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**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**IRC APPEAL CASE NUMBER 10 OF 2017**

**BETWEEN:**

**ELIAS DZIKO**

**APPELLANT**

**AND**

**AIRTEL MALAWI LIMITED**

**RESPONDENT**

**CORAM: JUSTICE M.A. TEMBO,**

Mpaka, Counsel for the Appellant  
Misanjo, Counsel for the Respondent  
Mankhambera, Official Court Clerk

**ORDER**

This is the order of this Court on the respondent's application to suspend enforcement of the decision of this Court that was made after this Court heard an appeal against the lower court decision on the appellant's action against the respondent, his former employer.

The lower court declined the appellant's claim for unfair dismissal.

The appellant's appeal alleged that he was unfairly dismissed from his employment in that the reasons for the termination of employment were not valid and that the procedure on termination was flawed. Accordingly, he claimed a number of reliefs on that basis.

After hearing the appeal, this Court determined that the appellant was unfairly dismissed only to the extent that he was not heard but that valid reasons existed for his dismissal.

This Court then ordered compensation to be assessed by the lower court on the basis of procedural unfair dismissal, that is, if the parties cannot agree on the same within 14 days of this Court's determination.

The respondent having been dissatisfied with the decision of this Court now intends to appeal against the decision of this Court to the Malawi Supreme Court of Appeal.

The respondent by the instant application seeks an order suspending enforcement of the decision of this Court pending its appeal.

Both parties filed skeleton arguments on the usual considerations on applications for suspension of enforcement of this Court's decision pending appeal.

At the date of hearing this Court directed the parties to address this Court on a specific question, namely, whether in view of the decision of the Supreme Court of Appeal made by Justice Kamanga SC JA in *Escom Limited v Kondowe t/a Saveman Investments* MSCA civil appeal number 67 of 2017 it would be appropriate for this Court to suspend enforcement of its own decision pending appeal when the assessment is not yet done.

In *Escom Limited v Kondowe t/a Saveman Investments* the Supreme Court of Appeal held that an appeal to that Court is premature if the decision appealed against is not a final decision, for instance, where an assessment of damages or compensation is yet to be done pursuant to this court's decision. And further that there cannot be a suspension of execution of the lower court decision pending an appeal in such circumstances.

The respondent argued that since the assessment of compensation has been ordered to be done by the lower court any appeal on assessment must be dealt with by this Court. It therefore asked this Court to suspend enforcement of the decision of this Court because there is no way of escaping multiple appeals in this matter.

Further, that the appellant is also cross-appealing against the finding of this Court that there is a valid reason for dismissal. Meaning that there will be multiple appeals.

The respondent contended that once the assessment is done, both parties will incur costs that they may not recover.

On his part, the appellant asked this Court to abide by the binding decision of the Supreme Court of Appeal in *Escom Limited v Kondowe t/a Saveman Investments*.

This Court observes that it is clear that, with regard to the sums yet to be assessed, it would be premature for the defendant to appeal to the Supreme Court of Appeal on those aspects in view of the Supreme Court's decision in *Escom Limited v Kondowe t/a Saveman Investments*.

The respondent cannot be allowed to suspend assessment proceedings pending appeal at this stage because any such appeal would be premature.

The point being that there is no final decision of this Court on aspects of compensation payable to the appellant that the respondent can appeal against until the sums involved are certain. Those are yet to be assessed and yet to be certain.

If the appeal were to go ahead, with unassessed compensation, then what it would entail is that in the event of the appeal failing the parties would go back to the lower court for an assessment and if the defendant is dissatisfied with the assessed sums it may appeal again and there would in effect be two appeals in one matter which is highly undesirable.

In the circumstances, the order suspending enforcement of the decision of this Court sought by the respondent cannot be granted. The respondent's application therefore fails.

The appellant then asked for costs on the appeal herein and on the present application.

The appellant contended that costs in proceedings before the High Court are subject to this Court's discretion in terms of section 30 of the Courts Act and that the case of *First Merchant Bank Limited v Mkaka and 13 Others* was decided without regard to section 30 of the Courts Act.

The appellant contended that the instant application essentially should not have been brought in the first place and so costs must be for the appellant.

The respondent resisted the costs application and wondered why the appellant would seek costs on the appeal.

The respondent also resisted the costs request on the present application and argued that it was not aware of the authorities on suspension of enforcement of decisions of this Court pending appeal when the said decisions are not final.

The Supreme Court in *First Merchant Bank Limited v Mkaka and 13 Others* MSCA Civil Appeal No. 53 of 2013 (Unreported) held that according to section 72 of the Labour Relations Act for matters taken before the Industrial Relations Court no costs orders shall be made in favour of either party even at appeals stage for good policy reasons that the initial matter at trial does not attract costs orders generally to encourage parties to be on an equal footing. Costs orders are seen to be a potential deterrent to litigation being commenced by employees.

This Court agrees with the appellant that for all matters before this Court, this Court has discretion as to costs orders.

This Court however notes that the Labour Relations Act was enacted by the Legislature with full knowledge that this Court has discretion in proceedings before it. The position on costs in the latter Act must therefore be given precedence.

For that reason, this Court agrees with the Supreme Court of Appeal that the policy reasons stated in *First Merchant Bank Limited v Mkaka and 13 Others* must prevail. That there must be no order for costs on employment proceedings even on appeals so that the policy behind the primary legislation as stated in section 72 of the Labour Relations Act is not defeated.

In the present matter this Court finds that this is an employment matter which commenced in the lower court where no costs orders are made except where a party fails to attend conciliation without good cause or where the matter is vexatious or frivolous. See section 72 Labour Relations Act.

The first question is therefore whether the respondent's case on the appeal herein was frivolous or vexatious to warrant a costs order against the respondent.

The respondent's case on appeal does not appear to be frivolous or vexatious at all. In fact, the respondent partly succeeded in opposing the appellant's appeal.

For that reason, this Court cannot award costs to the appellant on the appeal herein.

The second question is whether the respondent's case on the failed application to suspend enforcement of this Court's decision pending appeal herein when the assessment of compensation is pending was frivolous or vexatious to warrant a costs order against the respondent.

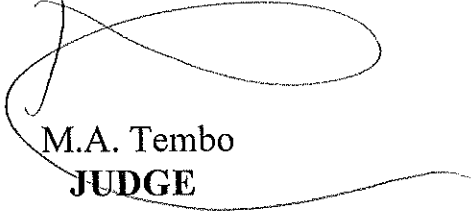
This Court observes that the Supreme Court of Appeal has made it abundantly clear that there shall be no suspension of enforcement of decisions of this Court pending appeal where the decisions of this Court are not yet final as is the case in the present matter.

The respondent indicated that it was not aware of such authorities. The appellant was able to address the question in his skeleton arguments. That means if the respondent was more diligent it should have known the legal position.

This Court would however exercise its discretion by letting each party bear its own costs considering that the position as stated in the case of *Escom Limited v Kondowe t/a Saveman Investments* is a recent position which the respondent may genuinely not have been appraised of at the time of filing its application.

So in the premises, each party shall bear its own costs.

Made in chambers at Blantyre this 11<sup>th</sup> December 2018.



M.A. Tembo  
**JUDGE**

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