

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0556

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ECOBANK MALAWI LIMITED

PLAINTIFF

AND

NYIOMBO INVESTMENTS LIMITED

DEFENDANT

Before the Hon. Lady Justice Irene Zeko Mbewe in Chambers

For the Plaintiff : *Mr. A. Shonga, SC of Messrs Shamwana & Company*

For the Defendant : *Mr. M. Mutemwa, SC of Messrs Mutemwa & Company*

R U L I N G

Cases Referred to:

1. *Southern Cross Motors Limited v Nonc Systems Technology Limited*
2011/HK/223
2. *Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Elias Andrew Spyron and Mary Ann Langley [1993-1994] ZR 36*
3. *Bellamano v Ligure Lombarda Limited [1976] ZR 267*
4. *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation) v Hyper Food Products Limited and 2 Others [1999] ZR 124*

Legislation Referred To:

1. *Constitution of Zambia (Amendment) Act No 2 of 2016*
2. *High Court Rules, Cap 27 of the Laws of Zambia*
3. *Rules of the Supreme Court, 1999 Edition*

On the 24th November 2016, the Plaintiff commenced proceedings herein by way of writ of summons against the Defendant claiming the sum of US\$14,277,835.30 as at 31st October 2016, plus interest at 11.5% and costs.

On 30th March 2017, the parties entered into a Consent Judgment in the sum of US\$11,248,403.00 plus interest at 11.5%. According to its terms, the Defendant was at liberty to apply to Court for an Order to settle the Judgment debt of US\$11,248,403.00 in instalments provided the said application is filed into Court within 14 days of the date of the Order.

On the 10th April 2017, the Defendant filed summons to pay Judgment debt by instalments pursuant to **Order 47 (1) Rules of the Supreme Court, 1999 Edition** supported by an affidavit deposed to by Jomo Matululu an Executive Director in the employ of the Defendant. According to the deponent, the Defendant is predominantly in the business of tenders and supply of fertilisers

under a massive programme for support to small scale farmers. That following the Government of Zambia's introduction of the cash backed E-Vouchers System, this has had the effect of reducing tenders. The deponent asserts that the Defendant is commercializing its activities in order to have a broader catchment of clients beyond the fertilizer support programme. According to the deponent, the Defendant's outstanding debts will be serviced and liquidated through an enhanced business module. A cash flow projection for the next five years is exhibited "**JM 1**" including the Defendant's historic debts and excluding the Judgment sum (**Exhibit "JM2"-12**). The deponent asserts that the Defendant is owed the sum of US\$59,723,436.30 which is committed in general to the accumulated liabilities and exposures as debts owed to Eco Bank and part of the PTA Bank debt, and an abridged statement is produced (**Exhibit "JM 13"**). The deponent asserts that the Defendant owns Plot 5277/8 Buyantashi Road, Heavy Industrial Area, Lusaka valued at approximately US\$4 million and is encumbered by Standard Chartered Bank (Zambia). According to the deponent, the Defendant proposes to pay US\$750,000 in 2018, US\$ 1.8 million in 2019, US\$2.9 million in 2020 and should there

be any balance after determination of the balance of the claim, from the Defendant's reserves it shall pay US\$4.2 million in 2021 and US\$3.6 million in 2022. The deponent asserts that the Defendant is in no position to pay any amount towards the Judgment debt in the year 2017 as the Defendant is in ongoing negotiations with Banks outside Zambia for implementation of its programme in the year 2018. That in the circumstances of this case, it just and equitable to grant the order as prayed.

The Plaintiff opposed the application by way of affidavit deposed to by Luke Grey Kataika the General Counsel in the Plaintiff Bank. It is deposed that the Defendant has failed to provide a full and frank disclosure and that the Defendant has not made any payment to the Plaintiff since 27th January 2017. That following the second Consent Judgment on 31st March 2017 the Defendant has made no payment and has failed to show the Court whether it is currently in business or not. According to the Plaintiff, the Defendant's historic debts are unsubstantiated and failed to specify how much of the unsubstantiated sum of US\$59,723,436.30 has been assigned towards payment of the Judgment debt to the Plaintiff. The

deponent asserts that the Defendant has not shown any proof of the encumbrances relating to Stand Plot 5277/8 Buyantanshi Road, Lusaka. In essence, the deponent proposes that the proposed payments set out by the Defendant are without basis and that the proposed instalments shall take up to six years to settle the Judgment debt. The deponent asserts that the Plaintiff should not be denied the fruits of its judgment and that if the Court is inclined to allow the payment of the Judgment debt in instalments, a period of no more than six months from the date of the Consent Judgment would be reasonable.

In the affidavit in reply, the deponent asserts that payment of the Judgment debt can only commence in 2018 and that arrangements are underway for payment of the Plaintiff's Advocates legal fees. The deponent asserts that the Plaintiff was unable to assign any monies paid directly to it by the Government of Zambia as the Defendant is not the primary debtor as it only guaranteed the debt on behalf of Nyiombo Malawi and at the time it assigned the debts, this liability had not been invoked. The deponent reiterated that it is just and equitable to grant the application to avoid the Defendant

going into liquidation which will result in massive unemployment and a telling effect on some of the creditors.

The Defendant filed skeleton arguments and cited **Order 47 Rule 1 Rules of the Supreme Court** and argued that the Defendant has shown its total liability, income and property it owns. Reliance was placed on the case of **Southern Cross Motors Limited v Nonc Systems Technology Limited¹, Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Elias Andrew Spyron and Others²** and urged the Court to allow the application.

The Plaintiff filed skeleton arguments into Court on 17th May 2017 in which it is argues that the Defendant has failed to discharge the burden of proof and that the only reason put forth by the Defendant for failing to pay the Judgment debt is that it has debts to service and essentially no sufficient reasons exist for the Court to allow it settle the Judgment debt in instalments. The Court was urged to dismiss the application as it is baseless and grossly unreasonable. Reliance was placed on the **Zambia Import and Export Bank Limited v Mkuyu Farms Limited and Others²** cited by the Defendant. In the alternative, that if the Court is inclined to allow

the Defendant settle the Judgment debt in instalments, the Court is urged to allow no more than six months for the full settlement.

At the hearing of the application Mr. Mutemwa SC, Counsel for the Defendant relied on the supporting affidavit, affidavit in reply, skeleton arguments and list of authorities and urged the Court to grant the application as prayed.

Mr. Shonga, SC Counsel for the Plaintiff in his oral submissions relied on the opposing affidavit, skeleton arguments. Counsel submitted that the Defendant had not made a full and frank disclosure of its assets and liabilities and urged the Court to dismiss the Defendant 's application.

I have carefully considered the affidavit evidence, skeleton arguments and oral submissions made by Counsel for the parties, and the authorities drawn to my attention. The issue for determination is whether or not to grant the Defendant's application to settle the Judgment debt in instalments.

Counsel for the Plaintiff contends that the **Order 47 (1) Rules of the Supreme Court, 1999 Edition** cited by the Defendant is the wrong order as it does not give power to the Court to determine an

application to pay a Judgment debt in instalments. Counsel for the Plaintiff cited the case of **Bellamano v Ligure Lombarda Limited**³, on the effect of non-compliance of court rules. In the circumstances of the present application, I opine that the mere fact that a party cites a wrong law or order, this ought not to deprive the Court of a jurisdiction where a jurisdiction exists to grant the order sought, and that such an application shall not be rendered incompetent or defective. Therefore, in order to meet the ends of justice, I shall proceed to determine the matter as if the Defendant had correctly cited the applicable order being **Order 36 Rule 9 High Court Rules, Cap 27 of the Laws of Zambia**. It is my considered view that proceeding to determine the application in no way prejudices the Plaintiff.

Order 36 Rule 9 High Court Rules, Cap 27 of the Laws of Zambia provides as follows:

“Where a Judgment 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 failure of any installment, the whole amount remaining unpaid shall forthwith become due:

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

The Court has the discretion to order the payment of a Judgment debt in instalments. From the cited Order, a Court may order a Judgment debt to be satisfied by instalments upon sufficient reason being shown by the judgment debtor.

Counsel for the Plaintiff argues that the Defendant has not made a full and frank disclosure of its assets and liabilities. Conversely, the Defendant argues that it has done so. In considering an application for payment of the Judgment sum by instalments, each case is governed by its own peculiar circumstances and the interest of both parties must be taken into account. It is trite that a successful litigant should not be denied the fruits of its Judgment except where sufficient reason is shown. I am ably guided by the Supreme Court in the case of **Zambia Export and Import Bank v Mkuyu Farms Limited and Others** ², where the Supreme Court held that

the Court may order that a Judgment debt be satisfied by instalments upon sufficient cause being shown by the judgment debtor.

In considering the Defendant's application I have to consider as to what constitutes "sufficient reason" as envisaged under **Order 36 Rule 9 High Court Rules, Cap 27 of the Laws of Zambia**. The factors I have taken into consideration is the financial status of the Defendant and whether the Judgment debtor has the means to pay the Judgment debt immediately or in the near future; whether the Judgment debtor will comply with the Order for payment by instalments, how long the proposed instalment payments will take to pay the debt; whether or not the Judgment Creditor will suffer hardship by the proposed length of time, the age and nature of the debt, the facts adduced against the application by the Judgment Creditor.

The Defendant showed its assets, liabilities, income and expenditure which I have carefully examined, and it is evident that the Defendant is not in a position to settle the Judgment debt hence the present application. However, in the Defendant's affidavit in

support, paragraph 6 lists the historic debts which I find to be vague particularly relating to Plot 5277/8 Buyantashi Road, Heavy Industrial Area, Lusaka as to whether the said property is encumbered or not. I would have expected the Defendant to avail this Court with a print out from the Lands and Deeds Registry to support the Defendant's position on its liabilities. Equally vague is **Exhibit "JM 6"** in the Defendant's affidavit in support as it fails to disclose the creditor though it is handwritten "Red Sea Trading Company", and in my view there is no nexus with the Defendant. A perusal of **Exhibit "JM9"** in the Defendant' affidavit in support of this application shows a list of companies and is devoid of any detail as to whether it relates to the Defendant, the dates of the listed debts so as to assist the Court discern or decipher the information. Conspicuously missing are the Defendant's revenue streams if any.

I have further examined the projected cash flow statement from year 2018 to year 2022 (**Exhibit "JM 2"**). I concur with Counsel for the Plaintiff that there are no projections for the year 2017. A cash flow is intended as a mere projection on inflows and paints a

picture of what is expected in the future. Notwithstanding, even if I were to subtract those liabilities that are vague in nature as aforesaid in the preceding paragraph, the Defendant remains with a huge debt burden and indebtedness to the Plaintiff. The Defendant cannot pay the Judgment debt in one payment. I am satisfied that the Defendant has shown sufficient reasons to entitle the Defendant to the order sought of settling the Judgment debt in instalments.

The proposed instalment payment plan by the Defendant is set out in paragraph 9 of the Defendant's affidavit in support as follows:

“9. Clearly, therefore, based on the huge debt burden, which in a way, will be ameliorated by the commercialization process, the Defendant proposes to pay US\$750,000 in 2018, US\$1.8 million in 2019, US\$2.9 million in 202, US\$4.2 million in 2021, US\$3.6 million in 2022 and balance if at all in 2023”.

Counsel for the Plaintiff has vehemently rejected the Defendant's instalment payment proposal whose implication is that it will take a period of up to five (5) years to settle the debt for a loan obtained on 27th May 2014. This in my view does not qualify as a reasonable time as guided by the Supreme Court in the case **of S. Brian**

Musonda (Receiver of First Merchant Bank (In Liquidation) v Hyper Food Products Limited and 2 Others⁴ where it was held that:

“It is not contrary to law or the rules for the Court to exercise its equitable jurisdiction of affording relief where a Judgment debtor can pay within a reasonable time even if it results in fettering the Judgment creditor’s freedom of inflicting a remedy of their own choice or preference”.

It is trite that an Order for instalment payments must be on reasonable terms and not at the dictates or whims of any party or the comfort of any of the parties. I am mindful of the Defendant's impecunious position and at the same time the Plaintiff should not be denied the enjoyment of the fruits of its Judgment. The Defendant has shown its willingness to settle the Judgment debt.

The sum total is that Defendant’s application to pay the Judgment sum in instalments succeeds.

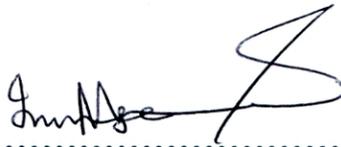
I order that the Defendant shall pay the Judgment debt in four quarterly instalments plus interest, the first instalment payable on

or before the 1st October, 2017. In default, the entire outstanding judgment debt shall become due.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Dated in Lusaka in Chambers this 12th day of June 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE