

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2016/HPC/0186



BETWEEN:

ACCESS BANK ZAMBIA LIMITED

PLAINTIFF

AND

JAMES CHOLA CHONYA

DEFENDANT

**CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at
Lusaka on the 17th day of November, 2017**

For the Plaintiff: Ms. C. Mulomba of Messrs. Theotis
Mataka & Sampa Legal Practitioners

For the Defendant: Mr. M. Mulele of Messrs. G. M. Legal
Practitioners

RULING

Cases referred to:

- 1. Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Others (1993-1994) ZR 36 (S.C.).*
- 2. Kawaya v. First Alliance Bank Zambia Limited, SCZ/8/208 of 1997 (Unreported).*

3. *African Banking Corporation Zambia Limited (T/A BancABC) v. Chat Milling Company Limited and 5 Others, 2014/HPC/0357*
4. *Access Bank Zambia Limited v. Mayase Mibenge, 2012/HPC/0556*

Legislation referred to:

1. *Order 36 Rule 9, of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2. *Orders 47 Rule 1 (3) of the Rules of the Supreme Court, 1999 Edition (the "White Book").*

This is an application by the Defendant for an order to pay the judgment sum in instalments (hereinafter called the "Application"). The Application is made pursuant to Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia, which provides as follows:

"Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance."

The background leading to this Application is that, by consent of the parties herein, this court entered judgment (hereinafter called the "Consent Judgment"), in favour of the Plaintiff on 8th November, 2016; and the following were the terms of the said Consent Judgment:

- (a) That judgment be entered in the sum of K67,778.86;
- (b) That the judgment sum shall attract interest at the commercial bank lending rate from the date of the Writ of Summons to the date of full and final settlement;
- (c) That the Plaintiff shall not charge interest on the overdrawn position of the Defendant's Account from 3rd May, 2016;
- (d) That the execution of the said Consent Judgment shall be stayed pending the Defendant's application to liquidate the Judgment sum in monthly instalments, which shall be filed within Five (5) days of the Consent Judgment; and
- (e) That each party will bear their own legal fees.

The Application is supported by an affidavit (hereinafter called "the Affidavit in Support"), sworn by the Defendant herein and whose testimony is that he does not have the capacity to liquidate the entire judgment sum in one lumpsum as his income cannot permit it.

It is deposed that the deponent's monthly net income from his employers, African Life Financial Services, is K8,600.00. As evidence

of this assertion, the deponent exhibited a copy of his pay slip, marked "JCC1".

The deponent further deposed that after his monthly expenses, the surplus from his income is K800.00. To this end, the deponent produced exhibit "JCC2", being a copy of his lease agreement, as one of his expenses. The deponent also deposed that, aside from the said expenses, he would also have to pay his lawyer's fees.

It was the deponent's testimony that he was only able to set aside K1,000.00, per month, towards liquidating the Judgment debt from the time of making this Application (being 23rd November, 2016) till May 2017 when he would increase the instalments to K1,600.00 per month, following an anticipated salary increment in April, 2017.

The deponent undertook to pay larger instalments as and when his financial position allowed; and further averred that the Plaintiff would not be prejudiced by the payment in instalments as the Judgment debt would be paid with interest at commercial bank lending rate until full and final payment.

The Affidavit in Support was augmented by Skeleton Arguments, the crux of which is that the Defendant has demonstrated, by way of affidavit evidence, that his finances cannot allow him to liquidate the Judgment debt in one lumpsum; and that his proposed payment plan will not prejudice the Plaintiff in any way.

Counsel's submissions were hinged on Order 36 Rule 9 of the High Court Rules (already cited above). Further, Counsel for the Defendant also referred the court to the case of *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Others*¹ to demonstrate his contention that a court may order that a judgment debt be liquidated in instalments upon sufficient cause being shown by a judgment debtor.

The Application is opposed and an Affidavit in Opposition, sworn by one Leonard Sichande, a Recoveries Officer in the Plaintiff bank, was duly filed into court.

The deponent avers that from the pay slip exhibited by the Defendant in the Affidavit in Support and from the tabulation of his monthly expenses, the Defendant has capacity to liquidate the Judgment debt in instalments which exceed the ones proposed by the Defendant.

It is the deponent's further averment that the Defendant did not show good faith by neglecting to service his loan for over four years and that even after filing the Affidavit in Support, in November 2016, he did not make any deposit, as a sign of commitment, to reduce his liability.

It is also the deponent's testimony that the bank will be prejudiced by the amount proposed to be paid by the Defendant as the proposed payment plan would mean that the repayment period exceeds twenty (20) years; and in turn, exceed the maximum period of repayment.

The deponent deposed that the proposed repayment period is far too long for a personal loan and that there is a possibility of default on the part of the Defendant during that period.

The deponent also deposed that the Plaintiff is willing to accept instalments of not less than K2,877.32 per month at 30% interest rate, which will allow the loan to be fully paid over a period of three (3) years. To this effect, the deponent produced exhibit "LS1", being an amortisation schedule for repayment over three (3) years.

Finally, the deponent deposed that the Defendant would not be harshly prejudiced by the payment structure suggested by the Plaintiff bank as some of the expenses tabulated by the Defendant in his Affidavit in Support are not essential to his livelihood.

The Affidavit in Opposition is augmented by Skeleton Arguments, in which Counsel has reiterated the provisions of Order 36 Rule 9 of the High Court Rules (already cited above).

The gist of the said Skeleton Arguments is that the Defendant has not shown sufficient cause to warrant the court making an order allowing him to liquidate the Judgment debt in his proposed repayment manner. In this regard, Counsel for the Plaintiff referred the court to the cases of *Sunday Kawayya v. First Alliance Bank Zambia Limited*² and *African Banking Corporation Zambia Limited (T/A BancABC) v. Chat Milling Company Limited and 5 Others*³.

Further, Counsel for the Plaintiff referred the court to Order 47 Rule 1 (3) of the Rules of the Supreme Court, 1999 Edition (hereinafter called the "White Book"), to fortify his contention that the Defendant has failed to list, in his Affidavit in Support, any assets he owns, their value and other incentives provided to him by his employer; which may reduce his expenses and thus enable him to complete the repayment of the loan within a shorter period of time.

Finally, Counsel for the Plaintiff submitted that the Defendant has not made any attempt to reduce his outstanding liability even after proposing to liquidate the debt in instalments and has thus, not acted in good faith. That the Plaintiff would be prejudiced if the Defendant were to be granted an order to liquidate the Judgment debt over a period of twenty (20) years.

At the hearing of the Application Counsel for the Defendant stated that the Defendant had exhibited proof of a salary increment in his Affidavit in Reply and that, therefore, the Defendant is now willing to pay instalments of K1,500.00 per month, towards liquidating the Judgment debt.

In response, Counsel for the Plaintiff reiterated the submissions in the Skeleton Arguments and in this respect, referred the court to the case of *Access Bank Zambia Limited v. Mayase Mibenge*⁴ in which it was stated that an application to settle a judgment debt in instalments should make reasonable proposals. In light of this, Counsel submitted that should this court grant this Application, the

Plaintiff proposes that the Defendant settles the Judgment debt in monthly instalments of K2,877.32 per month, at 30% interest rate for a period of three (3) years.

In reply to the Plaintiff's Counsel, Counsel for the Defendant challenged the Plaintiff's assertion in the Affidavit in Opposition that the Defendant's initial proposition for repayment would stretch over a period of twenty (20) years; and contended that the same was an exaggeration. Counsel for the Defendant further contended that, going by the Defendant's proposal, the entire liability would be settled within a period of seven (7) years; which he submitted would be reasonable and unlikely to prejudice the Plaintiff as the debt would be paid back at an interest.

In closing his submissions, Counsel for the Defendant contended that it was clear from the Plaintiff's counter proposal that sufficient cause has been shown for the Defendant to liquidate the Judgment debt in instalments.

I have carefully considered the parties' affidavits, the Lists of Authorities and the Skeleton Arguments in support of and in opposition to this Application. Indeed, as already pointed out by Counsel for the Defendant, a perusal of the parties' affidavits reveals that neither party is disputing the proposal for the Defendant to settle the Judgment debt in instalments. I shall, therefore, not delve into discussing the conditions that must be satisfied in order for a court to grant an order for payment of a judgment debt in instalments.

The issue in dispute, in my opinion, is the instalment amount and the period within which the said instalments are to be paid.

The Defendant's final proposition is that the most he is able to pay towards the liability is a sum of K1,500.00 per month. This is following an initial proposition to be paying the sum of K1,000.00 per month. Both of these propositions have been countered by the Plaintiff which has instead proposed that the Defendant pay K2,877.32 per month.

To support his propositions, the Defendant deposed that his income (before the salary increment) was K8,600.00, which would be reduced to only K800.00 after settling his monthly expenses. While the Defendant has managed to exhibit his lease agreement, in the Affidavit in Support, as proof of his rental expense, he has failed to produce any tangible evidence to substantiate his other alleged expenses. In this regard, I am not satisfied that the alleged expenses are incurred as tabulated by the Defendant. Further, I am inclined to agree with Counsel for the Plaintiff that some of the expenses tabulated are not essential to the Defendant's livelihood, particularly the maid and sundries.

I have also examined the Statement of Claim on the record and noticed that one of the facts recounted by the Plaintiff in paragraph 4 is that according to the loan agreement which was to run for three (3) years, the Defendant was to service the loan by monthly instalments of K1,480.70, from 22nd August, 2013 until full

repayment. Since the time the Defendant took out the loan, he has been aware that there is a liability pending with the Plaintiff. I am of the opinion that the Defendant must have reasonably been aware that the instalments pegged at the sum of K1,480.70 were an incident of him being an employee of the Plaintiff bank, at the date of the loan. The reasonable assumption, thus, is that the Defendant must have also been aware that this advantage would immediately cease once he was separated from the Bank and that the commercial bank lending rate would then apply. It goes without saying, then, that at the time, the Defendant must have been ready to part with that instalment sum every month.

In view of the foregoing, therefore, it seems to me that the Defendant has exaggerated his monthly expenses because in planning for his expenses and being fully aware of his outstanding liability to the bank, he could not reasonably expend all his income to the point that he appears not to have taken the loan into consideration. If at all the case is that he did not consider his debt to the bank each time he apportioned resources for his expenses, that would only speak volumes about the Defendant's unenthusiastic approach towards settling his debt.

In the premises, I find that the Defendant has failed to substantiate his claim that he is unable to service his loan at an instalment greater than K1,500.00 per month.

Turning to the period within which the instalments for the Judgment debt may be paid, the Defendant proposes that seven (7) years would be a reasonable period within which to settle the whole debt if the Defendant is allowed to pay K1,500.00 per month.

I have observed, from the record, that the date of the loan was initially 22nd August, 2013, to be serviced for a period of three (3) years. Assuming all things had gone according to plan, this would have meant that the loan would have been fully serviced by around August, 2016. However, this is 2017 and there is no proof on the record, tendered by the Defendant, to show that he made any effort from the time he stopped working for the Plaintiff bank to the time of these proceedings, to reduce his liability to the Plaintiff. Since there is no dispute by the Defendant that he is indebted to the Plaintiff, I see nothing that could have stopped him from reducing his indebtedness.

Given the Defendant's past conduct of applying no effort in settling his liability, I am inclined to agree with Counsel for the Plaintiff that the Plaintiff risks suffering default at the instance of the Defendant over the long period suggested.


To grant the Defendant's proposal of a period of seven (7) years within which to settle a loan that should have ordinarily been settled in 2016, would entail that the loan will fully be settled some time in 2024. Such a period, in my view, is too long and would be prejudicial to the Plaintiff which had initially contracted with the Defendant to

settle the loan by 2016. In my view, the suggestion by the Plaintiff to allow the Defendant settle the Judgment debt within three (3) years, is an expression of magnanimity on its part, considering the history and events in this matter.

In view of the foregoing and in light of the fact that the Plaintiff is not disputing the payment of the Judgment debt in instalments, the Application is granted. The Defendant shall settle the Judgment debt in monthly instalments of K2,877.32 at 30% interest, from the date of the Writ of Summons to the date of full and final payment. The execution of the Consent Judgment entered on 8th November, 2017, is hereby given effect.

Each party shall bear its own costs.

Dated at Lusaka the 17th day of November, 2017.


W.S. MWENDA (Dr)
HIGH COURT JUDGE