



REPUBLIC OF MALAWI
IN THE MALAWI SUPREME COURT OF APPEAL
CIVIL APPEAL No. 24 OF 2023

(Being High Court of Malawi, Principal Registry, Personal Injury Cause No. 557 of 2020)

BETWEEN:

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| GENERAL ALLIANCE INSURANCE COMPANY LIMITED | APPELLANT |
| AND | |
| LEVI JUMBE | 1 ST RESPONDENT |
| WONDERFUL KANTHALO | 2 ND RESPONDENT |

R U L I N G

1. The intended Appellant in this matter, General Alliance Insurance Company Limited, seeks leave to appeal out of time against the decision of the Assistant Registrar dismissing their application to be discharged and exempted from the assessment of costs proceedings. Their main argument on the intended appeal which they consider to be in the interests of justice, is that the Appellant having exhausted their monetary liability under the motor vehicle policy of insurance with their insured client they should be discharged as a party in the assessment of costs proceeding. The Appellant has filed an affidavit and accompanying skeleton arguments in support of the application whereas the Respondents have raised objections to the application by presenting an affidavit in opposition and corresponding skeleton arguments.
2. The background to this matter is set out in the ruling of the Assistant Registrar that was delivered on 11th April 2023. In summary, Mr. Jumbe and Mr. Kanthalo, the Respondents herein (who were the claimants in the court below), commenced a legal action against the Appellant and its insured driver, Mr. Makawa (who was the second defendant to the claim), claiming damages for personal injuries arising from a motor vehicle accident. On 28th October 2021, following a full trial, the High Court rendered a judgment of liability against the Appellant for the sum of the indemnification policy limit applicable to third parties. The total value of the aforementioned limit was K5 million. Subsequently, the matter was scheduled for assessment of damages on the 29th November 2022. The Assistant Registrar awarded the sums of K8 million to the first Claimant and K7 million to the second Claimant, along with the costs

of the proceedings. After the Respondents had filed a bill of costs and applied for assessment of costs the Appellant made an application before the Assistant Registrar seeking to be discharged from paying costs for the reason that it had exhausted its policy limit. The Assistant Registrar dismissed their application finding that costs are in the discretion of the court and an insurance company cannot restrict itself to the amount of costs it can pay in a proceeding.

3. The Appellant is aggrieved with the decision rendered and intends to initiate the appeal process in order to challenge the ruling. On 10th May 2023 the Appellant filed an *ex parte* application under section 7 as read with section 23(2) of the Supreme Court of Appeal Act, seeking leave to appeal outside of the designated timeframe. This was done with the intention of contesting the ruling made by the Assistant Registrar, which dismissed the Appellant's application to be discharged from the assessment of costs proceeding. The court directed that the Appellant's application be heard by way of *inter partes* hearing scheduled for 31st May 2023. On the appointed date the parties, represented by their respective legal practitioners, were granted the opportunity to present their arguments before the court and this is the ruling made after the *inter partes* hearing.
4. Before delving into the merits of the Appellant's application for leave to appeal beyond the stipulated timeline, the preliminary issue that warrants determination by this Court pertains to its jurisdiction to entertain and adjudicate over the Appellant's application. In *Mbale v Maganga*, (Misc. Civil Appeal 21 of 2013) [2015] MWSC 1, the court made it clear that the issue of jurisdiction can be taken up at any stage of the proceedings. The determination of jurisdiction is of utmost importance as it constitutes the basis of a court's "power and authority": *Mulli Brothers Ltd v Malawi Savings Bank Ltd* [2013] MLR 243. The case of *Portland Cement Company (1974) Ltd v Gilton Chakhaza* [2010] MLR 272 (SCA) notes that jurisdiction is a matter of law. As enunciated in *Yiannakis v Rep* [1995] 2 MLR 505 the jurisdiction of the Supreme Court of Appeal emanates from the Constitution and the powers of the Supreme Court of Appeal are provided in the Supreme Court of Appeal Act (Chapter 3:01 of the Law of Malawi): *Chihana v Rep (2)* [1992] 15 MLR 86 (SCA). It will be shown that the issue of jurisdiction was particularly important in the circumstances of the instant matter as the ruling in question was pronounced by an Assistant Registrar who handles a high volume of cases, some of which may be appealable to a High Court Judge while others are appealable to the Supreme Court of Appeal.
5. The present discussion commences with reference to the legal provision enshrined in section 21 of the Supreme Court of Appeal Act, Chapter 3:01 of

the Laws of Malawi, which delineates the civil matters that warrant adjudication before the Supreme Court of Appeal in the following manner:

“An appeal shall lie to the Court from any judgment of the High Court or any Judge thereof in any civil cause or matter:

Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—

- (a) an order allowing an extension of time for appealing from a judgment;*
- (b) an order giving unconditional leave to defend an action;*
- (c) a judgment which is stated by any written law to be final;*
- (d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:*

And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the Judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—

- (a) a judgment given by the High Court in exercise of its appellate jurisdiction or on review;*
- (b) an order of the High Court or any judge thereof made with the consent of the parties or an order as to costs only which by law is left to the discretion of the High Court;*
- (c) an order made in chambers by a judge of the High Court;*
- (d) an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases—*
 - (i) where the liberty of the subject or the custody of infants is concerned;*
 - (ii) where an injunction or the appointment of a receiver is granted or refused;*
 - (iii) in the case of a decision determining the claim of any creditor or the liability of any contributor or the liability of any director, or other officer, under the Companies Act in respect of misfeasance or otherwise;*
 - (iv) in the case of a decree nisi in a matrimonial cause;*
 - (v) in the case of an order on a special case stated under any law relating to arbitration;*
- (e) an order refusing unconditional leave to defend or granting such leave conditionally.”*

This section represents the main statute that confers upon the Supreme Court of Appeal its jurisdiction over civil matters. The powers and duties of the Registrar are provided under section 8 of the Courts Act and Order 25

of the Court (High Court) (Civil Procedure) Rules, 2017, henceforth referenced as CPR. The leading case that examines the application of the CPR is the case of *Liphava and Others v Mbaula and another*, (MSCA Civil Appeal No. 40 of 2019) [2021] MWSC 9. In the abovementioned case the Supreme Court of Appeal held that “there is no room for decisions of the Registrar coming directly to this Court” in light of section 21 of the Supreme Court of Appeal Act, which explicitly refers to a 'Judge' whilst excluding any reference to a 'Registrar'. As elucidated in the foregoing case and the case of *Catherine Mwala v Joyce Lipaya*, Civil Appeal No. 20 of 2015, which expounded on the Latin maxim "*expressio unius est exclusio alterius*," it is evident that had the legislature intended for decisions of the Registrar to be subject to direct appeal to this Court, the common law principle for construing legislation would have required that the statute specifically makes such provision.

The case of *Liphava and Others v Mbaula and another* provides clarity on the jurisdiction of the Registrar with regards to the proceedings outlined in Order 25 rule 1 of the CPR, which are deemed non-contentious in nature. Any matters of a contentious nature are expected to be presided over by a Judge, and any aggrieved party would have an opportunity to appeal to this Court. In situations where a proceeding is deemed to be contentious, it is incumbent upon a Registrar to refer the matter to a Judge for determination or to direct guidance, in accordance with Order 25 rule 2 of the CPR.

6. Moreover, in a prior judgment rendered in the case of *Nasiyaya v Attorney General*, MSCA Civil Case No. 7 of 2012, which was determined under the erstwhile civil procedure rules, the Court explicated a guiding principle for the nature of decisions made by the Registrar, where appeals may be lodged to a Judge of the High Court or to this Court. The principle was enunciated as follows:

“Certain decisions of the Registrar can be appealed against to a Judge in Chambers while other decisions are to be appealed directly to the Court of Appeal, in our case, to this Court. A distinction is drawn between those decisions of the Master in an interlocutory matter, on one hand, and those made on assessment of damages or on the hearing or determination of any cause, matter, question or issue tried before him or her, on the other. In the former, an appeal lies to a Judge in Chambers while in the later an appeal lies directly to the Court of Appeal.”

7. The case of *Liphava and Others v Mbaula and Another* elucidated that in situations where a Judge determines the issue of liability in a matter and orders that damages be assessed, the Registrar is empowered to conduct the assessment under delegated authority. Given that the assessment is integral to the court's judgment an appeal against the order may not be brought before a

Judge of the High Court, as it would constitute an appeal against their own decision. This Court would have jurisdiction over any appeal. This scenario is unlike a situation where a Judge has not delegated their authority, but rather, the powers are being wielded by the Registrar. In the event of such a circumstance, an option for recourse is available in which an appeal may be presented to a Judge of the High Court who will preside over an appeal within the confines of their Chambers

8. The aforementioned situation materialized in the case of *Liphava and Others v Mbaula and Another*, wherein it was explained on page 6 as follows:

“...However, in the present case the scenario is that the judge entered judgment for the appellants and ordered that damages be assessed by the Registrar. The Assistant Registrar duly assessed the damages. This completed the judgment of the court in as far as the appellants' action was concerned. Thus, the second respondent's application for an order of permanent stay of execution was not part and parcel of the judgment of the court. In my view, it was a stand-alone application. The Assistant Registrar's decision on this application does not supplement the judgment of the court which was entered by the judge. Therefore, it cannot be said that it should be considered in the same way we consider an order on assessment of damages in relation to an appeal against it.”

9. Similarly, in the instance case, the process of the Assistant Registrar hearing and determining the application brought by the Appellant to be discharged from the assessment of costs proceeding, was not an extension of the judgment made by the Judge who presided over the trial. This constituted a standalone or an independent interlocutory application, lying outside the realm of assessment of damages. The Assistant Registrar must have heard it the exercise of his powers under Order 25 rule 1 (a) of the CPR. Therefore, it should be noted that in regards to the Assistant Registrar's interlocutory order, the appropriate procedure for appealing lies to a Judge in chambers and not with this Court. This position was affirmed in the case of *Nasiyaya v Attorney General*. During the hearing of the present application, the Appellant explicitly referred to the preceding proceeding before the Assistant Registrar as interlocutory. Therefore, it was incumbent upon the Appellant to seek recourse to a Judge in chambers for a first appeal decision on the matter before it could be brought before this Court for a second appeal, in a way.
10. Moreover, upon being presented with an application for discharge, the Assistant Registrar ought to have adhered to the directives set forth in the case of *Liphava and Others v Mbaula and Another* and the case of *Nyahoda v*

Blantyre Newspapers Limited (Civil Cause 3492 of 2006) [2022] MWHC 11. The latter case shows that Registrars know that their jurisdiction is limited and subject to the direction of a Judge who has been assigned the case. The directives in *Liphava and Others v Mbaula and Another* would entail conducting a preliminary evaluation to ascertain whether first, he had jurisdiction and the given proceeding fell within the purview of those enumerated in Order 25 rule 1 of the CPR. Like was done by the Assistant Registrar in the case of *Nanchinga v Re-Union Insurance Co. Ltd* (Personal Injury Case 809 of 2011) [2018] MWHCCiv 4. Secondly, assessing the possibility of contention pertaining to the legal proceeding or the likelihood of an appeal. If the application was not substantively listed under Order 25, rule 1 of the CPR, then it was incumbent upon the Assistant Registrar to refer the application to the attention of a Judge. As this application pertains to the broader category of interlocutory applications, it was incumbent upon the Assistant Registrar to undertake an evaluation in accordance with the second criterion. In the event that the response under the second test was affirmative, as ultimately transpired, it would have been incumbent upon the Assistant Registrar to make a referral of the application to a Judge for either determination or direction.

11. The implementation of the assessment procedures delineated in the *Liphava and Others v Mbaula and Another* case has the potential to streamline the workflow of Registrars as can be seen in the cases of *S v Inspector General of Police, Clerk of the National Assembly and Minister of Justice; Ex-parte M.M and 18 Others* (Judicial Review 7 of 2020) [2022] MWHCCiv 19 (20 December 2022); *Lilongwe City Council v Khuleya* (Civil Cause 668 of 2018) [2019] MWHC 30; *Nsona v Lujeri Tea Estate Ltd*, Personal Injury 57 of 2015) [2018] MWHC 53 and *Rahman v Patrick & Cooperatives Insurance Company Ltd*, Personal Injury Cause 1023 of 2021 [2022] MWHCCiv 15.
12. The case of *Liphava and Others v Mbaula and Another* elucidates a framework for assessing the categories of legal proceedings that a Registrar may or may not be empowered to handle in compliance with Order 25 of the CPR. However, it is worth noting that the aforementioned case, coupled with the current issue at hand, highlights a triad of pivotal observations. First, it is noteworthy that parties have been filing and Registrars have been handling contentious proceedings, which necessitates the undertaking of a thorough review of the pertinent rules, with a view towards aligning them to the practical situation of their implementation and the capacity of the Registrars. Secondly, there is a pressing need to enhance the capacity of Registrars with respect to effectively assessing the proceedings that fall within their competency and those beyond their purview. Thirdly, that Order 25 of the CPR which provides for the powers and functions of a Registrar should be

considered for review with the aim of promoting adherence to Order 1 rule 5 (d) of the CPR. This sub-rule which stipulates that proceedings should be managed expeditiously and fairly demands the streamlining of the progression of proceedings, thereby averting needless preliminary objections as occurred in *Master Notice v Malawi Revenue Authority & Anor.*, Personal Injury Case 887 of 2011) [2018] MWHC 1117, and doing away with possible repetitive referral of proceedings or a case between a Judge and a Registrar.

13. The present court, invoking the provisions of section 21 of the Supreme Court of Appeal Act and the precedent set forth in *Liphava and Others v Mbaula and Another*, finds that it lacks the requisite jurisdiction to entertain the application for leave to appeal beyond the prescribed time limit. This decision is founded upon the fact that the interlocutory proceeding had been conducted by an Assistant Registrar rather than a Judge. The said proceeding did not constitute an extension of the judgment on liability against the Appellant. To assume jurisdiction of the application would result in violating the long standing principle that an appeal against an interlocutory order made by a Registrar should be brought before a Judge in chambers and not directly to this Court. The application is therefore dismissed for the above reasons.
14. The Court concludes by stating that the parties failed to assist the court to effectively manage the proceedings of this case by disregarding the recognition and prioritization of jurisdictional deficiencies as a crucial preliminary issue to be deliberated upon. As stated in *Minister of Finance and others v Mhango and others* [2011] MLR 174 (SCA) “the question of jurisdiction of a tribunal is basic law and the first point for consideration by any legal Counsel appearing before such tribunal”. In light of the circumstances and the finding that this Court lacks jurisdiction, the Court exercises its discretion not to make any order as to costs.
15. Any aggrieved party can appeal to the full bench of this Court.

Delivered and dated this 8th day of June 2023.



Dorothy nyaKaunda Kamanga
JUDGE

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| Mr. Dzimphonje | : Legal practitioner for the Appellant. |
| Mr. Master | : Legal practitioner for the Respondent. |
| Mr. Shaibu & Ms. Tchukambiri | : Senior Judicial Research Officers. |
| Mrs. Mthunzi /Mr. Maluwa | : Law / Court Clerks. |