IN THE MALAWI SUPREME COURT OF APPEAL MISC

CIVIL NO 54 OF 2015

BETWEEN:

ANGLIA BOOK
DISTRIBUTORS LIMITED APPELLANT

AND

THE REGISTERED TRUSTEES OF KALIBU
MINISTRIES
t/a KALIBU ACADAMY RESPONDENT

(Being (2014) Commercial Case No 70 (HC)(Commercial Division)(BT)

CORAM: JUSTICE D F MWAUNGULU

Kalua, of Counsel, For the Appellant

Chijere, of Counsel, For the Respondent

Minikwa, Official Court Interpreter

Mwaungulu, JA

ORDER

This is an appellant's application to stay execution of a monetary default judgment the respondent, claimants in the High Court (Commercial Division), obtained on 26 January, 2015. The respondent on 2 May, 2015 issued a writ of summons. It is unclear when the respondent actually served the writ on the appellant, the defendant in the High Court. The respondent, it appeared, served the default judgment on the appellant on 2 February, 2016. On 18 February, 2016, the appellant filed an application to set it aside. The respondent vehemently and successfully opposed the application before a judge of that court. The appellant appealed against the order refusing to set aside the judgment in default of defence . The appellant wants execution stayed. It must.

The best part to start is probably where, accepted by both counsel, since recent decisions of this court in *Chitawira Shopping Centre v H.M .S. Foods & Grains Limited* (2015) Civil Appeal No 30 (M.S.C.A.) (unreported) and *Mulli Brothers Limited v Malawi Savings Bank Limited* (2014) Civil Appeal No. 48 (MSCA) (unreported), the principles of balance of justice (convenience) espoused by Lord Diplock for interlocutory injunctions in *American Cyanamid v Ethicon* [1975] AC 396 apply to another species of interlocutory relief, stay of execution pending appeal. In this regard, this court approves trends on the correct principles when staying execution of judgments so that, in the end, justice is achieved whatever the outcome of the appeal.

The incidence of justice is captured in this statement by the High Court in *Joubertina Furnishers (Pty) Limited (t/a Carnival Furnitures v Lilongwe City Mall* (2013) Miscellaneous Civil Application No 41 (HC) (PR) (unreported):

> Requiring a party to perform some action, a positive injunction, before rights are determined, is unfair to a successful party performing the action, even where there is monetary compensation, especially when money cannot adequately compensate the damage. Equally, restraining a party from performing some action, a negative injunction, while a court determines a matter, is frustrating to a successful party. Such restraint or positive action vindicates justice and fairness to a successful applicant. In determining whether to grant interim reliefs, therefore, courts try to do the fair, just and convenient. Consequently, the principles and guidelines in *American Cyanamid Co v Ethicon Ltd* [1975] AC. 39, save in the exceptional circumstances in which they may not apply, should be applied fervently to avoid injustice and inconvenience from interim reliefs.

Is there a serious matter to be tried?

Under these principles, foremost, therefore, is the consideration whether there is a serious issues on and for the appeal hearing. This court does not have the benefit of the High Court's written order or judgment. The affidavit supporting the application suggests that the High Court refused to set aside the judgment in default of defence because the appellant was guilty of inordinate delay in applying to set aside the judgment. It must be, therefore, that there was no attempt to consider whether, apart from

delay, there was a defence on the merits. This is not to suggest that a defence on the merits always trumps delay. There are bound to be situations where, even where there is a formidable defence, delay causes prejudice and hardship where setting aside the judgment leads to injustice. On the other hand, non-prejudicial delay may ameliorate injustice. Whatever the case, a court must do that which is just in the circumstances. In this particular case, if all there is that there was delay in applying to set aside the default judgment, the delay from 2 February to 18 February may, on appeal, not be considered long and prejudicial enough. More so, where, like here, it is unclear when the appellant knew of the judgment obtained in default and in its absence.

It might be that the appellant should have indicated the date on which it became aware. On the other hand it may very well be that the respondent bore some onus in establishing whether the judgment in default was brought to appellant's attention. I say some because, as a matter of principle, there is no duty to notify the other party of a monetary default judgment.

En passant it is unclear what delay the High Court (Commercial Division) considered. It, in my opinion, need not include the time up to the entry of the judgment in default. Lord Justice Neill in *Trill v Sacher* [1993] 1 All E.R. 96, 978 -980 said:

> 'Inordinate' delay cannot be precisely defined. 'What is or is not inordinate delay must depend on the facts of each particular case' (see *Allen's case* [1968] 1 All ER 543 at 561, [1968] 2 QB 229 at 229 at 268). It is clear, however, (a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action and (b) that delay in issuing the writ cannot be classified as 'inordinate' provided the writ is issued within the relevant period of limitation. Delay which is inordinate is prima facie inexcusable (see Allen's case [1968] credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.

That delay can reasonably be accounted to the claimant (and defendant, but mainly to the claimant) and where, like here, the date of service of the originating process and acknowledgment of service are unknown, it can be presumed, in favour of the defendant, that the default judgment was obtained on the date when the last process was to be completed. In this respect, it would be fourteen day before judgment was entered. Again, where judgment was obtained in default of defence, the time within which the defence should have been filed, fourteen days, should be regarded as reasonable time to make the next application, in this case, the application to set aside the default judgment. Delay, therefore, starts at that moment. In this respect, the delay was two days. On appeal, the court will have to consider whether two days would be inordinate delay! These are the sort of considerations attendant at the appeal hearing. It is not for this stage to resolve them suffice to say that they are indicative of matters - serious ones - that the appeal court will have to consider.

Moreover, the principles of case management introduced in Order 1, rules 2 and 3 of the High Court (Commercial Division) Rules implode the domain in which they apply and no less where, like here, there is apparent delay between processes and one party applies to set aside a judgment for non-compliance with rules of procedure. Order 3, rule 1 (1) of the High Court (Commercial Division) Rules provides:

> These Rules are a procedural code with the overriding objective of enabling the Court to deal with commercial matters justly.

Order 3, rule 1(2) of the High Court (Commercial Division) Rules provides:

Dealing with case justly includes, so far as is practicable -

(a) ensuring that the parties are on an equal footing;
(b) saving expenses;
(c) dealing with a case in ways which are proportionate-

(i) to the amount of money involved;
(ii) to the importance of the case; and
(iii) to the complexity of the issues;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

Order 3, rule 1(3) of the High Court (Commercial Division) Rules provides:

The Court shall seek to give effect to the overriding objective when it-

(a) exercises any power conferred on by these Rules; or

(b) interprets any rule.

Order 3, rule 1(4) of the High Court (Commercial Division) Rules provides:

The parties shall help the Court to further the overriding objectives.

Regimented in the Civil Procedure Rules 1998, which influenced the High Court (Commercial Division) Rules, these rules existed in many and scattered forms at common law. The learned authors of Civil Procedure, Sweet & Maxwell, Thomson Reuters, 2010 ed, The White Book Service, state at page 17, paragraph 1.4.10:

> In the common law world, the expression "case management" is used in various senses. The significance of case management procedures is that they mark a change from the traditional position under which the progress of cases was left largely in the hands of the parties. In its narrow sense, "case management" means the exercise by the court of powers given to it to enable it, and not the parties, to dictate the progress of the case at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

Lord Woolf was, however, its harbinger when, well before the Civil Procedure Rules 1998, he said, in *Gravit and Others-v- Doctor and Others* [1997] 2 All ER 419, said:

> However, the criticisms of *Birkett v. James* [1978] AC. 297 were considered by the House in Department of Transport v. Chris Smaller Transport Ltd. [1989] AC. 1197. Lord Griffiths in a speech with which the other members of the House agreed, referred at pp. 1204-1205 to a statement of Kerr L.J. in his judgment in *Westminster City Council v. Clifford Culpin & Partners (unreported),* 18 June 1987; Court of Appeal (Civil Division) Transcript No. 592 of 1987, that our law needs to be changed both in substance and procedurally and, that the principles laid down in Birkett v. James are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover they then breed excessive further delays and costs in their application."

In 1997, there was in process the sort of changes to the law and Lord Woolf harbingers those:

> The period which has elapsed since Lord Griffith's speech has not seen any improvement in the problems caused by delay in the conduct of civil proceedings. In the county court a response to the corrosive effect of delay has been to introduce the automatic strike-out (C.C.R. Ord. 17, r. 11(9)). However this has proved to be a crude remedy the effects of which have not been wholly beneficial. It has funded an industry of satellite litigation. Furthermore, there is now on the horizon the introduction of the sort of process of reform to the rules of procedure which Lord Griffiths thought was required. In this situation it is at least open to question whether it is not preferable to await the outcome of the implementation of the new rules before making a substantial inroad on the principles endorsed by Lord Diplock in *Birkett v. James* [1978] AC. 297. They should by case management prevent the delay happening. If delays do happen they could provide the court with wider powers to mitigate the consequences."

Part 1 to 3 of the Civil Procedure 1998 applies to this court under section 8 (b) of the Supreme Court of Appeal Act and Order 3, rule 34 of the Supreme Court of Appeal Rules. The principles in the High Court (Commercial Division) Rules concerning the High Court (Commercial Division) that the overriding objective for a court to deal with (commercial) matters justly, by ensuring parties are on an equal footing, saving expenses and dealing with a case in ways proportionate to the amount of money involved; the importance of the case and complexity of issues; ensuring that a matter is handled expeditiously and fairly and allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; requiring that parties help a court to further the overriding objectives applied to the matter before me would require case management principles that, even if it is less than twelve months, as long as, let us three months pass after a judgment in default should have passed, the claimant must give the other party notice of intention to proceed. Moreover, I

would think that, on the same principles it should be possible that, rather than rush to court to set aside a judgment, a defendant should do so after a claimant overlooks one or more such notices.

In that way the court will ensure that parties comply with their duty, under Order 3, rule (1) (4) of the High Court (Commercial Division) Rules, to help the court. Relieving the Commercial court of applications to set aside default judgments where parties, with enough power, can resolve them frees the court to handle cases deserving trial and affords, therefore, an economic, efficient and effective allocation of the court's resources, court space and judge time. The court on appeal may have to consider these principles.

Are damages an adequate remedy?

On the second consideration, damages are most certainly an adequate remedy. The action itself redounds in damages. Consequently, the real consideration on this aspect is whether the respondent would be able to pay them should the appeal be unsuccessful. It must now be understood as compulsory that where there is an application to stay execution of a monetary judgment, both the applicant and the respondent must make a full disclosure of ability to pay damages. Failure to disclose, however, is no reason, standing alone, for refusing stay of execution. This is because, as in this case, it does not follow that the stay of execution will be granted simply because it has been demonstrated that the appellant is unable to pay. In answering the question the court has to balance where justice lay. The court could, still on balance, allow the injunction because the respondent equally can pay. Granting an injunction remains discretionary in spite of it. The court may allow the injunction if despite the applicant's inability to pay, the respondent similarly, cannot pay.

Frank and sincere disclosure by both parties insures that the court exercise the discretion properly and reasonably. A frank disclosure of means by both sides is - *sine qua nona* discretion may not be properly and reasonably made. In this respect, neither party disclosed information as to means to enable this court to exercise its discretion judicially. This, however, is not a reason for dismissing the application. Rather, it confirms that, on the facts, the situation is akin to where the balances are equal or even. That situation is reason why a court must move to the next stage and determine where the balance of justice (convenience) lies. The fact that a court may proceed to the next consideration because of paucity of information on the means of the parties is no license for parties not to proffer the handy information on means. There are instances where a court, on proof of means, has resolved stays of execution based on this consideration because it is the just thing to do. This notwithstanding, parties to the application must submit a statement as to means to enable a court to exercise the discretion judicially.

Balance of justice (convenience)

When considering staying execution, just like when granting an interim injunction, in the background are considerations of uncertainty of the outcome. Decisions or actions undertaken, before results are known, carry risks of injustice. Balance of justice enables a court to weigh the incidence of justice or injustice based on consequences flowing from certain considerations.

Should the court maintain the status quo

The first consideration is whether justice, once all is over and irrespective of the outcome, is achieved by maintaining or altering the status quo. On this aspect, the first exercise is, on the facts of the

case, determining the status quo. In monetary judgments, the status quo is where, but for the judgment, the money remains with the judgment debtor. If the appellant succeeds and the money remained with the appellant, justice will have been done and injustice avoided by maintaining the status quo. Where the appellant fails, the risks of injustice depends on four cardinal considerations based on ability to pay.

The first instance is where the appellant can pay the judgment debt and damages on the usual undertaking on which such injunctions are given and the successful party is unable to pay. On this aspect, it is little or, if not, no injustice to require a successful litigant to endure the usual and ordinary delay in the deprivation of the fruits of litigation while a vigilant and enthusiastic litigant pursues a statutory right to appeal. Successful litigants must be expected to endure such temporary inconvenience as normal vicissitudes of litigation truncated with a right of appeal. In this case, the court may have to maintain the status quo. It does not follow, however, that where the appeal process may be elongated stay of execution should be refused. Stay of execution may be refused because the successful party is unable to pay. The court may, if there are serious issues for trial, avoid the injustice by considering, suo motu or on application by a party, a speedy resolution. This will normally be the case where, on relative strength of the parties' case, the appellant may succeed. The second scenario is where the successful and unsuccessful litigant ares both able to pay. In such a case the discretion has, though not invariably, be exercised in favour of the successful litigant. The status quo may have to change. The third scenario is where both the successful and unsuccessful litigant are unable to pay. There the status quo may have to be maintained. Finally, is the scenario where the unsuccessful litigant is unable to pay, the successful litigant is able to pay. The court may alter the status quo

It must be remembered that in considering where the balance of justice (inconvenience) lies, the court is not trying to achieve the status quo. In each case the court considers whether maintaining the status quo achieves justice and avoids injustice when the outcome is ultimately known. Courts are generally reluctant to create new situations. It is only that in an application for stay of execution the respondent has a judgment in favour. Courts, therefore, may refuse to maintain the status quo where there is a risk of injustice (or inconvenience).

In this case, where parties have not disclosed their financial situation, it is difficult to resolve the balance of justice (convenience) based on status quo ante considerations. The application cannot, therefore, be dismissed based on these considerations. The court, therefore, may have to consider the relative strength of the parties' case.

Relative strength of the party's cases

Where there is a matter worth an appeal and damages are either an inadequate remedy or, being adequate remedies, either or both parties cannot pay, and justice cannot be achieved by maintaining or altering the status quo, the court must consider the relative strength of the parties' cases *(Series 5 Software v Clarke* [1996] 1 All E.R. 853; Series 5 Software v Clarke [1996] 1 All E.R. 853). In *Joubertina Furnishers (Pty) Limited (t/a Carnival Furnitures v Lilongwe City Mall* the High Court said

> Generally this must be done when in a case there is nothing to separate between the parties on the inconvenience and injustice they might suffer, mindful that the comparison is based on affidavit evidence and where there is a clearly a case made out showing a very likely result for one case as against the other. It is concomitant with justice and convenience

> that where a judge, on clear and admitted facts, concludes one party's case is much stronger than the other to direct the interim relief accordingly.

On appeal, considering relative strength of the parties' cases assumes a different complexion, if not complexity. The question, unlike on an injunction before trial, no longer proceeds on untried evidence on statements of truth. The case has already passed trial and the trial court made certain legal and factual findings. The court on such application must be wary not to resolve matters that should be covered in the appeal hearing. On the other hand, faced with such an application, the court should not yield on the pretext that it might thereby be determining the appeal. The court must do what is its usual and mandatory task - choose a course of conduct by way of refusing or allowing stay of execution - determining what in the circumstances of the case achieves more and greater justice and/ or avoids or ameliorates precipitous injustice. Where, therefore, one party's case has a better and higher case of success than the other, staying or allowing execution that way increases justice and reduces the risk of injustice. The converse is true. In such a case the court is choosing the best among equals or the better evil.

Has the appellant, therefore, raised a better case for setting aside? Without deciding, much in every way! The appellant's answer to the respondent's claim is twofold. First, the appellant contends that there was no contract with the respondent; the appellant alleges that the contract was between the respondent and another. Privity of contract is essential to contractual obligations: strangers to a contract, normally, cannot and should not be saddled with obligations they never agreed to or were agreed with another. To this, it is contended, the appellant was an agent. It is a question of fact, therefore of evidence, whether or not there was agency. The appellant, moreover, if it be that they were parties to the contract, alleges that the principal paid the respondent. Payment, if established by evidence, is a defence of satisfaction. Lack of privity and satisfaction are good answers to a contractual claim. There is, therefore, prospect that the appeal against setting aside the judgment in default of defence could succeed on either or both grounds. In this respect, the appellant's prospect of an appeal on a setting aside a judgment are better and greater and stay of execution should lean that way. Execution of judgment should, in this respect, be stayed and without conditions.

Denying or granting the stay of execution may finally dispose of the matter

In rejecting the stay of execution, I am mindful that the action may finally dispose of the matter. Where, therefore, an injunction is likely to dispose of the matter, Lord Diplock in *N.W.L. Ltd v Woods* [1979] 1294, 1307, cited by the High Court in *Joubertina Furnishers (Phj) Limited (t/a Carnival Furnitures v Lilongwe City Mall*, said:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeed in establishing his right to injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other".

An order staying execution here does not finally dispose of the matter, more especially a monetary award is the outcome of these proceedings

Speedy disposal of the appeal

This is a case where, in refusing stay, I should order a speedy hearing. This is not a complicated appeal. It centres on a judgement in default that, from the nature of things, involves no oral testimony. The appeal court, like the High Court (Commercial Division), will proceed on statements of truth (affidavits). There should, therefore, be little difficulty preparing the appeal record. I, to expedite the appeal hearing, make the following orders and directions.

Filing of addresses of service

The respondent, if it has not already done so, should file addresses of service under Order 3, rule 6 the Supreme Court of Appeal Rules by 10 May 2016.

The Registrar's summons to settle the record

The Registrar of the High Court, if he has not already done so, should, under Order 3, rule 7 of the Supreme Court of Appeal Rules, summon parties for 17 May 2016 to settle the record.

Filing (initial) skeleton arguments

The appellant should, under paragraph 1 (1) (a) (i) of Practice Direction No 1 of 2010 file initial skeleton arguments (without reference to the record but with page references of the judgment) by 31 May, 2016.

There is in this Court a bit of uncertainty, which on correct reading of Paragraph l(a) (i) of Practice Direction No 1 of 2010, on when parties file skeleton arguments. Much of that uncertainty emanates from thinking that skeleton arguments are a species rather than a genus. There are in fact four species of the genus skeleton arguments: (initial) skeleton arguments, appeal skeleton, replacement skeleton and supplementary skeleton arguments. The second problem concerns interpreting words used in the Practice Direction. It could very well be that in drafting the Practice Direction the four species of skeleton arguments were overlooked or subsumed. Practice Directions, however, must be interpreted consistently with the Supreme Court of Appeal Rules and the Supreme Court of Appeal Rules.

Moreover, skeleton arguments are matters of practice and procedure. They are subject to section 8(b) of the Supreme Court of Appeal Act and Order 3, rule 4 of the Supreme Court of Appeal Rules. Section 8(b) of the Supreme Court of Appeal Act provides:

> The practice and procedure of the Court shall be in accordance with this Act and any rules of court made thereunder:
>
> Provided that if this Act or any rules of court made thereunder does not make provision for any particular point of practice and procedure then the practice and procedure of the Court shall be -

> (a) in relation to criminal matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England;
>
> (b) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed by the Court of Appeal in England .

Order 3, rule 34 of the Supreme Court of Appeal Rules provides:

> Where no other provision is made by these Rules the procedure and practice for the time being in force in the Court of Appeal in England shall apply in so far as it is not inconsistent with these Rules, and the forms in use therein may be used with such adaptations as are necessary.

Consequently, our Supreme Court of Appeal Act, the Supreme Court of Appeal Rules, practice directions and procedural judicial precedents are to be read *mutatis mutandis* and *in tandem* the law, practice and procedure in the England and Wales Court of Appeals. To the extent that our rules and practice do not provide for other species of skeleton arguments, the law and practice in the England and Wales Court of Appeals supplement, augment, compliment and complement. Paragraph 1 (1) (i) of Practice Direction 1of 2010 provides:

> When presenting skeleton arguments in the Malawi Supreme Court of Appeal ... [i]n all substantive appeals ... [t]he appellant shall file with the court skeleton arguments within fourteen (14) days after filling the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.
>
> 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."

The words used in the Practice Direction are 'filing the appeal in this court.' The words used are not 'filing the record of appeal in this court.' In *Electoral Commission and Another v Mkandawire* (2009) Civil Appeal No 67 (MSCA) (umeported) this court, at page 7, said:

> The court below has not completed its task of preparing the record of appeal. The Registrar has not transmitted the record of appeal to this court. The appeal has not been entered in this court. As at the moment this court has no record of the appeal between the parties. This court is clearly not seized of the appeal about whose prosecution the respondent complains. It would appear that the application is clearly premature and it has been brought in the wrong forum.

The relevant facts on skeleton arguments appear in this further statement of the court:

> The respondent draws the court's attention to failure by the appellants to comply with the current Practice Direction which requires an appellant

> to file skeleton arguments within 14 days of commencing the appeal and to serve a copy of the skeleton arguments on the respondent during the same period. The respondent states that the appellant shave not complied with that direction and that such conduct is proof that the appellants are not interested in prosecuting the appeal.

The court then proceeds to make the following statement which, both by this court and the bar, confirmed or established the current precarious practice that skeleton arguments should be filed after the record of appeal is filed under order 3, rule 11 of the Supreme Court of Appeal Rules:

> 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>
>
> It would appear that for purpose of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the court below. The time stars 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. The appellants in my view, have not failed to comply with any provision of the Current Practice Direction. As indicated earlier, there is no appeal before this court which the appellants could prosecute. The respondent's application calls upon this Court to dismiss an appeal which is not before this court. It is impossible for this court to do that. The application by the respondent is indeed premature. It lacks merit.

The statements in the judgment are inconsistent and there is no attempt to interpret the words 'filing the appeal in this court' in paragraph 1of Practice Direction No 1of 2010. Of course, 'in this Court' means the Supreme Court! It seems this Court stressed the words 'in court' and overlooked considering who was supposed to file. In this respect, had this Court noted, as the provision clearly stipulates, that it was the appellant who was filing both the skeleton arguments and the appeal, it would not have concluded that filing in this court occurs at the time when the Registrar files the record of appeal. The court had to consider the whole phrase 'filing the appeal in this court.' If it had, it would have concluded from section 23 (1) of the Courts Act and Order 3, rules 2, 5 (3) and 19 of the Supreme Court of Appeal Rules, that the appeal, not the record of appeal, is what was filed and, therefore, the appeal is not 'filed with this court' at the time of lodging the record of appeal, it itself, not the appeal, but at the appellant filing the notice and grounds of appeal under Order 3, rule 2.

Order 3, *rule 19 of the Supreme Court of Appeal Rules*

Starting with the inconsistency, the two statements just quoted are contradictory. The court, obliquely, seems to suggest that this court is not seized of the matter or appeal from the time when the appellant files the notice under Order 3, rule 2 of the Supreme Court of Appeal Rules until the Registrar of the High Court files the record of appeal under Order 3, rule 11 of the Supreme Court of Appeal. First, it is a contradiction in terms to think that there can be a record of appeal when, as it appears, there is no

appeal. The record of appeal can only be when and where in law and fact there is an appeal. The record of appeal presupposes and precedes the appeal. The appeal is the *sine qua nona* there can be no record of it. The appeal triggers (preparation of) the record of appeal. Why prepare a record of appeal if there is no appeal? The record of appeal is for the purpose of appeal. The appeal, therefore, must be brought, filed, entered before there can be a record of it.

Secondly, the court cannot, in one breath, say as it says in the cited passages, that the court is not seized of the appeal during preparation of the record to submission of the appeal record, and, in another place refer to order 3, rule 19 of the Supreme Court of Appeal Rules. Side notes and titles are not generally part of the legislation. They are, however, an aid in interpreting the legislation. The title to order 3, rule 19 of the Supreme Court of Appeal Rules reads, 'Control of proceedings during pendency of appeal.' The words 'during' and 'pendency, 'juxtaposed with the word appeal can only mean one thing, namely, that the appeal, though pending, is *in situ.* That this is the case is apparent in the body of the provision too. Order 3, rule 19 of the Supreme Court of Appeal Rules provides:

> After an appeal has been entered and until it has been finally disposed of, the Court shall be seized of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the Court and not to the Court below

Order 3, rule 19 of the Supreme Court of Appeal Rules names who has to, what and what has to be done to that which is what. Order 3, rule 19 of the Supreme Court of Appeal Rules also prescribes the duration of seizure of the matter by this court. Starting with who has to, Order 3, rule 19 of the Supreme Court of Appeal Rules, names that as this court, the Supreme Court. The section can properly be understood by considering who it does not mention. The section does not say the High Court. The Supreme Court of Appeal, not the High Court, is seized of the matter. Logically, the appeal to this court being an appeal against its decision, the High Court cannot be seized of the appeal.

Once the appeal is in place, the responsibility of preparing the record cannot be the responsibility of the Supreme Court. Preparing the record is a process of ensuring that what transpired in the court High Court is available to the Supreme Court in a useful and replete manner. It is in itself not the appeal, the commencement or the end. Preparing the record of appeal cannot, therefore, be understood as meaning that the Supreme Court of Appeal is not and the High Court is seized of either the matter or the appeal. To suggest that there is no appeal or that the Supreme Court is not seized of the matter because the Registrar has not filed the record of the appeal under Order 3, rule 11 of the Supreme Court of Appeal Rules cannot be accurate. The analogous situation is to suggest that, in proceedings commenced by writ of summons or divorce proceedings, the High Court is not seized of the matter or proceedings have not commenced unless, respectively, the bundle of pleadings or Registrar's Certificate is filed. The Supreme Court, not the High Court, is seized of the appeal. Of course, there may be a concurrency of functions with the High Court. The Supreme Court of Appeal is, most certainly, seized of the appeal when the appellant files a notice of appeal. The notice of appeal is the notification of the appeal, the appeal is with the Supreme Court.

Secondly, to the question what is the subject matter of the provision, Order 3, rule 19 of the Supreme Court of Appeal Rules mentions that as the appeal. It is important, therefore, to mention clearly

what it does not mention. Order 3, rule 19 of the Supreme Court of Appeal Rules never, as in ever, mentions the subject matter of the Supreme Court of Appeal being seized is the 'record of appeal.' The Supreme Court of Appeal is seized of the matter when the 'appeal' is entered, not, as the decisions of this Court suggest in *Electoral Commission and Another v Mkandawire, Malawi Housing Corporation v Western Construction Company Ltd* (2013) Civil Appeal No 18 (MSCA) (unreported) and *Moto v Sabadia (No 2), Moto v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA) suggest, when the Registrar files the 'record of appeal.'

Order 3, rule 19 of the Supreme Court of Appeal Rules then provides for what should be done and where it should be done. What has to be done, in order for the Supreme Court of Appeal to be seized of the matter is that the appeal must be 'entered.' The question to ask is what does the word 'enter' mean? As we have seen it is not the record of appeal that has to be entered; it is the appeal. Assuming, for purposes of conversation, it is, as *Malawi Housing Corporation v Western Construction Company Ltd)* (unreported) and *Moto v Sabadia (No 2), Moto v Sabadia (No 2)* (2014) Civil Appeal No 2 (MSCA) (unreported) suggest, that it is the filing of the record of appeal that determines whether the case is filed, entered or seized of by this court, this court would lack jurisdiction to deal with applications not in the purview of the court below but this court until the record of appeal is filed under Order 3, rule 11of the Supreme Court of Appeal Rules. That cannot be true. This is neither the practice, nor the procedure of this court. This court, since time immemorial, hears and determines applications before and after the notice of appeal is filed with the court under Order 3, rule 2 of the Supreme Court of Appeal Rules. This Court does this because it is seized with the appeal and, at that, when the appeal is brought before it, by the notice of appeal being filed in the High Court, not when after the record of appeal is filed. There cannot be an interruption of the appeal once this is done. It cannot be said that after this point there is no appeal. It cannot be said that the appeal is not filed at this point; it cannot be said that there is no appeal at this point, until the record of appeal is filed.

Order 3, *rule* 2 *of the Supreme Court of Appeal Rules*

Order 3, rule 2 of the Supreme Court of Appeal Rules provides for how an appeal is 'filed:'

> All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Registry of the Court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the Court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties . It shall also have endorsed on it an address for service.

The subject matter of Order 3, rule 1(2) of the Supreme Court of Appeal Rules is very clear; it is 'All appeals.' It is not the 'record of appeal' that is brought. The 'appeal' is 'brought by notice.' 'Brought' comports a departure and arrival. The departure cannot be Supreme Court. The Supreme Court is the arrival. The departure is the High Court. The High Court is not the destination. And 'filed' in the registry of the court below! The appeal, therefore, is brought by filing the notice of appeal in the court below. This is when the 'appeal,' not the 'record of appeal' is filed. To understand it better, other words are deliberately omitted so that the section reads:

> All appeals ... shall be brought by notice... to be filed in the Registry of the Court below...

On filing the appeal, not the record of appeal, is when the Supreme Court is seized of the matter.

Order 3, *rule* 5 *(3) of the Supreme Court of Appeal Rules*

Order 5, rule 3 of the Supreme Court of Appeal Rules then provides when the appeal is deemed brought:

> 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 appeal, under this section, is not deemed brought when, under Order 3, rule 11 of the Supreme Court of Appeal Rules. The appeal is deemed brought when it is filed under Order 3, rule 1(2) of the Supreme Court of Appeal Rules. The filing of the notice of appeal in the High Court is the bringing of the appeal from the High Court to the Supreme Court of Appeal. This is consistent with the Supreme Court of Appeal Act.

Order 3, *rules* 10 *and 11 of the Supreme Court of Appeal Rules*

Under any construction of a statute or instrument filing the appeal can be interpreted as filing the record of appeal under Order 3, rules 10 and 11 of the Supreme Court of Appeal Rules mean filing the record of appeal. In this Court in *Electoral Commission and Another v Mkandawire, Malawi Housing Corporation v Western Construction Company Ltd* and *Moto v Sabadia* held that. Order 3, rule 11 of the Supreme Court of Appeal Rules actually talks about notifying and serving of the record of appeal (not filing the appeal) and setting down the appeal. Order 3, rule 11 provides:'

> The Registrar of the Court shall cause to be served on all parties mentioned in the notice of appeal who have filed an address for service a notice that the record has been filed and shall in due course enter the appeal in the cause list and give notice to the parties of the date of hearing. Civil Form 5

Order 3, rule 11 of the Supreme Court of Appeal Act is about notification and serving of filing the record of appeal. The title says as much, 'Notice of Filing.' It is a notification about the filing of the record of appeal in this Court. It is not a notification of the filing of the appeal. The notification of the appeal is by notice of appeal. There is nothing in this section to suggest that filing the appeal is filing the record of appeal. To the extent that it does refer to filing the record of appeal, it should be read with the provision preceding it that talks about filing the record of appeal. Order 3, rule 10 of the Supreme Court of Appeal Act provides:

> The Registrar of the Court below shall file the record in the Court when ready, together with - Civil Form 4
>
> (a) a certificate of service of the notice of appeal;
> (b) four copies of the record for the use of the Court;

(c) the docket or file of the case in the Court below containing all papers or documents filed by the parties in connection therewith.

The title of the rule is 'Filing record.' It is not filing the appeal. The body of the provision does not talk about filing the appeal.

Section 23 (1) of the Supreme Court of Appeal Act

Section 23 (1) of the Supreme Court of Appeal Act provides for how appeals are made from the High Court to the Supreme Court of Appeal:

> If a person desires to appeal under this Part from the High Court to the Court, he shall, in such manner as may be prescribed by rules of court, give notice to the Registrar of the High Court of his intention to appeal-
>
> (a) within 14 days of the judgment from which he wishes to appeal if such judgment is an interlocutory order;
>
> (b) within six weeks of the judgment from which he wishes to appeal in any other case.

The manner in which appeals, under section 23(1) of the Supreme Court Act, are made, filed, entered or brought is prescribed by Order 3, rule 2(1) not Order 3, rule 11 of the Supreme Court of Appeal Rules.

Practice directions, albeit legislative, are subservient to the rules of court and legislation and sub subservient legislation. There is, under section 19 of the General Interpretation Act, supposed to be consistency in meaning among words used in legislation, parent and subsidiary. To the extent that there is inconsistency, meanings of words in subsidiary legislation are, under section 21 of the General Interpretation Act, void. If, therefore, the words 'file' and 'appeal,' in paragraph 1of Practice Direction No 1 of 2010 mean 'filing the record of appeal,' they are inconsistent with the Act and subsidiary legislation. The words do not refer to 'record of appeal.'

The cases of *Malawi Housing Corporation v Western Construction Company Ltd* and *Moto v Sabadia (No 2)* are equally doubtful. They were, at the least, *per in curiam.* Of course *Electoral Commission and Another v Mkandawire* does refer to Order 3, rule 19 of the Supreme Court of Appeal Rules. It is not to interpret paragraph 1of Practice Direction No 1of 2010. The Supreme Court does not refer to section 23 (1) of the Supreme Court of Appeal Act, Order 3, rules 2 (1) and, 5 (3) and 19 of the Supreme Court of Appeal Rules. In that respect, if it interpreted paragraph 1 of Practice Direction No 1 of 2010 *Electoral Commission and Another v Mkandawire* is *per in curiam.*

Electoral Commission and another v Mkandawire

Electoral Commission and another v Mkandawire never interpreted paragraph 1of Practice Direction No 1of 2010. The Supreme Court actually says that 'It would appear that for purpose of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the court below.' The expression clearly shows that the Supreme Court was not certain as to be sure that this was the case.

If it had, it would have come to the conclusion, discussed at length later, arrived at by this court in *Standard Bank Limited v Mkandawire* that skeleton arguments, at least the initial skeleton arguments, are filed with the court after the appellant has filed the appeal, filing the notice of appeal.

Malawi Housing Corporation v Western Construction Company

Malawi Housing Corporation v Western Construction Company Ltd, decided after it never refers to *Electoral Commission and Another v Mkandawire.* It, additionally, does not interpret paragraph 1of Practice Direction No 1of 2010. The Supreme Court of Appeal without citing *Electoral Commission and Another v Mkandawire* and without considering section 23 (1) of the Supreme Court of Appeal Act, Order 3, rules 2, 5(3) and 19 of the Supreme Court of Appeal Rules actually comports that its conclusion is the ideal, not the consequence of interpreting Paragraph 1of Practice Direction No 1of 2010:

> *"Ideally the fourteen (14) day specified in the Practice Direction should run from that moment. It is expected that at the moment of filing of the record of appeal with this Court, the Registrar of the Court will immediately and pursuant to Order Ill 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 later it only makes judicial prudence that the 14 days for skeleton arguments start running from the time that the parties are served with notice of the record.* "

There is, therefore, no attempt by this Court to interpret paragraph 1of Practice Direction No 1of 2010.

Blantyre Water Board v Samuel Master and Others and *Standard Bank Limited v Mkandawire*

Blantyre Water Board v Samuel Master and Others (2014) Civil Appeal No 15 (MSCA) (unreported) is this Court's decision that essays interpreting paragraph 1of Practice Direction No 1of 2010. This court followed this decision in *Standard Bank Limited v Mkandawire* (2014) Civil Appeal No 51 (MSCA) (unreported), probably the latest decision on the matter. Both decisions do not refer to the first case on the matter *Electoral Commission and Another v Mkandawire.* They refer to Malawi *Housing Corporation v Western Construction Company Ltd,* the latest decision at that point.

Moto v Sabadia (No 2)

This court's latest decision was in *Moto v Sabadia (No 2),* Paragraph 1 of Practice Direction No 1 of 2010 was never interpreted. In that case, the court cited *Electoral Commission and Another v Mkandawire.* It neither cited this court's later decisions in *Malawi Housing Corporation v Western Construction Company Ltd ,* agreeing with its conclusion, nor the latest decisions in *Blanh;re Water Board v Samuel Master and Others* (2014) Civil Appeal No 15 (MSCA) (unreported) and *Standard Bank Limited v M kandawire* (2014) Civil Appeal No 51 (MSCA) (unreported),taking a different view.Instead the Supreme Court of Appeal cites *Electoral Commission and another v M kandawire* never interprets paragraph 1 of Practice Direction No 1of 2010. The critical principle is in this statement of the court:

> We want to begin by addressing the question as to when time starts running in terms of Practice Direction No 1 of 2010. Honourable Justice Tambala Sc., JA, had occasion to consider the same question in *Electoral*

Commission and Billy Kaunda V Harry Mkandawire MSCA Civil Appeal No 67 of 2009. His Lordship concluded that:

> "It would appear that for purposes of filing skeleton arguments time starts running after the appeal has been filed in this Court and not 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".

We agree with this conclusion.

Given that to this Court in *Electoral Commission and Another v Mkandawire* it 'appears' to be the case, this court could not 'agree with this conclusion' without elucidation to remove the doubt. The Court itself never interpreted paragraph 1 of Practice Direction No 1 of 2010. That it never regarded other latest previous decisions makes it a weak precedent in this Court and courts lower to this Court.

Interpreting Paragraph 1 of Practice Direction No 1 o/ 2010

Paragraph 1 of Practice Direction No 1 of 2010, therefore, comes once more for interpretation.' Filing the appeal in this court, based on what, to me to be correct interpretation on the Supreme Court of Appeal Act and the rules of court, does not refer to filing the record of appeal' under order 3, rule 11of the Supreme Court of Appeal Rules. It refers to 'filing the appeal.' This means when the appellant files in accordance with section 23 of the Act and Order 3, rule 2 of the Supreme Court of Appeal Rules, notice of appeal with grounds to the Registrar of the High Court.

How the practice touted here arose and was condoned are, to say the least, beyond me. Probably, as I understand, the practice touted here bases on some amendments, unknown to me, because I was out of the system. All the cases this Court decided, however, rely on the wording of Practice Direction No l of 2010. The practice suggested in these decisions clearly do not base on Paragraph 1 (a) (i) of Practice Direction No 1 of 2010. I, therefore, reproduce the Practice Direction as it is to see if it supports the practice vehemently championed:

> It is notified for general information and guidance to all legal practitioners that with effect from the date of this Practice Directi0n, parties in any appeal or other matter in the Supreme Court of Appeal shall be required to present skeleton arguments in accordance with this Practice Direction -
>
> **1.** When presenting skeleton arguments in the Malawi Supreme Court of Appeal -
>
> (a) In all substantive appeals –
>
> (i) The appealant shall file with the court skeleton arguments within fourteen (14) days after filling the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.

(ii) 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 .

To better understand the direction, different questions are asked

Who is the actor in paragraph 1(a) (i) of Practice Direction No 1 of 2010?

This is important. The actor performs many functions in paragraph l(a) (i) of Practice Direction No 1 of 201. It is the appellant, through and through. Now let us consider actors excluded from the direction: the Registrar, the High Court, the High Court Judge, the Supreme Court of Appeal Registrar, the Supreme Court of Appeal Judge, the Supreme Court and the respondent. It is important, for reasons appearing later, to underline that the Registrar of the High Court is the consequential omission in paragraph l(a) (i) of Practice Direction No 1of 201.

What is the Appellant supposed to do?

The appellant is supposed to file. Now let us see what the appellant is not asked to do here. The appellant is supposed to file, even though it makes no difference. The distinction is important, however, because, in Order 3, rule 11, it is the Registrar of the High Court, not the appellant, who is supposed to file the record of appeal.

What is the appellant supposed to file?

This looks like asking the obvious. This Court, however, not once, not twice states that under this Practice Direction, the record of appeal is that which is supposed to be filed. The truth of the matter is that the skeleton arguments are to be filed?

When are skeleton arguments supposed to be filed?

Skeleton arguments are supposed to be filed 14 days after a specific event!

What event?

The event is the filing of the appeal! The direction does not refer to the filing of a record of appeal. Introducing the words 'record of appeal' in paragraph l(a) (i) of Practice Direction No 1of 201 is judicial re-legislation. The words are not in paragraph l(a) (i) of Practice Direction No 1of 201.

Within what time is the appellant supposed to file skeleton arguments?

Within fourteen days.

Within fourteen days of what?

Within 14 days 'after' filing.

Filing what?

It is easy to miss the point here. This is where the point has actually been missed. Filing skeleton arguments, under paragraph 1(a) (i) of Practice Direction No 1 of 201, premises on occurrence of some specific event and caused by some specific actor. The specific event is filing the appeal. In this case it is not the filing of the record of appeal. It is the filing of the appeal. As demonstrated, there is a world of difference between filing an appeal and filing the record of it. Filing the appeal can only be filing its record, not by interpretation, but by divination.

Who is supposed to file the appeal?

The specific actor is the appellant, not the Registrar of the High Court. The Registrar never files the appeal, the appellant does. This is important. It seems that those who think that it is the record of appeal that has to be filed cannot properly identify the actor and the action. To identify the actor, shorn of other words, paragraph 1(a) (i) of Practice Direction No 1of 201 is recast as follows:

> The appellant shall file ... skeleton arguments ... after filing the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.

Clearly, it is the appellant who must file the appeal. It is not the responsibility of the Registrar to file the appeal. It is not the responsibility of the appellant to file the record of appeal under Order 3, rule 11of the Supreme Court of Appeal Rules with this Court. That is the function of the Registrar. The appellant must file the appeal. Skeleton arguments are filed within 14 days of that.

Where is the appeal supposed to be filed?

In this court, the Supreme Court of Appeal!

How is the appeal filed in this court?

The appeal is filed in this court by the appellant filing the notice of appeal in the High Court under Order 3, rule 2 of the Supreme Court of Appeal Rules. The Registrar's lodging of the record of appeal is not fling the appeal in this court.

What, therefore, our rules change in the practice in the England and Wales Appeal Court practice and procedure is that in Malawi skeleton arguments should be filed together with the notice of appeal.

Paragraph 3 of Practice Direction 52C provides:

> An appellant's notice (Form N161) must be filed and served in all cases. The appellant's notice must be accompanied...by the appellant's skeleton argument in support of the appeal...

They should be filed fourteen days after the notice of appeal is filed. Others suggest that the reason why skeleton arguments in the England and Wales Court of Appeals accompany the notice of appeal is because the record is available immediately.

The argument is a practical one, not a legal one. There is no reason why here the record cannot be had immediately. It is only that this Court has come to accept a *modus operandi* that is proving ineffective, inefficient and uneconomical. The Case Management System now in place solves that problem. Even without it, our court reporting unit can be regrouped to allow simultaneous transcription at no or very low cost. In fact the legal arrangements for preparing the record of appeal are obeyed in breach. These account for the problems we face.

Unnecessary, costly and delaying satellite litigation

In fact, it is requiring initial skeleton arguments to be filed after the record of appeal is ready that causes the satellite litigation for which all these cases are few instances of multitudinous and proliferating applications. Requiring skeletal arguments to be filed earlier means that the record of appeal would be incomplete and cannot be filed with this court under Order 3, rule 10, assigned a date under Order 3, rule, received by this Court, served on the parties, entered into the cause list and given a date of hearing under Order 3, rule 11 of the Supreme Court of Appeal Rules. Direction 1 (1) (a) (i) of Practice Direction properly interpreted, the questions would be resolved by this Court before the record is ready to be filed in this Court. The Registrar of the Supreme Court and the Supreme Court would be relieved from having to postpone cases because skeleton arguments were not filed at all. Parties will still be required to submit replacement the appeal skeletons, replacement skeleton arguments and supplementary skeleton arguments.

Avoidance of adjournments

There would be no need for adjournment of the case if the parties do not file the appeal skeleton, replacement skeleton or supplementary skeleton, the last being designed essentially to enable parties, with the leave of the court, because parties can proceed before this Court based on the initial skeleton arguments. This Court can still, under Order 5 of the Supreme Court of Appeal Rules, order compliance or make any order concomitant to justice.

The incidence of failure to file skeleton arguments

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 *Chiponda v Chilumbu* (2015) Civil Appeal No 49 (MSCA) (unreported) dismissal for want of prosecution serves two purposes:

> 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, timely and fair conclusion.

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. Setting down the case, under Order 3, rule 11is automatic and does not depend on filing skeleton arguments at that stage because skeleton arguments are filed fourteen days after filing the appeal. Setting down is automatic on receiving the record because skeleton arguments are supposed to be part of the record of appeal, skeleton arguments being filed 14 days of filing the appeal. The mandatory in paragraph 1(a) (ii) of Practice Direction that this Court that this Court shall not set down the case for hearing in the absence of skeleton arguments confirms what Order 3, rule 6 postulates in not making setting down depend on filing skeleton arguments after the record is ready. Its rigours, however, are reduced by Order 5 of the Supreme Court of Appeal Rules.

Early skeleton arguments as filter

Requiring skeleton arguments earlier on and having species of skeleton arguments serves as a filtering mechanism to disallow *in limine* worthy and sham appeals for purposes of delay and postponement of realizing the fruits of litigation. It is not a perfect mechanism; in its imperfection, it excludes obvious ones. A brief history of appellate practice will show that initially an appeal was commenced by a mere notice or affirmation of the intention to appeal. This rudimentary practice, still obtains in criminal proceedings and certain civil actions. It, however, led to abuse; it was very easy to file an appeal and only for purposes of delay. Subsequently, procedure required that the notice of appeal should be accompanied by grounds. The grounds required compliance with scrupulous rules. Completing the notice and deliberating on grounds would either exclude spurious grounds or sharpen the quality of appeals. It is from this vista that skeleton arguments must be understood.

Requiring litigants to frame their skeleton arguments earlier on enables appellant to consider, well in advance, whether an appeal will succeed. Certainly, the appellant or respondent required to

provide skeleton arguments will thoroughly test the appeal's chances of success by subjecting it to thorough evidential or legal scrutiny. This early filtering is beneficent for the appeal court.

Having skeleton arguments early avoids unnecessary preparation work later

Filing skeleton arguments with the notice of appeal at the filing of the appeal with the court (England and Wales Court of Appeals) or 14 days thereafter is chosen because the case is fresh to the parties. Practically, the High Court delivers judgments belatedly, freshness, at least of the evidence, may be compromised. The judgment, however, is fresh. Normally this should form the basis of framing the grounds of appeal and initial skeleton arguments. It is probably in anticipation of delay that the record that Supreme Court of Appeal Rules require that the notice of appeal have the broad and general ground in Order 3, rule 2 (4):

> No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent.

Waiting for skeleton arguments to be filed where these later cases suggest requires re-reading when the case is not fresh. The problem of Counsel's double reading are ameliorated by that the second reading will be a refresher. As we have seen, the court and the parties can still rely on their initial skeleton arguments. The benefits, which are many, outweigh this impediment.

Justices of appeal can start pre paring for the appeal as soon as they are seized

Earlier and proper skeleton arguments assist the appeal court's preparation of the hearing. Normally, as Order 3, rule 19 of the Supreme Court of Appeal suggests, this court is seized of the matter when the appeals is filed in the High Court. If the record is ready early or at the time of the notice, the justices of appeal assigned the matter commence preparation. They are apprised of the progress of the case until the Registrar of the Supreme Court receives the record under Order 3, rule 11 of court and enters it in the cause list under Order 3, rule 11 of the Supreme Court of Appeal Rules:

Some suggest that, because of the word 'enter' in Order 3, rule 11, the appeal is filed at this stage or at the lodgment of the record of appeal. At this stage the appeal is entered in the cause list; this cannot be filing the appeal in this court. The court is already filed and it, as an appeal, is 'entered in the cause list' for purposes of hearing.

Filing the record of appeal

The Registrar of the High Court should file the record of appeal under Order 3, rule 10 of the Supreme Court of Appeal Rules by 12 July 2016.

Entering the appeal on the cause list

The Registrar of the Supreme Court should under Order 3, rule 11 enter the appeal in the cause list on 12 July 2016

Notice of filing of the record

The Registrar under Order 3, rule 11 of the Supreme Court of Appeal Rules shall notify the parties that the appeal record is ready by 19 July 2016

Service of the record of appeal s

The Registrar of the Supreme Court under Order 3, rule 11 of the Supreme Court of Appeal Rules should serve the parties with the record of appeal by 19 July 2016.

Setting down the appeal for hearing

Registrar of the Supreme Court should under section 3, rule 11 of the Supreme Court of Appeal Rules set down the case after not earlier than 25 August 2016.

Appeal skeletons

Appeal skeletons are optional. Parties can serve them by 2 August 2016

Replacement skeleton arguments

Replacement skeleton arguments shall be served 14 days before the date set for hearing.

Supplementary skeleton arguments

Application for leave to file supplementary skeleton arguments should be made so that they are filed seven days before the hearing.

The costs of this application shall be in the cause. Consequential orders have followed this application for stay that may excite quick and speedy disposal.

The appellant and respondent are reminded of their constitutional responsibility for disputes to be resolved through mediation adumbrated in the High Court Commercial Division Rules and stressed in this Court under the Civil Procedure Rules 1998.

Made this 3rd Day of May 2016

_____

D F Mwaungulu
JUSTICE OF APPEAL