

# Eric Thomson and Others v Telekom Networks Malawi plc Civil Appeal Number 9 of 2023

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Allan Hans Muhome
<b>Cause Number:</b>	Civil Appeal Number 9 of 2023
<b>Date of Judgment:</b>	May 15, 2025
<b>Bar:</b>	Mr Patrick Mpaka, Counsel for the Applicant Counsel for the Respondents: Mr Luciano Mickeus

## Head Notes

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**Civil Procedure** – Stay of Execution – Discretionary power of Court – Size of award or financial hardship alone insufficient – Total stay refused

**Civil Procedure** – Stay of Execution – Applicant bears burden to prove Respondent's impecuniosity – No such proof adduced

**Civil Procedure** – Stay of Execution – Partial stay appropriate where a substantial legal issue arises for appellate review – Partial stay granted

## Summary

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The Appellant, Telekom Networks Malawi plc (TNM), applied to the High Court for a suspension of the enforcement of a judgment pending an appeal to the Supreme Court of Appeal. The application was filed under Order 10 rule 1 and Order 23 rule 9 of the Courts (High Court) Civil Procedure Rules 2017, as read with section 23 of the Courts Act and the Court's inherent jurisdiction. The Respondents, former employees of TNM, had been retrenched in August 2019 and were successful in their appeal to the High Court, which found that they had not been consulted as required by law. They were awarded compensation of K1,456,324,019.00 by the Assistant Registrar. The Appellant, being aggrieved by both the judgment on liability and the compensation amount, sought a stay of execution. The Appellant argued that the appeal had a high chance of success due to the contentious legal question of whether consultation is a legal requirement before retrenchment. It also contended that the compensation was unjust and that paying it would cause irreparable damage, rendering the appeal nugatory, as the Respondents had no known means of income to repay the money if the appeal succeeded.

The Respondents opposed the application, arguing that the Court does not typically deprive a successful litigant of the fruits of their litigation. The Court found that the Appellant had not proven the Respondents were impecunious, as they had only claimed not to know their current financial status. The Court also held that the magnitude of the award and the Appellant's alleged financial difficulties were not sufficient grounds for a stay. However, the Court acknowledged that it would be unjust to the Appellant to pay the entire compensation amount before the Supreme Court of Appeal could definitively settle the question of consultation before retrenchment. The Court therefore ordered the Appellant to pay half of the compensation to the Respondents within seven days. Each party was ordered to bear its own costs.

## Legislation Construed

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### 1. Statute

The Courts Act (s 23)

### 2. Subsidiary Legislation

The Courts (High Court) Civil Procedure Rules 2017 (Order 10 rule 1, Order 23 rule 9)

## Judgment

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1. The Respondents were in the employ of Telekom Networks Malawi plc (TNM) for various periods before they were retrenched in August 2019. They were successful on appeal from the Industrial Relations Court (IRC) to the High Court on their claim that they were not consulted as required by the law. They were awarded compensation in the sum of K1,456,324,019.00 by the Assistant Registrar.

2. TNM is aggrieved by both the Judgment on liability and the Order of Assessment and has filed an appeal to the Supreme Court of Appeal. In addition, TNM has taken up the within application for suspension of enforcement of Judgement pending appeal. The application is made under Order 10 rule 1 and Order 23 rule 9 of the Courts (High Court) Civil Procedure Rules 2017, as read with section 23 of the Courts Act and the Court's inherent jurisdiction.

3. The application is supported by the sworn statement of Counsel Marthayoshi Katangwe and skeleton arguments. Counsel Mpaka argued that the grounds of appeal have high prospects of success as the Court erred in holding that the Respondents were unfairly dismissed which is a serious issue to be decided on appeal in the light of the contentious position whether there is a legal requirement for consultation before retrenchment.

4. He further argued that the amount of compensation is unjust as it is against the weight of evidence. The award is said to be 14 times the prescribed statutory minimum. That TNM is constrained for cash as it is just emanating from a loss making position per Exhibits TNM 4 to 7. That the Respondents have no known means of earning an income and if the sums are paid over to them, TNM shall suffer irreparable damage and the appeal shall be rendered nugatory. In the circumstances, it will be in the interest of justice that a stay is granted, pending the determination of the appeal.

5. The Respondents oppose the application through the sworn statement of Counsel Mickeus and skeleton arguments. Counsel argued that, in the first place, the grant of a stay is discretionary per Tambala JA (as he then was) in *Anti-Corruption Bureau v Atupele Properties Ltd* MSCA Appeal Case Number 27 of 2005. Secondly, that Courts do 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. Thirdly, that where the Respondent would be unable to pay back the money then a stay may be justified. Lastly, that the Court would still have discretion to refuse a stay even where the Respondent is impecunious if the stay would be utterly unjust and oppressive. The Court’s discretionary powers, in applications of this kind, were reiterated by the Supreme Court of Appeal in *Mike Appel*

and Gatto Limited v Saulos Chilima (2014) MLR 231.

6. Counsel for the Respondents argued that the magnitude of the award is not enough ground to grant the stay, according to Mulli Brothers v Malawi Savings Bank MSCA Civil Appeal Number 48 of 2014. This was countered by Counsel Mpaka who cited Chitawira Shopping Centre v HMS Foods & Grains Limited MSCA Civil Appeal Number 30 of 2015 where Mwaungulu JA, SC stated that the Court should 'take judicial notice of the difficulties that the institution is undergoing at the moment.' Twea JA, SC also granted a stay where the issue of an excessive award arose in Attorney General v Sunrise Pharmaceuticals and Chombe Foods Limited MSCA Miscellaneous Appeal Number 11 of 2023.

7. Having considered all the arguments, this Court is of the view that TNM is solvent enough to settle the liability herein despite the alleged financial woes. As this Court opined in ADMARC v Malikebu and Others Miscellaneous Civil Cause Number 91 of 2024, the mere fact that an organisation has financial challenges should not be a sole ground for granting a stay. TNM is a public limited liability company which is duly listed on the Malawi Stock Exchange. It has made a profit of K10.06 billion in the year 2024 despite the cash flow challenges and the need for capital injection. It would be unjust, therefore, on the part of the Respondents, that they be prevented from enjoying the fruits of their litigation.

8. TNM bears the burden of proving that the Respondents are impecunious and this has not been satisfied by simply saying TNM does not know the Respondents' other sources of income apart from the salaries that they were receiving six years ago, when

they were employed.

9. Hon, Mzikamanda JA (as he was then) in the case of Malawi Revenue Authority v Mwase and Others MSCA Civil Application Number 28 of 2018 summarised the law as follows:

The state of impecuniosity to be relied on in an application such as the present one should be as at the time of the application and not as the situation was, say eight or nine years before the application. It was for the applicant to demonstrate impecuniosity at the time of the application...

10. This Court is of the view that TNM has not proved impecuniosity on the part of the Respondents. However, granting the whole of the compensation to the Respondents would be unjust to TNM as the question of consultation before retrenchment ought to be settled once and for all by the Supreme Court of Appeal. In the circumstances, this Court orders that TNM pay half of the compensation to the Respondents within 7 days from the date hereof. Each party shall bear their own costs.

Made in Chambers this 15th day of May, 2025.