THE REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

MISC. CIVIL APPEAL NUMBER 4 OF 2023

(Being Civil Appeal Number 1 of 2022 from High Court Commercial Division [Lilongwe]

BETWEEN:

REGISTRAR OF FINANCIAL INSTITUTIONS	**APPELLANT**
AND	
DR. THOMSON FRANK MPINGANJIRA	**1ST RESPONDENT**
&	
DR. PETER FRANK MPINGANJIRA	**2ND RESPONDENT**
&	
DR. NATHAN FRANK MPINGANJIRA	**3RD RESPONDENT**
&	
MR. WILLIAM MPINGANJIRA	**4TH RESPONDENT**
&	
MS. ANNABEL CHIKONDI MPINGANJIRA	**5TH RESPONDENT**
&	
M DEVELOPMENT LTD	**6TH RESPONDENT**

Coram; Hon Mr. Justice D. Madise JA

Messrs. E. Chapo and Z. Kumwenda for the Applicant/Appellant

Messrs Kita and Soko for the Respondents

Mr. K. Chimkono Clerk

Madise JA

RULING

Introduction

1, This application has come before me as a single member of the Court pending the hearing and determination of an appeal by the Appellant who is the Regulator of financial institution namely the Reserve Bank of Malawi. The Appellant first applied for a stay of the lower court's decision

in the court below and the same was denied. He then came to this Court with an application for a stay without notice which was granted on condition that the Appellant files a fresh application for continuation of the order of stay this time with notice. On 21 March I heard both parties on the application to sustain the order of stay and the Respondents opposed the application. The application is supported by sworn statements of Mr. Chapo for the Appellant and Mr. William Mpinganjira for the Respondents. I will not refer to the sworn statements as the issues raised therein have been ably presented in the arguments. I'm indebted to counsel from both sides for assisting the court with research so that the Court can be properly guided when arriving at its decision. This is the decision of the court.

2. This matter was in the court below on appeal after the Respondents had appealed the decision of the Appellant's Appeals Committee which had refused to transfer shares to the 1st, 4th and 5th Respondents into the 6th Respondent's company. Our learned brother in the court below faulted the Appellant and gave orders to the Appellant to consider the Respondents' application among other orders as to costs. Being unsatisfied with the orders of the court, the Appellant appealed to this Court against the decision of the court below. They filed a notice and grounds of appeal. The issue before this Court is whether or not the stay should be continued, varied or vacated. The cardinal principle which is well settled is that an appeal does not operate as a stay of execution of the judgment of the court below. However a superior court may stay execution when certain conditions are meant. The most important is the balance of justice. That the Applicant must demonstrate that if the judgment is allowed to be implemented the appeal will be rendered meaningless and nugatory.

3. Guidance is sought from the CPR 2017 rule 52.7, which states that unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In support of the application there are arguments supported by a sworn statement of Mr. Chapo of counsel. The Applicant/Appellant in argument stated as follows:

Arguments in support of a stay application

Application made after another one denied by lower court

4. That Order 1 rule 18 of the Supreme Court of Appeal Rules provides that '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.' The Appellant made the application for stay in the lower court before the Honourable Judge, but the application was denied. Hence this application to this Court.

Discretion to grant stay pending appeal

5. That the power to grant or refuse a stay pending appeal is discretionally which, of course must be exercised judicially. The general rule is that the successful litigant will not be deprived of the fruits of his litigation. However, there are instances where a stay of Judgment will be granted pending the hearing of appeal. That one of the widely accepted principle is that the applicant must demonstrate that if the judgment is allowed to be implemented the appeal will be rendered meaningless and nugatory. The Appellant cited ***Minister of Justice v Limbe*** (1) [1993] 16(1) MLR 317 (HC) and ***Circle Plumbing Ltd v Taulo*** [1993] 16(2) MLR 506 (SCA), per Mkandawire JA at p.508.

6. That however, in ***Mike Appel and Gatto Ltd v Saulos K Chilima*** MSCA Civil Appeal Case No. 20 of 2013, the Supreme Court of Appeal, while accepting that the principle above as a good starting point for the exercise of the court's discretion in stay applications, observed that there was no reason why the court's discretion should be fettered strict application of 'special circumstances' test. That Justice AKC Nyirenda JA, then stated:

"…the approach should be to look at all the facts of the case and base the decision on what is 'just' and 'expedient' in all circumstances of the case. This approach is in line with what is advocated by the Hammond case. We do not find any reason why we should shy away and continue to cage ourselves and resist adopt[ing] what is propounded in the Hammond case. A consideration of risk of injustice and prejudice would encompass the considerations currently and conventionally considered; but it also allows for other considerations relevant in the case. Liberal in that way, a court has got a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution."

7. That in the case of ***Moat Housing Group-South Ltd v. Harris,*** Brooke L.J. (with whom Dyson L.J. agreed) said that, in determining whether to grant a stay pending appeal, regard is to be had (amongst other things) to the potential prejudice to the parties. That in ***Hammond Suddards Solicitors v. Agrichem International Holdings Ltd,*** [2001] EWCA Civ 2065, December 18, 2001, unrep. (referred to at para. 52.7.2 in the White Book)**,** the Court (Clarke L.J. and Wall J.) referred to r.52.7 of the Civil Procedure Rules 1998

"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?" [Emphasis supplied.]

That where illegality, irregularity and excess of a judgment are in issue they constitute sufficient reasons for granting a stay. This is paramount because a judgment once issued is enforceable notwithstanding that it is illegal or irregular until it is set aside. See, ***National Bank of Malawi -v- Aziz Mahomed Issa and Another*** [MSCA 17 of 2010]**.**

Real prospect of success

8. The Appellant submitted that the appeal herein has real prospects of success. Among many arguments stated in the skeleton arguments in support of the appeal, some are that: - The Financial Services Appeal Committee did not have jurisdiction, therefore, its determination and proceedings before it were a nullity. That the Respondents brought the appeal before the Committee under section 82 of the Financial Services Act and their contention is that the issues raised by the Respondents did not satisfy the causes of appeal under the said section. That the causes of appeals under the said section 82 not being satisfied, the Committee did not have jurisdiction to determine the appeal brought under the said section.

9. That section 78 of the Financial Services Act could not have saved the proceedings as the appeal was not brought under that section and in any event it is not a provision to empanel an appeal before the Financial Services Appeals Committee. Consequently, the appeal before the Honorable Judge had no footing. That the Honorable Judge or the High Court, Commercial Division, did not have jurisdiction over the matter as the matter was not commercial, and it was a challenge by the Respondents of the exercise of regulatory and supervisory powers of the Appellant on matters of fitness and appropriateness of shareholders of a financial institution. That an order given without jurisdiction is a nullity since the proceedings were not transferred to the appropriate division of the High Court, the civil division, the effect is that the judgment was rendered by a division of the High Court without jurisdiction. The effect of the order given without jurisdiction is that there has been no order to be enforced from the beginning.

10. That section 22 of the Courts Act under which the Honorable Judge proceeded to handle the appeal and found the authority for its findings and orders, including rehearing and reversal of factual findings made by the Financial Services Appeals Committee and an order of costs for proceedings in the Committee; only applies to appeals from subordinate courts and not the Financial Services Appeals Committee, a statutory tribunal. The effect is the judgment was based on wrong footing of the law and *per incurium*.

11. That the Honorable Judge could not overturn the findings of facts made by the Financial Services Appeals Committee because they were not perverse. The findings of facts were based on evidence before the Committee which evidence was supplied to the Appellant and the Registrar of Companies by the 1st and 6th Respondents herein, either by themselves or through their appointed agents, in compliance with the regulatory and supervisory legal requirements and under oath. That the 1st Respondent was the sole controlling shareholder in the 6th Respondent. This was affirmed by the 1st Respondent's own statement under oath, the information supplied by FDH Financial Holdings Limited to the Appellant, and the annual return filed by the 6th Respondent with the Registrar of Companies.

The 6th Respondent standing as a shareholder rode on the fitness and appropriateness of the 1st Respondent.

12. That the 2nd and 3rd Respondents were never assessed as controlling shareholders in the 6th Respondent and neither were their names submitted for assessment as controlling shareholders when the 1st Respondent was being assessed. The 2nd and 3rd Respondents alleged controlling shareholding in the 6th Respondent was never disclosed to the appellant by the Respondents until the decision of the Appellant that the 1st and 6th Respondent dispose their shares and this information was inconsistent with the earlier information stated under oath by the 1st Respondent, supplied by FDH Financial Holdings Limited to the Appellant on its shareholding structure, and the annual return filed by the 6th Respondent.

13. That the Honorable Judge could not rehear grounds of appeal before the Financial Services Appeals Committee that were withdrawn by consent as recorded by the Committee. The only legal way to have set aside the recorded consent was for the Respondents to commence a fresh action, appropriately a judicial review against the Committee, other than appeal to the High Court on the recorded consent. That the Honorable Judge's decision essentially affirmed the Appellant's position that there was no application before the Appellant from the 3rd, 4th and 5th Respondents as envisaged under the financial services laws and that the 3rd, 4th and 5th Respondents needed to place an application before the Appellant to be assessed as shareholders. The prior assessment and confirmation as directors or managers in FDH Financial Holdings Limited or its subsidiary did not mean that the Appellant had to automatically recognize and approve them as shareholders without further assessment. There was therefore no justification to award costs of the appeal to the Respondents. Let alone to award costs on an indemnity basis.

Appeal rendered nugatory, academic or unenforceable and the risk of injustice

14. The Appellant submitted that the 6th Respondent is a controlling shareholder in FDH Financial Holdings Limited, a holding company in the financial services sector under the supervision and regulation of the Appellant. That it must further be appreciated that the 1st Respondent is the controlling shareholder in the 6th Respondent. The Appellant decided that the 1st Respondent should dispose of his shares in the 6th Respondent due to his conviction, and by extension, the 6th Respondent to dispose of its shares in FDH Financial Holdings Limited since by extension it also lost its fitness and appropriateness as shareholder due to the conviction of the 1st Respondent. The extension was because the 6th Respondent's standing as approved shareholder in FDH Financial

Holdings Limited rode on the fitness and appropriateness of the 1st Respondent. The 1st Respondent was assessed in place of the 6th Respondent for the purposes of recognizing the 6th Respondent as shareholder in FDH Financial Holdings Limited.

15. That the judgment directs the Appellant to consider an application to be placed by the 3rd, 4th and 5th Respondents for assessment as controlling shareholders in the 6th Respondent and that there should be no limitations on how the shares in the 6th Respondent could be dealt with. Once this application is placed and the 3rd, 4th and 5th Respondents are approved as controlling shareholders in the 6th Respondent: that there would be nothing to stop the 3rd, 4th and 5th Respondents from disposing their shareholding in the 6th Respondent. Indeed as acknowledged by the Honorable Judge below, there should no limitations placed on how the shares in the 6th Respondent could be dealt with. That one may argue that the, 3rd, 4th and 5th Respondents do not intend to transfer the shares in the 6th Respondent once they are approved as controlling shareholders. The matter is not one of intention. It is not a consideration at all. The consideration would be whether there would no legal basis to stop the 3rd, 4th and 5th Respondents from transferring their shares to any other persons after being approved as controlling shareholders.

16. That there would no such legal basis and to stop such transactions would be in contempt with the judgment of the Honorable Judge that there should be no limitations placed on how the shares in the 6th Respondent are dealt with. One may further argue that the Appellant can easily stop the 3rd, 4th and 5th Respondents from transferring their shares if they intend to do because it is the regulator and has to approve such transfer. Such contention would be flawed because the Appellant would have no legal basis to place such a limitation on the 3rd, 4th and 5th Respondents. The Respondents may at that time even drag the Appellant to Court. The Appellant would be in contempt with the judgment of the Honorable Judge by placing limitations not provided by the law on dealing with shares in the 6th Respondent. Thus a person may acquire the news in the 6th respondent from the 3rd, 4th and 5th respondents and these may resell them as there would be no basis to stop the transactions.

17. That in the event the appeal succeeds it would mean that the Appellant's decision that the 6th Respondent should dispose of its shares in FDH Financial Holdings Limited due to the 1st

Respondent's unfitness and inappropriateness stands and should be enforced. Thus if the appeal succeeds but the stay herein is not granted, the enforcement of this decision would be purely academic and rendered nugatory. It would be merely academic because at that time the shares in the 6th Respondent would have been deemed to be that of 3rd, 4th and 5th Respondents or would have been acquired by other persons from the 3rd, 4th and 5th Respondents. The basis of the 6th Respondent to dispose of the shares would have extinguished because there would be new shareholders with no record of conviction.

18 That the implementation of the decision that the 6th Respondent should dispose of its shares in FDH Financial Holdings Limited when its shares would have been acquired by new persons either from the 3rd, 4th and 5th Respondents or from such other new persons would mean reversal of the transactions to the status that the 1st Respondent is the sole controlling shareholder in the 6th Respondent with 99.99 percent shareholding. The reversal of the transactions might be challenged because there would no cause of concern at that time as new shareholders with proper fitness and appropriateness would be holding the shares in the 6th Respondent. That the implementation of the Appellant's decision in the event the appeal succeeds would thus be rendered nugatory-inconsequential, futile, vain or worthless. That in the event the appeal succeeds on points of jurisdiction, it would mean that the High Court proceedings and orders made therefrom were a nullity. Consequently, any decision to been taken by the new shareholders in the 6th Respondent would also be a nullity as there would be fruits of exercise of powers from a judgment declared a nullity. These decisions by the new shareholders and their effects would be undone. It is therefore expedient and just in the circumstances to continue with the stay to avoid implementation and perpetuation of nullity.

19. That in the event the appeal succeeds, the enforcement of the appeal consequently of the decision of the Appellant that the 1st and 6th respondents should dispose of their shares would prejudice or inconvenience innocent shareholders who acquire shares in the 6th respondent by reason of the 3rd, 4th and 5th Respondent disposing them. They would have purchased the shares with a view of having a long term investment only to be informed that their acquisition would have to be reversed. This inconvenience can be avoided by the continuation of the stay herein. It is therefore expedient to continue with the stay.

20. That the judgment directs the Appellant to recognize the 2nd and 3rd Respondents as controlling shareholders in the 6th Respondent. It is the Appellant's contention in the appeal that this is inconsistent with the records received by the Appellant pursuant to law, filed by the 6th Respondent with the Registrar of Companies, and stated under oath by the 1st Respondent which show that the 1st Respondent is the sole controlling shareholder in the 6th Respondent with 99.99 percent shares. That unless the judgment is stayed, the effect is that the Appellant would be to disregard records filed and held under law. The Court should be more inclined to error in upholding the records held and submitted under law rather than disregard them. It is therefore just and expedient to continue with the stay as this would promote recognition of records filed and held under the law and promote the filing of correct information by financial institutions until the appeal is determined by this Court. That in the circumstances it is better to preserve the status quo which obtained before the decision of the Appellant that led to the appeal before the Financial Services Appeals Committee.

21. That it is this same status quo that the Respondents sought and achieved when they obtained from the High Court a stay of implementation of the decision of the Financial Services Appeals Committee. There is no alarming cause that has occurred ever since that would not justify waiting for the appeal herein to be determined by this Court. That the 1st and 6th Respondents will continue to hold shares as they used to before the Appellant's decision that the shares should be disposed of until the appeal is determined. That the 1st Respondent is a convict and the longer he holds the shares the more it is prejudicial to the 6th Respondent and FDH Financial Holdings Limited.

22. That if at all the 1st Respondent's reputation worried the Respondents that much, it could have easily been a consideration to dissuade the Respondents from seeking a stay of the implementation of the decision of the Financial Services Appeals Committee before determination of the appeal by the High Court. The stay granted by the High Court prolonged the time the 1st Respondent held shares in the 6th Respondent and by extension in FDH Financial Holdings Limited. That what is so special now that the 1st Respondent cannot continue to hold the shares in the 6th Respondent and by extension in FDH Financial Holdings Limited until the appeal herein is determined by this Court? That the Court should take judicial notice that the 1st Respondent appealed against his conviction in this Court and he successfully applied for bail pending appeal. He is on bail because this Court found that he has high chances of his conviction being overturned. That there is therefore

already an indication from this Court that the 1st Respondent's conviction could be overturned. So the issue of the 1st Respondent disposing of the shares due to conviction could extinguish if acquitted on appeal by this Court which position tilts in favour of granting the stay to the extent that the 1st Respondent and the 6th Respondent continue holding the shares in the 6th Respondent and FDH Financial Holdings Limited respectively.

Appeal raises issues of legality, irregularity and excessiveness of judgment

23. The Appellant submitted that the appeal raises issues of legality, irregularity and excess of a judgment by using section 22 of the Courts Act to rehear the issues before it, reverse factual findings made by the Financial Services Appeals Committee and make various findings of fact and orders based on section 22 of the Courts Act. That the appeal raises issues of recognising the 6th Respondent as a shareholder without the standing of the 1st Respondent when in evidence it is clear that the 6th Respondent rode on the standing of the 1st Respondent to be recognised as a shareholder in FDH Financial Holdings Limited. The appeal thus raises the legality of recognising the 6th Respondent as a shareholder when it has never been assessed on its own right and name as such as required under the Financial Services Act and the Directives thereunder. That the appeal raises issues of illegality in that it is the Appellant's contention that the High Court judgment is *per incurium* section 92 of the Financial Services Act which restricts appeals from the Financial Services Appeals Committee on only matters of law. It is the Appellant's contention that the Honourable Judge dealt with matters of facts as well.

24. That the lower court's order directing the Appellant to recognize the 2nd and 3rd Respondents as controlling shareholders in the 6th Respondent when they have never submitted before the Appellant applications to be assessed as such is an overreach and irregular in light of the Financial Services Act and Directives thereunder. In particular section 54 (1) of the Financial Services Act requires that to be recognized as a controlling party of a financial institution, one must apply before the Appellant and be assessed and approved as such before assuming that role.

That the appeal raises issues of excessiveness of the judgment as there is no basis for ordering the Appellant to pay costs on an indemnity scale even for the proceedings before the statutory tribunal which is not a subordinate court. That the decision totally ignores section 78 (3) of the Financial Services Act. The Appellant therefore, prays that the judgment of the Honorable Judge dated 9th

December, 2022 be stayed pending determination of the appeal by the Supreme Court of Appeal. That costs of this application, be in the cause and the party that succeeds in the appeal should be awarded costs of this application.

Arguments in opposition to a stay application

25. The Respondents submitted that the principles for the grant of a stay appear from cases such as ***Mike Appel & Gatto Ltd v Saulos Chilima*** ***MSCA Civil Appeal No 20 of 2013,*** ***Mulli Brothers Ltd v. Malawi Savings Bank Limited,*** MSCA Civil Appeal No. 48 of 2014 and ***Reserve Bank of Malawi & Another v. Sparc Systems*** **Ltd** ***Civil Review Cause No. 13 of 2021.*** That Courts will grant a stay in a case when it is necessary to secure the rights of a party. The primary consideration in the court's determination will be whether the applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay. That an order for stay must be founded on the presence of three tests (similar to the test for interlocutory injunction), viz: a serious issue to be tried; irreparable harm; and a balance of convenience/justice; Although the test for a stay may be equated to a test for an interlocutory injunction, there may be circumstances when the two may be said to be different. In those circumstances, the question, however, remains one of a balance of convenience;

26. That the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong. Balance of convenience or balance of risk. The Court should also consider whether on the face of it, the impugned decision appear to have been attended with serious irregularities. See ***Chisakalimi v James*** et al MSCA Civil Appeal No. 12 of 2016; ***Reserve Bank of Malawi v Review Committee of the Public Procurement and Disposal of Assets Authority*** et al. That in this case, the Appellant's appeal does not raise serious issues and is almost certain to suffer an embarrassing defeat in the Supreme Court of Appeal. That the grounds of appeal are fatally incompetent and the appeal is likely to be dismissed on the basis of that. See ***Dzinyemba v Total Malawi*** Ltd MSCA Civil Appeal No. 6 of 2013; ***Mutharika and another v Chilima*** and another, Constitutional Appeal No. 1 of 2020.

27. That some of the grounds of appeal are fictitious in the sense that they attack a decision that was not made by the Judge. For instance, the Judge did not find that the 3rd – 5th Appellant were fit and proper persons to hold shares and neither did he direct the Appellant to accept the Respondents as such. The Judge expressly referred the matter to the Appellant for a decision that was simply consistent with the law. Order 3 rule 2 (1) of the Supreme Court of Appeal Rules says that. That all appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the Registry of the Court below which shall set forth the grounds of appeal which shall state whether the whole or part only ***of the decision of the Court below is complained of*** (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties. It shall also have endorsed on it an address for service. (emphasis supplied.)

28. That it would follow that one cannot appeal against a decision or point that was never made. The Supreme Court of Appeal itself has repeatedly held that even if a matter is filed in a wrong division of the High Court – which was not the case here – the matter is not one of jurisdiction but rather case management. ***Sheriff of Malawi and Attorney General V Universal Kit Suppliers*** CC MSCA civil appeal number 6 of 2017. This position is reinforced by the recent amendment to the Courts Act, namely the introduction of section 6A. See ***Shepherd Bushiri*** Review, Criminal Review No 11 of 2021. That Judge Manda remains a Judge of the High Court regardless of which Division or Registry of a Division he happens to operate from. That the decision of who gets to hear what matter the exclusive preserve of the Judiciary is itself and any other attempt to undermine judicial independence. See ***President of South Africa v South African Rugby Football Union*** 1999 4 (SA) 147**;** ***Kumwembe and others v Republic*** Criminal Appeal No 5 of 2017**.**

29. That the Appellant is wrong in suggesting that however way the Financial Services Appeals Committee decides the factual issues before is beyond question by the High Court. He will not be able to cite any law which backs up this strange proposition. On the contrary, as correctly held

by the Judge, factual findings that are perverse are actually errors of law. See ***Edwards (Inspector of Taxes) v Bairstow*** [1956] AC 14, 36 (HL). That the Judge was able to demonstrate how the inability of the Appeals Committee to properly deal with the evidence that was before it and, in some instance, to simply ignore evidence was an error of law. His findings in this sense cannot be impeached. The Judge's approach was actually supported by the Supreme Court of Appeal precedent. See ***JTI Leaf Malawi Ltd*** **v** ***Kad Kapachika*** MSCA Civil Appeal No 52 of 2016.

30. That the Appellant does not only regulate financial institutions but also their controlling parties. The Financial Services Act could not have been clearer on the point. Where a controlling shareholder wants to seek approval as a fit and proper person, it matters less that the application is routed to the Appellant by the licensed financial institution. The application cannot be said to be that of the financial institution. The post office does not own the parcels that it couriers. The suggestion, therefore, that the Appellant can only receive fit and proper person applications from licensed institutions is at best a misstatement of the law and at worst an attempt at misleading the Court.

31. That in any event, the Appellant had conveniently forgotten that he made it clear that he would not consider the 3rd – 5th Respondents as fit and proper persons on account of their blood relationship with the 1st Respondent. It defies logic, therefore, that in these proceedings, the Appellant continues to suggest that the Respondents should still have made their applications to him. This is the very instance of bad faith, malice and unreasonableness that the Appellant was rightfully condemned for by the Honourable Judge. That the stay application should be dismissed because it does not meet the other two tests of irreparable harm and balance of justice/convenience.

Irreparable harm:

32. That the judgment only requires two things to be done as of now by the Appellant. These are: For the Appellant to consider the Applications by 3rd to the 5th Respondents for approval as fit and proper persons to hold shares in the 6th Respondent Company. And; For the Appellant to pay costs of the proceedings in the court below on an indemnity basis. That if the 3rd to 5th

Respondent's applications are favourably considered by the Appellant, then these persons will become shareholders in the 6th Respondent. If the appeal is successful and the decision of the Appellant upheld, the Supreme Court would simply order the removal of the 6th Respondent as a shareholder FDH Financial Holdings Ltd. The 6th Respondent will simply sell its shares to some other shareholder. One wonders what is so complicated or irreversible about this.

As for the costs, these would ultimately be a money order. For money orders, it is critical for an Applicant for a stay order to demonstrate – through credible evidence - which the respondent will not be able to pay back. See ***Mathanda v FDH Bank Ltd*** Civil Appeal No. 7 of 2017 (unreported) is good authority for this proposition. Levant part quoted from ***NBM v D. Nahomi***, the court stated that:

There can be no doubt that in order to enable a court to determine whether an appeal, if successful, would be rendered nugatory by reason that there is no reasonable probability of an appellant getting the money back, is a matter of facts or evidence which an appellant must present to a court for assessment.

It seems to me that the appellant should have presented more facts than what I have to demonstrate that the respondent would be unable to repay the money if the appeal should be successful.

33. That other than this, the rest of the findings by the Court were really in the nature of legal declarations by the High Court which the Supreme Court of Appeal would also want to pronounce itself on. That these matters are significant beyond the immediate parties to this litigation. They are matters that even if the Court did not require any other action on the part of the Respondent, the Supreme Court might still have wanted to weigh in. It cannot be true, therefore, that the appeal will be rendered nugatory if the two orders highlighted above are immediately implemented. The Supreme Court of Appeal regularly sets aside proceedings in the High Court. There are a number of cases where this has happened including ***Almeida v Almeida*** MSCA Civil Appeal No 21 of 2021.

34. That there is no basis, therefore, for thinking that implementing the 2 orders highlighted above will stifle the appeal. The Appellant will not suffer any irreparable harm if the stay is refused,

therefore. On the other hand, the Respondents stand to lose out. They will not be able to earn dividends on the shares that they might hold in the 6th Respondent if they are even prevented from presenting their applications to the Appellant for approval as fit and proper persons to hold shares in the 6th Respondent.

Balance of justice.

35. That the balance of justice also favours the refusal of stay. In ***Hammond Suddards Solicitors v. Agrichem International Holdings Ltd,*** [2001] EWCA Civ 2065, December 18, 2001, unrep**,** which was approved by the Supreme Court of Appeal in ***Mike Appel & Gatto Ltd v Saulos Chilima*** MSCA Civil Appeal No 20 of 2013**, t**he Court (Clarke L.J. and Wall J.) referred to r.52.7 and said as follows:-(para. 22)

"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?" [Emphasis supplied.]

36. That in this case, if one contrasts the relative positions of the Respondents and the Appellants there is really no contest on who stands to suffer injustice if the stay is granted. The Appellant is not an investor. It has no dog in the fight as they say. Even if the appeal takes 7 years to resolve, it will not lose money. The same cannot be said of the Respondents who will lose money by way of dividends which would otherwise be payable if they were accepted as shareholders. The balance of justice is severely against the order now sought. The application should accordingly be dismissed with costs on an indemnity scale. Having laboured fervently for years due to the unreasonableness of the Appellant, the Respondents should not be kept out of the fruits of their

litigation for a day longer. It would be 'utterly unjust to grant the stay sought. See ***Nyasulu v Malawi Railways Ltd*** MSCA Civil Appeal No. 4 of 1993 and ***Stambuli v ADMARC*** Civil Cause No. 550 of 1991 (unreported).

The Decision

37. As stated earlier on the cardinal principle which is well settled is that an appeal does not operate as a stay of execution of the judgment of the court below. However a superior court may stay execution when certain conditions are meant. The most important is the damage and risk to the parties and the balance of justice. That the the Applicant must demonstrate that if the judgment is allowed to be implemented the appeal will be rendered meaningless and nugatory. The Appellant content that the judgment being appealed against directs the Appellant to consider an application to be placed by the 3rd, 4th and 5th Respondents for assessment as controlling shareholders in the 6th Respondent and that there should be no limitations on how the shares in the 6th Respondent could be dealt with. That once this application is placed and the 3rd, 4th and 5th Respondents are approved as controlling shareholders in the 6th Respondent: There would be nothing to stop the 3rd, 4th and 5th Respondents from disposing their shareholding in the 6th Respondent. From this argument it is clear that the Appellant is belittling the powers of the Court.

38. I'm in agreement with the Respondents that the primary consideration in the court's determination will be whether the Applicant for the stay has discharged the onus of demonstrating that there is a proper basis for the stay. That the three tests (similar to the test for interlocutory injunction), viz: a serious issue to be tried; *irreparable harm;* and a balance of convenience/justice have been met. Although the test for a stay may be equated to a test for an interlocutory injunction, there may be circumstances when the two may be said to be different. In those circumstances, the question before Court, however, remains one of a balance of convenience/Justice.

39. In my very considered view if this appeal is successful and the Respondents are allowed to transact in the 6th Respondent's company, these actions can be reserved by the Court. The Appellant argued that if the appeal succeeds but the stay herein is not granted, the enforcement of the decision would be purely academic and rendered nugatory. It would be merely academic

because at that time the shares in the 6th Respondent would have been deemed to be that of 3rd, 4th and 5th Respondents or would have been acquired by other persons from the 3rd, 4th and 5th Respondents. That the basis of the 6th Respondent to dispose of the shares would have extinguished because there would be new shareholders with no record of conviction. In my view it is not true that if the Applicant success in the appeal the same will be merely academic. This Court has the power to reserve whatever decision and actions the Respondents will make and take. Whatever decision the Respondent makes as the new shareholders in the 6th Respondent would also be a nullity as there would be fruits of exercise of powers from a judgment declared a nullity. Any decisions by the new shareholders and their effects would be undone.

40. The Appellant argues that the implementation of the decision that the 6th Respondent should dispose of its shares in FDH Financial Holdings Limited when its shares would have been acquired by new persons either from the 3rd, 4th and 5th Respondents or from such other new persons would mean reversal of the transactions to the status that the 1st Respondent is the sole controlling shareholder in the 6th Respondent with 99.99 percent shareholding. The reversal of the transactions might be challenged because there would no cause of concern at that time as new shareholders with proper fitness and appropriateness would be holding the shares in the 6th Respondent. The implementation of the Appellant's decision in the event the appeal succeeds would thus be rendered nugatory- inconsequential, futile, vain or worthless. This is an assumption that the Respondents once allowed to be shareholders will dispose of their shares to persons unknown. Let me state here that this Court deals with facts as they are existing and not academic future undertakings which have not happened.

41. The Appellant has moved the Court to be more inclined in upholding the records held and submitted under law rather than disregard them and that is will be just and expedient to continue with the stay as this would promote recognition of records filed and held under the law and promote the filing of correct information by financial institutions until the appeal is determined by this Court. The question that must guide this Court is what damage and risk will be caused if the stay is sustained or vacated? What prejudice will occasion if the stay is sustained or vacated bearing in mind the expansive powers of this court on appeal. I'm guided by ***Mike Appel and Gatto Ltd v Saulos K Chilima*** MSCA Civil Appeal Case No. 20 of 2013, the Supreme Court of Appeal, while

accepting that the principle above as a good starting point for the exercise of the court's discretion in stay applications, observed that there was no reason why the court's discretion should be fettered strict application of 'special circumstances' test. That Justice AKC Nyirenda JA, then stated:

"…the approach should be to look at all the facts of the case and base the decision on what is 'just' and 'expedient' in all circumstances of the case. This approach is in line with what is advocated by the Hammond case. We do not find any reason why we should shy away and continue to cage ourselves and resist adopt[ing] what is propounded in the Hammond case. A consideration of risk of injustice and prejudice would encompass the considerations currently and conventionally considered; but it also allows for other considerations relevant in the case. Liberal in that way, a court has got a wider premise upon which to exercise its discretion in granting or refusing to grant stay of execution."

42. I do not agree with the Appellant's view that the Honorable Judge or the High Court, Commercial Division, did not have jurisdiction over the matter as the matter was not commercial, and it was a challenge by the Respondents of the exercise of regulatory and supervisory powers of the appellant on matters of fitness and appropriateness of shareholders of a financial institution. That an order given without jurisdiction is a nullity since the proceedings were not transferred to the appropriate division of the High Court, the civil division. The effect is that the judgment was rendered by a division of the High Court without jurisdiction. The effect of the order given without jurisdiction is that there has been no order to be enforced from the beginning. Let me state again that this is a well settled principle of law that a judge of the High Court has all the powers under the Constitution and any other law to preside over any matter before any division within Malawi and that decisions made therefrom cannot be deemed irregular for want of jurisdiction as matters of creation of divisions are merely for case management within the preserve of the Judiciary.

43. The Appellant has further argued that section 22 of the Courts Act under which the Honorable Judge proceeded to handle the appeal and found the authority for its findings and orders, including rehearing and reversal of factual findings made by the Financial Services Appeals Committee and an order of costs for proceedings in the Committee; only applies to appeals from subordinate courts and not the Financial Services Appeals Committee, a statutory tribunal. The effect is the judgment was based on wrong footing of the law and *per incurium*. Again an order made by a judge no matter how irregular is good at law until reversed by a superior court. See ***Sheriff of Malawi and Attorney General V Universal Kit Suppliers*** CC MSCA civil appeal number 6 of 2017. This

therefore cannot be a basis to sustain the order of stay where there is no evidence of injustice that will be occasioned to the Appellant?

44. Having looked at the facts before this Court and the arguments advanced by the parties, I find that there is no justification whatsoever to continue with the stay of execution of the judgment of the court below. The Appellant agrees that should the Respondents indeed illegally transfer their shares, the same can be reserved by this Court. That in the event that the appeal succeeds on points of jurisdiction, it would mean that the High Court proceedings and orders made therefrom were a nullity. Consequently, any decision to been taken by the new shareholders in the 6th Respondent would also be a nullity as there would be fruits of exercise of powers from a judgment declared a nullity. Surprisingly the Appellant further added that these decisions by the new shareholders and their effects would be ***undone***. That it is therefore expedient and just in the circumstances to continue with the stay to avoid implementation and perpetuation of nullity. The Appellant seem to be blowing hot and cold on points that suits him best. This cannot be allowed in this Court.

45. On cost the Appellant alleged that if he is successful the Respondents will be unable to pay the costs if the stay is vacated. There can be no doubt that in order to enable a court to determine whether an appeal, if successful, would be rendered nugatory by reason that there is no reasonable probability of an appellant getting the money back, is a matter of facts or evidence which an Appellant must present to a court for assessment. In this matter before me the Appellant should have presented more facts than what I have to demonstrate that the Respondents would be unable to repay the money (costs) if the appeal should be successful.

46. The Respondents submitted that the grounds of appeal are fatally incompetent and the appeal is likely to be dismissed on the basis of that. See ***Dzinyemba v Total Malawi*** Ltd MSCA Civil Appeal No. 6 of 2013; ***Mutharika and another v Chilima*** and another, Constitutional Appeal No. 1 of 2020. I leave this decision for the full bench of the Malawi Supreme Court of Appeal.

47. The Court is in total agreement with the Respondents that if the appeal is successful and the decision of the Appellant upheld, the Supreme Court would simply order the removal of the 6th Respondent as a shareholder in FDH Financial Holdings Ltd. The 6th Respondent will simply sell

its shares to some other shareholder. The same cannot be said of the Respondents if the appeal fails and the stay is sustained. The Respondents will lose money by way of dividends which would otherwise be payable if they were accepted as shareholders. I'm in agreement with the Respondents that the balance of justice is severely against the order now being sought. The powers of this Court are expansive and the Court wonders what is so complex, complicated or irreversible about all this.

47. It is settled law that the power to grant or refuse a stay pending appeal is discretionally which, of course must be exercised judicially. The general rule is that the successful litigant will not be deprived of the fruits of his litigation. Additionally an order for stay must be founded on the premises of three tests (similar to the test for interlocutory injunction), viz: a serious issue to be tried; irreparable harm; and a balance of convenience/justice. In this regard and in exercise of my discretion, this application for continuation of the order of stay is hereby dismissed and the order of stay of execution of the judgments of the court below is vacated pending the determination of the appeal. Costs of this application, be in the cause and the party that succeeds in the appeal should be awarded costs of this application.

Made at Blantyre in the Republic on 28 March 2023.

Dingiswayo Madise

Justice of Appeal.

Signed by the Registrar…….