



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

MSCA MISCELLANEOUS CIVIL APPLICATION NO. 60 OF 2023
(Being High Court Lilongwe District Registry, Civil Registry, Civil Cause No 898 of 2023)

BETWEEN:

THE DEMOCRATIC PROGRESSIVE PARTY APPELLANT

AND

HON KONDWANI NANKHUMWA1ST RESPONDENT

HON. GREZELDER JEFFREY 2ND RESPONDENT

HON. JAPPIE MHANGO 3RD RESPONDENT

HON. YUSUF NTHENDA 4TH RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA, J.A.

Kaphale SC, Counsel for the Appellant

Respondents unrepresented

Mnthunzi, Recording Officer

RULING

An *ex parte* application has been presented before me as a single member of the Court under section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 of the Supreme Court of Appeal Rules.

Section 7 of the Supreme Court of Appeal Act reads:

7. Powers of a single member

A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:

Provided that—

(a) in criminal matters, if a single member refuses an application for the exercise of any such power, the applicant shall be entitled to have his application determined by the Court;

(b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.

And Order I rule 18 reads:

18. Court to which application should be made

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. [emphasis supplied]

According to the affidavit in support of the application herein, in particular paragraphs 11 to 20, the appellant is aggrieved with a Ruling of the High Court made on 29th July 2023 making certain orders and directions and that the appellant sought and was granted leave to appeal to this Court. It is further averred that the appellant subsequently, on 8th November 2023, filed an application for the suspension of the enforcement of the Ruling pending appeal. However, so it is averred, the court below, “through the Registry Clerk, simply directed that the Appellant’s said application for stay be made inter-partes and be served on the Respondents.” [par 17]

The deponent states further that the appellant complied by filing the *inter partes* application which was set down for hearing on 30th November 2023 but on 29th November 2023 “again through the Registry Clerk, the lower Court directed that the Appellant’s Application for a stay should be adjourned and heard in January, 2024, which is a period outside the period within which the Appellant was ordered to hold an NGC Meeting and an elective Convention.” [par 19]


It is the appellant’s belief and contention that upon the foregoing developments the court below has effectively declined to grant a stay pending appeal, hence the present application.

The affidavit in support of this application is sworn by one Charles Chigondongo Mhango, a Legal Practitioner in the firm Messrs Mhango Lawyers, and the National Director of Legal Affairs for the appellant. In the said affidavit the deponent does not inform this Court whether or not the directions allegedly made by the court below were made to him. This is important because the Court must be satisfied that the facts laid before it do not amount to inadmissible hearsay. Nor does the deponent identify the Registry Clerk who allegedly communicated the directions, if indeed made. The deponent has a duty to be fully candid with the facts he lays before the Court. The case of *Jeffrey and another v The Anti-Corruption Bureau* [2002-2003] MLR 90 is authority for the principle that a party who brings *an ex parte* application must disclose all material facts and that nothing material should be suppressed. See also *R v Kensington Income Tax Commissioners* (1917) KB 486. The rationale is that the other party has no opportunity to be heard on an *ex parte* application.

Finally, regarding the requirement under Order I rule 18 to the effect that an application over which this Court and the court below have concurrent jurisdiction can only be brought in this Court only if the Court below refuses the application it seems evident to me that the said requirement has not been met. The imputation by the appellant that the alleged directives of the court below for adjournments amount to a refusal of the application is not appealing. Aside the fact that the communications are not substantiated, my understanding of the term “refuses” is that that of a dismissal of the application. An adjournment not being a dismissal the court below has this far not refused the application. This application is therefore prematurely before a single member of this Court.

I decline to grant the within application.

Made in chambers at Blantyre this 13th day of December 2023.

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HON. JUSTICE R. MBVUNDULA
JUSTICE OF APPEAL