IN THE SUPREME COURT OF APPEAL

SITTING AT BLANTYRE

CIVIL APPEAL NUMBER 22 OF 2023

Before Justice of Appeal Dingiswayo Madise

[Being Commercial Case No. 459 of 2022]

BETWEEN:

ROADS AUTHORITY **1ST APPELLANT**

ROADS FUND ADMINISTRATION **2ND APPELLANT**

-AND-

AL-ABDULHADI ENGINEERING CONSULTANCY **RESPONDENT**

Coram; **Hon Mr. Justice D Madise JA**

Mr. P. Likongwe for the Appellants

Mr L. Gondwe for the Respondent

Mr K, Chimkono Clerk

RULING

Madise JA

Introduction

This matter came before me as a single member of the Court pursuant to Section 7 of the Supreme Court of Appeal Act hereinafter referred as the Act as read with Order I Rule 18 of the Supreme Court of Appeal Rules. Section 7 of the Supreme Court of Appeal Act states:

"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."* (emphasis added)

The Respondent (then Claimant in the Court below) commenced these proceedings in the High Court (Commercial Division) Blantyre Registry on 9th December 2023 but served the summons on the Appellants (then Defendants) on 11th January 2023. The Respondent also obtained a Freezing Injunction *ex-parte*, freezing all the Appellants' assets. All the Appellants' bank accounts were also frozen. The Appellants filed an Application to set aside the Freezing Injunction. On 8th February 2023 the Respondent filed an Application for a Default Judgment and the Court below issued the Default Judgment on the same day 8th February 2023. The Default Judgment ordered NBS Bank plc to immediately pay the sum of US$1,481,948.30 to the Respondent. NBS Bank paid the sum of US$1,481,948.30 to the Respondent's lawyers, Ritz Attorneys on 9th February 2023.

The Appellants (Defendants in the Court below) filed an application for stay of execution of the Default Judgment. At more or less the same time the Financial Intelligence Authority (FIA), on its own initiative for other reasons on 10th February 2023 issued a Freezing Directive against the bank account of Ritz Attorneys at Ecobank. Thus, the money remained at Ecobank. On 10th February 2023 the Appellants (then Defendants) filed an Application to set aside the default judgment on the grounds of irregularity and on the further ground that the Defendants (now Appellants) have defences on the merits. The Defences were exhibited in the sworn statement in support of the application. The Appellants (then Defendants) also filed skeleton arguments in which the defences were also highlighted. On 24th February 2023 the Appellants (then Defendants) filed a without notice aplication to vary the order for stay of enforcement to include a paragraph that the sum of US$1,481,948.30 that NBS Bank plc sent to Ecobank Malawi Ltd be preserved by Ecobank Malawi Ltd until the determination of the Application to set aside the default judgment. The Order adding a paragraph on preservation of the funds was issued on 29th March 2023.

The Appellants' applications to set aside the Freezing Injunction and to set aside the Default Judgment were heard on 21st February 2023. After the hearing, both parties filed and served their Submissions on both applications. The Ruling on the two applications to set aside the Freezing Injunction and to set aside the Default Judgment is dated 4th May 2023. The Ruling dismissed the

Defendants' (now Appellants') two applications with costs. The Ruling however maintained the Order for the money to be preserved by Ecobank for a further 7 days. On 5th May 2023, the Appellants filed a without notice application in the Court below for leave to appeal and stay of proceedings pending appeal. The Court below granted the leave to appeal but declined the application for stay of execution.

The Appellants obtained leave to appeal and have appealed to the Malawi Supreme Court of Appeal against the ruling of the Court below dated 4th May 2023. The Respondent filed an application in the Supreme Court of Appeal to have the money preserved at Ecobank paid out to the Respondent. The Appellants also filed an application for stay of execution of the ruling of the Court below. Both applications were opposed. The Single Member of the Supreme Court of Appeal heard both applications together on 20th June 2023 and dismissed the Respondent's application to pay the money out to the Respondent, granted a stay of execution of the ruling of the Court below and ordered that the money at Ecobank be paid into Court. Meanwhile the funds remain in Court. The Appellants processed the record of appeal in the High Court and the record of appeal which contains the Appellants' Skeleton Arguments was filed in the Supreme Court of Appeal and served on the Respondent.

Respondent's arguments for discharge of stay of execution.

The Respondent stated that he is not looking for much in this application. That he is not saying the Appellants cannot continue to prosecute their appeal. The Respondent has considered on a clear conscience that there is in fact no appeal properly before the Court. That the Respondent is simply asking the Court to discharge its orders which it granted on the pretext that there is a proper appeal logged with the Court. As true verification of the Court would have it, there is none and the status quo should remain that which obtained when the Appellants had not filed a purported appeal.

Legal issues

Whether discharge of the stay is the most appropriate remedy for failure to file skeleton arguments within the prescribed period.

Whether a stay should be discharged in favour of a party who does not have establishment in Malawi.

What guarantees are there that if the discharge is granted and later the Default Judgment is set aside, the Respondent will pay back the Judgment Sum?

Law, analysis and submissions

The Respondent argued that a successful party to litigation must enjoys fruits of litigation. He cited *Kadzipatike & Others v Zhejiang Communications Construction Group Company Limited* (MSCA Misc. Civil Application No. 29 of 2023, Being High Court, Commercial Division, Lilongwe Registry, Commercial Case No. 78 of 2020) [the *Zhejiang case*]. That the old position remains that : fruits of litigation vs appeal being rendered nugatory should be considered. The old cases state that the general rule is that the court does not make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he is "entitled" pending an appeal. This principle has been repeated by the courts in Malawi with approval on several occasions without number.

That where a justifiable reason emerges negating the need for stay, the right of a successful party to enjoy the fruits of litigation will be upheld and stay will be deemed unjust or unnecessary in the circumstances. That a stay in favour of an appellant is not as of right. The right is for the Respondent to be entitled to fruits of litigation. The only exception to this rule is where if a stay is not granted, or where it was granted, is subsequently discharged, the Appellant's intended appeal will be rendered nugatory. That it is important to emphasise that the Appellants herein are beneficiaries of not a general but merely an exception to it. He submitted that the Court should be slow to deny a party fruits of litigation. Parties who benefit from this exception must be only those who are willing to pursue their appeal in good faith and in compliance with law. That where damages can adequately compensate the Appellants in the event of a successful appeal, a stay should be refused or if it was granted and there is a good reason it must be discharged. As i such as in the present case where it is clear that the Appellant has not followed applicable procedural law in prosecuting the appeal, the stay should be discharged and the Respondent should be allowed to exercise his right to enjoy fruits of litigation.

That not to discharge the stay where there is glaring breach by the Appellants of procedural rules will be to recognise that the stay was granted as of right and to refuse to discharge the stay when clearly the Appellants have breached what was required of them is to further deny a Respondent fruits of litigation. That this will be in contravention with the general principle that a stay is not as of right and that an appeal does not operate as a stay. On this aspect, the Court is further invited to consider the principles of stays of judgments of the Court in determining whether to discharge or maintain the stay. He submitted that at any time in the proceedings, the principles for grant of stay also guide Courts in our jurisdiction when they are faced with applications for discharge of stay. He cited the remarks of the Honourable Justice Tambala in the case of *The Anti- Corruption Bureau v Atupele Properties Limited* (MSCA Civil Appeal Number 27 of 2005) [the Atupele Properties case] are quite key in the present matter. The Court said;

I must now revert to the law relating to stay of execution of Court's judgements. There are clearly four principles. The first is that it lies within the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as a general rule the court must not interfere with the successful party's right to enjoy the fruits of litigation. The third principle is an exception to the general rule and states that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the Appeal succeeds, execution of the court's judgement may be stayed. The fourth principle is that even where the party appealing is able to show that the successful party would be unable to pay back the damages if the appeal succeeds, the court may still refuse an application for stay of execution of a judgement if upon examination of the facts of the case, an order of stay of execution would be utterly unjust." [emphasis by underlining ours].

That the remarks of this Court in the ***Atupele Properties*** case (supra) should be examined very closely in the present case. In terms of the first principle expounded by the Court, it is conceded that grant or discharge of stay is in the discretion of the Court. The Court may grant or discharge stay in exercise of its discretion but on the guidance of the other three principles. That in terms of the second principle, the Court recognises that the right to have a judgment stayed is not for the appellant. It is for the party who obtained the judgment in its favour and that Courts should protect the successful party's right to enjoy fruits of litigation. It is submitted that the Court should look at the facts and consider that the Respondent has been kept out of its Judgment Sum for over a year now. The Respondent has not been able to access its money even where it is now clear that the Appellants are pursuing their appeal in breach of rules of procedure while enjoying existence of a stay of execution.

That the third principle for grant or discharge of stays is, as expounded by the Court, that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the Appeal succeeds, execution of the court's judgement may be stayed. It is observed that the third principle is not a standalone principle. It is merely an exception to the general rule which is that a successful party must enjoy fruits of litigation and Courts are duty-bound to protect the successful party's right. The exception to the said general rule is not to be exercised in favour of an appellant unconditionally. There is a condition to the third rule. The condition is that the Appellant must demonstrate that the successful litigant would be unable to pay back damages if the appeal succeeds. Conversely, in the context of determination of an application for discharge of a stay, he submitted, that the third principle imposes an obligation that over and above simply being a foreign entity without establishment in Malawi, the Respondent has no capacity to pay back damages to the Appellants should their appeal succeed.

That the Respondent's ability to pay lies outside of the consideration of fact of their lack of local presence in Malawi. It is further submitted that in determining whether the Respondent will most likely be able to pay damages, the Court must look at the facts of the case. The Court is invited to holistically look at the relationship between the Appellants and the Respondent. The Respondent was an entrusted consultancy contractor for Government of Malawi. The Respondent was assessed by the Appellants and deemed liquid, fit and proper enough to execute high value contracts in Malawi. It is a fact that the Respondent has been working in Malawi and ably so. He submitted that the Respondent has every ability to pay damages to the Appellants should their appeal succeed after the judgment sum is paid to the Respondent. That the burden, he submitted, lies on the Appellants to demonstrate very clearly and most satisfactorily that the Respondent whom they entrusted with a high value contract is now unable to pay them damages in the event that their appeal succeeds.

He further stated that issues of lack of local presence in Malawi have very little to do with the Respondent's ability to pay damages. In any case, he submitted, that the issues of lack of local establishment can easily and most successfully be taken care of by rules of enforcement of foreign judgments in Kuwait. He submitted that, the Respondent being an entity which has capacity to pay the Appellants damages, and which the Appellants have not demonstrated to be unable to pay the damages, the Appellants should not at all worry about their lack of local presence if they diligently follow the rules of recognition of enforcement of foreign judgments in the country where the Respondent is based. The rules are there.

That States generally agree in comity that foreign judgments are enforceable against their citizens and the applicable rules avenues of enforcements in such contexts should be available and capable of being pursued by the Appellants. Suffice to state that the Appellants themselves are agents of Government of Malawi. They will surely be able to follow the Respondent and enforce against it should need arise in future. That they will manage to follow the Respondent the same way they managed to locate it and award it the contract that is the subject matter of the present litigation.

That it is evidence from the record of the Court that the Appellants have adequate details of the Respondent such as official addresses, emails, information as to country of origin. It is also clear from the preamble of the Consultancy contract that both the Appellants and the Respondent deal very closely with entities in Kuwait. For instance, according to the contract, the Appellants obtained loan meant for the project the subject matter of the contract. The Appellants obtained the loans from the Kuwait Fund for Development (KF). That it is clear that the Appellants deal with Kuwait banks. It is possible, therefore, to enforce any judgments in Kuwait through banks with which the Respondent keeps its money, subject to applicable rules of enforcement of foreign judgments and orders in

Kuwait. He stated and respectfully invited the Court to take judicial notice of the fact that Kuwait is actually a member state to, among other treaties helpful to the Appellants, *The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [the Hague Judgments Convention]*. That Kuwait is bound by the convention to recognise and enforce judgments from non-Arab and non-Asian countries. It is submitted that the fact of the Respondent being a foreign entity alone cannot and should not be a sole consideration for the Court to not discharge the stay.

That the Court should take into account that the Respondent has already been kept out of its fruits of litigation for about a year now. The appeal is not a stay. The stay was obtained when it was expected that the Appellants would prosecute their appeal expeditiously and in compliance with rules. At this point, the Appellants having filed skeleton arguments in contravention with rules, there is no reason to preserve a stay. There is no more reason to keep the Respondent out of its judgment sum. That in any case, as advanced and submitted below, damages are an adequate remedy to compensate the Appellants should their appeal succeed and the Respondent has capacity to pay the Appellants.

He further submitted that damages will be adequate to compensate the Appellants should their appeal succeed after the judgment sum is released to the Respondent for the following reasons; Firstly, the Respondent is a liquid party. This cannot be in dispute because the Appellants and the entire Government of Malawi awarded a multimillion dollar construction contract to the Respondent. This is a fact. It can also not be in contention that the contract award was made upon a thorough assessment of the Respondent as a contractor who has adequate resources or capacity to perform the contract. That he was entrusted to perform a contract worth well over $ 1, 190, 000-00 as set out in the Special Conditions of the construction Contract [SCCs] between the Appellants and the Respondent.

That in awarding the high value contract to the Respondent, the Appellants acknowledged and continue to acknowledge that the Respondent has capacity to pay them damages for breach of contract. It is clear, therefore, that the Appellants understand the Respondent as an entity that has the capacity to pay them damages and to restore them to the position they would be in if the stay is discharged and the appeal succeeds. He submitted that if the stay is discharged and the Respondent's judgment sum is released to him, the appeal will not be rendered nugatory. This, he submitted, is because, should the appeal succeed, damages will be adequate to compensate the Appellants. In the premises, there are hardly any circumstances for maintaining a stay considering that the Appellant has not demonstrated that damages will not be adequate or that due to lack of the Respondent's local establishment in Malawi, enforcement of any orders will be impossible or costly.

That in the case of *The City of Blantyre v Manda and Others* (Civil Cause Number 1131 of 1990), and *Chichiri Shopping Centre v Ridgeview Investments* (MSCA Civil Appeal Number 30 of 2012), which this very Court recognised as one of the most progressive judgments when it comes to stay of execution of judgment, are for the position that a party seeking stay (or in the present circumstances, a continuation thereof!) must show special circumstances. He argued that over and above the above-expounded principles for grant or discharge of stay, the appellant has a lot more to demonstrate if an application to discharge a stay must be demonstrated. The Appellants must demonstrate special circumstances for the Court to maintain a stay that it granted on the pretext that the Appellants would pursue a proper appeal. Unfortunately, the Appellants are now in error. That Appellants flouted rules and filed skeleton arguments later than the time prescribed. They have contributed to delays in prosecution of the appeal. He submitted that the Appellants are as much required to demonstrate special circumstances for the Court to refuse to discharge the stay as they were required to demonstrate when they made the application for the stay. That no special circumstances have been demonstrated by the Appellants for the Court to maintain the stay especially where, clearly, the appeal which the Appellants are pursuing is marred by irregularities and will most likely be delayed because of the irregularities.

That where an appellant is in breach of rules of procedure, particularly the requiring him to file and serve skeleton arguments within the prescribed period, discharge of stay is the best remedy to prevent the Appellants from using stays as a means to an end. The last part concludes it all. The Court discharged a stay that it had granted. Clearly this Honourable Court discharged a stay on the pretext that skeleton arguments were not filed within the prescribed period. It is also clear, in the submission therefore, that Courts will not favour a stay where the appeal is marred with procedural irregularities. That discharge of stay for the Appellants' lack of compliance with procedure rules for appeal is and will not be unprecedented at all. This Honourable Court has done it and has the power to do it again.

Prayer

In conclusion he submitted that the Court has full jurisdiction to entertain the present application. The requirement of law is that the Appellants must demonstrate that the Respondent is incapable of paying those damages if their appeal succeeds, and the stay should be maintained and not be discharged. Despite being require by law to demonstrate inability to pay and inadequacy of damages, the Appellants have not provided proof that the Respondent has no ability to pay damages to them. The Appellants have failed to demonstrate special circumstances warranting that the stay should be maintained. That discharge of the stay herein is the most appropriate remedy insofar as the case is concerned. He submitted that the *Chitaya case* is the prevailing position of the law in Malawi where

the Court is bound to discharge stay where it is established that an Appellant filed process required by law in breach of rules of procedure.

Appellants' arguments

Legal Issues

The Respondent's Inter-Partes Summons for Discharge of Stay of Execution for Non-Compliance with Directions on Lodging Appeal states:

1. *There is no appeal lodged with the Court since until now the Appellants have failed to comply with rules for lodging of appeal with the Court in terms of filing Skeleton Arguments;*
2. *Consequently, the order for stay of execution of the Judgment of the Court below must fall away as it has no appeal to stand on; and*
3. *The averments in 1 and 2 constitute new circumstances necessitating the reconsideration of the legitimacy or justification for stay pending appeal and incidental or ancillary orders this Court made on July 12, 2023."* (emphasis added)

That as the parties had already argued before the Single Member of the Supreme Court of Appeal on stay of execution and whether the money should be paid to the Respondent, the matter on these points is *res judicata.* The Respondent justified the bringing of the same application by stating in the summons that there were new circumstances. The Respondent's submissions are 11 pages (including cover). Out of this, less than 1.2 pages discusses the alleged "new circumstances" regarding time for filing skeleton arguments. The summons mentions even the case that the Respondent is relying on in the summons (*Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy* Civil Appeal No 15 of 2015). However, in its submissions, the Respondent does not even mention this case. That the Respondent only mentions the case of *Chitaya and Others v Chitaya and Others* (Misc. Civil Appeal Number 09 of 2022). Very strange: the Respondent has abandoned the substance of its application. Instead, in 7 out of the 11 pages of its submissions, the Respondent dwells on principles of stay of execution. The arguments on stay of execution were already presented to the Single Member of the Supreme Court of Appeal by both sides on 20th June 2023, and the Single member after hearing both sides granted an Order staying execution. From this, it is clear that the Respondent is taking a second bite at the cherry. The reference to "new circumstances" was just a trick to get the Honourable Court to hear the Respondent's arguments again.

That the result is also that whilst the summons is based on "new circumstances" the Respondent's submissions are on a different issue on principles on stay of execution, which is *res judicata*. The issue for determination by this Court is whether or not the Honourable Court should discharge the Stay of Execution that the Honourable Court granted after hearing all parties. That the Appellants' arguments on the case of *Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy* Civil Appeal No 15 of 2015 is misplaced because the Single Member's order for submissions was for more detailed arguments on the time for filing skeleton arguments under Practice Direction 1 of 2010, and the effect of skeleton arguments filed out of time. This is because there are two conflicting schools of thought: one in *Malawi Housing Corporation v Western Construction Company Limited* [2014] MLR 209 and the other by Mwaungulu JA in *Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy* Civil Appeal No 15 of 2015.

Time for filing skeleton arguments

That the Respondent's argument is that there is no appeal lodged with the Supreme Court because the Appellants filed their Skeleton Arguments after over 14 days had expired from the date of filing the Notice of Appeal. There are three issues here

a. Whether or not an Appeal was lodged; and
b. What is the timeline for filing Skeleton Arguments? and
c. What are the consequences of filing Skeleton Arguments late?

Whether or not an Appeal was Lodged

Order III rule 5(3) of the Supreme Court of Appeal Rules states:

"An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below."

That the Respondent has exhibited the Appellants' Notice and Grounds of Appeal filed in the Court below on 12th May 2023. In terms of Order III rule 5(3), it is clear that the appeal was filed. It should also be noted that leave to appeal was granted. That it should also be noted that the record of appeal was duly filed in the Supreme Court of Appeal and served on the Respondent. That it is therefore very clear that the appeal herein was lodged with the Supreme Court of Appeal. That at the beginning of the hearing on 20th June 2023, the Single Member of the Supreme Court of Appeal asked the question whether there was an appeal in the Supreme Court of Appeal. Both Counsel for the Appellants and Counsel for the Respondent agreed that there was an appeal in the Supreme Court since there was a Notice of Appeal and Leave to Appeal. The Single Member proceeded to hear the

two applications only after confirming that there is an appeal in the Supreme Court of Appeal. That even in this very application by the Respondent, the Respondent acknowledges that there is an appeal. The Respondent states in paragraph 5.5 of its skeleton arguments in support of the application as follows:

"…. What we have here is non-compliance. It can be rectified. The Appellant might still prosecute the appeal upon rectification as the Court can waive the non-compliance/irregularity. The appeal can be validated. So it might not make litigation sense to attack the appeal. Appeal must be left alone."

That in that case the Respondent cannot claim that there is no appeal lodged as the Respondent claims in paragraphs 1 and 2 of the summons for discharge of stay of execution. Further, the Respondent cannot be blowing hot and cold on this point: the Appellants obtained leave to appeal in the Court below, and filed in the Supreme Court an application to have the money preserved at Ecobank paid out to the Respondent. The Respondent's application was heard in the Supreme Court of Appeal. The Respondent's application could not have been heard in the Supreme Court of Appeal if there was no appeal in the Supreme Court of Appeal.

What is the Timeline for Filing Skeleton Arguments?

The Appellant submitted that paragraph 1(a) (i) of Practice Direction No 1 of 2010 states
"*in all substantive appeals –*

> *(i) the Appellant shall file with the Court skeleton arguments within fourteen (14) days after filing the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondent;"* (emphasis added)

Order III rule 5(3) of the Supreme Court of Appeal Rules states:
"An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below." (emphasis added)

They submitted that the Notice of Appeal is not filed in the Supreme Court of Appeal but in the Court below. Regarding the substantive appeal, no document is filed in the Supreme Court of Appeal until the Record of Appeal is filed. Hence, the appeal is lodged in the Supreme Court of Appeal when the record of appeal is filed in the Supreme Court. Logically, time in the Supreme Court starts running when the record of appeal is filed in the Supreme Court. That in *Malawi Housing Corporation v Western Construction Company Limited* [2014] MLR 209 at page 214, a full bench of the Supreme Court of Appeal (three Justices of Appeal) said:

"By Order III rule 10, the Registrar of the court below shall file the record of appeal with this court. It is therefore only at this stage that the appeal can be said to be with this court for purposes of skeleton arguments. Ideally the fourteen (14) days specified in the Practice Direction should run from that moment. It is expected that at the moment of filing the record of appeal with this court, the Registrar of this court will immediately and pursuant to Order III rule 11 cause to be served on all the parties mentioned in the Notice of Appeal, notice that the record has been filed. In the event that the parties to the case are notified later it only makes judicial prudence that the 14 days for skeleton arguments start running from the time that the parties are served notice of the record." (emphasis added)

That in the summons the Respondent relied upon the case of *Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy* Civil Appeal Number 54 of 2015, delivered on 3rd May 2016. That is an Order issued by Mwaungulu JA as a Single Member of the Supreme Court of Appeal. Prior to Mwaungulu JA's Order, there were many other decisions of the Supreme Court of Appeal that were in line with *Malawi Housing Corporation v Western Construction Company Limited*. These include *Attorney General (Ministry of Health and Population) v Savenda Management Services* Miscellaneous Cause No 70 of 2021. In a Ruling delivered on 15th February 2022, Mkandawire JA said at paragraph 28:

"I am satisfied that the Record of Appeal in this matter was not yet settled at the time I was hearing this application. It is only after the Record of Appeal is settled in the High Court and filed with the Supreme Court and served on the parties that I can safely say that this appeal has been entered."

In *Electoral Commission and Another v Mkandawire* Civil Appeal Number 67 of 2009, Tambala SC JA said at page 7:

"The relevant Practice Direction provides, in paragraph 1 – (a) (i) as follows:-
the appellant shall file with the court skeleton arguments within fourteen (14) days after filing the appeal in this court. It would appear that for purposes of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the court below. The time starts running after the record of appeal is prepared and the Registrar of the court below has filed the appeal and it is entered in this court, in terms of rule 11 of the Supreme Court of Appeal Rules."

They submitted that the correct position is in *Malawi Housing Corporation v Western Construction Company Limited*. That the decision in *Malawi Housing Corporation v Western Construction Company Limited* was made by the full bench of the Court (three Justices of Appeal as was the composition at that time). That a Single Member cannot overrule that decision. The Notice of Appeal is not filed in the Supreme Court of Appeal. It is filed in the Court below. What is filed in the Supreme Court of Appeal is the Record of Appeal under Order III rule 10. That in some cases, especially when the appeal is on facts, but also appeals on law, the skeleton arguments must refer to pages of the Record of Appeal in order to make the arguments comprehensive in order to convince the Supreme Court of Appeal. In such cases, it would be difficult or impossible to draft comprehensive skeleton arguments before the Record of Appeal is ready. It therefore makes sense that the skeleton arguments should be filed 14 days after the Record of Appeal is filed in the Supreme Court of Appeal. Mwaungulu JA acknowledged the need for the skeleton arguments to cross-reference the Record of Appeal. That is why he came up with the various types of skeleton arguments. However, those types of skeleton arguments are not in Practice Direction No 1 of 2010. Those types of skeleton arguments are alien to Malawi. That the skeleton arguments are aimed at convincing the Supreme Court of Appeal, and not the Court below which is by that time *functus officio* after it has delivered its judgment. There is no point really in filing the skeleton arguments in the Court below.

On the practical side, the Supreme Court of Appeal does not have the Notice of Appeal as it is filed in the Court below. The Supreme Court therefore has no record that a Notice of Appeal has been filed until (unless there are miscellaneous interlocutory applications) the Registrar of the Court below files the Record of Appeal in the Supreme Court of Appeal as per Order III rule 10 of the Supreme Court of Appeal Rules. In the absence of the Record of Appeal, the Supreme Court may not entertain skeleton arguments as the matter will not be in the Supreme Court of Appeal before the Record of Appeal is filed. As per Mkandawire JA in *Attorney General (Ministry of Health and Population) v Savenda Management Services* (quoted above) the appeal is entered in the Supreme Court of Appeal only after the Record of Appeal is settled in the High Court and filed with the Supreme Court.

That the above factors lead to the conclusion that the decision of the Supreme Court of Appeal in *Malawi Housing Corporation v Western Construction Company Limited* is the correct decision. The Appellants' Skeleton Arguments were filed and served together with the Record of Appeal. It means the Appellants' Skeleton Arguments were filed in the Supreme Court on the same day when the appeal was lodged in the Supreme Court. The Appellants therefore fully complied with Practice Direction Number 1 of 2010.

What are the Consequences of filing Skeleton Arguments Late?

The Appellants argued that the time for filing skeleton arguments starts running from the time the Record of Appeal is filed in the Supreme Court, and that the Appellant complied with Practice Direction Number 1 of 2010. That however in the event that the Honourable Court follows Mwaungulu JA's decision, they maintain that the consequence is not to remove the stay of execution. The Respondent has not cited any rule or case law that says if there is a delay in filing skeleton arguments any stay of execution must be removed. 1(a) (iii) of Practice Direction Number 1 of 2010 states:

"if the appellant fails to comply with subparagraph (a) (i) of this paragraph, the appeal shall not be set down for hearing and may at the court's instance be dismissed."

That the sanction is for not filing Skeleton Arguments at all. The sanction is not to set the case down for hearing. Dismissing the case is only at the Court's instance and not on the application of the respondent. The Practice Direction does not specify what happens if the skeleton arguments are filed late. The reason for not setting down the appeal is that there are no skeleton arguments. Once there are skeleton arguments, even if filed late, there is no reason for the Court not to set down the appeal for hearing. It should also be remembered that the Court has power under Order I rule 4 of the Supreme Court of Appeal Rules to enlarge time.

That the incidence of failure to file skeleton arguments within 14 days after filing the appeal has consequences depending on whether the record of appeal has been filed or not. Paragraph l (a) (ii) Practice Direction provides: If the appellant fails to comply with sub-paragraph (a) (i) of this paragraph, the appeal shall not be set down for hearing and may at the court's instance be dismissed. If the record of appeal is not ready, the respondent can apply for dismissal of appeal for want of prosecution based on failure to file skeleton arguments after 14 days and not at all. As is stated in Chaponda v Chilumbu (2015) Civil Appeal No 49 (MSCA) (unreported) Dismissals for want of prosecution serve two purposes. First, where they result in dismissal of the whole action, they stop the process which, but for want of dismissal, would be unjust or prejudicial through tardiness or laches. They, with the real threat of dismissal of the action or process and without stalling proceedings, invigorate and spur the sort of actions that further the action to speedy, tim*ely and fair conclusion.*

That if the record is ready and it is without skeleton arguments, the Court can receive the record of appeal under Order 3, rule 10 of the Supreme Court of Appeal Rules but decline to set down the case

for hearing under Order 3, rule 11. The reason why this Court does not refuse such a record is Order 5 of the Supreme Court Rules:

Non-compliance on the part of an appellant with these Rules or with any rule of practice for the time being in force shall not prevent the further prosecution of the appeal if the Court considers that it is in the interests of justice that non-compliance be waived or the appellant given a further opportunity to comply with the Rules. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given. Failure to file skeleton arguments in time or at all is non-compliance on the part of the appellant under this rule and the appellant must be given a chance to comply or the non-compliance be waived." (emphasis added)

Thus, the *Anglia* case which the Respondent is relying upon actually states that the appellant must be given a chance to comply or the non-compliance be waived. In the present case, the skeleton arguments were filed and the record of appeal has been filed in the Supreme Court of Appeal.

Enlargement of time

Order I rule 4 of the Supreme Court of Appeal Rules states:

The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interests of justice.

That the Notice and Grounds of Appeal was first filed on 12th May 2023, and the Skeleton Arguments were filed on 5th July 2023. That even if the Court follows Mwaungulu JA's decision, the delay is not inordinate and the Respondent has not suffered any prejudice. The Skeleton Arguments have already been filed and served on the Respondent. Hence, the Court could in that event enlarge the time for filing the skeleton arguments in the interests of justice.

Standing of the Respondent

Order III rule 6 of the Supreme Court of Appeal Rules states:

(1) Every person who by virtue of service on him of a notice of appeal becomes a respondent to any appeal or intended appeal shall within thirty days after service on him of the notice of appeal file in duplicate with the Registrar of the Court below notice of a full and sufficient address for service in such number of copies as the said Registrar shall require. The Registrar of the Court below shall

forthwith send a copy of the notice of address to the Registrar and shall cause a copy thereof to be served on the appellant.
(2) Such notice may be signed by the respondent or his legal representative.
(3) If any respondent fails or omits to file such notice of address for service it shall not be necessary to serve on him any other proceedings in the appeal or any notice of hearing thereof." (emphasis added)

The Appellants submitted that the Respondent has not filed an address for service. The Respondent is in breach of the rules on this point. As such, the Respondent is not entitled to be served with any documents in this appeal. That it follows logically that the Respondent is not entitled to make any application and is not entitled to be heard when it has not filed an address for service. Further, the Respondent was served with the Appellants' skeleton arguments and has exhibited them to its application. However, the Respondent has not filed its skeleton arguments. The Respondent itself is in breach of paragraph 1(a) (ii) of Practice Direction Number 1 of 2010. The Honourable Court will be exercising its equitable jurisdiction when deciding the Respondent's application. There is the legal maxim *he who comes to equity must come with clean hands.* In Simiyoni v Kanyatula [1999] MLR 382 the Malawi Supreme Court of Appeal said *"he who comes to equity must come with clean hands". "The conduct of the party applying for relief is always an important element to be considered"*
The Appellants submitted that the Respondent has come to Court with unclean hands. The Respondent's application should also be dismissed on this ground.

The real issue between the parties

The Respondent argued that the real issue between the parties is the sum of US$1,481,948.30 which the Respondent seized from the 2nd Appellant's bank account at NBS Bank. Upon the orders of the Supreme Court of Appeal, the money (part thereof) in Malawi Kwacha was paid into Court and is now in the safe custody of the Court pending determination of the appeal. The Respondent has made many applications (mostly *ex-parte)* in the High Court and in the Supreme Court to get this money. The Respondent has no presence in Malawi and has no assets in Malawi. Once the Respondent gets this money that is the end of the appeal. The Respondent will not be interested in the appeal, and the appeal will be rendered nugatory. It should be noted as stated above that the Respondent's Counsel has not even filed its address for service and has not even filed any Skeleton Arguments on the substantive appeal. The Appellants pray that the Honourable Court should not grant the Respondent's application.

Balance of justice

The Appellants submitted that the balance of justice lies in favour of continuing the stay of execution. The Single Member of the Supreme Court of Appeal already made his determination on this point and nothing has changed to warrant a change of that determination. There is therefore no need for the Court to consider the Respondent's application on this. The Respondent argued that location of the Respondent does not matter. The Respondent stated that if the Appellants win, they can enforce the judgment in Kuwait. This would be very costly for the Appellants, and the logistics would not be easy at all. The Respondent is admitting that paying out the money to the Respondent takes the money out of the reach of Malawi Courts. If the Court were to order payment of money to the Respondent, the Malawi Court would be abdicating its jurisdiction to courts in Kuwait. The balance of justice is that the money must remain under the control of the Court in Malawi until the final judgment.

That the Respondent also argued in its submissions that the Respondent has assets and bank accounts in Kuwait. There is no affidavit and no evidence that the Respondent has assets in Kuwait. The Respondent further argued that the Respondent "is a liquid party". No evidence has been shown that the Respondent is liquid. No bank statement has been presented in Court to show the Respondent's supposed liquidity. It should also be noted that throughout the proceedings in the Court below and in the Supreme Court of Appeal there is no affidavit or any document signed by the Respondent that has been filed in Court. All affidavits and all documents have been signed by Messrs Ritz Attorneys. This gives doubts on the traceability of the Respondent. The Respondent also argued that the fact the Government of Malawi awarded a contract worth US$1,190,000 to the Respondent shows that the Respondent has capacity and financial resources to perform the contract. That is not the correct logic.

Firstly, it is common knowledge that in construction contracts contractors and consultants ordinarily get advance payments from the employer as they are starting the contract. In the present case, Exhibit PL1a in the Appellant's Affidavit in Support of Application for Stay of Execution is the summons filed by the Respondent in the Court below. Attached to the summons is the contract between the 1st Appellant and the Respondent. Page 30 of the contract has the Special Conditions of Contract. It refers to clause 41.2.1 and it states that the Respondent would be paid an advance payment in foreign currency and in local currency. An award of contract does not necessarily mean that the contractor or consultant has financial muscle. That it should also be noted that in paragraph 8 of the 1st Defendant's Defence, the 1st Defendant stated that the Respondent abandoned the contract without concluding it and went back to Kuwait. This negates the claim that the Respondent has capacity and resources to perform the contract.

Prayer/submission

The Appellants therefore prays that the Honourable Court should dismiss the Respondent's application with costs. Considering the circumstances, the Respondent's application is frivolous and vexatious. The Appellants prays for an Order that the costs should be taxed forthwith on an indemnity scale.

Finding

It is settled law that an appeal does not operate as a stay of execution of the judgment of the court below. That there is need to balance the old position: fruits of litigation vs appeal being rendered nugatory. Case law state that the general rule is that the court does not make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he is "entitled" pending an appeal. This principle has been repeated by the courts in Malawi with approval on several countless occasions. The Court acknowledges that where a justifiable reason emerges negating the need for stay, the right of a successful party to litigation fruits will be upheld and stay will be deemed unjust or unnecessary in the circumstances.

On time for filling skeleton arguments as per Practice Direction NO 1 of 2010 vis-à-vis discharge of stay, two important things are clear. First is that the 14-day period within which an Appellant must file arguments for appeal runs as from the date of filing of the Notice of Appeal in the High Court. Second thing is that where the foregoing rule is not followed by an appellant, the appeal may still be heard but a stay may be discharged so that the successful litigant enjoys fruits of litigation. The reading of Order III rule 5(3) of the Supreme Court of Appeal Rules is very clear:

"An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below."

The facts are not in dispute that the Appellants obtained leave to appeal in the Court below, and the Respondent filed in the Supreme Court an application to have the money preserved at Ecobank paid out to the Respondent. The Respondent's application was heard in the Supreme Court of Appeal. The Respondent's application therefore could not have been heard in the Supreme Court of Appeal if there was no appeal in the Supreme Court of Appeal. In considered view there is no confusion on the interpretation of

1(a) (i) of Practice Direction No 1 of 2010 which states

"*in all substantive appeals –*

(i) *the Appellant shall file with the Court skeleton arguments within fourteen (14) days after filing the appeal in this Court and shall during the same period serve a copy of the skeleton arguments on the respondent;"* (emphasis added)

There is no dispute that a notice of appeal is not filed in the Supreme Court of Appeal but in the Court below. Regarding the substantive appeal, no document is filed in the Supreme Court of Appeal until an appeal is entered meaning that the Record of Appeal has been settled and filed with this Court. An appeal is only lodged (eneterd) in the Supreme Court of Appeal when the Record of Appeal is filed in the Supreme Court. It therefore means that time in the Supreme Court starts running when the Record of Appeal is filed in the Supreme Court. The operative word is …. *in this Court*….meaning the Supreme Court of Appeal and not the High Court. This is the correct interpretation of Practice Direction No 1(a) (i) of 2010. I'm fortified by the decision of the full bench in *Malawi Housing Corporation v Western Construction Company Limited* [2014] MLR 209 at page 214, a full bench of the Supreme Court of Appeal (three Justices of Appeal) said:

"By Order III rule 10, the Registrar of the court below shall file the record of appeal with this court. It is therefore only at this stage that the appeal can be said to be with this court for purposes of skeleton arguments. "Ideally the fourteen (14) days specified in the Practice Direction should run from that moment. It is expected that at the moment of filing the record of appeal with this court, the Registrar of this court will immediately and pursuant to Order III rule 11 cause to be served on all the parties mentioned in the Notice of Appeal, notice that the record has been filed. In the event that the parties to the case are notified later it only makes judicial prudence that the 14 days for skeleton arguments start running from the time that the parties are served notice of the record."

I'm in agreement with the Appellants that the decision in *Malawi Housing Corporation v Western Construction Company Limited* was made by the full bench of the Court (three Justices of Appeal as was the composition at that time). A Single Member cannot overrule that decision. It makes logical sense that when the appeal is on facts, or and on law, the skeleton arguments must refer to pages of the Record of Appeal in order to make sound arguments before the Supreme Court. In this regard it would be difficult or impossible to draft comprehensive skeleton arguments before the Record of Appeal is ready. It therefore makes sense that the skeleton arguments should be filed 14 days after the Record of Appeal is filed in the Supreme Court of Appeal. Even Mwaungulu JA in *Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy* Civil Appeal No 15 of 2015 acknowledged the need for the skeleton arguments to cross-reference the Record of Appeal.

I'm further fortified with the case <u>*Electoral Commission and Another v Mkandawire*</u> Civil Appeal Number 67 of 2009. where Tambala SC JA said at page 7:

"The relevant Practice Direction provides, in paragraph 1 – (a) (i) as follows:-
the appellant shall file with the court skeleton arguments within fourteen (14) days after filing the appeal <u>in this court.</u>

I therefore find that for purposes of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the court below. The time starts running after the record of appeal is prepared and the Registrar of the court below has filed the appeal and it is entered in this Court, in terms of rule 11 of the Supreme Court of Appeal Rules. It is a fact that the skeleton arguments are aimed at convincing the Supreme Court of Appeal, and not the Court below which is by that time *functus officio* after it has delivered its judgment. There is no point really in filing the skeleton arguments in the Court below. The court below has no business with skeleton arguments meant for the Supreme Court of Appeal. To decide otherwise will entail filling two sets of skeleton arguments one in the court below together with the notice of appeal and another set in the Court above which does not make any logical and economic sense.

In this matter a decision was already made that the application to pay out the judgment sum to the Respondent was denied and the Court ordered the money to be paid into Court. I find that there are no new circumstances to warrant this application and the same could have been filed before the entire bench with the view to vary, discharge or reverse the order made by a single member in accordance with section 7 (d) of the Supreme Court of Appeal Act. *"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 –*
>
> *(c) 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;*
>
> ***(d) 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."***

On the issue of non-compliance the same has not been substantiated. But even if there was non-compliance on the part of an Appellanst with these Rules or with any rule of practice for the time being in force that notwithstanding shall not prevent the further prosecution of the appeal if the Court considers that it is in the interests of justice that non-compliance be waived or the Appellanst given a further opportunity to comply with the Rules. The Court has these powers under Order I rule 4 of the Supreme Court of Appeal Rules.

The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interests of justice."

It not in dispute that the Respondent was an entrusted consultancy contractor for Government of Malawi. The Respondent was assessed by the Appellants and deemed liquid, fit and proper enough to execute high value contracts in Malawi. It is a fact that the Respondent has been working in Malawi and ably so. However that alone is not a guarantee that once the money is paid to him and the appeal succeeds he will be able to pay back the money. I disagree with the Respondent that if the Appellants win, they can easily enforce the judgment in Kuwait. Why should a matter being heard by courts in Malawi involve courts in Kuwait? Have we failed in our duty as court in Malawi to resolve this dispute? The answer is in the negative. If this were to be allowed it will bring on board unnecessary costs to all parties involved.

The Respondent is admitting that paying out the money to the Respondent takes the money out of the reach of Malawi Courts. I agree with Appellants that if the Court were to order payment of money to the Respondent, the Malawi Court would be abdicating its jurisdiction to courts in Kuwait. I find that the balance of justice is that the money must remain under the control of the Court in Malawi until the final determination of the within appeal. The Respondent also argued in its submissions that the Respondent has assets and bank accounts in Kuwait and that he is liquid. There is no affidavit or any other evidence whatsoever that has been filed with the Court to support this assertion. It is settled law that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages, in the event that the appeal succeeds, execution of the court's judgement may be stay.

In conclusion it is the finding of this Court that the balance of justice lies in favour of continuing the stay of execution. I as a Single Member of the Supreme Court of Appeal already made this determination on this point and nothing has changed to warrant a change of that determination. There is therefore no need for the Court to reconsider the Respondent's application in this matter. It is

important to note that the stayed judgment was not a judgment on the merits. It was a judgment entered in default of rules of procedure. The balance of justice dictates that the Appellants should be allowed to present their case before the full bench and let the Court decide whether to sustain the default judgment or order that the matter be remitted back to the Court below before another judge where the Appellanst will be allowed to enter a defence and defend the claim.

In these premises I determine on two fronts. Firstly this application and many more before it was ill-conceived as there is a valid appeal before this Court. The Respondent filed in the Supreme Court an application to have the money preserved at Ecobank paid out to the Respondent. The Respondent's application was heard in the Supreme Court of Appeal. The Respondent's application could not have been heard in the Supreme Court of Appeal if there was no appeal in the Supreme Court of Appeal. The same was denied with costs.

Secondly this matter is res judicata before a single member of the Court. The application is therefore dismissed with cost. I order that the Appellants should obtain a date from the Registrar of this Court for the hearing of the substantive appeal within 21 days.

I so order
Made at the Supreme Court of Appeal at Blantyre in the Republic on 14th March 2024

Dingiswayo Madise
Justice of Appeal