IN THE MALAWI SUPREME COURT OF APPEAL
SITTING AT BLANTYRE
MSCA CIVIL APPLICATION NO. 19 OF 2025
(Being High Court Principal Registry Civil Application No. 40 of 2024)

BETWEEN:
JOHN KAZOMBO AND 45 OTHERS ..... APPLLICANTS
AND
SOUTHERN REGION WATERBOARD ..... RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA, SC, J.A.
K. M. Amuli, Counsel for the Applicants
I. Mndolo, Counsel for the Respondent
M. Mnthunzi, Recording Officer

RULING

On 15th May 2025 I heard an *inter partes* application taken out by the applicants for an order that they be paid the judgment amount of K27 803 425.10 being part of compensation awarded to them by the Industrial Relations Court (the IRC). The applicants cite Section 7 of the Supreme Court of Appeal Act as read with Order 1 rule 18 of the Supreme Court of Appeal Rules and the inherent jurisdiction of the Court as the legal authority for their taking out the application in this Court. Whilst the provisions of the Act and the Rules are clear in themselves the applicant's counsel did not address the Court on the authority of the inherent jurisdiction as far as the within application is concerned.

The application is purportedly taken out "pending the hearing and determination of the substantive matter of the appeal".

The application is supported by an affidavit sworn by counsel Amuli, representing the applicants, wherein he informs the Court that the applicants were employees of the respondent employed at various dates, some of whom served for more than 15 years and that sometime around November 2020 the applicants successfully sued the respondent in the IRC and were each awarded amounting to K2 000 000.00 as compensation for unfair labour practices. The IRC further ordered the Registrar to conduct assessment of compensation for unfair dismissal, pension benefits and partial payment of the November 2020 salary which was apparently assessed in the amount of K92 million. Thereafter the respondent applied for an order of stay of execution in the IRC which application was declined.

The respondent then made another application for stay in the High Court, Zomba Registry, which court granted the stay on condition that the respondent pays into court the amount of K46 million, which the respondent did. The court subsequently, made an order dated 9th January 2025, that the order suspending execution (granted without notice) be continued until hearing of the appeal lodged in that court, secured by the K46 million paid into court. The court further ordered that the matter in that court should be settled for appeal once the order for compensation was issued by the IRC. That has since taken place. The order is dated 7th January 2025. In that order the Assistant Registrar of the IRC determined that the respondent should pay the amount of K27 803 452.10 as compensation for unfair dismissal. Again the respondent applied for an order of stay which was declined, whereupon the applicants obtained a warrant of execution leading to the respondent paying that amount to the Sheriff. Once again the respondent made an application to the High Court for stay of execution of the K27 803 452.10 order. Following the recovery of the K27 803 452.10 the applicants prayed in the High Court that the K27 803 452.10 be released to them, in the discretion of the court, so that the applicants are not totally deprived of the fruits of their litigation, but the High Court declined to grant the prayer. It is on account of the said High Court refusal to order the release of the K27 803 452.10 that the applicants are before this Court so that this Court may relook at the application and order the release of the K27 803 452.10 as desired by the applicants. Curiously counsel has not, as opposed to all other instances in his affidavit, exhibited the order of the High Court declining as alleged. This is significant since, as will be noted from the affidavit in opposition to this application,

the respondent's counsel deposes that there never was such an application in the High Court. The issue will be addressed in due course.

The application is opposed. In that regard there is an affidavit sworn by counsel Mndolo on behalf of the respondent. The affidavit essentially confirms the chronology of events and factual position laid out in counsel Amuli's affidavit. Counsel Mndolo however submits that the application herein is incompetent because the jurisdiction of this Court is yet to be triggered as their no appeal in this Court against any decision of the High Court. She points out that as a matter of fact there is still a pending appeal before the High Court against the judgement of the IRC brought by the respondent, which is yet to be determined by the High Court. Counsel Mndolo, further still, points out that in fact the applicants have never brought any application of the present nature before the High Court, such that even if there was an appeal or contemplated appeal before this Court Order I rule 18 would not come into play.

Section 7 of the Supreme Court of Appeal Act provides 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—
>
> (a) ...
>
> (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)

Let me first dispose of the issue whether there was such an application before the High Court. As earlier alluded to counsel for the applicant has no exhibited to his affidavit a copy of the application or an order of the court below in that regard. He also did not bring the same to the attention of this Court at the hearing of this application. I have personally perused the file herein and have found no such

application. The only place where some such request was made in the court below is in an affidavit which was sworn by one Jimmy Masamba of Messrs Amuli & Co, dated 15th April 2025, in opposition to an application by the respondents in the court below, wherein after submitting that courts do not ordinarily deprive successful litigants of the fruits of their litigation he prays that there was no plausible explanation or reasons why the respondents (now applicants) should not paid the K27 803 452.10, which prayer the court did not grant. That such a submission was made does not, however, amount to an application under the rules of procedure applicable in the High Court. Order 10 of the Courts (High Court) (Civil Procedure) Rules is the applicable Order and, in my understanding of that Order, an argument or submission against another party's application is not in the contemplation of that Order as being itself an application. This, in my view, is notwithstanding the provisions of rule 2(2) of that Order, which permits the making of oral applications. The statement referred to herein was a submission regarding the legal position and no more. In my view, whether or not such applications be written or oral, they have to be formally made. I find therefore that the present application was not first brought in the court below as would be required under the Order I rule 18.

It is also to be observed, as was submitted by counsel for the respondent, that the application that was before the court below is not the same that is now before this Court. The application that was before the court below was taken by the respondent, and it was for an order for a stay of execution of the judgment of the IRC pending appeal in the High Court. On the other hand the application before this Court is for an order for payment of part of the judgment sum. The two are obviously different and, consequently, it cannot be correctly stated that the application which was refused in the court below is the selfsame one now taken in this Court and therefore within the purview of Order I rule 18 of the Supreme Court of the Appeal Rules.

The third and last point that must be made in this application is that the concurrent jurisdiction as between this Court and the High Court, arising under Order I rule 18 of the Supreme Court of Appeal Rules, presupposes that an appeal will have been lodged or pending in this Court. Counsel for the applicants takes the position that this is not a requirement and cites the case of *Fumu Mdolo v Boniface Mdolo and Muzipasi Mdolo* MSCA Civil Appeal No. 44 of 2016 in which learned Chipeta JA,

in considering whether an application that was refused in the High Court could be reheard in this Court without leave, stated as follows:

> … an application for stay in this Court, once a like application has been refused by the High Court, does not come by way of an appeal. Instead it comes as an application for a rehearing of the refused application in this higher Court. Indeed by paragraph 3 of his affidavit in support, the Applicant made it clear he was approaching this Court with a 're-application' following the High Court's denial of relief when he applied there first.

The *Mdolo* case must, however, be distinguished from the present on account of the fact that unlike in the present the *Mdolo* case was already on appeal in this Court. This Court had therefore assumed jurisdiction by reason of that fact, that an appeal had already been entered in this Court. The present case, on the contrary is in fact on appeal in the High Court and far from being on appeal in this Court, if ever it will. What is before this Court, in the present case, is a Miscellaneous Civil Application. So was it in the case of *Ted Sparks Jumbe v Christopher Kasema and the Attorney General* MSCA Miscellaneous Civil Application No. 46 of 2023, cited by counsel for the respondent. In that case learned Kapanda JA had the following to say as to the position at law in circumstances such as are obtaining in the present case:

> First, the application is improperly before this Court because matters typically come to this particular court through the avenue of appeal. As earlier noted, this Court is an appellate court. Thus, its primary function is to hear appeals or matters related to appeals. Secondly, there is no pending appeal before this Court, as was rightly put in ***Dalitso General Dealers Ltd v Mybucks Banking Corporation Ltd*** … in the normal course, matters are brought before this Court either as part of an ongoing appeal or in anticipation of an appeal. In the case before this Court there is no pending appeal. The applicant is seeking relief, but the matter is still pending before the Court below, and there is no existing appeal related to it before this Court. Further, it is well to note that the matter is still before the Court below, and there is no appeal related to it in this Court. Therefore, the Applicant is improperly before this Court, as there is no proper basis for the matter to be entertained at this stage.

The present matter is on all fours with that in *Ted Sparks Jumbe v Christopher Kasema and the Attorney General* and, therefore the outcome must be the same, i.e. that the present application is improperly before this Court and should not be sustained.

For the foregoing reasons the application is dismissed with costs.

Made in chambers at Blantyre this 2nd day of June 2025.

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HON. JUSTICE R. MBVUNDULA, SC, J.A.