ADMARC Limited v Alex Malikebu and 3281 Others

Judgment

Court:	High Court of Malawi
Registry:	Civil Division
Bench:	Honourable Justice Allan Hans Muhome
Cause Number:	Miscellaneous Civil Cause Number 91 of 2024
Date of Judgment:	December 23, 2024
Bar:	Mr Patrice Nkhono SC, Counsel for the Applicant Counsel for the Respondents: Mr Shepher Mumba and Mr Ackim Ndlovu

1. The Respondents were in the employ of ADMARC when on 31st August 2022, the Minister of Agriculture announced, through a press conference, that ADMARC would undergo a restructuring process which later led to the retrenchment of the Respondents. According to the findings of the Industrial Relations Court (IRC), the Respondents were not consulted, as required by the law. The IRC disposed of this class action on a point of law, holding that the Respondents were unfairly dismissed and that ADMARC perpetrated unfair labour practices. Compensation was assessed at K25,050,448,242.67 and a stay was granted by the IRC subject

to payment of 50% of the compensation at K12,525,724,120.84.

2. ADMARC is aggrieved by both the Judgment on liability and the Order of Assessment and has filed an appeal to the High Court. In addition, ADMARC has taken up the within application for suspension of enforcement of Judgement pending appeal. The application is made under Order 10 rule 1 of the Courts (High Court) Civil Procedure Rules 2017 as read with section 65(3) of the Labour Relations Act and the Court's inherent jurisdiction.

3. Counsel for the Respondents argued that the words in section 65(3) that 'a stay by the IRC or the High Court' mean that the Applicant having been refused the stay in the IRC, it ought to appeal to the High Court and not bring this application. This Court already disagreed with this understanding and held that the correct interpretation of section 65(3) is that a stay can be applied for both in the IRC and the High Court and that where a stay is denied in the IRC, an aggrieved party can apply for the same in the High Court and not necessarily appeal that decision: see the Ruling of 3rd May 2024 in the within matter.

4. The application is supported by the sworn statement of Counsel Francisco Chikabvumbwa, Mr Richard Kwatiwani, the Applicant's Director of Finance and skeleton arguments. Senior Counsel argued that the grounds of appeal have high prospects of success and that if the Respondents are paid, the appeal shall be rendered nugatory. That the IRC erred to dispose of the matter on a point of law, without a full trial to examine the facts of the case.

5. Senior Counsel further argued that the amount of compensation ordered by the IRC is very high and it will ruin the Applicant if paid and that the Respondents will not be able to repay the same in the event that the appeal is successful. He stated that the Respondents are spread all over the country and it will be difficult to trace them; that the Respondents were already paid retrenchment packages which were part of the assessment of compensation per exhibits FC 7 – FC 12. It was further stated that ADMARC is unaware of the Respondents financial capacity to repay the compensation. Counsel deponed that ADMARC is financially unsound and relies on Government subvention and as at December 2024, ADMARC had funds amounting to K1.4 billion against its current debts of K3.6 billion per exhibits FC 19 – FC 24.

6. The Respondents oppose the application through the sworn statement of Alex Malikebu and skeleton arguments.

7. The general rule is that the Court does not make a practice of depriving a successful litigant of the fruits of litigation, and locking up funds to which prima facie he is “entitled” pending an appeal: see Annot Lyle (1886) 11p.114, p.116. This principle has been repeated by the Courts in Malawi with approval on several occasions without number. In National Bank of Malawi v D. Nkhoma t/a Nyala Investments, SCA Civil Appeal Number 6 of 2005 (Unreported), the Supreme Court of Appeal stated that ‘there can be no doubt that in order to enable a court to determine whether an appeal, if successful, would be nugatory by reason that there is no reasonable probability of an appellant getting the

money back, is a matter of facts or evidence which an appellant must present to a court for assessment.'

8. From the decided cases, the main factors that a court attending to an application for stay of execution of a judgment pending appeal ought to consider are whether the appeal has merits (prima facie), whether the appeal will be rendered nugatory if a stay order is not granted and who will be most or least prejudiced if the stay order is granted or not. See Nyasulu v Malawi Railways Ltd [1993] 16(1) MLR 394 and Manly Msuku and Others v Timothy Chigwere MSCA Civil Appeal Number 39 of 2015.

9. The Court, at this stage, is not invited to deal with the merits of the grounds of appeal themselves. However, a cursory examination displays unfairness on the part of ADMARC: the Respondents were not consulted as they were simply sent on leave and later retrenched through a ministerial statement. The Minister was not part of the Board of ADMARC and so he clearly acted ultra vires.

10. In addition, this Court considers that since some of the Respondents were re-engaged by ADMARC, the appeal cannot be wholly rendered nugatory. That the Respondents are spread all over the country is not a good ground to deny them fruits of their litigation considering that the Applicant maintains personal files for all its employees including their bank details as admitted through exhibits FC 7 – FC 12. With appropriate Court Orders, the Respondents can be traced through the Know Your Customer requirements that banks are obliged to comply with.

11. There is evidence that the Respondents failed to attend court proceedings in the IRC due to financial difficulties, however, this alone does not compel the Court to deny them the fruits of their litigation. The retrenchment packages already paid to the Respondents can always be reconciled at the conclusion of the matter.

12. Lastly, ADMARC's own financial unsoundness has been clearly established by the evidence of its Director of Finance. However, financial incapacity cannot be a good ground for a stay as there are plenty of financing options on the market, including recovery of sums due from the Government per exhibits AM 1, AM 2 and AM 3. In any event, ADMARC is a limited liability company with its own assets that can satisfy the judgment debt and it is distinct from its shareholders. The provisions of the Public Finance Management Act do not suggest that state owned enterprises should ignore judgment debts which are part of the rule of law.

13. All in all, this Court considers that, on the available authorities and evidence, the risk of prejudice or injustice lies against the Respondents and so this Court exercises its discretion in favour of the Respondents – see the Supreme Court of Appeal Ruling in Mike Appel and Gatto Limited v Saulos Chilima (2014) MLR 231 at 238. This Court does not therefore find persuasive reasons to tamper with the decision of the IRC and so ADMARC shall pay the Respondents half of the compensation within the next 14 days. It is so ordered.

Made in Chambers this 23rd day of December, 2024.