REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

CIVIL APPEAL NUMBER 35 OF 2022[Being Civil Cause No. 01 0f 2022, High Court of Malawi Lilongwe Registry, Commercial Division]

BETWEEN

GELSOM MKWEZA **1ST APPLICANT/APPELLANT**

GAM FUELS LTD **2ND APPLICANT/APPELLANT**

AND

MASTER BOREHOLE DRILLING LTD **RESPONDENT**

CORAM:

HON JUSTICE L P CHIKOPA SC, DEPUTY CHIEF JUSTICE

Kaphale SC/Nyanda of Counsel for the Applicants/Appellants

Kachere of Counsel for the Respondent

Minikwa Court Clerk

Mrs. C. Fundani/ Mr. K. Chinkono, Court Clerks

RULING

The respondent took out an action against the respondents claiming damages and loss of profits arising out of a fuel transaction gone wrong.

It is alleged that the respondent's Managing Director, in August 2020 bought fuel on credit from the second applicant's filling station for the sum of K1,500,000.00. The fuel was not paid for on time.

In November 2020 the first applicant came to Nathenje where the respondent was drilling a borehole for a client. Apparently, there was a vehicle, belonging to the respondent, on top of which was a compressor being used in the borehole drilling exercise referred to above. The first applicant removed ignition keys from both the vehicle and the compressor as a result of which the respondent was allegedly unable to timeously complete the borehole drilling exercise and make economic use of the two pieces of equipment.

It is fair to say that by December 2020 a proper dispute had arisen between the respondent and the applicants. One side claiming its K1,500,000.00. The other compensation for, in the main, loss of use of the vehicle and the compressor.

To settle the same, it was agreed that the respondent would in *lieu* of the fuel debt drill a borehole at the first applicant's farm in Dedza. It is not clear, and maybe unnecessary to determine at this stage, whether or not it was. The fact is that the respondent on January 5, 2022 commenced this action in the court below claiming damages and loss of profits arising out of its failure to use the compressor and vehicle whose keys were in the alleged improper custody of the first applicant.

The respondent claimed the sum of K1,095,000,000.00 being loss of profits, interest thereon and costs. The respondent was to a large extent successful. The court below awarded it the sum of K747,000,000.00 being lost profits up to the date of judgment, a further sum, to be assessed by the Registrar for loss of profits from the date of judgment up to when the keys would be handed over and costs of the action. This was courtesy of a judgment dated June 29, 2022.

The applicants then came to this court. They sought a stay of execution pending appeal against the above findings. It was not granted. The judgment in the court below was, in the view of this court, clearly inchoate and could not therefore be appealed against. There cannot, so to speak, be a stay pending a nonexistent appeal or one that has no prospect of being. See the cases of **Toyota Malawi Ltd v Jacques Mariette**[supra], **AON Malawi Ltd v Makolo**[supra and **Malawi Housing Corp v John Suzi Banda**[supra].

Subsequently our parties were called to appear before the Registrar of the court below for assessment of the outstanding lost profits. The respondent did not attend. The Registrar thereupon dismissed the assessment and actually made an order dated November 3, 2023, striking it out altogether with costs to the applicants.

On November 24, 2023 the applicants approached the court below with a **'motion for leave to appeal'**. It was brought under Order III, Rule 3 of the Supreme Court of Appeal Rules. The text of the motion spoke of *'an application for leave to appeal against the decision of the High Court ..... given on the 29th day of June 2022'*. Six grounds for the application were given. We do not want to list them now. Suffice it to say that they read like grounds of appeal as opposed to being the grounds for the application.

If only for the record Order III Rule 3 provides as follows:

> *'(1) where an appeal lies only by leave of the Court or of the Court below any application to the Court for such leave shall be made* ex parte *by notice of motion.*
>
> *(2) if leave to appeal is granted by the Court or by the Court below the appellant shall file a notice of appeal:*
>
> *Provided that nothing in this subrule shall be deemed to prohibit an appellant from filing a notice of appeal prior to the hearing of the application for leave to appeal.'*

The request was declined. Going by the Judge's notes on the face of the motion the refusal was in the following words:

'In terms of section 23(1)(b) of the Supreme Court of Appeal Act this process is coming way out of time. It is accordingly declined.'

Section 23(1)(b) provides:

*'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_*

(b) within six weeks of the judgment from which he wishes to appeal ...'

The applicants are here again. They are looking for the leave denied them in the court below. The application is supported by an affidavit sworn by the applicants' counsel and written arguments.

The application is opposed. The opposition is also buttressed by an affidavit sworn by the respondent's counsel and written arguments. The gravamen of this opposition is, *inter alia*, the contention that the judgment being appealed against is still, in the view of the respondent, inchoate.

We have looked at the arguments from our contestants. And the law. The question that immediately comes to our mind is *'exactly what are the applicants looking for?'* It might look like an easy question to answer at first sight. Except that when one talks about an application for leave to appeal it is section 21 of the Supreme Court of Appeal Act and not Order III Rule 3 that immediately comes to mind. That section talks of instances in which a litigant requires leave to appeal and not the manner in which leave should be sought.

The questions being:

i. Can the applicants appeal against the judgment of June 29, 2023 in view of the alleged inchoacy?

ii. Do the appellants need leave to appeal against the decision of June 29, 2022? and

iii. Looking at the court below's reference to section 23(1)(b) above-mentioned and the fact that the applicants are trying to appeal in November 2023 against

a judgment of June 2022 could it be that the application was for an extension of time within which to appeal and not leave to appeal as envisaged in section 21 of the Supreme Court of Appeal Act? In other words, could it be that the applicants have brought the wrong application before this court?

Whichever perspective one looks at this matter from the law is clear. One cannot appeal against an inchoate judgment. Further, the right to appeal in a judgment that was hitherto inchoate only concretizes when the judgment loses its inchoacy. When it has been determined to finality. Then and only then does the time within which to appeal start running. See **Toyota Mlw Ltd v Jacques Mariette** MSCA Civil Appeal Number 62 of 2012[unreported], **AON Malawi Ltd v Garry Tamani Makolo** MSCA Civil Appeal Number 16 of2016[unreported] and **Malawi Housing Corporation v John Suzi Banda** MSCA Civil Appeal Number 73 of 2018[unreported].

We do not want to, in any way, seem like we are interfering with the court below's freedom to further deal with this matter in any manner it deems fit. Or indeed predetermining any questions that might come to this court from those proceedings. We cannot however fail to notice that the combined effect of the Registrar's ruling and order of October 5, 2023 and November 3, 2023 respectively was to dispose of the assessment of lost profits outstanding from the judgment of June 29, 2022 to the extent that there was, from November 5, 2023, no proceedings outstanding in the said court in relation to the judgment of June 29, 2022. That judgment in our view thereupon ceased to be inchoate and became appealable.

We are aware that there is a contention from the respondent that the judgment of June 29, 2023 is still inchoate merely because there is an application in the court below to reinstate the dismissed assessment of damages. Nothing could be further from the truth in our view. Without in any way seeking to comment on the said application's merits we believe that there is no denying the fact that as of now there is before any court no unfinished business about the judgment of June 29, 2022. The application for restoration of notice of assessment is just that. An application to resurrect the inchoacy. It can succeed in the same way that it can fail. It does not however seem to us to be best practice or good case management to further delay these proceedings on

the basis of what might be instead of proceeding on what actually is. The appeal process in this court is undoubtedly sufficiently flexible to accommodate the resurrected assessment and its consequences if need be. To answer the question whether or not the judgment of June 29, 2022 is inchoate and therefore unappealable the answer is that the same is since November 5, 2023 no longer inchoate and is therefore appealable.

Coming to the second and third questions and looking at the law, the facts and the arguments before us it is obvious that leave to appeal was not necessary. Certainly not in terms of section 21 above-mentioned. Similarly unnecessary was an application to extend time within which to appeal which appears to have been a consequence of the applicants' misapprehension of the date on which the time within which to appeal started running in this case which cannot certainly be June 29, 2022.

The application for leave was therefore as unnecessary as it was misconceived. Both in this court and in the one below. It is dismissed with costs.

Just so that there are no strings left hanging we should also make mention of a contention from the respondent praying that we dismiss the application for not having proceeded on proper forms. The perennial form over substance debate in our view.

Going by the debate and conclusions above the contention and its consideration is strictly speaking, and with the greatest respect, otiose. But maybe only as *obiter* we will say that there will be instances where failure to use prescribed forms will result in the dismissal of an application. This, in our view, would clearly be no such case. We would not have, if called upon, have found it necessary to dismiss the application before us merely because the wrong forms were used.

Made this 8th day of October, 2024 at Blantyre

L P CHIKOPA SC, JA

DEPUTY CHIEF JUSTICE