Prima Fuels Limited and Another v Total Malawi Limited and Another Commercial Cause Number 259 of 2019

Judgment

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice Trouble Kalua
Cause Number:	Commercial Cause Number 259 of 2019
Bar:	For the 1st Claimant: Counsel E. Phiri For the 2nd Defendant: Counsel N. Chalamanda

1. The 1st Claimant took out the present application to strike out the notice of appeal herein and/or vacate the order for stay of proceedings granted herein for failure on the part of the 1st Defendant to file “initial” skeleton arguments in support of the said appeal. The application was made pursuant to Order 10 rule 1 of the Courts (High Court) (Civil Procedure) Rules, 2017 [CPR 2017] and was supported by the sworn statement of Wapona Kita, of counsel. The 1st Defendant opposes the application. The sworn statement of Dalitso Mtambo, 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.

2. From the time this file was reassigned to us on 19th September 2024, this is the fourth ruling we are having to make. On 5th November 2024 we delivered a ruling on an application to set aside an order for stay of proceedings pending arbitration. On 26th November 2024 we delivered a ruling on an application for leave to appeal and stay of proceedings pending appeal. On 10th January 2025 we delivered a ruling on an application to set aside the notice of appeal herein for being irregular. And if we add the initial ruling made by Mtalimanja J on 11th September 2019 on an application for stay of proceedings pending arbitration and the ruling made by Mkandawire, SC, JA on 13th March 2025 on an application to vacate the order for stay of proceedings herein, that is six rulings in total from our Courts. Then there is of course, the ruling by the Arbitration Tribunal made on 11th February 2022. Seven rulings. And yet the substantive matter is yet to come on the floor. Six years and seven rulings later. We can't help but wonder: are we rearranging deck chairs on the Titanic? Or are we simply busy putting lipstick on a pig? Are we treating the symptoms and completely ignoring the cause? Is it the case that one of the parties does not want this matter resolved on the merits? Or? But perhaps we digress.

3. The 1st Claimant's argument is that an appellant is required to file "initial" skeleton arguments together with the notice of appeal or within 14 days of the filing of the notice of appeal as provided for under part 52 of Practice Direction 21 of the English Civil Procedure Rules (1998) which provides as follows:

52.9 (1)The Appellant's notice must, subject to (2), (2A) and (3) below, be

accompanied by a skeleton argument. Alternatively, the skeleton argument may be included in the appellant's notice. Where the skeleton argument is so included it will not form part of the notice for purposes of rule 52.8
(2)Where it is impractical for the appellant's skeleton argument to accompany the appellant's notice it must be filed and served, subject to (2A) below, on all respondents within 14 days of the filing of the notice.

4. The problem, for it is indeed such, is that Mwaungulu, SC, JA, sitting as a single member of the Malawi Supreme Court of Appeal in Misc. Civil Appeal Number 54 of 2015: Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy, decided, on 3rd May 2016, that the above was the position at law in Malawi. The 1st Defendant, who is the appellant, has not filed "initial" skeleton arguments. Neither together with the notice of appeal nor 14 days thereafter. Its been over 5 months since the said skeleton arguments were due. The delay is inordinate and prejudicial to the 1st Claimant. Hence the prayer for an order setting aside the notice of appeal and/or the order for stay of proceedings herein.

5. The 1st Defendant, on the other hand, argues that they are under no legal obligation to file skeleton arguments at this point in time. Those are needed after the record of appeal has been settled or once a date of hearing of the appeal has been fixed. None of those steps have occurred. Consequently, the obligation to file skeleton arguments has not kicked in yet and therefore this application is patently premature and fundamentally misconceived.

6. The application of the practice and procedure obtaining in England in our Supreme Court is via section 8 of the Supreme Court of Appeal Act, Cap 3:01 of the Laws of Malawi. It provides as follows:

8. The practice and procedure of the Court shall be in accordance with this Act and any rules of court made thereunder:
Provided that if this Act or any rules of court made thereunder does not make provision for any particular point of practice and procedure then the practice and procedure of the Court shall be—

(a) in relation to criminal matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England;
(b) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed by the Court of Appeal in England.

7. For matters not expressly provided for in the Supreme Court of Appeal Rules [the Rules], Order III rule 34 thereof provides as follows:

34. Where no other provision is made by these Rules the procedure and practice for the time being in force in the Court of Appeal in England shall apply in so far as it is not inconsistent with these Rules, and the forms in use therein may be used with such adaptations as are necessary.

8. In civil appeals to the Malawi Supreme Court of Appeal a notice of appeal is filed with the High Court. Order III rule 2(1) of the Rules provides in part as follows:

All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the Registry of the Court below.....

Under Order III rule 5(3) of the Rules an appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below.

9. The Rules provide for the "entering of the appeal" under Order III rule 7 of the Rules which state:

The Registrar of the Court shall cause to be served on all parties mentioned in the notice of appeal who have filed an address for service a notice that the record has been filed and shall in due course enter the appeal in the cause list and give notice to the parties of the date of hearing. [emphasis supplied]

10. The wording of the above rules is a recipe for confusion. What is clear though is that an appeal to the Supreme Court is brought by notice of appeal. However, that notice is filed in the High Court and not in the Supreme Court. At that point the Supreme Court is not aware that an appeal has been brought before it, in a manner of speaking. All things being equal, the Supreme Court gets to be aware of the appeal when it is entered in its cause list after the record of appeal has been filed with the Court. It is at that point that the Supreme Court is seized of the whole of the appeal proceedings.

11. The practice relating to skeleton arguments in the Supreme Court has been the subject of several Practice Directions from the Chief Justice. The area has always been sufficiently covered. Whilst it is not covered in the Supreme Court of Appeal Act or the Rules, it has always been addressed by the Practice Directions. Why would we, therefore, import the practice and procedure obtaining in the Court of Appeal in England on a matter that the Chief Justice has issued directions on? Why would we look anywhere else? The categorization of skeleton arguments into four different and distinct species of ‘initial skeleton arguments’, ‘appeal skeleton arguments’, ‘replacement skeleton arguments’ and ‘supplementary skeleton arguments’ appear to us to be alien to our practice and procedure. It is as if a litigant (or more particularly an appellant) is obligated to file four different types/sets of skeleton arguments labelled as above at different stages of the appeal. That is not the case. In our practice a party is required to file skeleton arguments. That’s it. And if need be, a party may file supplementary skeleton arguments, not because they are a different species of skeleton arguments, but rather because he has supplemental arguments to make. They

are supplementary in the English language sense of the word and not as some legal requirement in the rules of procedure. If one has nothing supplemental to his arguments, one need not file anything called supplementary skeleton arguments.

12. On 2nd January 1996, Richard Allen Banda, SC, CJ issued a Practice Direction in the following words:

It is notified for general information and guidance to all Legal Practitioners that with effect from 1st February 1996, oral arguments in the Supreme Court of Appeal shall not be allowed unless, two weeks prior to the date of hearing of the appeal, a skeleton argument has been lodged with the Court's Registry

The need for filing of skeleton arguments in the Supreme Court could not be overemphasized. The time for doing so was clarified. Two weeks before the date of hearing. Nine years later, this Practice Direction however, was superseded by another made on 28th November 2005 by Leonard Ezra Unyolo, SC, CJ. It provided as follows:

IT IS HEREBY notified for general information and guidance to all Legal Practitioners that with effect from the date of this Notice –

1. When presenting skeleton arguments in the Supreme Court of Appeal, Counsel shall –

(a) In all substantive appeals, exchange skeleton arguments as between the parties within 28 days from the date of filing the appeal;

(b) With regard to interim orders and related matters, exchange skeleton arguments as between the parties within 14 days from the date of filing the appeal;

(c) With regard to the filing of skeleton arguments to the Supreme Court Registry, deposit the skeleton arguments with the Registrar 14 days before the date of hearing; and this provision shall apply to substantive appeals, interim orders and related matters;

This Practice Direction introduced a two-tier requirement as regards arguments in the Supreme Court. Firstly, was the exchange of arguments as between the parties. Both the Appellant and the Respondent had to prepare skeleton arguments and exchange copies with each other, within 28 days or 14 days respectively depending on whether the appeal was substantive or with regard to interim orders. The 28 days or 14 days period was to be calculated from the date of filing the appeal, which is, in itself, a big problem. As noted above, an appeal is brought to the Supreme Court by filing a notice of appeal in the High Court. In which case the 28 days/14 days period would have to run from the date the notice is filed (as opposed to the date the record of appeal is lodged with the Supreme Court and the appeal is entered). These would be arguments that would not make any reference to the record of appeal, as there would be none at that point in time. Perhaps the type that Mwaungulu, SC, JA in the Anglia Book Distributors case referred to as “initial” skeleton arguments. If we were to go by

this Practice Direction alone, both parties herein would be guilty of non-compliance as we do not have evidence of exchange of such “initial” skeleton arguments on the appeal. The second tier of the requirement was with regard to the filing of the skeleton arguments with the Supreme Court itself. That would then have to be done 14 days before the date of hearing in any event. The problem is compounded by the fact that about five years later, on 25th March 2010, Lovemore Green Munlo, SC, CJ, issued a new Practice Direction No. 1 of 2010 that provided for different requirements to the Unyolo, SC, CJ Practice Direction. This Practice Direction makes no reference to the previous one by Unyolo, SC, CJ. However, it also purports to supersede the 1996 Banda, SC, CJ Practice Direction, which had already been superseded by the Unyolo, SC, CJ Practice Direction. Like repealing a rule that’s long been repealed already. Confusion double confounded right there. We did wonder whether the two Practice Directions can therefore be read together, side by side. Our view though is that the later in time must prevail. They are on the same subject, providing for contradictory requirements. It must be taken that the earlier one was superseded even though the later one does not expressly say so. We are guided, in holding this view, by the age-old Latin maxim lex posterior derogat legi priori. The current and operative Practice Direction on the subject, therefore, is the 2010 one by Munlo, SC, CJ. It provides as follows:

IT IS HEREBY NOTIFIED for general information and guidance to all legal practitioners that with effect from the date of this Practice Direction, parties in any appeal or other matter in the Supreme Court of Appeal shall be required to present skeleton arguments in accordance with this Practice Direction –

1. Filing of skeleton arguments

When presenting skeleton arguments in the Malawi Supreme Court of Appeal –

(a) in all substantive appeals –

(i) the appellant shall file with the Court skeleton arguments within fourteen (14) days after filing the appeal in this Court and shall during the same period serve a copy of the skeleton arguments on the respondent;

The period for filing and service of the skeleton arguments was rolled into one, replacing the two-tier requirement of exchanging and then filing. And the period was reduced to 14 days. From the date of filing the appeal in this Court. Filing the appeal in this Court is a continuation of our problem with the interpretation of this requirement. The notice of appeal is filed in the High Court. At that point the appeal is filed. But it is not filed in the Supreme Court. What would then be the meaning of the phrase in this Court? In this Court being the Supreme Court. Would a notice that is filed in the High Court be taken to have been filed in this Court? As noted, the Practice Direction makes no mention of the settling or the lodging of the record of appeal with the Supreme Court, at which point, as we noted, the Supreme Court would then be aware of the appeal, as it were. Where would the skeleton arguments be, when filed in the Supreme Court at this point, in the absence of a file in the Supreme Court? Hanging in the air? And of what use would the skeleton arguments be to the High Court, if filed in the High Court together with the notice of appeal, when the High Court is, at that moment and in respect of the question being appealed against, functus officio? All this is compounded by Order III rule 2 (1) of the Rules under which it is specifically provided that an appeal is brought to the Supreme Court by filing a notice of appeal in the High Court. Would we then say once that notice is filed in the High

Court the appeal has been filed in this Court, the Supreme Court, such that time for filing skeleton arguments begins to run there and then?

13. Fortunately for us, the Supreme Court (Msosa, SC, CJ, Nyirenda and Twea SC, JJA), on 27th March 2014, in Malawi Housing Corporation v Western Construction Company Limited 14 MLR 209 put the question to bed. Nyirenda, SC, JA (as he then was) delivering the judgment of the full bench (as it was constituted then) said at 214:

We should take this opportunity though to clarify our understanding of Practice Direction Number 1/2010, in particular as regards the 14 days within which the skeleton arguments shall be filed in civil appeals.

Appeals to this court will ordinarily originate with a Notice of Appeal filed with the court below; Order III rule 2. Upon filing a Notice of Appeal there are several steps to be undertaken by the Registrar of the court below together with the appellant and the respondent as well as other parties identified with the appeal. These stages are set out in Order III rules 5, 6, 7, 8 and 9 of the Supreme Court of Appeal Rules. Indeed, these are stages through which this matter passed as we stated earlier. At all these stages the appeal is still with the court below.

By Order III rule 10, the Registrar of the court below shall file the record of appeal with this court. It is therefore only at this stage that the appeal can be said to be

with this court for purposes of skeleton arguments.

Ideally the fourteen (14) days specified in the Practice Direction should run from that moment. It is expected that at the moment of filing the record of appeal with this court, the Registrar of this court will immediately and pursuant to Order III rule 11 cause to be served on all the parties mentioned in the Notice of Appeal, notice that the record has been filed. In the event that the parties are notified later it only makes judicial prudence that the 14 days for skeleton arguments start running from the time the parties are served with notice of the record.

14. The direction from the apex Court couldn't be any clearer. The fourteen (14) days period does not begin to run until the appeal is with the Supreme Court. Until when the record of appeal is filed with the Supreme Court and the parties are notified would the requirement to file skeleton arguments kick in. That, the Supreme Court said, was how the Practice Direction was to be understood. All was well until when two years later, on 3rd May 2016, Mwaungulu, SC, JA (sitting as a single member of the Supreme Court) decided otherwise in the Anglia Book Distributors Limited case, completely overruling the full bench in the Malawi Housing Corporation case. The JA, in typical Mwaungulu style, asked and answered in the judgment, in part, the following questions thus:

Who is the actor in paragraph 1(a)(i) of Practice Direction No 1 of 2010?

This is important. The actor performs many functions in paragraph 1(a)(i) of Practice Direction No. 1 of 2010. It is the appellant, through and through. Now, let us consider actors excluded from the direction: the Registrar, the High Court,

the High Court Judge, the Supreme Court of Appeal Registrar, the Supreme Court of Appeal Judge, the Supreme Court and the respondent. It is important, for reasons appearing later, to underline that the Registrar of the High Court is the consequential omission in paragraph 1(a)(i) of Practice Direction No. 1 of 2010.

What is the appellant supposed to do?

The appellant is supposed to file. Now let us see what the appellant is not asked to do here. The appellant is supposed to file, even though it makes no difference. The distinction is important, however, because, in Order 3 rule 11, it is the Registrar of the High Court, not the appellant, who is supposed to file the record of appeal.

What is the appellant supposed to file?

This looks like asking the obvious. This Court, however, not once, not twice states that under this Practice Direction, the record of appeal is that which is supposed to be filed. The truth of the matter is that the skeleton arguments are to be filed?

When are skeleton arguments supposed to be filed?

Skeleton arguments are supposed to be filed 14 days after a specific event!

What event?

The event is the filing of the appeal. The direction does not refer to the filing of a record of appeal. Introducing the words ‘record of appeal’ in paragraph 1(a)(i) of

Practice Direction No. 1 of 2010 is judicial re-legislation. The words are not in paragraph 1(a)(i) of Practice Direction No. 1 of 2010.

Within what time is the appellant supposed to file skeleton arguments?

Within fourteen days.

Within fourteen days of what?

Within fourteen days after filing.

Filing what?

It is easy to miss the point here. This is where the point has actually been missed. Filing skeleton arguments under paragraph 1(a)(i) of Practice Direction No. 1 of 2010, premises on occurrence of some specific event and caused by some specific actor. The specific event is filing the appeal. In this case it is not the filing of the record of appeal. It is the filing of the appeal. As demonstrated, there is a world of difference between filing an appeal and filing the record of it. Filing the appeal can only be filing its record, not by interpretation, but by divination.

Who is supposed to file the appeal?

The specific actor is the appellant, not the Registrar of the High Court. The Registrar never files the appeal, the appellant does. This is important. It seems

that those who think that it is the record of appeal that has to be filed cannot properly identify the actor and the action. To identify the actor, shorn of other words, paragraph 1(a)(i) of Practice Direction No. 1 of 2010 is recast as follows:

The appellant shall file…. Skeleton arguments…. After filing the appeal in this court and shall during the same period serve a copy of the skeleton arguments on the respondents.

Clearly, it is the appellant who must file the appeal. It is not the responsibility of the Registrar to file the appeal. It is not the responsibility of the appellant to file the record of appeal under Order 3 rule 11 of the Supreme Court of Appeal Rules

with this Court. That is the function of the Registrar. The appellant must file the appeal. Skeleton arguments are filed within 14 days of that.

Where is the appeal supposed to be filed?

In this court, the Supreme Court of Appeal!

How is the appeal filed in this court?

The appeal is filed in this court by the appellant filing the notice of appeal in the High Court under Order 3 rule 2 of the Supreme Court of Appeal Rules. The Registrar's lodging of the record of appeal is not filing the appeal in this court.

What, therefore our rules change in the practice in the England and Wales Appeal Court practice and procedure is that in Malawi skeleton arguments should be filed together with the notice of appeal. Paragraph 3 of Practice Direction 52C provides:

An appellant's notice (Form N161) must be filed and served in all cases. The appellant's notice must be accompanied by the appellant's skeleton argument in support of the appeal…

They should be filed fourteen days after the notice of appeal is filed.

15. There you have it. Our confusion compounded. It is on the basis of this decision that the 1st Claimant herein took out the present application. As always, Mwaungulu, SC, JA, very elaborate in his analysis of what he thinks the Practice Direction says and means. And thereby overruling the full bench of the Supreme Court. Or could he? We find the answer in the dicta of Madise, SC, JA (himself sitting as a single member of the Supreme Court) in Civil Appeal Number 22 of 2023: Roads Authority and Roads Fund Administration v Al-Abdulhadi Engineering Consultancy. In his ruling dated 14th March 2024 on this very question, Madise, SC, JA made the following findings:

There is no dispute that a notice of appeal is not filed in the Supreme Court of Appeal but in the Court below. Regarding the substantive appeal, no document is filed in the Supreme Court of Appeal until an appeal is entered meaning that the

Record of Appeal has been settled and filed with this Court. An appeal is only lodged (entered) in the Supreme Court of Appeal when the Record of Appeal is filed in the Supreme Court. It therefore means that time in the Supreme Court starts running when the Record of Appeal is filed in the Supreme Court.

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The operative word is … in this Court… meaning the Supreme Court of Appeal and not the High Court. This is the correct interpretation of Practice Direction No. 1(a)(i) of 2010. I'm fortified by the decision of the full bench in Malawi Housing Corporation v Western Construction Company Limited [2014] MLR 209 at page 214, a full bench of the Supreme Court of Appeal (three Justices of Appeal) said:

……

I'm in agreement with the Appellants that the decision in the Malawi Housing Corporation v Western Construction Company Limited was made by the full bench of the Court (three Justices of Appeal as was the composition at that time). A Single Member cannot overrule that decision. It makes logical sense that when the appeal is on the facts, or and on the law, the skeleton arguments must refer to pages of the Record of Appeal in order to make sound arguments before the Supreme Court. In this regard it would be difficult or impossible to draft comprehensive skeleton arguments before the Record of Appeal is ready. It therefore makes sense that the skeleton arguments should be filed 14 days after the Record of Appeal is filed in the Supreme Court of Appeal. Even Mwaungulu JA in Anglia Book Distributors Limited v The Registered Trustees of Kalibu Ministries t/a Kalibu Academy Civil Appeal No 15 of 2015 acknowledged the need for the skeleton arguments to cross-reference the Record of Appeal.

……

I therefore find that for purposes of filing skeleton arguments, time starts running after the appeal has been filed in this Court and not in the Court below. The time starts running after the record of appeal is prepared and the Registrar of the

court below has filed the appeal and it has been entered in this Court, in terms of rule 11 of the Supreme Court of Appeal Rules. It is a fact that the skeleton arguments are aimed at convincing the Supreme Court of Appeal, and not the Court below which is by that time functus officio after it has delivered its judgment. There is no point really in filing the skeleton arguments in the Court below. The Court below has no business with skeleton arguments meant for the Supreme Court of Appeal. To decide otherwise will entail filing two sets of skeleton arguments one in the Court below together with the notice of appeal and another set in the Court above which does not make any logical and economic sense. [emphasis in bold supplied]

16. Right there is the correct position at law. A single member of the Supreme Court cannot overrule the full bench of the Supreme Court. Mwaungulu, SC, JA's attempt to do so was for naught, the effort merely Sisyphean and to no avail. A wild goose chase. The correct reading and interpretation of Practice Direction No. 1 of 2010 was that which the Supreme Court provided in the Malawi Housing Corporation case. There is no requirement under our practice and procedure to file "initial" skeleton arguments together with the notice of appeal or within fourteen days thereafter. Skeleton arguments are required when the appeal is with the Supreme Court upon the record of appeal being filed with the Court and the appeal being entered. And applying that binding authority in the instant case, the 1st Claimant's application is ill conceived and premature. It must accordingly be dismissed.

17. We note that the 1st Defendant wrote to the 1st Claimant on 23rd December 2024 proposing to the 1st Claimant documents to be included in the record of appeal. (see

exhibit DM3). There appears to have been no response from the 1st Claimant. Had that consent order been executed we would have had a record of appeal

herein ages ago. We note from the record that after the Ruling by Mkandawire, SC, JA on 13th March 2025 on an application to vacate the stay of proceedings herein, the 1st Defendant took out a Summons to settle the record of appeal. As it is, the Registrar has summoned the parties herein to appear before her on 1st July 2025 in order to settle the record. The parties need not wait that long. They can execute a consent order this very day and have that record finalised in no time at all. That is if they indeed are desirous of having this appeal disposed of as quickly as possible. As we already remarked previously, the dispute herein involves sizeable amounts of money. It should be in the interests of all parties to ensure that it is dealt with expeditiously. As the Supreme Court observed in the Malawi Housing Corporation case from the moment a notice of appeal is filed it is the shared responsibility between the Court and the parties to ensure that the appeal is carried forward to completion. The rules place a higher responsibility on the appellant. That could not be an idle role for the appellant. This Court, as it does with all other matters before it, is definitely playing its part to ensure a speedy disposal of this matter. The question is: are the parties doing the same thing?

18. The contemplated appeal herein is not on the merits of the claim. It is on a very specific and narrow question: whether the arbitration proceedings having been terminated in the manner they were herein, that arbitration has been had, allowing the parties to revert to this Court for a resolution of the dispute on its merits. Both the merits of the decision being appealed against and the question whether the right to appeal against that decision has in fact accrued at this point in time should be one that the Supreme Court will dispose of fairly quickly. Only if the parties move with dispatch to have the appeal before the Supreme Court. If it takes the parties five months just to have the record of appeal settled, we shudder to think how long it will take to have the matter heard in the Supreme Court. We, as a Court, can only do so much. We have no dog in the fight. The rest

is really up to the parties themselves.

19. In the circumstances, the prayer to have the notice of appeal herein set aside is hereby dismissed.

20. We do not have fresh basis upon which to exercise our discretion to vacate the order for stay which we granted herein. Certainly not on the grounds advanced in the 1st Claimant's application. We cannot fault the 1st Defendant for the absence of a record of appeal herein up until this moment nor for the snail's pace at which the appeal seem to be grinding so far. The prayer to vacate the stay must therefore also fail.

21. The 1st Claimant is condemned to costs of this application. We so order.

Pronounced in chambers at Lilongwe this 29th day of May 2025.