. This Court, however, would, given section 8 (b) of the Supreme Court Act, regard very authoritatively decisions of the England and Wales Civil Division of the Court of Appeals. The decisions are very persuasive in the Court below. These decisions, given that Part 1 of the Civil Procedure Rules, 1998, is in pari

materia with Order 1, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017 would apply to the Court below. No decision comes to prominence than the latest decision of the England and Wales (Civil Division) Court of Appeals in *Bilta (UK) Ltd (in liquidation) and Others v Traditional Services Ltd* [2021 EWCA 221 (22 February, 2021 and in the judgment of Nugee, LJ., with who Richards and Jackson, LJJ., agreed.

Bilta (UK) Ltd (in liquidation) and Others v Traditional Services Ltd was where the trial court refused adjournment. Nugee, LJ, after reviewing many cases before and after the overriding principle in the Civil Procedure Rules, 1998, *Bilta* said:

In those circumstances we were taken to a number of authorities, dating back to long before the introduction of the CPR, and received much more extensive submissions on the law than it appears the Judge did. I consider ... it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that Mr. Scorey is right that the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist ... And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for.

Decisions by the Court of Appeals and the English and Wales Court of Appeal before the Civil Procedure Rules, 1998, that Nugee, L.J., considers may illuminate principles underpinning the decision whether or not to adjourn. Nugee, LJ, continued:

There have of course been many procedural changes since 1943, not least the introduction of the CPR, but unless these have made all the difference, it

would, I think, be surprising that what struck them then as giving rise to a clear risk of injustice should be regarded very differently today.

The wider principle, therefore, has not changed by the Civil Procedure Rules that, following the civil procedure - now extended to criminal proceedings under The Criminal Procedure Rules - in the Woolf reforms that have stormed the common law world.

The principAL thread through all this is that, apart from reasons or grounds of adjournment, the court, where an adjournment is sought, refusal or allowing adjournment must not result in injustice. Injustice premises on the need for a fair trial. A trial that prevents a party to present its full side of a case is prima facie unfair. Justice is assured and assuring where a court was, through trial, able to hear and receive all evidence from litigants. So, where, adjournment prevents a full trial - the best determinant of justice - it is, in principle unfair to the party applying for adjournment. In *Green v Northern General Transport Co Ltd* (1970) 115 SJ 59 adjournment was sought because, served with notice of a trial date, a material witness could not make it because of bronchitis, albeit all other witnesses were heard. The Court below refused adjournment. Lord Denning MR (Edmund Davies and Megaw LJJ agreeing), allowing the appeal, said:

If by refusing an adjournment an injustice would be done, the judge erred in point of law if his decision was unjustified. If there was a material witness who was not available or whose presence was desirable the judge should grant an adjournment provided that any injustice so caused could be compensated in costs.

On 22 February, 1990, the Court of Appeals decided *Lombard Finance v Brookplan Trading & Others* (unreported). The defendant, whose defence was that the guarantee agreement was fraudulently altered, applied two weeks before trial to adjourn proceedings because a material handwriting expert was appearing in another court. The Court below refused adjournment because the defendant had left it for too late. The Court of Appeal allowing the appeal said:

I have borne in mind the reluctance this court should have to interfere with the exercise of a judge's discretion, but it does seem to me that it would be unfair in the extreme that, against the background of circumstances I have described, this applicant should be deprived of the expert witness simply because he did not notify the court a little earlier that the witness was not available.

In both cases, the Court felt it was unfair on the defendant who seeks to adjourn to continue with the trial where it would be unfair not to hear the defence or evidence. The position is not any different in Australia before the Civil Procedure Act, 2007 incorporating the principles in the Civil Procedure Rules, 1998. In *Sali v SPC Ltd* (1993) 67 ALJR 841, 843, the High Court of Australia:

In *Maxwell v Keun,* [[1928] 1 KB 645] English Court of Appeal held that, although an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, it will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. That proposition has since become firmly established and has been applied by appellate courts on many occasions. Moreover, the judgment of Atkin LJ in *Maxwell* has also been taken to establish a further proposition: an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action. However, both propositions were formulated when court lists were not as congested as they are today and the concept of case management had not developed into the sophisticated art that it has now become.

In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources, the competing claims by litigants in other cases awaiting hearing in the court as well as interests of other parties ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other

litigants and the public interest in achieving the most efficient use of court resources.

The *Sali* case, in extending consideration of court resources and unfairness to others waiting for a day in court, broaden the necessary matters that should dominate the decision whether or not to adjourn.

In Canada, where I doubt if she has the equivalent of Part 1 of the Civil Procedure Rules, 1998, Courts approach the matter from principles of natural justice (*Law Society of Upper Canada v Igbinosun* (2009) 265 OAC 27 (CA); *McIntyre v Ontario College of Teachers* (October 12, 2012, Ont. SCJ (Div. Ct). (For Hong Kong, see *House v The King* [1936] HCA 40). In 'To Adjourn or not to adjourn, that is the question,' the authors state:

Although the decision to grant an adjournment is discretionary, the case law has established that an adjournment must be granted where the failure to adjourn would result in a breach of natural justice. Natural justice is the principle that all parties have a right to a fair hearing. A fair hearing is one where all parties are able to put their cases squarely before the decision-maker, or to respond fully to the evidence and arguments of other parties. If a party makes an adjournment request because he or she cannot fully or adequately present his or her case, the tribunal may be required to grant the adjournment.

The authors state that under Canadian law, on adjournment a court must consider the reasons for adjournment and the impact of the adjournment on one requesting the adjournment. Will it impact the ability of a person adjourning to present the case?

The next case, decided by the England and Wales Court of Appeal (Civil Division) after the Civil Procedure Rules, 1998), was *Teinaz v Wandsworth London BC* ([2002] EWCA Civ 1040). The impact of the Civil Procedure Rules, 1998, was not considered. On further appeals, Peter Gibson LJ (Arden LJ and Buckley J agreeing), remarked:

Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so is a denial of justice. Where the consequences of the

refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645, 653 on adjournments in ordinary civil actions:

"I quite agree that the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; on the other hand, if it appears that the result of the order below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

The Court continued with this general statement:

A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court or to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

Albon v Naza Motor Trading Sdn Bhd (No 5) [2007] EWHC 2613 (Ch) was a High Court of England and Wales decision. The defendant, shortly before trial day, changed solicitors except for counsel to adjourn the case because a material witness for sickness would not travel from Malaysia to England. Satisfied about at least three of the four conditions in *Dick v Piller* [1943] I KB 497, Lightman J refused adjournment. He thought that, while previous decisions were useful, a court faced with an adjournment, has now to proceed on the overriding principle in the Civil Procedure Rules, 1998. Proceeding on these considerations, the Court refused adjournment. There was no appeal to the then Court of Appeals.

In *Terluk v Berezovsky* [2010] EWCA Civ 1345 the case turned out more on whether or not to adjourn to enable a defendant to have legal representation. Sedley LJ (sitting with Mummery LJJ sitting) said:

Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, Lord Hope said (at §6):

"[T]he question whether a tribunal ... was acting in breach of the principles of natural justice is essentially a question of law."

As Carnwath LJ said in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, §50, anything less would be a departure from the appellant court's constitutional responsibility. This "non-*Wednesbury*" approach, we would note, has a pedigree at least as longstanding as the decision of the divisional court in *R v S W London SBAT, ex parte Bullen* (1976) 120 Sol. Jo. 437; see also *R v Panel on Takeovers, ex p Guinness PLC* [1990] 1 QB 146, 178G-H per Lord Donaldson (who had been a party to the *Bullen* decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European Court of Human Rights under article 6 of the Convention - for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant's right both at common law and under the ECHR to a fair trial."

In *Dhillon v Asiedu* [2012] EWCA Civ 1020, on the first day of trial, an application for adjournment was refused. The Court considered the impact of the Civil Procedure Rules, 1998, on the power to adjourn. The defendant contended that he lacked capacity and was unable to give evidence. But running up to trial, the case was strewn with periods of adjournments and adverse peremptory orders about further evidence and this was the third time the case was finally set down for hearing. The England and Wales Court of Appeal affirmed the refusal. Arden and Davis LJJ agreed with Baron J when she said:

"a. [T]he overriding objective requires cases to be dealt with justly. CPR 1.1(2) (d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.

b. [F]airness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).

c. [I]t may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.

d. [U]nless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (*Aldi Stores Limited v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail."

In *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101 Gloster LJ said:

"Mr. Small rightly accepted that the question of whether or not to grant an adjournment of a trial on health grounds was a discretionary matter for the trial judge. However, as he submitted, and as I accept, the jurisdiction of this court is not confined simply to considering whether irrelevant factors were taken into account, or relevant ones were ignored in the *Wednesbury* sense, or whether the decision not to adjourn lay within the broad band of judicial discretion of the trial judge. Rather, the authorities make clear that, in reviewing the exercise of discretion, the Court of Appeal has to be satisfied that the decision to refuse the adjournment was not "unfair": for example, see *Terluk v Berezovsky* [2010] EWCA Civ 1345 (per Sedley LJ at paras 18-20), quoted below, particularly in circumstances where his right to a fair trial under Article 6 ECHR is at stake."

She proceeded and said "Obviously overall fairness to both parties must be considered."

The fairness question works together with the reasons for adjournment. In agreeing with Nugee, LJ, in *Bilta (UK) Ltd (in liquidation) and Others v Traditional Services Ltd,* Jackson, LJ, said

There are two aspects to an application to adjourn: assessing the facts and exercising the discretion. Here, the facts supporting the application were not in dispute and the appeal concerned the exercise of discretion. But in every case, the court will first need to assess the facts behind the application, and where a litigant fails to substantiate the reason for an adjournment, the outcome of the exercise of discretion will scarcely be in doubt.

The incidence of the Overriding Principle

The incidence of the overriding principle on the overall question on adjournment gets mixed responses in different jurisdictions. The England and Wales High Court in *Albon v Naza Motor Trading Sdn Bhd (No 5)* assumed primacy of the overriding principle. In In *Dhillon v Asiedu* the England and Wales Court of Appeal applied the principle together with other principle without resolving primacy. It is in *Bilta (UK) Ltd v Nat West Markets plc,* where *Albon v Naza Motor Trading Sdn Bhd (No 5)* and *Dhillon v Asiedu,* where the England and Wales Court of Appeals creates the sync. Nugee, LJ, says:

Mr. Parker had a third submission, which was that in applying the overriding objective under CPR r 1.1 the need to ensure that a case is dealt with expeditiously and fairly is only one of the factors to be taken into account, and that all the factors are relevant. As a matter of the drafting of the rule that is no doubt true ... In my judgment therefore the relevant principles are as I have set them out at paragraph 30 above."

Stated differently, the overriding principle is one among others that a court must consider when deciding whether or not to adjourn. In Australia the position is whatever principles were before the Civil Procedure Act, 2007, they are affected by the statutory rule - despite that a Court has inherent jurisdiction to adjourn proceedings *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 252) In *State of Queensland v J L Holdings Pty*

Ltd (1997) 189 CLR 146 at 154, the Court, Dawson, Gaudron and McHugh JJ, said:

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

Basten and Campbell, JJA agreed with Spigelman CJ, in *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 when he observed that, while *State of Queensland v J L Holdings Pty Ltd* proposed applicable common law principles, those principles are affected and modified by statute both directly and via statutory authority for rules of court. Said the Chief Justice:

In this State *J L Holdings* must now be understood as operating subject to the statutory duty imposed upon the courts by s 56(2) of the *Civil Procedure Act* 2005, which requires the Court in mandatory terms – "must seek" – to give effect to the overriding purpose – to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" – when exercising any power under the Act or Rules.

The power to adjourn

Our Order 16, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017, is worded differently albeit that, apart from it, the Court has inherent power to adjourn. Order 16, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017, provides:

The Court may adjourn trial at any time for good reasons; which reasons shall be endorsed on the court record.

The power to adjourn is both enabling and limiting. The section is a general power to adjourn. It is limiting because, where there are no reasons or the reasons are bad, the court may not adjourn. The Court may only adjourn for reasons - good reasons. The Court can act on its own, in which case it may require parties to attend, or at the instance of a party who has given notice to another. The Court acting *suo motu* may have to consider the wider powers and

orders that it can make under the Rules of Court. It is important that the application to adjourn be made much earlier (*Law Society of Upper Canada v Igbinosun*; *McIntyre v Ontario College of Teachers*). A party, however, has a right, as happened in this Court, to apply for adjournment in court. Whatever the case, the Court has to exercise discretion and exercise it judicially.

Consequences of a refusal or allowing an adjournment

Where a party, as happened in this case, applies for adjournment in court must be distinguished from where a party, duly served and on time, does not attend court and where, again as happened here a defendant is present in person with or without Counsel and seeks adjournment. Where a party does not attend, under Order 16, rule 7 of the Courts (High Court) (Civil Procedure) Rules, 2017, the Court need not adjourn:—

(1) The Court may proceed with a trial in the absence of a party but-

(a) where a party does not attend the trial, it may strike out the whole of the proceeding;

(b) where a claimant does not attend, it may strike out his claim and any defence to a counterclaim; and

(c) where a defendant does not attend, it may strike out his defence and dismiss his counterclaim.

(2) Where the Court strikes out the proceeding or any part of it under this rule, it may, on application of a party, subsequently restore the proceeding, or that part of the proceeding that was struck out.

(3) Where a party does not attend and the Court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

(4) An application under sub rules (2) or (3) respectively must be supported by evidence.

(5) Where an application is made under sub rules (2) or (3) respectively by a party who failed to attend the trial, the court may grant the application only if the applicant-

(a) acted promptly when he found out that the Court had exercised its power to strike out or to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial.

1. The Court may, on application, order the re-opening of a proceeding after trial but before judgment where the Court is satisfied that it is necessary to do so in the interests of justice.

In any of these scenarios, the trial Court and an appellate court natural justice and the right to affair trial complaints do not arise. This is the law, practice and procedure where a party does not attend. Failure to attend eschews one's right - given by a court - to a fair trial where one can respond to the case of another and advance one's side of the case (Unit Traders vs. Commissioner of Customs 2012(281) ELT659 (Mad). No fair trial questions arise when a court proceeds in the absence of a party who, served with a notice of hearing or present at the last adjournment, does not attend. Fairness is restored, if unfairness at all proceeded from obtaining such a judgment, in that in this scenario, the defendant can, without appealing, set aside a judgment.

Dismissal, when the complainant is absent, is with liberty to restore, subject of course, to the statute of limitation.

Where, however, a party, present or absent from court, applies for adjournment, the outcome depends on whether or not the Court will adjourn the proceedings. The need for reasons for adjournment conflates. Fairness - the right to a fair trial - arises whether the court refuses or adjourns the case. Where the Court will, it can only do so on the peril of reasons and the reasons must be recorded on the record of the Court. Where, however, the Court will not adjourn, the reasons for adjournment must be disclosed *per force* a party appeals against the exercise of the discretion. In cases below the High Court, there can be judicial review of the decision to refuse adjournment (*Director of Public Prosecutions v Ozakca* ([2006] NSWSC 1425; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 258 (CA). In the latter case, fairness of the trial and rules of natural justice arise.

Where a party is present in court, with or without a legal practitioner, is not a situation of non-attendance covered by Order 16, rule 7 of the Courts (High Court) (Civil Procedure) Rules. In such a case, the court is faced with a decision that will ensure that there is a fair trial, as described. A court, therefore, is under a duty to ensure that an opportunity avails where parties must present for a court's determination all in their case as justice demands or requires. The truth is that refusal to adjourn the hearing is, on the face of it, a direct impingement on the right to a fair trial. It prevents a party, a complainant or defendant, from presenting the correct and full case for a court's determination. Any adjournment must, therefore, encourage parties to present their case fully so that a court decides the case as justice requires. This is an instance where justice itself has to be balanced with procedural fairness - the process of the court to ensure that there is a just outcome in the first place.

Failure to adjourn a case offends procedural fairness. In *Nitiva v Director of Public Prosecutions* [1999] NSWCA 332, the Court of Appeal said

The principles upon which an adjournment ought to be granted are well established. The court has a discretion to grant or refuse an adjournment. However, a refusal to grant an adjournment can, in certain circumstances, constitute a denial of procedural fairness:

Procedural fairness must be even handed both sides (*The Queen v Lewis* [1988] HCA 24; 165 CLR 12, 17) In *Watson v Watson* (1968) 70 SR(NSW) 203 at 206, Asprey JA said "in doing justice a court proceeds on a two-way street and in the exercise of a discretion the rights of both the parties to the litigation must be considered".

Exercise of the power and/or discretion

A fortiori, an adjournment will not, therefore, be granted as a matter of course. Conversely, an adjournment will be refused or allowed where, in all circumstances of the case, it is the just thing to do. All, therefore, depends on the circumstances of the case. In *Law Society of Upper Canada v. Igbinosun* a trial riddled with pretrial and after trial adjournments for six years was eventually set down for a specific date with an unless order to dismiss or determine the case should the applicant not comply with the order. At the time of the peremptory order, it was clear to the court that the defendant would change counsel. The trial court declined the defendant's application for adjournment when counsel in the application suggested possible dates of hearing. On appeal, the decision was reversed for denial of natural justice. Remaining in Canada, in *McIntyre v. Ontario College of Teachers,* the defendant being involved in other proceedings and for health reasons, the case was set on a day on a peremptory order that, for health reasons, the defendant should produce a medical report. On Appeal the Court confirmed the trial court's order refusing adjournment on health grounds without a medical report. The matter is extremely discretionary on the facts of a particular case. The period up to the time of adjournment and existence of a peremptory order are reasons, among many, that a court regards in exercising discretion. These considerations, like others like them, are neutral in that their absence or

presence are not determinative of whether or not to adjourn. They are matters that a court will regard. Lord Bingham in R v Aberdare Justices *ex parte Director of Public Prosecutions* (1990) 155 JP 324 (then as Bingham LJ) and in R v Hereford Magistrates' Court *ex parte* Rowlands [1998] QB 110 essays crystallization (Crown Prosecution services v *Picton* [2006] EWHC 1108 (Admin); *Pari-Jones v Crown Proswecution Service* . [2018] EWHC 3482 (Admin) Case No: CO/2234/2018). The attempt is not exhaustive. There are matters about parties, legal practitioners and witness (availability and health) *Director of Public Prosecutions v Gursel Ozakca & Anor* [2006] NSWSC 1425 and *Director of Public Prosecutions v Chaouk & Anor*), legal or non-legal representation (*Walker v Walker* [1967] 1 WLR 327; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497; *Petrovic v Taara Form Work (Canberra) Pty Ltd* (1982) 62 FLR 451; Cf *Bloch v Bloch* (1981) 180 CLR 390), the type, importance and seriousness of case *(Director of Public Prosecutions v Chaouk & Anor*), court resources (space and time) (*Director of Public Prosecutions of North South Wales v Ozakca & Anor* and *Director of Public Prosecution of North South Wales v Chaouk & Another*); rights of others waiting for their day in court, backlog and delay and generally fairness questions(*Sali v SPC Ltd* (1993) 67 ALJR 841); whether this is the first application of the adjournment (*DPP v Chaouk & Anor*); consent of the other party (*Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246; *DPP v Chaouk & Anor* [2010] NSWSC 1418); objection to adjournment (*Director of Public Prosecutions of North South Wales v Ozakca*); seeking legal aid (*Friends of the Glenreagh Dorrigo Line Inc v Jones* (unreap, 30/3/94, NSWCA); concurrence between civil and criminal proceedings (*Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382 at 386, 387; *McMahon-Winter v Larcombe* [1978] 2 NSWLR 155; *Ceasar v Sommer* [1980] 2 NSWLR 929 and *McMahon v Gould* (1982) 7 ACLR 202. These, and many more, are the mosaic and hotchpotch in which the discretion is exercised. For adjournment in criminal proceedings *DPP v Gursel Ozakca & Anor* [2006] NSWSC 1425 and *DPP v Chaouk & Anor* [2010] NSWSC 1418) are pertinent. The decision to adjourn or not adjourn can be very consequential generally.

Besides the often quoted statement, justice delayed is justice denied, adjournments can result in public criticism. Despite widespread public criticism of delays caused by adjournments, there has not been any study in Malawi on the matter as to provide a more comprehensive solution. Consequently, the solutions have been sporadic and inadequate. Authoritative works by the United Nations and World Bank reports and academics are both moribund and interesting reading on the problems, interventions for law reform (PJDP, 2015a: 1;(World Bank 2010b; PJDP (2015b; 11) 4 GSDRC Helpdesk Research Report 1374 2; (World Bank 2010a; Plummer, 2012: 203; (World Bank 2010a: xvi); UNODC, 2014: 20);World Bank 2010a: xvii-xxiv; 65);UNODC, 2014: 20; World Bank, 2011: ii-iii);6 GSDRC Helpdesk Research Report 1374; Messick, 2015: 4); (World Bank 2011: 43): (World Bank 2010b: 36): Hazra (2006); Dandurand (2014: 424) A report by the Pacific Judicial Development Programme (PJDP, 2015a: 23); (CEPEJ, 2008: 15); GSDRC Helpdesk Research Report 1374; PJDP, 2015b: 9; (PJDP 2015a: 10) (Dakolias, 2000); World Bank (2013: 4); (PMD: 2014; Dandurand (2005); (CEPEJ, 2008: 15); (Raine and Willson, 1993); Michels (1995); (Libman, 2006: 168); World Bank, 1999: 34; (PJDP, 2015b: 26); 10 GSDRC Helpdesk Research Report 1374; 'Addressing Inefficiencies in the Criminal Justice Process, Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy (http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/) Inefficiencies Preliminary Report (pdf), Dakolias, M. (2000); 'Legal and Judicial Development: The Role of Civil Society in the Reform Process. Fordham International Law Journal 24 (6): S26-S55 (http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1778&context=il); 'European Commission for the Efficiency of Justice (CEPJ) (2008). Compendium of "best practices" on time management of judicial proceedings. Brussels: Council of Europe(http://euromedjustice.eu/system/files/20090706165605_Coe), Compendium of Best Practices on time management of Judicial Proceeding.doc.pdf Hazra, A. K. (2006); 'Possibilities, Dynamics and Conditions

for Reform of the Judiciary in India, in McInerney, T. F. (ed) Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries. Rome: International Development Law Organisation (Retrieved from: http://www.ebrd.com/downloads/legal/what/idlo.pdf); Libman, R. (2006)0, 'Criminal Trial Rules in Provincial Courts in Canada, 2007-2008 Edition, Salt Spring Island: Earlscourt Legal Press Inc. Messick, R.E. (2015); 'Uncorking the bottlenecks: Using political economy analysis to address court delay, Bergen Norway: U4 Anti-Corruption Resource Centre. Retrieved from (http://www.cmi.no/publications/5612-uncorking-the-bottlenecks), Micevska, M. and A.K. Hazra (2004); The Problem of Court Congestion: Evidence from Indian Lower Courts; ZEF Discussion papers on Development Policy 88, Centre for Development Research, University of Bon (https://ideas.repec.org/p/ags/ubzefd/18750.html), Michels, M. J. (1995); 'Management Note: Case Management Techniques Work,' Justice System Journal, 18(1), 75-88, National Audit Office, (2006). 'Crown Prosecution Service - Effective Use of Magistrates' Courts Hearings, Report by the Comptroller and Auditor General, London: House of Commons (https://www.nao.org.uk/report/crown-prosecution-service-effective-use-of-magistrates-courthearings/), Addressing case delays caused by multiple adjournments 11 Pacific Judicial Development Program (PJDP) (2015a); 'Reducing Backlog and Delay Toolkit, Wellington: New Zealand Minister of Foreign Affairs and Trade,'(http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Reducing-Backlog-and-Delay-Toolkit.pdf), Pacific Judicial Development Program (PJDP) (2015b); 'Reducing Backlog and Delay Toolkit - Additional documentation, Wellington: New Zealand Minister of Foreign Affairs and Trade. Retrieved from (http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Reducing-Backlog-and-Delay-Toolkit-AD) (pdf), Performance Management Directorate (PMD) (2014); 'Court Case Delays: Impact Evaluation Diagnostic Study Report, Nairobi: PMD (http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/COURT%20CASE%20DELAYS-

%20IMPACT%20EVALUATION%20DIAGNOSTIC%20STUDY%20REPORT) (pdf Plummer, J. (2012); 'Diagnosing corruption in Ethiopia: perceptions, realities, and the way forward for key sectors. Washington D.C.: World Bank (https://openknowledge.worldbank.org/bitstream/handle/10986/13091/699430PUB0Publ067869B09 780821395318) (?sequence=1); (Raine, J. W., & Willson, M. J. (1993); 'Organizational culture and the scheduling of court appearances,' Journal of Law and Society, 20(2), 237-252 (http://www.jstor.org.ezproxyd.bham.ac.uk/stable/pdf/1410169) (pdf) United Nations Office on Drugs and Crime (UNODC); 'Assessment of the Criminal Justice System in Ethiopia,' New York: United Nations, World Bank, (1999); 'Reducing Courts Delays: Five Lessons from the United States,' Washington DC: World Bank (http://wwwwds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2016/03/18/090224b082f0e108/2_0/Rendered/PDF/Reducing0court0om0the0United0States); 'Uses and Users of Justice In Africa: The case of Ethiopia's Federal Courts,' Washington D.C., World Bank (http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-caseethiopias-federal-courts), World Bank, (2010b); 'Uses and Users of Justice In Africa: The case of Ghana's Specialised Courts,' Washington D.C.: World Bank (Retrieved from: http://documents.worldbank.org/curated/en/2010/07/13145814/uses-users-justice-africa-caseghanas-specialised-courts), World Bank, (2011); 'Malaysia: Court Backlog and Delay Reduction Program,' Washington D.C.: World Bank (http://documents.worldbank.org/curated/en/2011/08/18286988/malaysiacourt-backlog-delay-reduction-program-progress-report), World Bank, (2013); Kenya - Judicial Performance Improvement Project, Impact Evaluation Design Summary, Washington D. C: World Bank (http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741- 1401909601248/Summary_Kenya) (pdf) World Bank (2014); Doing Business 2015: Going Beyond Efficiency,' Washington D.C., World Bank

(http://bit.ly/1tgNlae. (12 GSDRC Helpdesk Research Report 1374 Expert contributors). helpdesk@gsdrc.org).

Some reforms include legislative reforms limiting the number of adjournments to three (India); times in which cases must, from registration, be concluded to one years; limiting to three months the time of delivery of judgment, reducing activities in the process; introduction of incentives to judges, case management, limiting court based adjournments and adoption of Information, Communication and technology interventions. Until all these interventions are, even partially, *in situ*, courts have only their inherent or statutory power to mete the justice of the particular case and resolve the wider and louder concerns caused by adjournments.

I would, therefore, reduce those principles as follows. A court faced with adjournment, however tardy, even given at the trial, must ultimately consider the effect of refusal or allowing the adjournment on the right of parties to a fair trial - the right of either party to have justice settled after being given an opportunity to present its and answer the opponent's by full trial where a court, under its duty under section 9 of the Constitution, ascertains the facts and applies the law. Section 9 of the Constitution creates a right viz-a-viz a citizen and a duty to the court for a fair trial. The need for a fair trial is a principle of the general or common law that now receives statutory force in the overriding principle in Part 1.1 of the Civil Procedure Rules, 1998, for this Court and Order 5, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017. Both provisions entreat and require courts, when exercising any power under the Rules of Court - not any less when exercising the power to adjourn - that they "shall seek" to "give effect" to the overriding principle that requires courts to deal with proceedings "justly" by ensuring that proceeding are dealt with "expeditiously and fairly," allocating to a proceeding an appropriate share of the Court's resources, while taking into account the need to allocate resources to other proceedings.

A court must, therefore, refuse or allow adjournment with a view to promoting occurrence of a fair trial - fair to the applicant and the respondent.

There are bound to be situation where, all considered, it is unjust or unfair to a complainant to allow adjournment of a trial. Just as there are bound to be circumstances where it is unfair or unjust to refuse postponement. The Court, however, also considers the fairness question from the reasons for adjournment.

A court may still refuse or allow adjournment where no reasons are given by the applying party or the opposing party. The reasons for adjournment go more to process than principle. Because fairness, by itself is a valid reason for refusing or allowing adjournment. Order 16, rule 5 of the Courts (High Court) (Civil Procedure) Rules requires that a reason be given for an adjournment. That reason must go to fairness of proceedings – the extent to which they affect the right of a party to a trial. Any other reason may not count. In exercising the power under Order 16, rule 5 of the Courts (High Court) (Civil Procedure) Rules, 2017, a court must seek to give effect to the overriding principle.

The fairness question is answered from the consequences of a refusing or allowing adjournment. If adjournment is allowed, obviously, the respondent and the applicant, if there is no unfairness, will both be able to have a fair trial. A Court must ensure a fair trial. There is a long passage by Dean J in the Full Court Federal Court of Australia in *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343, which, as of necessity I must quote *in extenso* for richness of the principles thereby stated:

A refusal to grant an adjournment can constitute a failure to give a party to the proceedings the opportunity of adequately presenting his case. If the tribunal had, in the present matter, refused an application by the appellant for an adjournment to enable him to procure Dr Evans' attendance as a witness, that refusal may well have constituted such a failure. No such application for an adjournment was, however, made. If it had been made, it is highly probable that the Tribunal would have acceded to it: indeed, counsel who appeared for the appellant stated that he did not dispute that, if the appellant had applied for an adjournment, the Tribunal would have granted it. The absence of any

application for an adjournment does not, however, necessarily conclude the issue adversely to the appellant. The failure of a tribunal which is under a duty to act judicially to adjourn a matter may, conceivably, constitute a failure to allow a party the opportunity of properly presenting his case even though the party in question has not expressly sought an adjournment (see *Priddle v Fisher* [1968] 1 WLR 1478). In this regard, however, it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable opportunity to present his case.

The incidence, therefore, is when a court refuses adjournment. There, there is, prima facie, an infringement of the right to a fair trial. The latter scenario is not akin to non-attendance of a party to the proceedings. For, as happened in this case, counsel and or a party is present at the hearing. The infringement of the right is a consequence of refusing or allowing the adjournment.

The rules of court give two options where, like here, the defendant is absent or is excluded from proceedings. The court may proceed with the trial or strike the pleadings - the defence. In the former case, there is no hearing where proceedings commenced by an originating writ of summons. The complainant obtains a judgment in default of pleadings. This default judgment can be set aside as a matter of course without the need for an appeal. The Court below never dismissed the pleadings. In any case, third party proceedings seemingly commenced by originating summons rather than an originating writ summons. The matter, therefore, could only proceed to a trial or hearing.

The complainant, where it is the complainant's or the defendant's application, adjournment is refused, will proceed, to a full trial or hearing, allowing the defendant or the defendant's counsel to cross-examine witnesses and contradict other evidence. The defendant will also be allowed to call to lead evidence in defence and have one's witnesses cross-examined and evidence contradicted. Once a court allows an adjournment, parties will be afforded a full hearing as a matter of course. The Court has to call for a full trial. The court cannot, unless agreed to by parties, act on witness statements or affidavit evidence only. As this Court observed recently in of *Lakhani and*

another v Vindhani and another (2012) (MSCA) Civil Appeal No 55 (unreported), a judgment with parties present will not be *res judicata* where a court proceeds with a bare and hollow trial where, required to have a hearing, the judge enters a default judgment without a trial. A court must at a refused or allowed adjournment afford parties a full trial if there is no complication based on the availability of a party or a party's witnesses.

Where proceedings continue a court must resolve fairness of the trial from absence of a party's witnesses. On the face of it, if there is nothing else, absence of a party or material witnesses or evidence redounds into an unfair trial. A material witness need not necessarily be a party's witness where, like here, a party requires an opponent's party to be cross-examined. It must be that, for the other party, justice will be more apparent for the court when the other party is cross-examined. Consequently, a court must avail parties the right for them and their material evidence to be present. That includes the right of a party to legal representation.

The right to legal representation by a legal practitioner of choice, albeit not spelled out in civil proceedings as it is in criminal proceedings under section 42 of the Constitution, premises on other rights in the Constitution as, for example, the right to fair administrative action under the Constitution. Generally, the right to be represented by a legal practitioner of choice, is central to the right to a fair trial. A legal practitioner, protected by immunity and privilege, is tasked to present a party's case - the evidence and legal framework - with clarity and lucidity so that a court can do justice or the fair thing. So much so that a litigant must, where feasible, have counsel in all matters legal and more so when asserting rights in a court of law. Consequently, faced with an adjournment where a party may not be represented or, if represented, represented adequately, absence or otherwise, goes to the right to a fair trial. A court, therefore, will not have to act in a manner where a party may not be represented or, if represented, adequately represented. Inadequate representation may arise because a legal practitioner has not adequately prepared for the trial; where there has been an abrupt

change of a legal practitioner; or where counsel in court was not the one who is in charge of the matter.

The power of this Court on appeal against an order of adjournment

The foremost consideration on appeal is more about the manner the discretion was exercised rather than the actual discretion made. This Court does not proceed on the basis that, if it were in the shoes of the court below, it would have exercised its discretion differently. This Court proceeds on the basis that adjournment is a matter in the discretion of a trial court. This Court, therefore, seldom, if not, never, interferes with the discretion of a court unless it is wrong in law and principle or such that no reasonable trial, on the facts and circumstances, could have exercised the discretion in the manner exercised by the trial court. This court will interfere where the trial court overlooked a material factor; undermined an important factor; or exaggerated a minor or peripheral consideration. In *R v* Alexandroaia (1995) 81 A Crim R 286, 290, the Criminal Court of Appeal, following *Maxwell v Keun and others*, said:

> Whether or not an adjournment should be granted is a matter which lies within the discretion of the trial judge. An appeal based upon the judge's refusal to grant an adjournment is thus one against the exercise of a discretion, and it will be allowed only where it has been established that the judge has erred in the proper exercise of that discretion. There is a strong presumption in favour of the correctness of the decision, but that presumption will be overcome where it is shown that the judge has acted on some wrong principle, or has given weight to extraneous or irrelevant matters, or has failed to give wait or sufficient weight to relevant considerations, or has made a mistake as to the facts. Even if the precise nature of the error may not be discoverable, it is sufficient that the result was so unreasonable or plainly unjust that the appellant court may infer that there has been a failure properly to exercise that discretion. An appellate court may not, however, substitute its own

findings of fact for those of the primary judge unless there was no evidence to support a particular finding, or the evidence is all one way or the judge has misdirected himself in relation to those facts. If the appellate court is satisfied that there has been an injustice to one of the parties as a result of the judge's exercise of discretion it is under a duty to review the order made."

An appellate Court will certainly interfere where the power to adjourn is used in a way as to undermine the justice system or process in order to ensure legitimacy or decorum in the system. Kirby, P, as he then was in *Blazevski v Judges of the District Court* (1992) 29 ALD 197, 200:

In 'particular circumstances', therefore, appellate courts will resolutely intervene both for the assurance of justice and the manifest appearance of justice and to uphold the integrity of the system of justice. See *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 (CA) at 258. Courts providing judicial review to rectify departures from the requirements of procedural fairness will likewise give relief for departures from such requirements which will have taken the trial court outside the proper exercise of its jurisdiction. In criminal cases, they will do so where the injustice has been done to the prosecution as well as to the accused. See for example R v Dudley Justices; Ex parte Director of Public Prosecutions, (Times Law Reports, 24 June 1992) at 10 (Mann LJ)."

Application of these principles to the case

In this matter, applying the principles mentioned earlier and the powers of this Court on appeals of this nature, the Court below overlooked important factors which, if considered, would have resulted in adjournment of the matter. The Court further never afforded parties a full trial when ultimately it refused adjournment. The Court below never considered that refusal of an adjournment would result in an unfair trial in that the appellant would be inadequately represented by counsel who had no clue on or had minute

knowledge of the case. On the facts, two reasons were advanced for the need for adjournment and both reasons were backed by evidence.

First, the adjournment was sought because of a listing or scheduling problem between two courts of concurrent jurisdiction. Surely, when that happens, it is a germane reason for adjournment for either case - more especially, if there were no actual discussions or consultations - which must occur - between the Registrar and counsel on setting down cases. The question further turns down on when counsel became aware of the date of hearing. Where the matter is known earlier, surely a legal practitioner is under a duty under to inform the Court and apply for adjournment. On the other hand, counsel has a right to make an application in court. Listing problems are a good reason for adjournment (*State Pollution Control Commission v Australian Iron and Steel Pty Ltd* (1992) 29 NSWLR 487,493-494; *Director of Public Prosecutions (NSW) v Chaouk and Anor)*. On the face of it, therefore, there was a good reason for adjournment.

Secondly, the appellant informed the court that, based on that the matter would be adjourned, the defendant was not advised to come. On the face of it, absence of a defendant and the defendant's witnesses is a good reason for adjournment. The court never considered the possibility of the complainant's case continuing and adjourning only for the defendant's case.

Moreover, the Court below never considered whether there were previous adjournments or contumelious conduct. Obviously, a court need not necessarily affect a party's application for adjournment on the first or second request. All here shows that this was a first adjournment and the Court should have been more condescending. Additionally, that matter was commenced in 2018 and first set down for hearing. The matter was conducted with dispatch. There is no suggestion that there could be a scheduling problem.

Certainly, where there is a scheduling problem, a court must be very cautious when adjourning a case. Practically, when a matter is adjourned, unless there is a possibility of a short adjournment, the matter falls to the bottom of the general list and parties and other litigants will have lost an

opportunity for a day in court. The court's resources - time and space - will have been lost. A judge's preparation will have been deflated by the prospect of another preparation.

Admittedly, these considerations go to principles of case management. They are, however, considerations which must not trump the demands of justice and need for a fair trial. In Queensland v JL Holdings Pty Limited [1997] HCA 1; (1997) 189 CLR the Court (Dawson, Gaudron and McHugh JJ) said:

Sali v SPC was a case concerning the refusal of an adjournment in relation to which the proper principles of case management may have a particular relevance. However, nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

A court cannot be cavalier about a request for adjournment. A court must regard the listing schedule to avoid parties weaponing adjournments as a tool against quick realisation of rights. More importantly, the list is important to see the possibility of a short adjournment. Short adjournments, especially for hours or the next day, must be allowed (*Carryer v Kelly* [1969] 2 NSWR 769; *Petrovic v Taara Formwork (Canberra) Pty Ltd* (1982) 62 FLR 451.A court must, for obvious reasons, almost invariably allow short adjournments.

The reasons for adjournment were, in my judgment germane and were supported by evidence. The matter, on proper exercise of the discretion, should have been adjourned. But even if these reasons were not germane, which they were, the court below never considered the consequences of adjournment on a fair trial. Refusal to adjourn the case where a party and a party's witness are absent was actually infringing the right to a fair trial and adjournment should have been allowed at the peril of costs unless adjournment would have caused injustice to the complainant. There is no evidence or

suggestion that this was the case. The Court below should have considered this principle. The discretion was exercised after overlooking a material factor.

Equally, the court below, actually, even if the discretion was properly exercised, and it was not, the court below in conducting the trial itself as it did actually denied the appellant the right to a fair trial. It should not have proceeded purely on affidavit evidence or witness statements. It should have asked the complainant to lay evidence and subject it to scrutiny and allow counsel present to cross-examine the witnesses of the complainant. I agree with Chikopa, JA, on this matter. And all I have done is to add a few comments that I thought were appropriate.

There is a duty, where a court adjourns a matter, to give directions in the form of peremptory orders as to conduct of proceedings. The court can, in the order, attach conditions as to the future conduct of the case. The effect of this judgment is that the matter is being adjourned. I agree that the matter should be scheduled before a different judge. I would further order that the case should be brought before the judge or registrar within 14 days so that the court and the parties, depending on the state of the list, consult on the possibility of a short adjournment or proper location of the case on the list.

Costs

A correct cost order on facts of this case has bothered me some. Clearly, the problems the Court below faced were partly because Counsel on both sides did not determine the legal issues arising on the fact of adjournment and, therefore, were of little assistance to the Courts in this matter. Courts, particularly when new Rules of Court arise, rely quite a lot on counsel received from Counsel. There is no presumption that anyone, let alone judges, know all the laws or rules. Courts, therefore, rely heavily on counsel from a legal practitioner. In fact, the duty on the Court and Counsel to identify legal issues quickly is one important tenet on the overriding principle of the Civil Procedure Rules, 1998, and the Courts (High Court) (Civil Procedure Rules, 2017.

There were, therefore, conceptual difficulties about how to treat the judgment of the court below. Was it a judgment in default because the other

party was absent technically? In my opinion, it was on the facts. Where a judgment is entered in the absence of another party - and evidence is given - it is still a default judgment. The absent party has technically three options: appeal against the decision on the evidence and demonstrate that there was no case on a balance of probabilities; appeal and apply for additional evidence under the Supreme Court of Appeal Act; or apply to the same Court to set aside the judgment to enable a further hearing.

The problem with the first two options is that, after an appeal, which may take very long, there will be a full trial. This can be avoided by the third option. This Court and the Court below can properly deny leave to appeal on this otherwise interlocutory matter. The complainant, risks a costs order, on the principle that costs follow the event. Consequently, a practice, which has almost solidified to a principle of law, has developed that in such a case the party must apply to set aside the judgment. In that case, the defendant will pay all the costs of the application to set aside based on the defendant's absence at the trial. A party absent at the trial cannot escape that responsibility by appealing to this Court on the pretext that a court may make an order that each party bears its cost.

I would, therefore, equally allow the appeal and reluctantly or very reluctantly order that each party bear its costs.

Dated this 26th day of April, 2022 at Blantyre.

Honourable AKC Nyirenda SC
CHIEF JUSTICE

Honourable E B Twea SC
JUSTICE OF APPEAL

Honourable Dr J M Ansah SC

JUSTICE OF APPEAL

Honourable Justice R R Mzikamanda SC

JUSTICE OF APPEAL

Honourable Justice A Chipeta SC

JUSTICE OF APPEAL

Honourable Justice L P Chikopa SC

JUSTICE OF APPEAL

Honourable Justice F E Kapanda SC

JUSTICE OF APPEAL

Honourable Justice D F Mwaungulu SC

JUSTICE OF APPEAL

Honourable Justice A D Kamanga SC

JUSTICE OF APPEAL