IN THE MALAWI SUPREME COURT OF APPEAL
PRINCIPAL REGISTRY

MSCA CIVIL APPEAL NO. 59 OF 2024
(Being High Court Commercial Division Lilongwe Registry Commercial Cause No 191 of 2019)

BETWEEN
SADM PHARMACEUTICAL CO. LTD ..... APPELLANT

AND
CENTURY PHARMACEUTICAL CO. LTD ..... RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA, S.C., J.A.
Chisale, Counsel for the Appellant
Kadzakumanja, Counsel for the Respondent
Mnthunzi, Recording Officer

RULING

Mbvundula, S.C., JA:

There is before this Court an *inter partes* application brought by the appellant for an order of stay of execution of an order of the High Court, Commercial Division, at Lilongwe, ("the High Court" or "the court below") dated 16th October 2024, pending the determination of the appellant's appeal, "on the grounds that on the facts and the unique circumstances [of this case] the balance of justice weighs in favour of such stay pending appeal". The appeal is against the refusal by the court below to adjourn a hearing on the grounds on the ground that there was no justifiable cause for adjourning. The application for stay was first brought in the High Court which refused to grant it on the grounds, firstly, that it considered the appeal to be

speculative, secondly that there was no leave to appeal, no notice of appeal and no grounds of appeal. This was on 8th November 2024. An order for leave was, however, subsequently granted on 11th November 2024.

The order sought to be stayed is a Final Charging Order against the appellant's property Title Number Alimaunde 29/188 with regards to sums of money owed by the appellant to the respondent, namely:

i) the sum of US$ 859 065 being balance on principal;
ii) interest thereon not yet assessed but estimated at K2 001 873 912.15 at a flat rate of 19% per annum for 7 years;
iii) any further interest becoming due;
iv) party and party costs not yet assessed, to be added to the judgment debt.

The appellant does not dispute owing the principal sum contained in the order, but raises other issues to be alluded to hereinafter.

The application is supported by two affidavits sworn by David Bisnowaty and Michael Stenala Chisale, counsel for the appellant.

The application is brought pursuant to the provisions of section 7 (b) and 8 (b) of the Supreme Court of Appeal Act as read with Order I rule 18 of the Supreme Court of Appeal Rules and Part 3 rule 3.1(f) of the Civil Procedure Rules in England. The relevant part of section 7 of the 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:
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> Provided that—
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> ...
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> (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.

Section 8 provides as follows, in so far as is presently relevant:

> The practice and procedure of the Court shall be in accordance with this Act and any rules of court made thereunder:

Provided that if this Act or any rules of court made thereunder does not make provision for any particular point of practice and procedure then the practice and procedure of the Court shall be—

(b) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed by the Court of Appeal in England.

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.

Although the appellant cited Part 3 rule 3.1(f) of the Civil Procedure Rules in England) as being relevant there was no further reference to the same in their legal arguments.

The Final Charging Order was made following a judgment in default entered against the appellant for failing to enter an appearance, as well as subsequent procedural requirements being flouted by the respondent.

It may be relevant to mention, at this point, that the appellant had filed an application to set aside the default judgment but, according to what is referred to as an "interim consent order" dated 24th July, 2019, entered at the instance of the appellant, the appellant agreed to make payments as follows:

1. USD 20 000.00 for the months of July and August 2019;
2. USD 25 000.00 for the months of September and October 2019;
3. USD 30 000.00 for the months of November and December 2019;
4. USD 40 000.00 from January 2020 until the debt is fully paid.

In paragraph 8 of the consent order it was agreed that:

8. **THAT** in the event of default on the part of the Defendants to effect any of the installments herein by the 7th day of any installment being due and payable, the Claimants will be at liberty to enforce payment of the whole balance due by any lawful means.

Mr David Bisnowaty informs this Court through his affidavit in support of the present application that he is the Chairman of the appellant company, and that the

appellants' legal practitioners were Messrs Lexon and Lords. He further states that instead of effecting service of Messrs Lexon and Lords, the respondents served an Interim Charging Order directly on the appellants on account of the fact that their said legal practitioners were not in a position to accept service. Regarding this, in the affidavit in opposition by Counsel Kadzakumanja, for the respondent, it is averred that when they attempted to affect service they found the appellant's legal practitioners' premises closed and when he spoke with Counsel Theu of Lexon and Lords, Counsel Theu informed him that he was no longer in active practice, so the only option remaining was to serve the appellants directly. Resultantly Counsel Kadzakumanja did send copies of the court process to one Jonathan Bisnowaty, who is said to be the deponent's son.

Mr David Bisnowaty lays blame on Messrs Lexon and Lords for failure to properly represent the applicant's interests in the court below, leading to the order now sought to be set aside. He further states that he was unable to consult Mr Theu until a few days before 16th October, 2024, the day on which the court was to be moved to enter the Final Charging Order. He was however able to retain new counsel whom he instructed to seek an adjournment to allow the new counsel to take up instructions from him on behalf of the appellant.

Mr Bisnowaty further blames the respondent's lawyers for having served some documents through his son's WhatsApp although, according to him, his said son holds no position in the appellant company. It would appear that the point he seeks to make here is that there was ineffective service. This point is made in paragraph 18 of his affidavit. However, earlier on in paragraph 15, he states that because their lawyers were not available to accept service the Interim Charging Order was served directly "on us". This Court understand the words "on us" in that statement as acknowledging effective service on the appellant of the Interim Charging Order and the notice of hearing of the application for the Final Charging Order, scheduled for 16th October, 2024. He is in fact on record as having stated that he himself became aware of the interim order prior to its being rendered final, albeit shortly before. That is why he instructed counsel to seek an adjournment.

Concerning the appellant's lawyers' alleged mishandling of the appellant's case, all this Court will say is that, even if the allegation was true, the respondent's rights must not be prejudiced thereby.

Mr Bisnowaty informs the Court that during the critical stages of the proceedings in the court below, in particular from mid-2023, he was stationed in Israel where he had been assigned to establish the Malawi Government's diplomatic mission to

Israel, and as such he was not able to effectively attend to the matter in the court below. He also claims that he was the only person who had custody of documents relevant to the case, hence the appellant's application for an adjournment afore-stated. This Court considers this excuse as untruthful as it is absurd considering that the appellant is a Malawian registered limited company whose records should ordinarily be at its at its registered office here in Malawi and not on the person of its board chairperson abroad. It is commonplace knowledge that such entities do no operate through just one person.

Mr Bisnowaty informs this Court that the action in the court below arose as result of the appellant's default in paying for pharmaceutical raw materials supplied by the respondent to the appellant for the production of various medicines which the appellant was to produce at the instance of the Malawi Government for supply to the Central Medical Stores Trust, a public trust enjoined with the duty of supplying and delivering drugs to all Malawi Government health establishments. He goes on to state that "the delay or non-payment" of debt is on account of non-payment of the applicant's invoices issued to the Malawi Government, in a totally different transaction, in which the appellant was ordered by this Court to refund sums amounting to about 7 billion Kwacha which the High Court had awarded the appellant.

It is Mr Bisnowaty's expressed belief, per paragraphs 22 and 23 of his affidavit, that it would be unjust and contrary to the interests of justice to deny the appellant the order of stay of the Final Charging Order when the default was on the part of the appellant's legal practitioners in failing to properly represent the appellant. Such, he argues, would amount to punishing the appellant for the sins of their legal practitioners and amounting to denial of access to justice and "the right to fair by an innocent litigant" (sic). This point has already been addressed. He is also of the view that the balance of convenience lies in favour of granting the order of stay or suspension of the Final Charging Order since interest has only been estimated and not yet been assessed, and similarly that costs have not yet been ascertained. He also laments that the respondent has taken steps to enforce the order by having the property valued and advertised together with plant and equipment on the premises, which Counsel Kadzakumanja disputes whilst pointing out that no evidence produced to that effect.

What appears material from the affidavit sworn by Counsel Michael Stenala Chisale are the following:

1. That the appellants made two applications for stay twice in the court below. On the first occasion the court declined to grant the application on the basis

((i) that it considered the appeal to be speculative, (ii) that there was no application for leave to appeal and grounds of appeal on the court file. The second one was declined on the ground that since the court had earlier considered and declined the self-same application the court considered itself to have become *functus officio*.

2. The appeal referred to is intended to move this Court to find that (i) the court's refusal to allow an adjournment of the application for the Final Charging Order was wrong, (ii) that the court erred in entering the Final Charging Order without affording the appellant an opportunity to be heard, the relief sought being one reversing the decision and ordering that the appellant be heard with regard to the Final Charging Order application.
3. That the appellant has a good and arguable appeal which has significant chances of success as is apparent in the notice and grounds of appeal and that if the application herein is not granted the appeal will be rendered an academic exercise as it is not known whether the respondent will be able to repay the money to be realized out of the Final Charging Order whose net effect is to dispose of the property.
4. That even if the respondent would be in a position to repay the money realized, the appellant would have lost an invaluable asset, plant and machinery of national strategic essential "commodity" (sic) considering that the plant produces medicines which are supplied to the Malawi nation "as it would be difficult if not important to acquire the same asset considering the prevailing economic environment characterized by hyperinflation that Malawi is currently experiencing". (sic)
5. That an order staying the execution or enforcement of the charging order would be in the interest of justice.

In opposition to the application is an affidavit sworn by Henry George Kadzakumanja, Counsel for the respondent. He begins by laying the background facts to the dispute leading up to the point where the Final Charging Order was issued. He points out that the Interim Charging Order was in fact served on Regional Commissioner for Lands, the Land Registrar, and the appellant's Legal Practitioners, Messrs Lexon and Lords. This is evidenced by Exhibit "HGK 8" to the affidavit, which, he states, was sought to be personally served on Messrs Lexon and Lords, but the service could not be effected because their premises were found closed. That is when Mr Kadzakumanja contacted Mr Theu who informed him that he was no longer in active practice, after which he started to deal with Messrs David and Jonathan Bisnowaty directly. He has exhibited to the affidavit documentation between Counsel Kadzakumanja and Jonathan Bisnowaty with respect to the subject matter, also being evidence that the appellants had six months prior notice of the

impending hearing of the application for the Interim Charging Order (now made final), which the appellant failed to attend to. Counsel Kadzakumanja also states that when he noticed that the appellants were taking no action with respect to the application for the Interim Charging Order he in fact reminded them of the same and advised them to appoint new counsel who filed a notice of appointment only two days before the hearing of the said application.

According to Counsel's affidavit, when the application was called for hearing the appellant then sought an adjournment to which he objected on the ground that the appellant had had sufficient time to prepare, so there were no good grounds for an adjournment to be granted, and the judge in the court below agreed. This then lead to the Final Charging Order being obtained.

According to paragraph 19 of Mr Bisnowaty's affidavit his legal practitioners prayed for an adjournment to afford him time to travel from Israel to Malawi as there were several issues he would have wanted to bring to the attention of the court below being that the properties subjected to the charging order were encumbered elsewhere, that interest had yet to be assessed as had been agreed by the parties. In response counsel Kadzakumanja opines that the issue of encumbrances lacks merit since no statement of account has been provided considering, in particular that the same date back to 2009, a period of more than 15 years, nor has the value of the property been made available to demonstrate that it cannot support subsequent encumbrances. In any event, so he argues, notwithstanding the pending interest assessment the principal sum, which is not in dispute, ought to be settled. It is Counsel's view that it would not be in the interest of justice to grant the order suspending the enforcement of the Final Charging Order without provision of any alternative as to how the principal will be settled.

Counsel is also of the view that the chances of the appeal herein succeeding are very slim, if at all, considering that the judge in the court below was justified in refusing the prayer for adjournment in the circumstances of the case.

The broad issue for determination in the present application is whether or not the circumstances of this case merit the granting of stay of the execution of the Final Charging Order granted in the court below.

I must begin by making it clear that the appeal being referred to herein is not against the decision granting the Final Charging Order but the decision by the court below

to decline to grant an adjournment of the application that sought the granting of the said Final Charging Order. I make this clarification because at times the appellant has purported to argue the merits or demerits of the decision to grant the Final Charging Order. I would have expected the appellant to address this Court on whether or not the court below was justified in refusing to allow the adjourn because that is the only matter counsel who appeared on behalf of the appellant addressed the court below on, and which the court refused to allow. Having disallowed the adjournment the court proceeded to lawfully grant the Final Charging Order as the rules permit, and that process is not being challenged in this application. Clearly what is being sought herein is a stay of the execution of the Final Charging Order, which order was granted following the refusal to allow the adjournment. This is all too clear from the appellant's statement in paragraph 24 of the affidavit in support that:

> 24. That in these circumstances, the Appellant makes an application for the suspension of enforcement of the said final charging [order] to preserve the status quo and its interests pending the hearing and determination of appeal against the Court below decision to exercise its discretion judiciously by allowing the prayer for adjournment. (sic)

It is also clear from the affidavit in support that the granting of the Final Charging Order is not being faulted. It is only its execution that is sought to be stayed.

This position is further made clearer by the grounds of appeal, which are as follows:

> 3. Grounds of Appeal:
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> 3.1 The Court below erred in law in allowing the application to make an interim charging order without according the Appellant the right and an opportunity to be heard thereon, when the Court declined to grant a request for adjournment of the proceedings before it by the appellant.
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> 3.2 The Court below erred in law and in fact and contravened the active case management principle in failing to put the parties before it at on an equal footing in that having decided to determine the parties final rights after turning down the request for adjournment the Court was obliged and failed to have regard to the Appellant's circumstances and reasons advanced thereon for the request for the adjournment of the proceedings before the Court below.

3.3 The Court below exercised its discretion with respect to the request for adjournment in disregard of principles regarding adjournments and therefore committed an error of fact and law in the circumstances before the Court.

3.4 The decision of the Court below is against the weight of the evidence adduced for and against the proceedings with the hearing and determination of the Charging Proceedings before it.

Further still, Counsel Chisale, for the appellant, expressly stated in his affidavitthat the appeal is intended to move this Court to find that the refusal by the court below to allow the adjournment of the application to enter the Final Charging Order was wrong.

This then brings us to the question whether there are sufficient grounds justifying the granting of an order for stay under the circumstances of this case.

The principles applicable are as follows:

1. An appeal does not act as a stay and a court would be reluctant to deprive a successful litigant of the fruits of his litigation and locking up funds to which it is *prima facie* entitled to, pending an appeal.

2. Where the unsuccessful party exercised its unrestricted right of appeal, the court must allow the stay of proceedings if the appeal, if successful, would otherwise be rendered nugatory.

3. Chances of a successful appeal are not a ground for ordering a stay. However a stay will normally be granted only where the applicant satisfies the court with evidence showing that if the judgment money is paid there will be no reasonable prospect of recovering it in the event of the appeal succeeding. This, however is not a closed rule for the court must consider all factors including whether there are special circumstances which militate in favour of granting the order of stay and the onus will be on the applicant to prove or show such special circumstances.

4. The mere fact that the respondent would not be able to pay back the money does not in all cases operate as a stay of execution. It is open to

the court to refuse a stay if on the facts of the particular case it would be 'utterly unjust' or 'unconscionable' or 'inexpedient' not to do so.

Some case authorities for the foregoing principles are the following: *The Ann Lyle* (1886) 11 PD 114. *Wilson v Church (No 2)* (1879) 12 Ch D 454; *Dangwe and another v Banda* [1993] 16(2) MLR 509 (SCA); *Nyasulu v Malawi Railways Ltd* MSCA Civil Appeal No. 4 of 1993 (unreported); *Stambuli v ADMARC* Civil Cause No. 550 of 1991 (unreported); Atkins v GW Railway (1886) 2 TLR 400; *Thomson v CGU Insurance Ltd* [2008] MLR 402 (SCA); *AR Osman and Co v Nyirenda* [1995] 1 MLR 13; *City of Blantyre v Manda and Others*, Civil Cause No. 1131 of 1990 (unreported).

Counsel Chisale, it will be recalled, stated in his affidavit in support, *inter alia*, that the appeal is intended to move this Court to find that the refusal by the court below to allow the adjournment of the application to enter the Final Charging Order was wrong. This Court does not agree with that assertion. First it must be appreciated that the decision to allow or not an adjournment is in the judicious discretion of the court. This simply means that the court must exercise its discretion upon good and sensible judgment on the facts and circumstances present. It has been clearly demonstrated that the appellants were informed of the pending application for the Interim Charging Order (now made final) to be entered at least six months before the date of the hearing and that counsel for the respondent went out of his way to remind the appellant of the fact, yet the appellants only took no meaningful steps. Then he also advised them when it was learnt that Counsel Theu was no longer in a position to represent them, to appoint another legal practitioner yet for six months they again took no meaningful steps, only to act just two days prior to the hearing of the application. Whilst not losing sight of the fact that the appellant seeks to appeal against the very decision disallowing the refusal to adjourn, on my part, I hold the view that considering all the circumstances leading to the said refusal, and in particular the conduct of the appellant, the court's exercise of its discretion is without blemish.

Counsel Chisale, by extension to the above argument, takes the position that the court below erred in entering the Final Charging Order without affording the appellant an opportunity to be heard, the relief sought in this regard being a reversal the decision and ordering that the appellant be heard with regard to the Final

Charging Order application. As already alluded to, it being the laxity and inertia of the appellant in its conduct of the proceedings in the court below it can only be the appellant who must bear the blame. The court never closed the door before the appellant. To the contrary the appellant slept on its rights.

Counsel Chisale also argued that the appellant has a good and arguable appeal which has significant chances of success as is apparent in the notice and grounds of appeal and that if the application herein is not granted the appeal will be rendered an academic exercise as it is not known whether the respondent will be able to repay the money to be realized out of the Final Charging Order whose net effect is to dispose of the property. In this regard the principle that an appeal does no act as a stay and that a court must be reluctant to deprive a successful litigant of the fruits of his litigation must be reiterated. More importantly must the principle that the mere fact that the respondent would not be able to pay back the money does not in all cases operate as a stay of execution. Besides the onus lies on the appellant to demonstrate that the successful litigant will be in no position to pay back should the appeal succeed. This the appellant has not happened. Counsel went further to suggest that even if the respondent would be in a position to repay the money realized, the appellant would have lost an invaluable asset, considering that it is employed for a valuable venture, namely production of medicines for government health facilities. I take the view that this cannot lie in the mouth of the appellant. If the appellant considered the asset as being so valuable and important it would have ensured that it honoured its legal obligations in full letter and spirit.

It will be recalled, further, that the consent order entered between the parties on 24th July 2019, (at the behest of the appellant for that matter), and under which the parties agreed that the appellant would make payments as from July 2019 and make full settlement by January 2020, and further that in the event of any seven day default by the appellant the respondent would be entitled to enforce payment of the whole debt balance by any lawful means. The evidence before the court below as well as in this Court is that the appellant has completely defaulted on its obligations under the said consent order hence the respondent is entitled to recover the debt. Granted the appellant's total disregard to honour such arrangements, entered voluntarily, and indeed at its behest, it is not in the interest of justice to grant a stay or suspension of the Final Charging Order herein.

Finally, the appellant also advances the argument that the other reason why the stay must be granted is that interest and costs are yet to be determined, and that the formula applied by the respondent is not correct. It is an idle argument. Those are issues to be raised at taxation and assessment proceedings, respectively. They cannot affect the appellant's liability for the principal debt.

The application is entirely without merit and is hereby dismissed with costs.

Made in chambers at Blantyre this 8th day of May 2025.

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R. MBVUNDULA, S.C.
JUSTICE OF APPEAL.