IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Cause No. 1061of 2005

BETWEEN

AMOS PATRICK MCHENGA...PLAINTIFF

AND

STANDARD BANK LIMITED...DEFENDANT

Coram: **Manda, J**

        Kadyampakeni for the Plaintiff

        Gondwe for the Defendant

        Mrs Matekenya Court Clerk/Interpreter

RULING

This was the plaintiff's application requesting this court to dismiss a notice of appeal which was filed by the defendant as well as the appeal itself. The basis of filing this application was that the defendant never sought leave to appeal to the Supreme Court against the decision of a judge in chambers and that this was contrary to the provisions of Section 21 of the Supreme Court Act.

The background to this matter is that the plaintiff brought an action against the defendant under the Employment Act. Following a trial, a judgment was made in favour of the plaintiff by Justice Manyungwa on the 24th day of May 2010. Following

this judgement, there was no immediate appeal by the defendant, however on the 17th of September 2010, the defendant filed an ex-parte application for leave to appeal out of time. This application was supported by an affidavit which was sworn by Lusungu Vulula Gondwe, counsel for the defendant in which there was a prayer that the court should 'grant an order extending time within which to apply for leave'. The ex-parte application was heard on the 20th day of September 2010, by Justice Chipeta and he made the following Order:-

"I hearby grant leave to the defendant to appeal out of time as prayed. Notice of appeal to be filed at the latest by 30/09/2010, close of business"

Justice Chipeta's Order was perfected on the same day and it read as follows:-

Upon hearing counsel for the Defendant;

AND UPON READING the affidavit of Lusungu Vulula Gondwe filed herein;

IT IS HEREBY ORDERED and ADJUDGED that:

1. *The time within which to apply for leave BE and IS HEREBY EXTENDED*
2. *Leave to appeal BE and is hereby granted*
3. *The Notice of Appeal be filed by 30th September, 2010*

The Order is dated 20th September 2010 and was signed by the Deputy Registrar.

It is the plaintiff's argument that from the two Orders, the handwritten and the perfected one, the court never granted leave to the defendant to appeal to the Supreme Court. According to the plaintiff, the only leave that was granted by the court was that the defendant could appeal out of time. In this regard, the plaintiff was of the view that the defendant, besides filing the application for leave to appeal out of time, should have filed another application for leave to appeal against the decision-in-

chambers of Justice Manyungwa. Further, the plaintiff argued that the application for leave to appeal against the decision of Justice Manyungwa was never laid before Justice Chipeta and that since the court was not moved, Justice Chipeta could not be deemed to have granted the defendant leave to appeal.

However from the wording of the perfected Order, it does state in paragraph 2, that *Leave to appeal BE and is hereby granted.* From this wording, it was my view that clearly the defendant was granted leave to appeal, and the decision complained of being that of a judge-in-chambers, then one must assume that such an appeal would lie to the Malawi Supreme Court of Appeal. This is also especially in view of the fact that the issue of extending time was dealt with in paragraph 1, of the perfected Order. I must therefore disagree with counsel for the plaintiff's view that paragraph 2 should be deemed to read "leave to appeal out time is hereby granted" [this is counsel's phrasing]. Indeed I would go further to state that it is not up to counsel to start giving interpretation of court orders, especially where the wording of such orders is clear. If anything all counsel can do is perhaps to go before the same court that granted the order to seek clarification as to what the Order is really stating. However, I do not think that counsel should be allowed to import words into an order which are not there in the first place.

Of course I must admit that perhaps the wording of the perfected Order is different from the handwritten Order and that this may lead to questions as to what was the intention of Justice Chipeta. I do not think I can attempt to answer those questions because then I will be dwelling on matters of speculation. One thing is to be noted though, is that in both the handwritten order and in the perfected order, there are these words "*The Notice of Appeal be filed by 30th September, 2010*". There can no doubt that these words were directed to the defendant and that the placed on them a positive obligation which was to file a notice of appeal by 30th September 2010. The question then becomes what would follow after the filing of a notice of appeal? It goes without saying

that the notice will be served on the other party and that steps will be taken to settle the record before the appeal is then set down. In other words, the filing of the notice will set in motion the appeal process. Indeed this being an order of the court, I do not think that the defendant would have had any choice in the matter but to comply. It is to be noted that had the defendant failed to comply with the direction of the court to file the notice of appeal on the appointed date, it would have been open to the plaintiff to file a motion for issuance of a certificate of non-compliance. In such an instance, I do not think that it would be open to the defendant to argue that the order was erroneous in that the application for leave was supposed to have been made under Section 21 of the Supreme Court Act. In the same vein I do not see why the plaintiff should be allowed to have the appeal dismissed, because according to him leave to appeal should be deemed not to have been given due to the fact that no application was made requesting for the same.

What we must also not lose sight of is the fact that when leave to appeal out of time was granted, it must have been on the general understanding that there was merit in the appeal. If such was the case then justice would demand that the defendant should have his day in court. A further point to be considered is that the fact that there was an application to leave out of time, it means that there was delay in the matter. Thus in view of expediency, I do not see anything wrong with a judge granting leave to appeal within the context of an application for leave to extend time to file the appeal. After all, the court can exercise its inherent jurisdiction and give direction on a matter even though no specific application has been made before it.

I would want to believe that when Justice Chipeta directed that the defendant should file a notice of appeal by the 30th of September 2010, he did grant the defendant leave to proceed with the appeal and that such a decision was within the law. This is especially in view of the fact that there was delay in filing the appeal. In view of this I must state that the argument by the plaintiff that there should have been a separate application for

leave to appeal amount to being pedantic. It must be stated that there is no argument being made by the plaintiff that the defendant never filed the notice of appeal, in fact the plaintiff is conceding to the same. I would have then thought that it would be in the interest of the plaintiff to see to it that the appeal is heard without any further delay, unless of course the plaintiff is operating under the mistaken belief that the defendant would be precluded from filing his appeal once leave is 'properly' obtained.

I must reiterate that the defendant filed his notice of appeal under the direction of the court; I do not think then that he can be precluded from filing the same should the current notice of appeal be dismissed. Thus even if we were to accept the plaintiff's argument that the defendant should make a formal application for leave to appeal to the Supreme Court, the net effect will be the same so I do not really see the point in this application. In view of this I must dismiss the plaintiff's application for being frivolous and vexatious. The plaintiff is thus condemned in costs.

Made in Chambers this.............day of................................2011

K.T. MANDA

JUDGE