



REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MISC. CIVIL APPLICATION NUMBER 62 OF 2024

*(Being High Court, Commercial Division, Lilongwe Registry, Commercial Cause No
259 of 2019)*

BETWEEN:

TOTAL MALAWI LIMITED.....APPELLANT

AND

PRIMA FUELS LIMITED.....1ST RESPONDENT

**THE ATTORNEY GENERAL (MINISTER OF
FINANCE AND ECONOMIC AFFAIRS).....2ND RESPONDENT**

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE SC, JA

Msiska SC/Chalamanda, Counsel for the Appellant

Phiri (Ms)/ Kita, Counsel for the 1st Respondent

Attorney General(Thabo Nyirenda), for 2nd Respondent

C. Masiyano, Recording Officer

RULING

1. This is an application brought by the 1st Respondent (Applicant) dated 3rd of December 2024. The Applicant filed an application to vacate the order of stay of proceedings. The application is made under section 7 of the Supreme Court of Appeal Act as read with Order 1, Rule 18 of the Supreme Court of Appeal Rules and part 23.3 of the Civil Procedure Rules, 1998 and under the inherent jurisdiction of the Court. In its application, the Applicant relied on the

affidavit made by Mr Wapona Kita. There were also filed skeleton arguments in support of the same. The Appellant opposed the application.

2. This matter came for hearing on 24th of February 2025. On this day, both parties addressed me at some considerable length. I thereafter reserved my ruling hence this delivery today.

3. On the 5th of November 2024, the Court below set aside an order for stay of proceedings pending arbitration on account of the arbitration proceedings having been terminated and the Arbitration Agreement providing that in such circumstances, either party was at liberty to refer the matter back to the High Court for trial. A copy of the ruling is tendered as exhibit WK1.

4. The Appellant was dissatisfied with the ruling and filed an appeal. The Notice of Appeal is exhibit WK2. The Appellant filed an application in the Court below for leave to appeal and also applied for a stay of the proceedings pending the determination of the appeal.

5. The application was vehemently opposed on the ground that it was an inchoate appeal.

6. On 26th November 2024, the Court below granted both orders. The ruling is tendered as exhibit WK3.

7. In its application, the 1st Respondent (Applicant) does maintain the position that the Appellant's right of appeal has not yet crystallized as the Court below is yet to fully determine the matter before it and that the ruling of 5th November 2024 was an interlocutory ruling that did not determine the matter before the Court below.

8. The 1st Respondent therefore says that there can be no stay of proceedings since for the appeal to be had, the matter must be allowed to go for full trial to judgment. Only if the Appellant loses the case will its right of appeal be triggered.

9. The 1st Respondent therefore prays to the Court to vacate the order of stay of proceedings granted by the Court below on 26th of November 2024.

10. The Appellant first questioned the foundation of the 1st Respondent's application under the Civil Procedure Rules. The Appellant submitted that on the concurrent jurisdiction, the application sought to overturn a ruling without a valid appeal and also highlighted the importance of determining the current forum of the dispute. The Appellant further highlighted that the argument put by the 1st Respondent is incorrect as the Appellant is not appealing an inchoate ruling.

11. The set aside ruling while not a final judgment on the merits of the Respondent's claims against the Appellant, is a final and enforceable judgment that completely and finally disposes of the dispute between the parties as to the proper forum for the Respondent's claims.

12. That the Court's jurisprudence on inchoate decisions, must be understood in context. That the Court was not invalidating section 21 of the Supreme Court of Appeal Act. Whilst the Supreme Court has discouraged appeals of inchoate judgment, it has not invalidated section 21 of the Act and has cautioned parties to understand its jurisprudence on inchoate decisions in context.

13. The Appellant respectfully requests the Court to dismiss the application in any event.

14. This matter is brought under section 7 of the Supreme Court of Appeal Act as read with Order 1, Rule 18 of the Supreme Court of Appeal Rules. Section 7 of the said Act provides as follows:

"A single Member of the Court may exercise any power vested in the Court not the hearing or determination of an appeal".

This section is therefore general in nature

15. Order 1 Rule 18 provides:

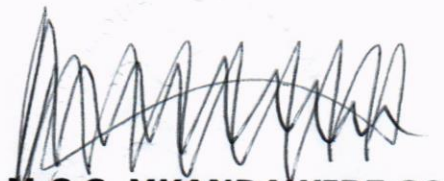
"Whenever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the Applicant shall be entitled to have the application determined by the Court.

16. Order 1 Rule 18 is crystal clear. It directs the parties in very certain terms that do not come with your application to the Court unless it has been refused in the Court below. This Rule of procedure is mandatory and there was a reason for that. One of the reasons I think is to avoid the Apex Court to be congested with multiple applications such as the one at hand.

17. The Respondent should therefore have brought its application first before the Court below. Only after the Court below had refused the application, that is when the Court should have been seized with the matter.

18. I therefore dismiss this application with costs to the Appellant.

Made in Chambers at Blantyre this 13th day of March 2025



M.C.C. MKANDAWIRE SC

JUSTICE OF APPEAL