IN THE SUPREME COURT OF APPEAL

MISCELLANEOUS CIVIL APPLICATION NUMBER 53 OF 2023

(Being High Court of Malawi, Principal Registry, Civil Appeal Number 13 of 2021)

BETWEEN

CHRISTINA CHITHILA .....1ST APPLICANT

KONDWANI MKONDA ..... 2ND APPLICANT

DAVID KWENDA ..... 3RD APPLICANT

CHIMETA MULAMBIA ..... 4TH APPLICANT

AND

CENTRAL EAST AFRICAN RAILWAYS LIMITED..... RESPONDENT

CORAM: HON. JUSTICE J. KATSALA JA
H. Mwangomba, of counsel for the Applicants
P. Mpaka, of counsel for the Respondent
C. Fundani, Court Clerk/Recording Officer

RULING

Katsala JA,

The applicants took out a notice of motion under section 7 of the Supreme Court of Appeal Act and Order I, rule 18 of the Supreme Court of Appeal Rules seeking an order of this Court setting aside an order made by Mambulasa J sitting in the High Court, Civil Division, Principal Registry at Blantyre on 15 December 2021 staying execution of a judgment of the Industrial Relations Court

and ordering that the applicants be paid only 15 percent of the judgment amount and that the balance be paid into court.

The applicants seek the order aforesaid on the ground that the order made by the Judge in the court below is unjust and inequitable. In the alternative, they seek an order of this Court varying the order of the court below in such a manner as to allow that 75 percent of the judgment of the Industrial Relations Court (hereinafter "the IRC") be paid to them and that the balance of 15 percent be paid into court. The applicants filed an affidavit sworn by Christina Chithila in support of their application while the respondent filed an affidavit sworn by Bracious Kondowe in opposition to the application.

Briefly, the background to the matter is that the applicants are former employees of the respondent. They took out an action in the IRC challenging the termination of their employment on the grounds that it was discriminatory, unfair labour practice, unlawful and unfair. By its judgment delivered in March 2021, the IRC found in favour of the applicants. The respondent was dissatisfied with some parts of the judgment and filed a notice of appeal to the High Court. However, the respondent proceeded to pay the applicants a total sum of K839,353,770.20 in respect of severance pay and bonuses which were some of the successful claims.

By an order on assessment of damages made on 11 August 2021, the IRC awarded the applicants a total sum of K3,657,648,455.71 as compensation on the other heads of claims and interest. The IRC ordered that the respondent should pay the award within six weeks from the date of the order. The respondent sought an order staying the execution of the order of damages pending the determination of its appeal against the judgment but the same was declined by the IRC.

On 23 September, 2021 the respondent made an *ex parte* application in the court below seeking an order staying execution

of the order of damages or, in the alternative, an order of payment of the award into court. The court below granted the order staying execution but ordered that the said sum of K3,657,648,455.71 be paid into court within 90 days and that it be deposited into an interest earning account pending the determination of the respondent's appeal.

On 1 October, 2021 the applicants applied *inter partes* to the court below for an order setting aside the order staying execution and of payment into court. The applicants raised a number of grounds, including that the respondent had suppressed material facts and that the order itself was unjust and inequitable bearing in mind, among other things, that the applicants had already undertaken under oath to refund the money in the event that the appeal succeeds. In the alternative, the applicants prayed for a variation of the order of payment into court so as to allow payment of part of the compensation to them as they await the determination of the appeal.

After hearing arguments and thoroughly considering the facts and the applicable principles of law, on 15 December, 2021 the court below found that there was nothing unjust or inequitable about the order of stay it granted *ex parte* and refused to set it aside. However, the court granted the applicants' alternative prayer. The court varied the order of payment into court by ordering that 15% of the award be paid to the applicants and 85% be paid into court.

Now, the applicants come to this Court praying for an order setting aside the Judge's order on the ground that it is unjust and inequitable. In the alternative, they seek an order of this Court varying the Judge's order in such a manner as to allow that 75 percent of the award by the IRC be paid to them and that the balance of 15 percent be paid into court.

In the affidavit in support of the application, the applicants take issue with the Judge's refusal to set aside the order of stay

having found that they would not be able to pay the money back in the event that the appeal succeeds. They feel that the order of the court below is grossly unfair because it is punishing them for being out of employment and having no source of income despite that it is the respondent itself who unfairly dismissed them from their jobs, thereby condemning them into their present situation. As such, the order of stay is working to the benefit of the respondent especially now that despite the appeal being heard judgment is yet to be delivered. In the meantime, the applicants are facing a lot of hardship such that even their children are being chased out of school because they are failing to pay school fees for them; they are failing to cope with the rising cost of living and have depleted all their savings. In the circumstances, it is only fair that they be allowed to get the money that was paid into court or, alternatively, the Court should order that at least 75% of the money be paid to them pending the determination of the appeal.

In its affidavit in opposition to the application the respondent basically challenges the application on the basis that it is wrongly brought before this Court. It ought to have been brought before the Judge in the court below. The respondent deponed that the applicants' affidavit clearly contains matters which were not before the Judge in the court below when he considered their application. For instance, it narrates events which happened after 15 December, 2021 the date the Judge made the order the applicants are seeking to set aside. As it were, the applicants are introducing new facts in this Court. In terms of the scheme under Order I, rule 18 of the Supreme Court of Appeal Rules (hereinafter "the Rules"), this is not tenable. In short, the respondent's argument is that the applicants should have brought before this Court the same application they made before the Judge in the court below if their wish was to have this Court make its own determination thereon. Having not appealed against the order of the Judge, the applicants cannot now come to this Court with the present application beseeching this Court

to purportedly exercise jurisdiction that is concurrent with that of the court below as provided for under Order I, rule 18 of the Rules.

The full text of Order I, rule 18 of the Rules reads as follows: -

> "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".

There is no dispute that this rule governs a situation where there is concurrent jurisdiction between the court below and this Court. And that the rule provides that in such cases the applicant must first go to the court below with his or her application and only where such application is refused can he or she come to this Court with the application. The provision uses the word "shall" which depicts that the applicant has no option but to first go to the court below before he/she can make the application in this Court. In this respect, I would say that any suggestions that such application can be brought direct to this Court seem to have no support from the rule itself.

It is also clear from the rule that what is brought before this Court is the same application that the applicant made in the court below. This is an imperative and fundamental aspect of the concurrent jurisdiction as envisaged in this rule. The applicant has the benefit of having two different courts consider and determine his/her application. He/she is allowed to have a second bite of the cherry, so to speak.

Coming to the present application, it is apparent from the documents filed that the application which is before this Court is not the same application which was before the Judge in the court below. Paragraphs 10 through 21 of the affidavit in support of the present application narrate things which transpired after the Judge made his order. Obviously, such developments were not

part of the factors for consideration by the Judge when he heard the application. Further, the applicants' contention that the Judge's order is unjust and inequitable is, to a greater extent, grounded on the post order developments.

During the hearing of this application when confronted about this element and the fact that the application before this Court is not the same application that was before the Judge in the court below, it became clear that the applicants had grossly misconceived Order I, rule 18 of the Rules and its purport. It was also clear that the applicants had not done their homework before conceiving the application before this Court.

I am sure if the applicants had done their homework, and done it properly, they would have found sufficient guidance and known the correct thing to do. There are many decisions from this Court on this rule which would have left them in no doubt at all on the correct way of going about the application. In any case, the rule itself is very clear that it is the same application which was before the court below which is brought before this Court for determination.

Thus, I fail to appreciate how and why the applicants could not understand that and proceeded as they did. On this point alone, the applicants' motion cannot succeed.

Further, the applicants have come to this Court after a lapse of two years since the Judge in the court below made the order they are complaining about. In my opinion, a lapse of two years is too long a period for one to bring the application under Order I, rule 18 of the Rules. It is imperative that such applications must be made quickly, that is, soon after the judge in the court below has pronounced his/her decision on the application. A delay of two years is inordinate. I have not seen any circumstances showing that despite the inordinate delay, the interests of justice require that the application should still be

entertained. On that ground, this application ought not to be entertained and must fail.

Further, and in case I am wrong on the foregoing findings, I wish to say that having considered the material which was before the Judge in the court below, and also the developments which occurred after the Judge's order as deponed in the affidavit in support of this application, I find that the Judge was justified in coming to the conclusions he made.

The record shows that in April 2021, following the judgment of the IRC, the applicants were paid the sum of K839,353,770.20 as the balance on severance allowances and bonuses as ordered by the court. This was after the respondent had already paid them the sum of K475,799,910.05 as severance allowances upon termination of their employment. It means that the applicants were paid a total sum of K1,315,153,680.25 as severance allowances and bonuses. As earlier stated, the IRC awarded the total sum of K3,657,648,455.71 on the remaining heads of claim upon assessment of damages. The respondent is appealing against both the judgment of the IRC including the order on assessment of damages. Now the applicants state that they are unable to find alternative employment due to the lack of jobs on the market. They have tried to engage in business but their ventures have failed due to the harsh economic conditions in the country. In the result, they are facing hardship to the extent that their children are being chased from school for non-payment of school fees, and they have depleted their savings and pension. In other words, what the applicants are saying is that all the money they received pursuant to the success of their case in the IRC, that is, the K1,315,153,680.25 is finished. They are impecunious as we speak.

Having considered all the factors, the Judge in the court below sympathised with them and ordered that they be paid 15 percent of the K3,657,648,455.71 and that 85 percent be paid into court

pending the determination of the respondent's appeal against the IRC's judgment and award of damages.

In their application before this Court, the applicants state that they are dissatisfied with the Judge's order and want it set aside on the ground that it is unjust and inequitable. They want this Court to order that they be paid all the money which was paid into court. In other words, the applicants want the full award, that is, the K3,657,648,455.71, to be paid to them. Alternatively, they want this Court to order that they be paid 75 percent of the award, that is, about K2,743,236,341.78, and that 15 percent, about K914,412,113.93, be paid into court pending the determination of the respondent's appeal.

Having considered all the evidence in this matter, I come to the conclusion that it would be judicial madness of the highest degree if this Court or indeed any other court were to order that the applicants be paid the full award pending the determination of the respondent's appeal. As it was found by the Judge in the court below, a finding which I also come to, the applicants have demonstrated that they have failed to engage in any gainful ventures during the period they have been out of employment. And even after being paid the sum of K548,647,268.36 pursuant to the order of the Judge in the court below, they still cannot even pay for their children's school fees. What it means is that, despite being paid a total sum of K1,863,800,948.61, the applicants are still facing financial hardships. They have failed to manage the K1,863,800,948.61 and now they want to be paid the balance of the award. They contend that they will be able to pay back the money in the event that the respondent's appeal succeeds.

I have not seen any evidence showing that they would have the ability to pay the money back. They have not disclosed how the money they have been paid so far has been invested. All they have said is that they are impecunious. In the circumstances, I am afraid to say that all they have managed to show is that they

are financially irresponsible persons. They are spendthrifts. This is evidence showing that they may not be able to pay the money back in the event that the appeal succeeds. Also, I suspect that the applicants' intention is to render the appeal nugatory in the event that it succeeds. They do not intend to pay back the money. I suspect that they want to get as much money from the award as is possible and then dissipate it. Otherwise, I do not see the motivation behind the appetite for money they have displayed.

Further, I find that the Judge in the court below was very lenient. Having found as he did that the applicants had nothing to show despite the money they had already received, he should not have ordered that they be paid 15 percent of the award. In my considered view, there were no factors justifying such an order. If anything, there were strong factors militating against it.

As I conclude, I would want to say that as courts, we need to consider seriously the circumstances of each case before we order payment of a judgment debt into court. By granting a stay of execution of a judgment it means that the court is satisfied that there is or are good grounds for doing so. One of such grounds is that the court is satisfied that if the judgment money is paid to the successful litigant, there is no reasonable prospect of recovering it in the event of an appeal succeeding. See *Thomson v CGU Insurance Ltd* [2008] MLR 402.

Therefore, in my opinion, there must be special reasons why the court should go a step further to order a payment of the judgment debt into court. An order for payment into court cannot be and should never be ordered as a matter of course. It should not be ordered as a consolation to the successful litigant whose judgment has been stayed pending the determination of an appeal. It must be ordered only where there are good grounds justifying it. For instance, evidence that the appellant will not be in a position to pay the judgment money in the event that the appeal fails would constitute good ground. Evidence showing

that the appellant is a non-resident and/or has no assets within the jurisdiction, or that he is about to flee the jurisdiction, or that he or it is dissipating his or its assets with the intention of defrauding his or its creditors, or defeating the course of justice, or that an entity is winding up its business may persuade a court to make an order for payment of the judgment sum into court. Obviously, it is a matter which is in the discretion of the court and is a question of fact. Consequently, it will vary from case to case, and it would be a futile exercise to attempt to compile an exhaustive list of the factors.

In my view, a court must not be quick to order a payment into court. It must drag its feet. It must be appreciated that such payments can have a huge and/or devastating impact on the cash flow of a person or an entity especially when the amount involved is huge. When paid into court, the money is locked up thereby depriving the person or entity of the cash which could have been used for day-to-day operations, investments, and debt servicing, just to mention a few. No solace should be found in the fact that, in most cases, the court orders that the money be invested in an interest earning bank account. What the court needs to know is that interest on a bank deposit is not the best investment especially in an economy like ours where the currency is constantly depreciating in value.

Where the amount involved is substantial, as in the present case, the court should be hesitant to order a payment into court unless there are good grounds to justify such an order. I do not see such grounds in the present case. There is no evidence which suggests that the respondent would not be able to pay the damages in the event that its appeal fails. As such, it is my view that the Judge should not have made the order in the absence of good grounds to justify it.

In the premises, on the evidence before me, I find that even if the applicants' application had been properly made before this Court, I would still have come to the same conclusion as the

Judge in the court below for the reasons I have given and those he gave which I have not bothered to reproduce in this judgment. I would only have parted with him on his conclusion in respect of the payment of the 15 percent to the applicants and the order that the respondent pay the 85 percent into court. Otherwise, I do not think he exercised his discretion in a manner that would have warranted interference from this Court. Thus, I see no merit in the application and it must fail.

I now come to the issue of costs. During the hearing of the application I asked counsel for the applicants to convince the Court why the applicants should not be made to bear the costs of the application in this Court in view of the fact that they brought an application which openly flouted Order I, rule 18 of the Rules despite its clarity and the abundance of guidance from this Court on the matter. I formed the opinion that this application was ill conceived and a mere waste of both the respondent's and the Court's time and resources.

Counsel said that this being a labour matter the law prohibits making of orders of costs. It is the Legislature's intention that litigation of labour matters should not be hindered by orders of costs or the fear of being condemned to pay costs. Further, there are decisions of this Court which specifically hold that costs are not awardable in labour matters, for instance, *First Merchant Bank v Mkaka* [2014] MLR 105.

On the other hand, the respondent urged this Court to condemn the applicants in costs since costs in this Court are in the Court's discretion and there are cases where this Court has awarded costs even in labour matters. Counsel referred the Court to the case of *Stanbic Bank Ltd v Mtukula* [2006] MLR 399 in which, despite it being a labour matter which had started in the IRC, this Court condemned the appellant to pay the costs following a dismissal of its appeal.

In my industry I have also stumbled upon another judgment by this Court in an appeal between the same parties and relating to the same matter. The judgment was delivered on 16 October, 2007 by a panel comprising Justices of Appeal Tambala, Mtambo and Tembo. Again, the Court condemned the appellant to pay the costs of the appeal despite it being a labour matter which had originated in the IRC. See *Stanbic Bank Ltd v Mtukula* [2007] MLR 291 (SCA).

There is also the decision of this Court in *Leyland Daf (Malawi) Ltd v Joe Ndema* [2006] MLR 257 where this Court condemned the appellant to pay the costs of the appeal despite it being a labour matter which had originated in the IRC.

Further, the appeal in *Kalowekamo v Malawi Environmental Endowment Trust* [2006] MLR 151 (SCA) emanated from an action which was commenced in the IRC. This Court dismissed the appeal and proceeded to order the appellant to pay costs.

The case of *Arnold Malinda and others v Carlsberg Malawi Ltd* MSCA Civil Appeal No. 4 of 2013, a decision of this Court made recently on 23 October, 2023, has also been brought to my attention during the writing of this ruling. In this case, Mbvundula JA, sitting as a single member of this Court, set aside an order for security for costs pending an appeal in this Court obtained *ex parte* earlier on the ground that the principle in the *Mkaka* case is that since section 72 of the Labour Relations Act proscribes the award of costs in the IRC equally no costs should be awarded in labour matters on appeal. Consequently, in labour matters, no order for security of costs of an appeal could be made.

Maybe worth mentioning is also the case of *Liquidator, Import and Export (MW) Ltd v Kankwangwa and Others* [2008] MLLR 219 where the High Court refused to make an order of costs after determining an appeal on a labour matter on the ground that such an order would not have been made by the IRC. However,

it is interesting to note that when the matter came on appeal in this Court, the appellants were condemned to pay the costs of the appeal. There was no discussion of why the Court decided to make the order despite the refusal to award costs by the judge in the court below. See *Kankhwangwa and Others v Liquidator, Import and Export (Mw) Ltd* MSCA Civil Appeal No. 4 of 2003 (unreported).

In *Capital Outsource Group (Pty) Ltd v Happy Msiska and others* [2010] MLR 28 (HC) Madise J (as he then was) having dismissed an appeal against the decision of the IRC proceeded to condemn the appellants in costs.

I must say that in all the decisions of this Court that I have referred to above, their Lordships did not discuss why they made the orders of costs even though the appeals were in respect of labour matters which had first been commenced and tried in the IRC. The Court must have proceeded on the principle that costs follow the event – hence the losing party must bear the costs of the appeal/matter. And also to be fair to their Lordship, it would appear that the issue of costs not being payable in labour matters was never raised in all these matters. Had it been raised, I am certain that their Lordships would have rendered opinions just as was the case in the *Mkaka* case.

It is only Kapanda J (as he then was) sitting in the High Court on an appeal from the IRC in the *Kankhwangwa* case (supra) that gave a reason for his refusal to make an order as to costs. The judgment does not state whether the issue was raised by the parties to the appeal or not. It would appear that the Judge proceeded to make the order based on his own understanding of the law on costs in labour matters commenced in the IRC.

In so far as I am able to establish, it is only in the *Mkaka* case that the issue of whether a party can be condemned to pay costs on appeal in a labour matter was raised. Their Lordships had the benefit of hearing the arguments of counsel on the point before

making their determination. Unfortunately, in their treatise their Lordships did not refer to previous decisions of their Court in which orders of costs were made against losing parties. As such, there is no discussion of the earlier decisions and why, this time around, the Court found it necessary to depart from what I would call, its seemingly settled position on costs in labour matters. Consequently, it is not clear whether the decision in the *Mkaka* case was made conscious of the earlier decisions of this Court or not.

In the *Mkaka* case, discussing the issue of costs in an appeal involving a labour matter originating from the IRC, their Lordships opined as follows: -

> "On this point, upon bearing in mind section 72 of the Labour Relations Act and upon considering all the arguments the parties have exchanged, we are of the view that the law governing employment matters that are commenced in the Industrial Relations Court clearly points to an approach that does not hinder access to justice in such matters. The law has taken away the obligation to suffer costs on account of petitioning the court for relief on labour claims. To hope or believe that such matters would begin and end in the court of first instance would be too idealistic. To then say that parties are only free from the yoke of bearing costs when the matter is in the primary court, but that they must be ready to face even colossal costs should their case graduate into an appeal or appeals hereafter, we believe, could easily freeze any aggrieved person's intentions to even just commence litigation for fear of the unknown. It would also stifle the development of jurisprudence in labour matters. We believe therefore that just as the respondents must have been happy to commence and prosecute their claim without prospect of having to bear the costs of litigation on loss of their case, had they lost it, they would not be entitled to reap costs

from the appellant just because of the appellant's desire to try out for a different brand of justice in the higher courts. We agree, therefore, with the appellant that it did not deserve to be condemned in costs as it was done just because it chose to exercise its right to seek justice in two higher courts."

In my considered view, the issue of costs in the IRC should not be confused with the issue of costs in labour matters generally. To make this clear I will reproduce section 72 of the Labour Relations Act in full. It provides as follows: -

> "(1) Subject to subsection (2), the Industrial Relations Court shall not make any order as to costs.
>
> (2) The Industrial Relations Court may make an order as to costs where a party fails to attend, without good cause, any conciliation meeting convened under this Act, or where the matter is vexatious or frivolous."

There are several points that need to be noted from this section. These are: -

1. It is not correct that there are no costs in the IRC.
2. Subsection 2 clearly empowers the IRC to make an order of costs in two instances:
    a. where a party without a good cause fails to attend a conciliation meeting, and
    b. where the court finds that a matter is vexatious or is frivolous. It is clear from the wording of the subsection that the costs are in the discretion of the IRC.
3. The IRC cannot make an order of costs unless it is exercising the discretion under subsection 2.
4. The sanction not to award costs is specific to the IRC.

In my judgment, the fact that the section specifically mentions the IRC means that the sanction on costs is not of general

application. Had it been the Legislature's intention to proscribe awarding of costs in labour matters, then it would not have specifically mentioned the IRC only. The provision would have been general. In other words, the Legislature would have said in subsection 1 something like "no court shall make any order as to costs". But having singled out the IRC, obviously, it means that the other courts that deal with labour matters are excluded. In my judgment, the principal rule of statutory interpretation: *expression unius est exclusion alterius* (the inclusion of the one is the exclusion of the other) applies here. It is **only** the IRC that is prohibited from making orders as to costs (except in the scenarios provided for in subsection 2, as already stated above).

So, to interpret section 72 as meaning that costs cannot be awarded in labour matters, with the greatest respect, is farfetched and unsupported by the text of the section. It is against the ordinary meaning of the words used in the section itself. Further, such interpretation is against the intention of the Legislature as expressed in the section itself. In essence, it amounts to an amendment of the section by the Court.

Further, in order to understand the Legislature's intention more, one needs to look at section 65 of the Labour Relations Act. It provides as follows: -

> "(1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.
>
> (2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered."

In my opinion, by making the decisions of the IRC final and binding on the parties, it means that it was the intention of the

Legislature that labour matters should primarily be handled and finalised in the IRC. And that appeals, if any, should be rare – hence the prescription that the appeals should only be on questions of law and jurisdiction. Otherwise, I do not see any other reason that would have made the Legislature to come up with such wording in section 65.

Consequently, the view expressed by their Lordships in the *Mkaka* case that to hope or believe that labour matters would begin and end in the IRC would be too idealistic doesn't seem to be supported by the wording in section 65. In fact, that seems to be, not just the hope or belief, but also the intention of the Legislature. Whether that is idealistic or not is an issue which does not arise since the section makes provision for appeals, which is a clear reflection of the Legislature's acknowledgement of reality. In any case, even if it were to arise, I do not think it would be for the courts to resolve. It would be for the Legislature itself to resolve through an amendment of the law.

Further, I do not see how the scheme as expressly stated under sections 65 and 72 would hinder the development of jurisprudence in labour matters. In my view, the subjection to costs on appeals in labour matters is for a good reason. As I see it, the intention is that those that want to appeal against a decision of the IRC must first take a deep breath and think through their decision before they proceed to appeal. In other words, knowing that they may suffer costs on appeal, they must have good grounds and be certain that their appeal has reasonable prospects of success before they set the appeal process in motion.

It is not each and every grievance which must be pursued on appeal. Others would say, there must be a cost-benefit analysis before lodging an appeal. Hence, one must assess whether the benefit from the appeal justifies the expenses incurred in pursuit thereof. The expenses include time, resources and legal costs, to mention but a few. So, where one decides to pursue an

appeal, they should face the natural consequences of their action including suffering costs. That is part of the scheme under the Labour Relations Act especially sections 65 and 72. And it is not for this Court to change.

I do not think the development of jurisprudence is or should be a factor when interpreting statute. I can bet that development of jurisprudence was never on the mind of the Legislature when it formulated and passed this law.

In any case, the jurisprudence will still be developed from the appeals on questions of law and jurisdiction to be pursued by those litigants willing to take the risk of suffering the costs. This has already been demonstrated from the many judgments by both the High Court and this Court in appeals in labour matters which commenced in the IRC. What more would one need? Nothing, I dare say.

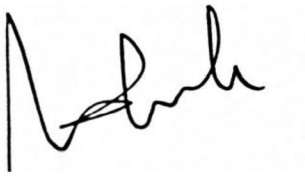
With the greatest respect, it seems to me that there is an urgent and great need for this Court to reconsider its positions on costs espoused in the *Mkaka* case and the earlier decisions and settle the issue. There is confusion which has also trickled down to the court below as is reflected in the judgments I have cited.

In my view, and with the greatest respect, as I have already tried to demonstrate in this judgment, the position taken in the *Mkaka* case is not supported by the words used in section 72 of the Labour Relations Act. In my judgment, the position taken in the earlier cases where the costs generally followed the event is correct and in line with the scheme under the Labour Relations Act and the law. Both the High Court and this Court have the discretion to award costs in appeals on labour matters. Such discretion has not been taken away by section 72 of the Labour Relations Act. It is still intact and must be exercised following settled principles, that is, judiciously. In the same vein, I would say that it is perfectly within the court's discretion to order security for costs of an appeal in a labour matter.

In the premises, it is my view that I am entitled to exercise this Court's discretion on costs. Further, I find that the application brought by the applicants before this Court is ill conceived and clearly flouted Order I, rule 18 of the Rules and established case authority. The applicants did not do their homework before making the application. The application was just a waste of both the respondent's and this Court's time and resources. In my judgment, the application is one which if it were in the IRC, it would have been found to be vexatious or frivolous and the court would have exercised its discretion to make an order of costs.

Therefore, I do not see why this Court should not exercise its discretion on costs. Since the application has failed, I see no reason why the respondents should not be awarded the costs of the application in this Court. It is only fair and just that the applicants be condemned to bear the costs. And I so order.

Made at Blantyre this 10th day of November 2023.



J. KATSALA
JUSTICE OF APPEAL