IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NUMBER 40 OF 2019

(Being Personal Injury Cause Number 848 of 2013 – High Court of Malawi, Zomba Registry)

Between

ELIDA LIPHAVA .....1ST APPELLANT

LYSON CHIPEMBERE .....2ND APPELLANT

MARKO THOM .....3RD APPELLANT

And

MICHAEL MBAULA.....1ST RESPONDENT

PRIME INSURANCE COMPANY LIMITED.....2ND RESPONDENT

CORAM: HON. JUSTICE R.R. MZIKAMANDA SC, JA
HON. JUSTICE L.P. CHIKOPA SC, JA
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI JA
HON. JUSTICE J. KATSALA JA
HON. JUSTICE I.C. KAMANGA JA
HON. JUSTICE M.C.C. MKANDAWIRE JA
H. Mwangomba, of counsel for the Appellants
I. Kumpita, of counsel for the Respondents
Mrs Chintande/ Minikwa, Court Clerks
Mrs Msimuko, Court Reporter

JUDGMENT

Mzikamanda S.C., JA,
My Lords and My Lady, I have read the opinion of Justice Katsala, JA and I agree with it entirely. For the reasons he gives I would dismiss the appeal.

Chikopa S.C., JA,
My Lords and My Lady, I have had the advantage of reading in advance the opinion of Justice Katsala, JA. I agree with it, and for the reasons he gives I would dismiss the appeal.

Kapanda S.C., JA,
My Lords and My Lady, I too have read in advance the opinion of my learned friend Justice Katsala, JA. I agree with it, and for the reasons he gives I would dismiss the appeal.

Potani JA,
My Lords and My Lady, I have also read in draft the opinion of Justice Katsala, JA. I agree with it, and for the reasons he gives I would dismiss the appeal.

Katsala JA,
My Lords and My Lady,

In this appeal the appellants seek the reversal of the decision of the Assistant Registrar made on 27 September 2018 ordering a permanent stay of the execution of an order of damages made in the appellants' favour. At the hearing of the appeal, it became necessary for the Court to determine, as a preliminary point, whether the appeal was competently before the Court. This judgment relates to that preliminary issue.

The brief background to the appeal is as follows. On 29 November 2013 the appellants commenced an action against the respondents claiming damages for personal injuries sustained on 19 September 2013 in a road traffic accident involving a Toyota Hiace minibus driven by the first respondent and insured by the second respondent. It was alleged that the accident was caused by the first respondent's negligent driving as a result of which the minibus overturned and appellants sustained injuries. The respondents filed and served a defence to the claim in which, inter alia, they denied the alleged negligence and pleaded contributory negligence on the part of the appellants. Further, the second respondent averred that its

liability, if any, was limited to indemnifying the first respondent only to the extent of the amount agreed upon in the policy of insurance covering the minibus.

After several adjournments, the matter came up for trial before Honourable Justice Ntaba on 7 November 2017. However, despite being duly served with the notice for the trial, the respondents did not appear and on the appellants' application, the judge proceeded to strike out the respondents' defence and to enter judgment in favour of the appellants for damages to be assessed.

The matter was set down for assessment of damages on 20 November 2017. However, the respondents did not attend despite being aware of the appointment. The Assistant Registrar proceeded to hear evidence from the appellants and delivered his ruling on 8 January 2018 by which he awarded the appellants the sums of K1.5 million, K1.8 million and K2.2 million, respectively, as damages. Subsequent thereto, the appellants made several attempts to enforce payment of the sums and costs of the action through garnishee orders and other judgment enforcement processes but to no avail.

On 24 July 2018, more than six months from the date of the award, the second respondent took out an application before the Assistant Registrar for an order permanently suspending the execution of the order of damages on the ground that the 2nd respondent was no longer liable to make any further payments in respect of the accident because its limit of liability under the policy of insurance covering the minibus had been exhausted. It was contended that the second respondent's limit of liability under the insurance policy was K5 million which had already been paid out to other claimants from the same accident by the time the order of damages was made. And in terms of section 148(1) of the Road Traffic Act the second respondent was not obliged to make payments over and above the K5 million limit to third parties claiming directly from it. The second respondent produced in evidence a facing sheet which allegedly detailed the payments it had made under the insurance policy in respect of the accident.

The appellants opposed the application arguing that to grant the order sought would in essence be tantamount to availing the respondents a defence which the respondents never pleaded in their defence. Further, the Honourable Judge having struck out the respondents' defence and entered judgment for damages to be assessed, the defence could not be restored at this stage. Also, at no point in the course of the action did the

respondents plead that the limit of liability had been exhausted as such they could not do so at execution stage.

After listening to arguments, the Assistant Registrar agreed with the second respondent's position and held that the limit of liability under section 148(1) of the Road Traffic Act is a statutory limit as such a party need not plead it. In his view, what is incumbent upon an insurer when faced with claims for payment is simply to demonstrate whether the limit has been exhausted or not. And the second respondent having demonstrated that it had already paid the policy limit of K5 million to other claimants from the same accident, the court has no jurisdiction to force the second respondent, as an insurer, to make further payments beyond the limit. The Assistant Registrar then proceeded to grant the application and ordered a permanent stay of the execution of the order of damages against the second respondent.

It is against this order that the appellants have appealed to this Court.

The preliminary issue that needs to be resolved before we delve into the merits of the appeal is whether the appeal is competent bearing in mind that it is against an order of an Assistant Registrar made in chambers. In other words, can an appeal against the decision of the Registrar of the court below lie directly to this Court? If the answer is yes, is there need for leave to appeal to be obtained before the appeal could be filed?

We invited counsel to address us on the point.

It must be mentioned at this point that we only heard the appellants on this matter and were unable to hear the respondents because they had failed to comply with the protocols prescribed under the Practice Directions governing the practice and procedure in this Court.

Counsel for the appellants argued that under the Courts (High Court) (Civil Procedure) Rules (hereinafter "the CPR"), the rules currently governing the practice and procedure in the court below, there is no provision for appeals to a judge in chambers against decisions of the Registrar. This is unlike what prevailed under the Rules of the Supreme Court, 1965, the CPR's predecessor. In the absence of such provision, it follows that an appeal against a decision of the Registrar can only lie to this Court. The scenario under Order 25, rule 2 of the CPR is not an appeal process. It caters for cases where the Registrar feels that she is not competent enough to handle a matter or issue then she can refer that issue or matter to a judge for determination. The present case is different because the Assistant Registrar proceeded to handle the matter and determined it. Consequently, an appeal against that decision can only lie to this Court though the scheme under

section 21 of the Supreme Court of Appeal Act is that appeals to this Court are against decisions of the High Court or a judge.

Further, he argued that in any case there is case law to the effect that an appeal against an order of assessment of damages by the Registrar of the court below lies directly to this Court. And in the present case, the order of permanent stay of execution being appealed against emanated from the order of damages made by the Assistant Registrar as such it follows that an appeal should lie directly to this Court.

On whether there was need to apply for leave to appeal counsel argued that section 21 of the Supreme Court of Appeal Act does not apply to the present appeal. A reading of the section shows that it does not include the Registrar. The section only talks of a judge which is a different office from that of Registrar. Had it been the intention of the lawmakers to include the Registrar, the section would have specifically said so.

My Lords and My Lady, I have considered in depth the issues at hand and conclude that the present case is different from those relied upon by the appellants in bringing their appeal direct to this Court. I find that when a judge determines the issue of liability in a matter and orders that the damages should be assessed by the Registrar, the Registrar conducts the assessment on behalf of the judge. Initially, it should be the judge himself/herself assessing the damages but in his/her discretion decides to delegate the task to the Registrar. And it makes perfect sense that when the Registrar carries out the assessment, in essence, it is the judge or his/her court which makes the assessment. The Registrar determines the figures which are necessary in order to make the judgment delivered by the judge complete. Thus, the assessment is part and parcel of the judgment of the court (as made by the judge). Consequently, an appeal against the order of assessment cannot lie to the judge or another judge of the High Court. If it were to so lie, it would in effect mean that the judge is sitting on an appeal against his own judgment or to put it differently, the High Court is sitting on an appeal against its own decision. This, as we all know, is untenable.

Needless to say, that this issue has sufficiently been discussed by this Court before where it has held that a judgment on liability only pending assessment of damages is inchoate. It becomes complete once the order of damages is made. See *Malawi Housing Corporation v J Suzi Banda* 73 of 2018 (unreported), *Toyota Malawi Limited v J Mariette* MSCA Civil Appeal No. 62 of 2016 (unreported) and *Attorney General v Sunrise*

Pharmaceuticals Ltd and another MSCA Civil Appeal No. 11 of 2013 (unreported).

However, in the present case the scenario is that the judge entered judgment for the appellants and ordered that damages be assessed by the Registrar. The Assistant Registrar duly assessed the damages. This completed the judgment of the court in as far as the appellants' action was concerned. Thus, the second respondent's application for an order of permanent stay of execution was not part and parcel of the judgment of the court. In my view, it was a stand-alone application. The Assistant Registrar's decision on this application does not supplement the judgment of the court which was entered by the judge. Therefore, it cannot be said that it should be considered in the same way we consider an order on assessment of damages in relation to an appeal against it.

Section 21 of the Supreme Court of Appeal Act provides as follows: -

> "An appeal shall lie to the Court from any judgment of the High Court or any judge thereof in any civil cause or matter:
>
> Provided that no appeal shall lie where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—
>
> (a) an order allowing an extension of time for appealing from a judgment;
>
> (b) an order giving unconditional leave to defend an action;
>
> (c) a judgment which is stated by any written law to be final;
>
> (d) an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree:
>
> And provided further that no appeal shall lie without the leave of a member of the Court or of the High Court or of the judge who made or gave the judgment in question where the judgment (not being a judgment to which section 68 (1) of the Constitution applies) is—
>
> (a) a judgment given by the High Court in exercise of its appellate jurisdiction or on review;
>
> (b) an order of the High Court or any judge thereof made with the consent of the parties or an order as to costs only which by law is left to the discretion of the High Court;
>
> (c) an order made in chambers by a judge of the High Court;

(d) an interlocutory order or an interlocutory judgment made or given by a judge of the High Court, except in the following cases—

(i) where the liberty of the subject or the custody of infants is concerned;

(ii) where an injunction or the appointment of a receiver is granted or refused;

(iii) in the case of a decision determining the claim of any creditor or the liability of any contributor or the liability of any director, or other officer, under the Companies Act in respect of misfeasance or otherwise; Cap. 46:03

(iv) in the case of a decree nisi in a matrimonial cause;

(v) in the case of an order on a special case stated under any law relating to arbitration;

(e) an order refusing unconditional leave to defend or granting such leave conditionally."

In my view what comes out clear from this section is that there is no room for appeals against decisions of the Registrar coming directly to this Court. The section repeatedly talks of a judge, which, clearly excludes the Registrar. As counsel for the appellants conceded in argument, if it were the intention of the lawmakers to allow appeals against the decisions of the Registrar of the court below to come directly to this Court, this section would have expressly stated so. That is a correct view of the law as it stands now. Therefore, it is obvious that the present appeal is caught by this section.

My Lords and My Lady, I now turn to Order 25 of the CPR. What is its practicability?

My research on the issue has not been very fruitful. The only case I have found on this Order is the High Court decision in *Urban Mkandawire v Council for the University of Malawi* Civil Appeal No. 24 of 2007 (unreported) where Chirwa J discussed the propriety of an appeal against the decision of the Registrar to a judge in chambers.

The brief facts of the case are that following a judgment of the High Court (Nyirenda K., J) awarding the appellant two months' salary and two months' professional allowance as damages for wrongful termination of his employment, the appellant took out assessment proceedings before the Assistant Registrar. Whilst waiting for the return date, the parties executed a consent order for the payment of K8 million as damages due to the appellant under the judgment. However, on the return date of the

assessment proceeding, the respondent objected to the proceeding on the ground that the consent order was subsisting and that there were no damages to be assessed. After hearing arguments, the Assistant Registrar sustained the objection. The appellant appealed to a judge in chambers. After analysing the provisions of Order 25, rule 2 of the CPR, and on the basis of the authorities presented to him, the learned Judge came to the conclusion that the appeal was properly before him because it was an appeal against a decision of the Assistant Registrar sustaining the objection. It would have been different if it were an appeal against an order of assessment of damages, which lies direct to the Supreme Court of Appeal.

With the greatest respect to the learned Judge, I hold a different view on the issue.

I have looked at the CPR and I have come to the conclusion that they do not provide for an appeal against a decision of the Registrar to a judge in chambers as was the case under the previous rules. This should not be surprising at all when you appreciate the new case management scheme introduced by the CPR. Under this scheme, there is what is known as "active case management" whereby the court takes an active role in the management of the case instead of leaving it to the parties as was the case under the old rules. Under the new regime, a matter is assigned to a judge at commencement. (See Order 5, rule 19 of CPR). The default position is that the judge will handle the matter to its conclusion including all applications on it unless the matter is transferred to another judge either upon termination of mediation or for some other reason. (Paragraph 2 of the Initial Direction (Form 3) also alludes to this). Hence, it is only logical and sound that Order 25 of the CPR is couched in the manner it is. The Registrar has jurisdiction to handle matters but subject to the direction of a judge – presumably, the judge who was assigned the case on commencement or later on in the course of the action.

The powers and functions of Registrars are expressly provided for under Order 25 of the CPR as follows: -

> "1. Subject to the direction of a Judge, the Registrar may exercise the jurisdiction, powers and functions of the Court to make, or refuse to make, an order, on any or all of the following__
>
> (a) interlocutory orders, except orders for injunctions;
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> (b) orders consented to by__
>
> (i) the parties to the application for the order; and

(ii) any other person who will be required to comply with the order or to suffer anything to be done under the order;

(c) the amendment of documents;

(d) the extension or abridgment of time;

(e) the consolidation of proceedings;

(f) service of documents;

(g) entering judgment on acknowledgment of a claim of money;

(h) entering a judgment in default;

(i) setting aside a judgment in default;

(j) striking out a proceeding;

(k) issuing a summons to give evidence or produce documents;

(l) inspection of a document or thing produced in response to summons;

(m) the enforcement of judgments or orders;

(n) assessment of damages;

(o) assessment of costs;

(p) costs in respect of any order granted or refused by the Registrar; or

(q) an injunction where the parties consent to any order under a proceeding.

2. (1) The Registrar may, of his own initiative, or on application by a party, refer a proceeding before him to a Judge in chambers.

(2) Upon receipt of reference of a proceeding under sub rule (1), the Judge may—

(a) hear and determine any issue which was before the Registrar in the proceeding; or

(b) determine any question arising in the proceeding and may return the proceeding to the Registrar with directions as the Court considers appropriate."

A close look at the proceedings listed in Order 25, rule 1 of the CPR reveals that, save for the assessment of damages, generally, by their nature, the

proceedings are not contentious or expected to be seriously contentious. They are proceedings where the likelihood of an appeal is almost non-existent. In my view, this suggests that the contentious matters are to be handled by the judge so that in the event of an appeal, it should lie directly to this Court in line with the existing law. Though not expressly stated therein, that is why rule 2 empowers the Registrar, on his/her own initiative or on a party's application, to refer a proceeding to a judge for determination and/or direction. Obviously, it means that the referral must be made before the Registrar has determined the proceeding.

In this respect, I think it is necessary that whenever there is a proceeding before the Registrar, he/she needs to first assess if it is one of the types listed in Order 25, rule 1 of the CPR. If yes, he/she should assess if it is contentious and/or there may be a likelihood of an appeal. Where the answer is in the affirmative, the proceeding must be referred to the judge who was assigned the matter for determination. Where the proceeding is not one of those listed in Order25, rule 1 of the CPR, then obviously, the Registrar must refer it to the judge for determination and/or direction.

In my view, the Registrar is at liberty to make this decision at any time including after he/she has already commenced hearing the proceeding so long as it is before he/she has made a determination. It is my belief that if the Registrar were to proceed in this manner, the spirit and intent of the CPR generally and Order 25 specifically will be promoted and that situations like that in the *Urban Mkandawire* case (supra) and the one we are faced with in the present appeal will be averted.

In the premises, I find that the Assistant Registrar should not have heard and determined the proceeding for a permanent stay of the execution of the order on assessment of damages. If he had properly applied his mind to the application, it ought to have been clear to him that the application was very contentious and that the likelihood of an appeal against his decision was very high bearing in mind that the decision's effect would be either to extinguish the appellants statutory right to have recourse to the second respondent for payment of the damages awarded to them or to expose the respondents to liability above their insurance policy limit. This was a proper matter which should have been referred to the judge for hearing and determination.

For these reasons I find that we do not have a competent appeal before us. I have no option but to dismiss the appeal.

However, in the circumstances, since the application was heard by a court which lacked jurisdiction, it is only proper that the application be heard by a competent court. In this respect I think it is just and fair that the appellants and/or the respondents be at liberty to move the court below to

have the application which was heard and determined by the Assistant Registrar heard and determined by a judge, if they so wish. In the event that there is dissatisfaction with the judge's decision, the party dissatisfied may appeal to this Court.

On costs, though the general rule is that costs follow the event, I appreciate the fact that the issue raised by this appeal is new and somehow novel and that there has not been any authoritative discussion and/or guidance on it. The present appeal has offered this Court the opportunity to look at the issue and proffer guidance as contained herein. As such, I find it only just and fair not to condemn the appellants in costs. Therefore, I make no order as to costs.

Kamanga JA,

My Lords, I too have had the advantage of reading in draft the opinion of Katsala JA, and for the reasons which he gives, with which I fully agree, I too would dismiss this appeal.

Mkandawire JA,

My Lords and My Lady, I have had the advantage of reading in draft the opinion Katsala JA, and for the reasons which he gives, with which I fully agree, I too would dismiss this appeal.

Pronounced at Blantyre this 2nd day of December, 2021.

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HON. JUSTICE R.R. MZIKAMANDA SC, JA

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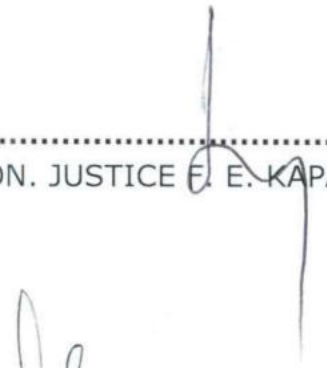
HON. JUSTICE L.P. CHIKOPA SC, JA



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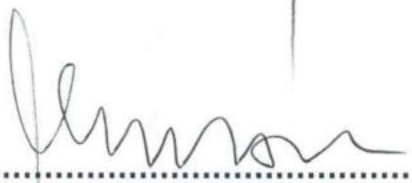
HON. JUSTICE F. E. KAPANDA SC, JA



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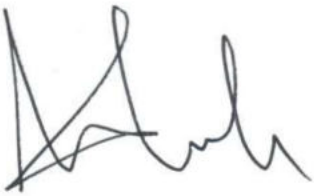
HON. JUSTICE H.S.B. POTANI JA



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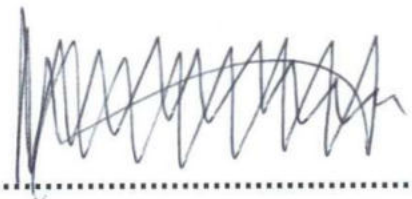

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HON. JUSTICE M.C.C. MKANDAWIRE JA