IN THE MALAWI SUPREME COURT OF APPEAL
SITTING AT BLANTYRE

MSCA CIVIL APPEAL CASE NO. 9 OF 2021
(Being High Court, Principal Registry, Judicial Review Cause No 68 of 2014)

BETWEEN

MALAWI LAW SOCIETY..... APPELLANT

AND

REGISTRAR OF FINANCIAL
INSTITUTIONS ..... RESPONDENT
INSURANCE ASSOCIATION OF MALAWI ..... INTERESTED PARTY

CORAM: HON. JUSTICE L.P. CHIKOPA SC, J.A.
HON. JUSTICE F.E. KAPANDA SC, J.A.
HON. JUSTICE J. KATSALA J.A.
HON. JUSTICE I.C. KAMANGA J.A.
HON. JUSTICE D. MADISE J.A.
HON. JUSTICE R. MBVUNDULA J.A.
HON. JUSTICE D. nyaKAUNDA KAMANGA J.A.

Msisha SC, Mpaka, Counsel for the Appellant
Nkhono SC, Counsel for the Respondent
Mmeta, Counsel for the Interested Party
Chinkono, Minikwa, Recording Officers
Namagonya, Muntinti, Reporters

RULING

Mbvundula JA:

In 2014 the respondent promulgated a Directive known as the Insurance [Claims Management] Directive which the appellant was aggrieved with. Consequently the appellant instituted judicial review proceedings in the High Court questioning certain aspects of the Directive. The High Court dismissed the judicial review application against which the appellant appealed in this Court.

The appeal was set down for hearing on 14th July 2022 whereat Counsel for the appellant did not show up with no prior communication to this Court explaining the absence. This Court dismissed the appeal for non-attendance by Counsel for the appellant.

The appellant then filed an application to re-enter the appeal citing Order III rule 21 (2) and Order III rule 19 of the Supreme Court of Appeal Rules as read with CPR Rule 52.30 and section 7 of the Supreme Court of Appeal Act.

The hearing of the application to re-enter the appeal took place on 10th November 2022, and after considering the parties' respective submissions this Court unanimously determined that the application was untenable and proceeded to dismiss it, reserving, however, its reasoned Ruling to a later date. This is the Ruling.

The application was supported by an affidavit sworn by Counsel Mpaka, who was to represent the appellant at the hearing of the appeal. He stated therein that he failed to appear on time for the appeal because, unknown to him, his wrist watch was behind time by some minutes and that he only realized this when he heard the correct time from his car radio when he was roughly halfway between his office in Blantyre and the Court at Chichiri. He deposed that upon realizing that he would be late he called a court clerk at the Supreme Court Registry who, according to his affidavit, informed him that the Justices of Appeal were entering the courtroom. The clerk allegedly spoken to by Counsel remains unidentified and has therefore not independently confirmed Counsel's claim. Counsel further stated that he also called Senior Counsel Nkhono, representing the respondent, and that Senior Counsel missed his call but called later to inform him that the case had been dismissed. In

court, however, Senior Counsel Nkhono expressed ignorance of the reasons why Counsel Mpaka was absent as, according to him, he had had no communication from Counsel Mpaka.

Counsel Mpaka urged this Court to allow the application to re-enter the appeal as the matter on appeal "is of great importance to the administration of justice and business regulation and has been the subject of long drawn out and intensive discussion amongst the legal profession and the insurance industry and their regulators including the Malawi Judiciary, the Malawi Law Society, the Registrar of Financial Institutions and the Insurance Association of Malawi." Counsel averred that this appeal presented an opportunity through which the final Court of appeal in this country can offer judicial guidance on administration of justice and regulation of the business environment in the insurance sector and therefore that the Court should exercise its discretion to re-enter the appeal and dispose of it on the merits.

For the respondent was filed an affidavit sworn by Senior Counsel Nkhono. Counsel Nkhono saw no good reason for the appellant's failure to attend as, in his view, Counsel Mpaka would have had other devices, apart from his wrist watch, such as his phone and his laptop to tell the correct time. That Counsel Mpaka called Senior Counsel is in contrast to Senior Counsel Nkhono's account in court that he was surprised that counsel for the appellant was absent, and that he had had no communication from him. In response to that, Counsel Mpaka stated, in an affidavit in reply, that the only gadget he relied upon to know the time was his wrist watch as he had switched off his phone to avoid disturbances and had not switched on his laptop, the reason being that during the previous two days he had had a long trial at the Industrial Relations Court such that he had no time during those two days to prepare himself for the appeal herein, and in light of this he rose early on the morning of the appeal arriving at his office around 4 am whereupon he switched off his phone and did not switch on his laptop hence his singular reliance on his defective wrist watch. Yet, as earlier observed, he claimed to have called the court clerk and Counsel Nkhono from the same phone he claimed to have switched off. There are obvious contradictions here. If he indeed called the court clerk and Counsel Nkhono it must follow that his phone was available for him to know the correct time. If it was off then it means he neither called the clerk nor Counsel Nkhono. We will not fill in the gaps on behalf of Counsel. The bottom line, however, is that his account of what transpired does not ring true.

Senior Counsel Nkhono was also of the view that even if the wrist watch was not telling the correct time Counsel for the Appellant would still have not been on time as he would not have had enough time to rob, find the right courtroom and be seated at the bar by 9.00 am. In Mr Nkhono's estimation, if the wrist watch had been displaying the correct time Counsel for the appellant would have had only five minutes between his time of arrival at the court and the time scheduled for the hearing, so appellant's Counsel would still have been late for the hearing. This point, in our view, cannot be faulted. We are of the view that diligent Counsel will not start off for a hearing to be just on time. Diligent Counsel will take into account unforeseeable events which might delay them on their way to court rather than leave matters to chance. Counsel should rather wait at the court for their matter to be called than hope that in the event of their being late the court will shift the time to accommodate their delay. This, as a matter of fact, is why there is allowance for the element of *travelling and waiting* with respect to bills of costs.

Senior Counsel Nkhono invited this Court, when exercising its case management discretionary powers, to take into account the full circumstances of this case. It was Senior Counsel's contention that the circumstances and history of this matter strongly show that the appellant has shown little interest in pursuing the appeal and that the incident of 14th July 2022 appeared to demonstrate and underscore a pattern of relative disregard for the appeal, on the part of the appellant. In this regard Senior Counsel brought to the fore the following facts, which the appellant has not disputed, though he sought to justify them.

Counsel Nkhono pointed out that the court below having delivered its judgment on 22nd February 2018 the appellant filed its appeal in March 2018 and in the following month obtained a stay of execution of the judgment pending appeal. For a period of three years thereafter the appellant took no step to prosecute the appeal and that despite the respondent being at liberty to apply to have the appeal dismissed for want of prosecution, the respondent's Counsel instead had the record of appeal prepared, filed and served on the appellant, despite this being the duty of the appellant. That notwithstanding, so it was observed, the appellant still took no further step to prosecute the appeal, but Counsel for the respondent, with a view to achieving progress in the appeal, proceeded to prepare the respondent's skeleton arguments on appeal and its list of authorities, and served them on the appellant on 9th July 2021, and yet again the appellant took no further step to prosecute the appeal. It was further

averred that even after the appellant was served with the Interested Party's skeleton arguments on 25th August 2021 the appellant was not prompted into filing and serving its skeleton arguments, and that it was only after the appellant was served with a Notice of Hearing earlier scheduled for 17th February 2022 that the appellant proceeded to file its Chronology of Events, Skeleton Arguments and List of Authorities on 10th February 2022, only seven days before the scheduled hearing.

In the view of the respondent, the appellant's failure to attend Court was not justifiable and did not rule out lack of diligence on the part of Counsel for the appellant who had consistently shown a pattern of not being interested in pursuing the appeal, perhaps, according to Senior Counsel Nkhono, because of the appellant's comfort derived from the fact that the respondent is restrained by the order staying execution of the judgment of the court below. Accordingly, Counsel for the respondent expressed the view that it would not be in the interest of justice to re-enter the appeal.

In his affidavit in reply Counsel Mpaka expressed surprise at the assertions of lack of diligence on his part. He argued as follows in his said affidavit.

Firstly, that Senior Counsel Nkhono was shown the time displayed by his wrist watch and noted the mishap that had befallen Counsel for the appellant on 14th July 2022. We have already observed that Counsel ought to be proactive by anticipating unforeseen eventualities. There is no merit in this argument.

Secondly, that regarding an earlier adjournment of 19th February 2022, hearing of the appeal failed because the Court was not quorate as at that time there was an inadequate number of Justices of Appeal for the Supreme Court of Appeal, hence the adjournment was inevitable. This, unfortunately, does not justify the appellant's failure to have taken the necessary steps towards prosecuting the appeal since the judgment of the court below, of 22nd February 2018, i.e. four years prior. And if the reason for the delay in filing was that the Court was not quorate one must wonder how come he nonetheless filed the necessary documents, albeit only seven days to the scheduled hearing.

Thirdly, Counsel Mpaka averred and argued that the whole history narrated in the affidavit of Senior Counsel Nkhono lacked any bearing on the events of 14th July 2022 as by then all records necessary for the appellant to present its appeal were on

record. Our take is that a pattern is a string of related events and that in the usual course of things all the events must be considered one in relation to the rest, and not singularly. In that regard we are more inclined to agree with the respondent that the conduct of the appellant taken in the light of all the events surrounding its handling of the appeal herein, including the events of 14th July 2022, demonstrate the appellant's general disregard for the timely attainment of justice, more so when the respondent stands restrained by the order of stay granted to the appellant in the court below.

In the case of *RTM Initiative Limited t/a Track v Electricity Supply Corporation of Malawi Limited* MSCA Civil Appeal No. 52 of 2019, this Court upheld a decision of the High Court dismissing a matter for non-attendance, where Counsel for appellant averred that due to heavy traffic, he failed to arrive at the court premises at the scheduled time. This Court found that to be an insufficient cause for Counsel's non-attendance. The facts of this case are no different from those in the *RTM* case. There exists no sufficient cause in the present case for Counsel's failure to attend at the appointed time such that even if under the relevant statutes re-entry of the appeal was permissible, the application herein would fail for want of sufficient or good cause for counsel's non-attendance much so in view of the appellant's general inertia with respect to the appeal.

The term "sufficient cause" was considered by the Kenyan Court of Appeal in *Wilson Cheboi Yego v Samuel Kipsang Cheboi* [2019] eKLR and was accepted to be:

> "... the burden placed on a litigant ... to show why a request should be granted or an action excused" and that "[i]t is a question of fact in respect of which the court has to exercise its discretion in the varied and special circumstances of each case."

The court then stated that:

> "Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

The Court also cited a decision of the Court of Appeal in Tanzania as follows:

"The Court of Appeal in Tanzania had this to say on "sufficient cause" in The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006 in discussing what constitutes *sufficient cause:*

> *"It is difficult to attempt to define the meaning of the words* 'sufficient cause'. *It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)"*

The court further cited the decision of the Supreme Court of India in the case of *Parimal v Veena* [2011] 3 SCC 545 where the latter court observed that:

> "sufficient cause" *is an expression which has been used in large number of statutes. The meaning of the word* "sufficient" *is* "adequate" *or* "enough", *in as much as may be necessary to answer the purpose intended. Therefore the word* "sufficient" *embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context,* "sufficient cause" *means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been* "not acting diligently" *or* "remaining inactive." *However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."*

On the facts before us, and in our assessment, Counsel's account of what caused his non-attendance is not convincing. It leaves doubt in our minds as to whether Counsel acted diligently and not negligently by departing for court at the last minute, by leaving matters to chance. There are unexplained gaps in counsel's account such as the irreconcilable account that Counsel's phone was off yet at the same time made calls therefrom. This, in the least, coupled with the appellant's generally indolent conduct of the appeal cannot amount to a sufficient cause. The history of this matter clearly points to the fact that the other parties to the case have been prejudiced by appellant's unreasonable delay or failure to prosecute the appeal timely whilst the order staying execution of the judgment below ties the appellant's limbs.

The provisions of the CPR Rule 52.30 in England relate to the procedure on reopening of appeals and, strictly speaking, are not relevant to the disposal of the application before us. So are the provisions of section 7 of the Supreme Court of Appeal Act as well as those of Order III rule 19 of the Supreme Court of Appeal Rules. Our focus is therefore on Order III rule 21 of the Supreme Court of Appeal Rules.

Under Order III rule 21 of the Supreme Court of Appeal Rules the Court may either *strike out* or *dismiss* an appeal for non-appearance by the appellant. On 14th July 2022 this Court *dismissed* the appeal for non-appearance by Counsel for the appellant. As earlier mentioned the present application was principally brought under Order III rule 21 (2) which provides for appeals that have been struck out. We also observe that the appellant's skeleton arguments proceed on the same trajectory. In consequence the appellant has wholly proceeded along that erroneous path from the beginning to the very end. The appellant's application, has little, if anything, to do with the decision of the Court, dismissing and not striking out the appeal. We therefore find the appellant's application unhelpful in the appellant's bid to have the appeal re-entered.

In his submissions for the appellant, Senior Counsel Msisha urged this court to allow the application to re-enter the appeal on the basis that there was an explanation as to the appellant's non-attendance, which he asserted was not disputed by the respondent, namely that Counsel appeared late. Senior Counsel also asked this court to take into account that on the hearing date the appellant had all necessary documents in place. He submitted that under the provisions of Order III rule 21 of the Supreme Court of Appeal Rules reinstatement can be done on terms as to costs or otherwise as the Court deems fit. Further, the point was advanced that there was a genuine issue to be determined that warranted the attention of this Court, and that no injury would be occasioned to the other side, the Regulator or the Insurance Association.

In response, on behalf of the respondent, Senior Counsel Nkhono singled out the fact that Order III rule 21 (2) of the Supreme Court of Appeal Rules empowers this court to re-enter an appeal which has been struck out "if the court thinks fit". It was his

submission that the Court must look at all the circumstances and the history of the case and as per the respondent's affidavit in opposition the history of the case, in particular, the conduct of the appellant's Counsel, did not justify the re-entry of the appeal.

Unlike Counsel for the appellant, Counsel for the respondent did reckon that the appeal was dismissed and not struck out but was of the view that in either case this court has jurisdiction to re-enter the appeal if it deems it fit. He was of the view that the practical effect is one and that this court has inherent power to re-enter the appeal.

Counsel for the Interested Party, Mr Mmeta, shared the respondent's position as it relates to the conduct of Counsel for the appellant. Counsel Mmeta invited this Court to look at the identity of the appellant as a regulatory body of the legal profession in Malawi and to judge whether its conduct did warrant the exercise of the Court's discretion in its favour as having lived by example.

Regarding the effect of Order III rule 21 (2) of the Supreme Court of Appeal Rules counsel Mmeta submitted that the consequences of dismissal is that the matter cannot be re-entered, that the effect is the same as where the appeal has been dismissed after a full hearing. Further, Counsel Mmeta pointed out the fact that the application to re-enter the appeal did not state the grounds, but that the same only appeared in the affidavits.

On the suggestion that this Court may allow a re-entry of an appeal that has been dismissed regardless of the fact that Order III rule 21 (2) of the Supreme Court of Appeal Rules makes no provision therefor counsel expressed the opinion that a matter dismissed on a technicality is as good (or as bad) as one dismissed on the merits and is incapable of revival.

We will now consider the matter of the court's inherent jurisdiction, which Counsel Nkhono said we could exercise in this case.

Lord Bingham of Cornhill in *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 at 3037 said the following:

> "In his article "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23, Jacob was largely concerned with the inherent jurisdiction

of the High Court, and the procedural aspects of that jurisdiction. But he propounded (page 51) a definition which has never perhaps been bettered:

> "....the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them"."

This definition was adopted in the local case of *Bottoman and another v Republic* Principal Registry Miscellaneous Criminal Application No. 14 of 2013; [2015] MWHC 441.

In the South African case *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) in discussing the inherent jurisdiction of the court, it was stated as follows:

> "[13] Our courts derive their power from the Constitution and the statutes that regulate them. Historically the supreme court (now the high court), in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. That power is now enshrined in s 173 of the Constitution...
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> [14] Jerold Taitz succinctly describes the inherent jurisdiction of the high court as follows in his book *The Inherent Jurisdiction of the Supreme Court* (1985) pp 8-9:
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> > '. . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.'
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> ...

[17] A court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In this regard see *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd* where this Court stated that:

> 'While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute". . .'

[18] ... Moreover, a high court may only act in respect of matters over which it already has jurisdiction. A high court can therefore not stray beyond the compass of **s 173** by assuming powers it does not have.

[19] Courts have exercised their inherent jurisdiction when justice required them to do so. In this regard the following dictum by Botha J in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & another* should be noted.

> 'I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'"

This Court (Chipeta SC, JA) in *Parliamentary Service Commission v SJR Catering Services* [2018] MLR 198 proceeded likewise after being called upon to apply the

default provisions of the Civil Procedure Rules 1998 of England ostensibly to fill in gaps apparent in local legislation. He stated (p 220 par *f*):

> "As for issues promoting the overriding objective of the court, as provided in the Civil Procedure Rules 1998, these to me, should not be taking priority over what local legislation says … It is local law that should instead take priority, and only when it has fallen short of making provision for a situation should resort be had to the default provisions contained in the Civil Procedure Rules 1998 to fill gaps in local law."

He further stated (p 221, par *e*) that the jurisdiction of the Court should not be called upon just to serve the convenience of a party but to serve the interests of justice. The specific words he used are:

> "Now, I tend to think that when the jurisdiction of this court is being called upon just to serve the convenience of a party, and not necessarily to serve the interests of justice, this court should, on the spot, put its foot down and say rules are rules and they must be obeyed."

That a court cannot exercise jurisdiction not conferred upon it by statute is exemplified by another South African case, *Moch v Nedtravel (Pty) Ltd. t/a American Express Travel Service* (329/95) [1996] ZASCA 2; 1996 (3) SA 1 (SCA) in which the court was urged to use its inherent power to grant a party a right of appeal which the statute, the Insolvency Act, did not give to it. In response to this submission the court observed that its inherent power did not extend to the assumption of jurisdiction it otherwise did not have under the Act.

We make the point here that we are not and would not be persuaded to exercise any jurisdiction outside the Rules merely to assist a party who has proceeded in an indiligent, tardy, unconscionable and inequitable manner such as the present appellant who appears to have taken advantage of the order staying the execution of the judgment below to the disadvantage of the other parties to the case. If that were to be, the interests of justice would not be properly served, the respondent having waited for more than three years to have the appeal disposed of.

Our examination and analysis of the provisions of Order III rule 21 (2) of the Rules of the Supreme Court leaves us with the clear impression that the omission by the legislative authority to provide for re-entry of an appeal that has been dismissed whilst allowing the same for one that has been struck out was deliberate rather than accidental. We are of the firm view that whatever may have been the justification, there was a deliberate intention to withhold from this Court the jurisdiction to entertain any application to re-enter an appeal that has been dismissed for non-attendance. Appellant's Counsel appeared in fact to appreciate this position by couching the application herein as though the appeal had been struck out and not dismissed.

Finally we uphold the position advanced by Counsel Mmeta that an appeal dismissed on a technicality suffers the same fate as that dismissed on the merits. In this regard we adopt the position taken by the Zambian Supreme Court of Appeal in the case of *Barclays Bank Plc v Njovu & and 41 Others* (SCZ 9 21 of 2019) [2020] ZMSC 122 where it reaffirmed its prior decision in *Dar Farms Transport Limited v Moses Nundwe* Appeal No 46 of 2014 that an appeal dismissed on a technicality cannot see the light of day again, that such an appeal cannot be restored to the active cause list as the court then becomes *functus officio*. The dismissal, it was held, serves as an estoppel from further entertaining the appeal. Having dismissed the appeal herein for non-appearance by the appellant our Court became *functus officio*.

By way of summary, the application to re-enter the appeal is dismissed, with costs, on the following major grounds:

1. our lack of jurisdiction to re-enter the appeal under Order III rule 21 (2) of the Supreme Court of Appeal Rules or to exercise our Court's inherent jurisdiction;
2. our having become *functus officio* upon dismissing the appeal for non-attendance by the appellant's Counsel;
3. the tardy, indolent, and inequitable conduct of the appellant with regard to the prosecution of the appeal as shown by the appellant's general disregard to timely prosecute the appeal.

Pronounced in open court at Blantyre this 10th day of November 2022.

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HON. JUSTICE R. MBVUNDULA, J.A.

We concur.

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HON. JUSTICE L.P. CHIKOPA SC, J.A.

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HON. JUSTICE F.E. KAPANDA SC, J.A.

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HON. JUSTICE J. KATSALA, J.A.

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HON. JUSTICE I.C KAMANGA, J.A.

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HON. JUSTICE D. MADISE, J.A.

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HON. JUSTICE D. nyaKAUNDA KAMANGA, J.A.