



IN THE MALAWI SUPREME COURT OF APPEAL
PRINCIPAL REGISTRY
MSCA CIVIL APPLICATION NO. 64 OF 2023

BETWEEN

FIRST CAPITAL BANK LIMITED APPLICANT

AND

FUMBANI KANYIKA AND OTHERS RESPONDENTS

CORAM: HON. JUSTICE R. MBVUNDULA, J.A.

Alide and Dzimphonje, Counsel for the Applicant

Mumba and Ndlovu, Counsel for the Respondents

Minikwa, Recording Officer

ORDER

Mbvundula, JA:

On 29th December 2023 I considered the applicant's *ex parte* application purportedly brought pursuant to section 7 of the Supreme Court of Appeal Act as read with Order I rule 18 of the Supreme Court of Appeal Rules. The application has since been heard *inter partes*.

The dispute between the parties was firstly instituted in the Industrial Relations Court (the IRC). The respondents instituted their action in that court having been declared redundant by the applicant. The IRC found in their favour, on a point of law, and awarded compensation which were subsequently assessed. Subsequently the applicant lodged an appeal and applied for a stay of execution of the decision on the point of law, which was granted *ex parte*. Thereafter the respondents successfully applied for an order in that court vacating the order of stay. The assessment of the

award was finalized on 19th December 2023 in a sum totaling K865 053 392.49 which the IRC ordered to be paid to the respondents within 7 days thereafter.

In the meantime the applicant had filed an appeal to the High Court against the decision on the point of law as well as the Ruling vacating the order of stay of execution. Thereafter the applicant applied to the High Court for suspension or stay of the IRC judgment but the same was denied on 22nd December 2023 on the ground that there was no evidence on the part of the applicant showing that the respondents lacked capacity to repay the sums should the applicant's appeal succeed, hence the application brought before this Court.

This Court's jurisdiction to hear the application [under Order I rule 18] has, essentially, been put to question by counsel for the respondents. In counsel's words there is an irregularity in that the applicant skipped the IRC and rushed to the High Court and to this Court. His argument is that until the appeal is before the High Court the IRC retains jurisdiction on the stay.

In his response counsel for the applicant argued that issue of stay was addressed by the IRC by vacating the stay, which, in counsel's view amounts to a refusal. Counsel went on to state that what was before the High Court was not an appeal but an application based on section 65 (3) of the Labour Relations Act which provides that the lodging of an appeal does not amount to a stay unless the IRC or the High Court directs otherwise. Counsel stated, correctly in my view, that his understanding was that the jurisdiction under that provision is concurrent as between the IRC and the High Court.

Counsel for the applicant proceeded to argue that the coming in of this Court is pursuant to Order I rule 18 of the Supreme Court of Appeal Rules. He said that upon the IRC refusing the application for stay what came before the High Court was a fresh application under the Labour Relations Act and that the bringing of the application to the High Court is what triggered the provisions of Order I rule 18.

In his reply counsel for the applicant disputed that the jurisdiction under section 65 (3) gives concurrent jurisdiction to the IRC and the High Court because, according to him, the law requires that when there is an appeal the record must be prepared and that when that matter has been transmitted to the High Court the IRC loses jurisdiction. Counsel disputed that there was any refusal as asserted by counsel for

the applicant. However, in his own affidavit in support of the application to vacate the stay order herein, he narrates that the stay in the IRC was successfully challenged, hence it cannot lie in his mouth to state the contrary before the Court.

It was respondents' counsel's further assertion that the application in the High Court was refused because the record was not yet before the court. I have not come across this fact in the affidavits. What is on record is that the refusal by the High Court was on account of lack of evidence that the respondents lacked capacity to repay. See the affidavit of counsel Alide in support of the application for stay. The latter assertion is to be preferred for being made under oath as opposed to the factual assertion made orally before the court by counsel.

Finally counsel for the respondents submitted that what the applicant was supposed to do was to appeal to this Court against the High Court's refusal.

The relevant part of section 7 of the Supreme Court of Appeal Act is as follows:

A single member of the Court may exercise any power vested in the Court not involving the hearing or determination of an appeal:

Provided that—

...

(b) in civil matters, any order, direction or decision made or given in pursuance of the powers conferred by this section may be varied, discharged or reversed by the Court.

Order I rule 18 provides:

Whenever an application may be made either to the Court below or to the Court, it shall be made *in the first instance* to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court. (Emphasis supplied)

This Court appears to have no jurisdiction to entertain and grant the application. In addition to Order I rule 18 of the Supreme Court of Appeal Rules, section 65, in particular, subsection (3) of the Labour Relations Act is pertinent. It is thereunder provided:

65. Appeals

(1) Subject to subsection (2), decisions of the Industrial Relations Court shall be final and binding.

(2) A decision of the Industrial Relations Court may be appealed to the High Court on a question of law or jurisdiction within thirty days of the decision being rendered.

(3) The lodging of an appeal under subsection (2), shall not stay the execution of an order or award of the Industrial Relations Court, *unless the Industrial Relations Court or the High Court directs otherwise*. (Emphasis supplied).

A proper reading of Order I rule 18 of the Supreme Court of Appeal Rules and section 65 (3) of the Labour Relations Act reveals the undoubted position that under Order I rule 18 this Court (subject to certain conditions being met) shares concurrent jurisdiction with the High Court over the applications referred to thereunder, whereas under section 65 (3) of the Labour Relations Act it is the IRC which shares concurrent jurisdiction with the High Court. The provision under the Labour Relations Act confers no jurisdiction upon this Court to entertain applications for stay that have previously been declined by the IRC and subsequently by the High Court.

The determinant question with relation to Order I rule 18 of the Supreme Court of Appeal Rules, and in so far as the issue of jurisdiction is concerned, is whether the application herein may have been made either to the High Court, at first instance, or to this Court, in terms of the Order, and the answer should be in the negative because the application for stay that was refused below could only be made under section 65 (3) of the Labour Relations Act to the IRC and/or to the High Court, and not to this Court. It is also pertinent to point out that the application that was considered by the High Court was not at first instance, which automatically removes it from the scope of Order I rule 18.

To suggest that just because the application found itself before the High Court then the provisions of Order I rule 18 were thereby triggered is an attempt to confer upon this Court jurisdiction which it otherwise does not have. Save where a court exercises its inherent jurisdiction, a court is not entitled to exercise jurisdiction not conferred upon it by statute.

I find myself to be in agreement with the submission of counsel for the respondents that the application herein is irregular for want of jurisdiction on the part of this Court. I accordingly vacate the order I made on 29th December 2023 and order that

the money paid into court be accessed by the respondents in their respective entitlements.

Made in chambers at Blantyre this 10th day of January 2024.



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HON. JUSTICE R. MBVUNDULA, J.A.