

IN THE MALAWI SUPREME COURT OF APPEAL SITTING AT BLANTYRE
MSCA CIVIL APPEAL NUMBER 57 OF 2021
[Being Civil Cause Number 404 of 2021, High Court of Malawi, Lilongwe
Registry]

BETWEEN:
AIRTEL MALAWI PLC

APPLICANT

AND

COMPETITION & FAIR TRADING COMMISSION

RESPONDENT

CORAM:

HON. JUSTICE L. P. CHIKOPA SC, JA,

Mhone[Mr.]/Charamba[Ms.] of Counsel for the Applicant/Respondent

Itimu[Ms.]/Mota[Mr.] of Counsel for the Respondent/Appellant

Masiyano[Ms.] Court Clerk

RULING/ORDER

In the exercise of their functions the Respondent fined the Applicant the sum of MK2,113,099,066.00 for *inter alia* unfair trading practices. The Applicant is dissatisfied and seeks to appeal against the fine. He comes before this court seeking a stay pending such appeal. The application is opposed. Both parties have filed affidavits in support of their positions.

Whether or not to grant a stay is in the discretion of the court before whom the application for stay is made. And such court will only grant a stay if the interests of justice weigh more towards granting the stay than not. See **Mike**

Appeal & Gatto Ltd v Saulosi Chilima MSCA Civil Appeal Case No 23 of 2013[unreported].

And as we understand the law the burden is on the applicant to prove on a balance of probabilities that a refusal to grant stay will result in such injustice.

In the instant case we have been told that the fine is huge. That it will therefore adversely impact the Applicant's operations. There was also the suggestion that an appeal herein will be successful and that not granting a stay might result in such appeal being rendered nugatory. Lastly the Applicant spoke about jurisdiction. In its view the Respondent had no jurisdiction to hear and determine the complaint before it. The decision complained of is therefore untenable.

With respect there is only one question in this matter. It is whether or not the Applicant has shown, on a balance of probabilities, that it will be occasioned an irretrievable injustice if a stay is not granted. The answer can only be in the negative. The fact that the fine is huge, and it is by all standards huge, is not by itself evidence of potential or actual injustice. More has to be shown to establish injustice. Similarly it is not enough to say that paying the fine now will adversely impact the Applicant's operations. There has to be proof of such allegation. We have not been shown any such proof in the instant case.

Much the same can be said about the suggestions that the Respondent will not be able to repay the fine if the appeal is successful. No evidence has been placed before us to prove the allegation.

About the appeal itself and its prospects of success it appears to us that the Applicant is not even sure what it should do about the fine. In one breath it seems to want to place the matter before the High Court. In another to bring it before this Court on appeal. True this might be as a result of the High Court itself not being sure whether this matter is a commercial matter or not. Or where any dissatisfaction with the fine should be pursued. If truth be spoken that is of little consequence if at all. A party should itself be sure what it wants

from which court. It should never go to law hoping that the courts will give it advice or directions on how best to proceed with its matter. The Constitutional Court famously said in **Maziko Charles Sauti Phiri v The Privatization Commission & The Attorney General** High Court of Malawi, Constitutional Case Number 13 of 2005[unreported] that courts are not in the habit of giving gratuitous advice to litigants. We would be most reluctant therefore to grant a stay just to allow an applicant time to ask one or the other court for guidance on how it should proceed with its matter.

The Applicant's application for stay is therefore refused. ~~With costs.~~

Dated on December 10, 2021 at Blantyre.

L P CHIKOPA SC
JUSTICE OF APPEAL