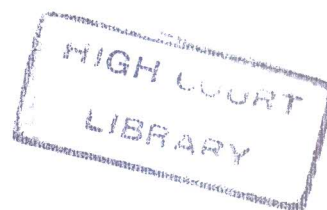




Malawi Judiciary



IN THE MALAWI SUPREME COURT OF APPEAL

PRINCIPAL REGISTRY

MSCA CIVIL APPEAL NO. 11 OF 2013

(Being High Court Cause Number 474 of 2012)

BETWEEN:

THE ATTORNEY GENERAL APPELLANT

-AND-

SUNRISE PHARMECEUTICALS 1ST RESPONDENT

-and-

CHOMBE FOODS LIMITED 2ND RESPONDENT

CORAM: HONOURABLE JUSTICE TWEA SC, JA

Mtonga, Counsel for the Appellant

Chokocho, Counsel for the Respondent

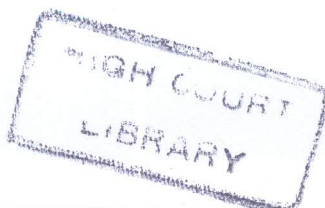
Chimtande (Mrs.), Recording Officer

S. B. Mwafulirwa (Mrs.), Principal Personal Secretary

Court: This is the ruling.

RULING

This is an application for stay of execution of Judgment of the late Manyungwa J. that was delivered on 22 March, 2013.



The essence of the matter is that the Respondent companies, as per pleadings, deal in pharmaceuticals and food manufacturing respectively. It is not clear how these companies are joined as plaintiffs, except that, according to the third paragraph of the statement of claim, it is suggested that they either use the same warehouses which are situated in Area 36 in the City of Lilongwe, or that they use the same shops as outlet for trading goods. They brought this action claiming compensation, loss of business and loss of use of their movable and immovable assets, against the Attorney General. It is their case that the loss arose from damage caused during riots that ensued in the course of public demonstrations. They claimed that, by virtue of the minister failing to establish a riot damage fund, the Attorney General, now appellant before this court, must be held liable for their loss and damage. The Attorney General denied responsibility.

In the course of pleadings the respondent then filed a summons for judgment under Order 14 A of the Rules of the Supreme Court: to dispose of the case on point of law. The court found that the appellant was under a duty to establish a riot damage fund, and had failed to do so. It thus entered judgment for the plaintiffs, now respondents. The court further awarded all the compensation and damages sought. The appellant application to stay execution was denied, hence this appeal.

The first thing that I would point out is that the grant or refusal of stay of execution is at the discretion of the court.

Secondly, that courts do not make it a practice to deprive a successful litigant of the fruits of litigation, unless there are sufficient reasons for doing so: **National Bank of Malawi vs Aziz Mahomed Issa and Famous Bakery and Confectionary Limited**, MSCA 17 of 2010, **Ismail Sabadia and Lennie Nkhonjera vs Elizabeth Moto**, MSCA 4 of 2013, **City of Blantyre vs Manda and others** (1992) MLR 114 and also **Ridgeview Investments vs Chichiri Shopping Mall Centre**, MSCA 2446 of 2006.

I have examined the arguments presented. I bear in mind that it is not any duty at this stage of the proceedings to consider the merits of the case. However, I must mention that I still need to be satisfied that issues raised, for or against the stay, are sufficient to justify the exercise of my discretion one way or another.

The crux of the appellants case is that the judgment in issue was wrong at law and, in any case, excessive. The issues for determination, according to the summons were (a) whether Government is liable to compensate the plaintiffs, and (b) whether section 106 of the Police Act places liability for riot damages on organisers or convenors or is joint and several with the Government in view of the provisions of the Riot Damage Act. The court below not only decided issues of liability, but went on to award compensation and damages, without hearing any evidence.

The gist of this case is the interpretation of the Riot Damage Act. The ruling granting leave to appeal, by Chipeta JA, also points to this. The arguments raised, about public interest and policy, will also be dependent

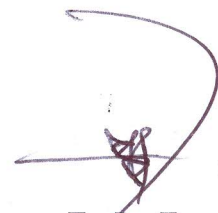
on this. I am aware, that the respondent argued that strength of appellants case, as a ground for stay of execution has, never before, been argued before this court. I do not agree with that view. When one takes the broad view of "sufficiency" of reasons or "frivolity" of an application, which are argued before this court all the time, one will see that such arguments call on the court to assess the strength of the case. I would not therefore, put any weight on this argument.

I have had recourse to the judgment of the court below, notwithstanding that it was not among the documents filed by the parties. The judge in the court below noted that the plaintiffs obtained police reports with a view to claim from their insurers. Their insurers however, declined to compensate them on account of a political risk exclusion clause in the policies. This is significant. It signifies the essence of a riot damage fund. That is, that after the declaration of riot damage area, a designated community is compelled to contribute to such a fund. It puts the responsibility to alleviate the suffering of those that suffer damage or personal injury, as a result of the riotous conduct on the part of the citizens, on that designated community. When making payment from such a fund however, the conduct of the claimant, in respect of the damage, will be taken into regard. Further, any sum paid from the riot damage fund will be deductible when assessing damages in a civil suit: Section 9 of the Riot Damage Act. The riot damage fund therefore, is not a substitute for civil claim. The court will also have to take into consideration the constitutional right to peaceful demonstration and determine when a peaceful demonstration, as pleaded, becomes an unlawful assembly, for purposes of the Riot Damage Act.

It should also be observed that the court below proceeded, from the summons, to dispose of the issues in the statement of claim and the defence. It is my view therefore, that where legality, regularity and excess of a judgment are in issue they constitute sufficient reasons for granting a stay: **National Bank of Malawi vs Aziz Mahomed Issa and Another, and Ismail Sabadia and Lennie Nkhonjera vs Elizabeth Moto** (Supra). This is paramount because a judgment, once issued, is enforceable notwithstanding that is illegal or irregular until it is set aside.

Accordingly, I grant stay of execution of the judgment of late Manyungwa J. dated 22 March 2013 pending the determination of the appellant's appeal. Costs will be in the cause.

PRONOUNCED in Chambers this 22 day of July, 2013
at Blantyre.



E. B. Twea SC
JUSTICE OF APPEAL