REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
LILONGWE REGISTRY
COMMERCIAL CAUSE NUMBER 259 OF 2019

BETWEEN:

PRIMA FUELS LIMITED……...……..……. 1st CLAIMANT
ATTORNEY GENERAL
(MINISTRY OF FINANCE AND ECONOMIC AFFAIRS) ……...…2nd CLAIMANT

AND

TOTAL MALAWI LIMITED……...……1ST DEFENDANT
TOTAL LIMITED……..…..2ND DEFENDANT

CORAM: **HON. JUSTICE TROUBLE KALUA**
W. Kita, of counsel for the 1st Claimant
E. Phiri, of counsel for the 1st Claimant
M. Msisha, SC, of counsel for the 1st Defendant
N. Chalamanda, of counsel for the 1st Defendant
Kataika, court clerk

RULING

Kalua, J

1. By a Ruling made on 5th November 2024 this Court set aside the Order staying all further proceedings herein pending referral of the dispute between the parties to arbitration which had been granted on 11th September 2019 by **Mtalimanja, J**. The 1st Defendant, being dissatisfied with the said Ruling took out the present application for leave to appeal and stay of proceedings pending the determination of the appeal. The application was made pursuant to **section 21** of the **Supreme Court of Appeal Act**, Cap 3:01 of the Laws of Malawi, **Order III rule 3(1)** of the **Supreme Court of Appeal Rules** and **Order 10 rule 1** of the **Courts (High Court) (Civil Procedure) Rules, 2017**.

2. The application is supported by the sworn statement of Dalitso Mtambo, of counsel, sworn and filed of record. The 1st Claimant opposes the application and the sworn statement of Wapona Kita, of counsel, was relied upon in opposition. Both the 1st Claimant and the 1st Defendant filed skeleton arguments containing the law in support of their respective positions.

3. Under **section 21** of the **Supreme Court of Appeal Act** Cap 3:01 of the Laws of Malawi, an appeal against an Order made in Chambers by a Judge of the High Court

shall lie with the leave of the Court (the Supreme Court) or of the High Court or of the Judge who made the Order. Under **Order III rule 3(1)** of the **Supreme Court of Appeal Rules** where an appeal lies only by leave of the Court (the Supreme Court) or of the Court below any application to the Court for such leave shall be made ***ex parte*** by **notice of motion** [emphasis supplied]. On the strength of the above provision and rule we determine that this application is properly before us. However, it would be important, at the outset, to clarify that the application for leave to appeal by the 1st Defendant herein was already made *inter partes* at the conclusion of the hearing which culminated in the Ruling being appealed against. It was made orally and not by way of notice of motion as provided for by the above quoted rule. The 1st Claimant responded to and opposed the application. The direction from the Court was for the application to be made formally in writing with liberty to the 1st Claimant to respond so that we could apply our mind to the applicable law and rules of procedure that the parties were citing and make a formal Order thereon. The *inter partes* application was not as a result of the Court's direction as the 1st Defendant seems to suggest. The Court exercised its discretion and formalised the application as it had been presented. The Court record is clear on this.

4. Be that as it may, we form the view that the contemplated appeal is on an important question of law. In as far as we were able to research, we did not find authorities that decided on the exact question that we decided on. Again, we did not find the local authorities cited by the parties in their respective submissions helpful on the issue we decided on either. The question was not whether we could grant an order of stay pending referral of the matter to arbitration or not. That was already decided upon by **Mtalimanja, J**. We were referred to many authorities, both from our Courts as well as other jurisdictions dealing with the Court's powers to stay proceedings where the parties agreed to an arbitration clause. Many of such authorities, bar perhaps one only, we must add for the avoidance of doubt, were merely persuasive and not binding on this Court and were all, in our view, besides the point. Rather the question was whether, in the circumstances of this case, where the parties had actually submitted to arbitration and the arbitration proceedings were then terminated in the circumstances that they were, we could lift the stay. We decided we could. And decide we must, even on questions that appear not to have been extensively adjudicated upon previously. Otherwise the law will not grow if we restrict ourselves only to those questions on which there is clear authority on all fours. We found no binding local authority, either from the submissions or from our own research on the subject matter that suggested we couldn't. We made up our mind and decided on what we think the position at law ought to be. Whilst we can draw valuable guidance from authorities from other jurisdictions we were obviously not bound by any such authority. The decision is ours. We can all, therefore, benefit from the views of the apex Court on the question of what a Court like ours is to do faced with similar circumstances. On account of the fact that the contemplated appeal is on an important question of law in our arbitration practice, and on that account alone, we must grant the 1st Defendant leave to appeal against our Ruling as prayed for.

5. The 1st Claimant argues, forcefully so, that the jurisprudence emanating from the Supreme Court frowns upon appeals against interlocutory judgments in favour of dealing with appeals once and for all after final judgment has been rendered. Looking at the authorities cited, it is clear that the Supreme Court has firmly shut the door on appeals against inchoate judgments. One common thread in the cases cited, though, is

that these were appeals lodged against interlocutory judgments that had finally resolved the question of liability between the parties except for certain aspects thereof, like assessment of damages payable or agreement of the parties on how the said damages would be payable or would be paid. In **MSCA Civil Appeal Number 67 of 2018: ESCOM v Samson Evans Kondowe t/a Saveman Investment** the appeal was lodged before assessment of damages was conducted. Similarly, in **MSCA Civil Appeal Number 62 of 2016: Toyota Malawi Limited v Mariette** the appeal was filed against a judgment on liability pending assessment of damages. In **MSCA Civil Appeal Number 52 of 2016: JTI Leaf v Kapachika** the question of liability had been decided upon by the Court pending agreement between the parties or the Court's determination on the damages payable. In **Misc. Application Number 73 of 2018: MHC v John Suzi Banda** the appeal was filed pending the resolution of quantum of interest payable. The 1st Claimant argues that the principle is not limited to cases where liability has been established but also applies at all stages of the proceedings including where liability is yet to be determined or the substantive hearing is yet to be conducted. It is an argument that makes a lot of sense in our view and appears to be a reasonable deduction from the authorities cited. Which is why we would have loved to look at the cited decision in **MSCA Civil Appeal Number 14 of 2022: Ombudsman v State *ex parte* Malawi Energy Regulatory Authority** to appreciate the position of the Supreme Court on appeals against interlocutory orders like the one in this case where the question of liability is not in issue at all. That decision would have perhaps provided the clearest guidance on the current position obtaining in the Supreme Court on this question. It is a shame that a copy of that decision is yet to be perfected. In which case therefore, this matter will present the latest opportunity for the Supreme Court to render fresh guidance relating to appeals against interlocutory orders. An opportunity we may do well not to miss. It is guidance that all Courts below can surely use.

6. In the spirit of the overriding objective of the **Courts (High Court) (Civil Procedure) Rules, 2017** under **Order 1 rule 5(1)(b)** to deal with proceedings justly, including saving expenses, it would not make sense to allow these proceedings to continue in this Court whilst an appeal is pending. As we observed in the earlier Ruling, the parties have already incurred considerable expenses in the prosecution and defence of this matter. We are duty bound to guard against further unnecessary expenses being incurred.

7. We can only hope that the contemplated appeal in the Supreme Court will be expedited. It is in the interest of all parties concerned that this matter be resolved. One way or the other. Either through further fresh arbitration proceedings should the Supreme Court be so minded to order, or through this Court. Whilst the sums claimed in this matter are humongous, the cause of action remains, in our view, quite simple. One which does not need 5 years to decide upon. We have had this case on our books for the last 5 years. We certainly do not want it to remain a statistic on our records for the next 5 years. We shall not allow it. Not under our watch. I am sure the parties, being astute business persons, we assume, realise that the longer this matter takes to be resolved the more expenses the parties will continue to incur. Prosecuting and defending this matter won't get any cheaper. Commercial efficacy demands that there be an end to litigation at some point. So does the law.

8. The 1st Defendant submitted at length on the grounds of appeal that it seeks to advance in the Court above. Equally, the 1st Claimant has, in his skeleton arguments, attempted to respond to all the arguments advanced by the 1st Defendant regarding the proposed

grounds of appeal. We have resisted the temptation to comment thereon lest we start sitting on an appeal against our own decision. We shall, as we must, leave that to the Supreme Court, should the Supreme Court be of the view that an appeal against the interlocutory ruling made herein is in order.

9. In conclusion therefore, the 1st Defendant is hereby granted leave to appeal against the Ruling of this Court made on 5th November 2024. In the meantime, we exercise our discretion and order that all further proceedings herein be and are hereby stayed pending the determination of the said appeal by the Malawi Supreme Court of Appeal.

10. Costs of this application shall be in the cause. We so order.

Pronounced in Chambers at Lilongwe this 26th day of November 2024.

TROUBLE KALUA
JUDGE