

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HPC/0329



B E T W E E N:

ZAMBIA FITMENT CENTRE LIMITED (T/A KWIKFIT)

PLAINTIFF

AND

KEREN MOTORS LIMITED

DEFENDANT

Delivered in Chambers before the Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 5th day of January, 2017.

For the Plaintiff : V. K. Chitupila, Esquire of Messrs AB & David

For the Defendant : M. Mushemi, Esquire of Messrs Nhari Mushemi & Associates

R U L I N G

Legislation referred to:

1. *High Court Rules, Chapter 27 of the laws of Zambia.*

This is the Defendant's application by way of Summons and supporting Affidavit to pay Judgment sum in installments pursuant to **Order 36 Rule 9** of the **High Court Rules** filed into Court on 13th October, 2016 together with Skeleton Arguments and List of Authorities.

The application followed the Judgment on admissions entered on 16th October, 2016 in favour of the Plaintiff to recover from the Defendant K33,460-00 and US\$25,430-38, interest and costs.

In the supporting Affidavit, JANE MAKUMBA, the Office Manager for the Defendant deponed that the Defendant has had financial difficulties to honour its obligations because of non payment of money the Defendant is owed by the Government of the Republic of Zambia. The Defendant, therefore, proposed to pay the Judgment sum in installments of K5,571-00 and US\$4,238-40 monthly with effect from 31st October, 2016.

As part of its demonstration as regards its financial status, the Defendant exhibited to the supporting Affidavit two letters it received from the National Road Fund Agency dated 9th April, 2016 confirming that a total amount of K3,922,445-14 was owed to it by the Government of the Republic of Zambia. The Defendant also exhibited its Bank Statements, a list of Fixed Assets, Valuation Reports of Motor Vehicles and Property and a list of Debtors and Creditors.

The application was opposed. The Affidavit in Opposition filed on 4th November, 2016 was sworn by SUGATH ASANKA NANYAKKARA, a Manager in the Plaintiff Company, who stated that the information disclosed by the Defendant in the supporting Affidavit was not sufficient to demonstrate that the Defendant is able to liquidate the Judgment sum in the proposed installments and time-frame. It was further deponed that even though the Defendant indicated that it would

make the first installment payment on 31st October, 2016, no payment had been made. It was, therefore, the deponent's contention that this is not a proper case for the granting of the application to pay in installment. This Affidavit was also filed with the requisite Skeleton Arguments and the List of Authorities.

On 26th November, 2016, the Defendant filed into Court an Affidavit in Reply sworn by JANE MAKUMBA. She stated that in fact, the Defendant had made part payment of the Judgment sum and Cheque No. 00156 dated 19th November, 2016 in the sum of K33,426-00 was exhibited to the Affidavit in Reply.

At the hearing on 7th December, 2016, both parties by respective Learned Counsel relied on the contents of the Affidavits filed into Court, the Skeleton Arguments and List of Authorities. I will not delve into the details of the arguments because of the approach I have taken in disposing of the application which will become clear later. Save to state that the core argument in the Defendant's Skeleton Arguments was that the Defendant had met the requirement of **Order 36 Rule 9** of the **High Court Rules** by showing sufficient reason in the supporting Affidavit while the Plaintiff argued to the contrary.

The question that falls for determination is **whether the Defendant has shown sufficient reason for the Court to Order payment of the Judgment sum by installments?**

Order 36 Rule 9 of the **High Court Rules** 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. Such Order may be made at the time of giving Judgment, or at any time afterwards, and may be rescinded, upon sufficient cause, at anytime. Such Order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due.”

In relation to “sufficient reason”, the onus lies on the Defendant applicant as Judgment debtor to provide the Court with a full and comprehensive statement of its financial affairs including a comprehensive list of assets and liabilities, income and expenditure and documentary proof as far as possible to enable the Court determine its financial status.

In the case before me, the Defendant as Judgment debtor exhibited to the supporting Affidavit, inter-alia, two important letters dated 9th April, 2016 from the National Road Fund Agency to the Defendant which alluded to the Defendant’s expected income from construction contracts with the Government of the Republic of Zambia.

The two letters exhibited as “JM1” and “JM2” respectively are for completeness reproduced here below:

"NRFA/16/RF/BANKS192

9TH April, 2016

The Managing Director

Keren Motors Limited

P. O Box 31897

Mungwi Road

LUSAKA

Dear Sir/Madam

TO WHOM IT MAY CONCERN – LETTER OF COMFORT

We wish to confirm that we are in possession of Interim Payment Certificate No. 4 with the certified amount of ZMW1,657,017.60 for works carried out by Keren Motors Limited on the Spot Improvement of selected Community Transport Infrastructure for Rural Accessibility and Mobility Programme (RAMP) in Sinazongwe District in Southern Province of Zambia.

The said OPC has been certified by Ministry of Local Government and Housing (MLGH) for payment and we intend to settle the stated amount once funds are released by the Ministry of Finance.

In settlement of this IPC, Keren Motors Limited has instructed us to channel part of the proceeds of the said IPC outstanding, into your account No. 1868982500125 in the name of Keren Motors Limited held at Zanaco Bank, Lusaka Business Centre Branch, Lusaka.

We emphasize that our responsibility is to remit the stated amounts on the above stated IPC into the above quoted Bank once funds are available.

Further this letter does not form part of the project contracts between Ministry of Local Government and Housing (MLGH) and the said Contractor and is not part of any other arrangement that the said Contractor may enter into with other third parties.

This letter is a mere statement of fact on the status of this IPC which is pending in our system and the contents of this letter are true as of the date of this letter. The national Road Fund Agency shall not accept any liability occasioned by reliance upon this letter of comfort.

Yours Faithfully
NATIONAL ROAD FUND AGENCY

(Signed)
Vincent Nyambe
DIRECTOR FUND MANAGEMENT

(Signed)
Anthony Mwanaumo
DIRECTOR CEO

The second letter which was very similar to the one above was also as follows:

"NRFA/16/RF/BANKS191

9TH APRIL, 2016

*The Managing Director
Keren Motors Limited
P. O. Box 31897
Mungwi Road
LUSAKA*

Dear Sir/ Madam

TO WHOM IT MAY CONCERN – LETTER OF COMFORT

We wish to confirm that we are in possession of Interim Payment Certificates No. 8 with the total amount of ZMW2,265,422.54 for works carried out by Keren Motors Limited on the Rehabilitation & Upgrade of selected urban roads to Bituminous standard (20.02 Km) in Mkushi District in Central Province of Zambia.

The said IPC has been certified by Ministry of Local Government and Housing (MLGH) for payment and we intend to settle the stated amount once funds are released by the Ministry of Finance.

In settlement of this IPC, Keren Motors Limited has instructed us to channel part of the proceeds of the said IPC outstanding, into your Account No. 0140021573901 in the name of Keren Motors Limited held at Stanbic Bank, Mkushi Branch, Lusaka.

We emphasize that our responsibility is to remit the stated amounts on the above stated IPC into the above quoted Bank once funds are available.

Further this letter does not form part of the project contracts between Ministry of Local Government and Housing (MLGH) and the said Contractor and is not part of any other arrangement that the said Contractor may enter into with other third parties.

This letter is a mere statement of fact on the status of this IPC which is pending in our system and the contents of this letter are true as of the date of this letter. The National Road Fund Agency shall not accept any liability occasioned by reliance upon this letter of comfort.

Yours Faithfully
NATIONAL ROAD FUND AGENCY

(Signed)
Vincent Nyambe
DIRECTOR FUND MANAGEMENT

(Signed)
Anthony Mwanaumo (Dr.)
DIRECTOR CEO

My interest has been drawn to a material fact arising from the above two letters which was, however, not incisively touched on in the Plaintiff's Affidavit in Opposition and the arguments. This pertains to the fact that from the two letters, it is more than apparent that the Defendant also maintained Accounts at Zambia

National Commercial Bank, Lusaka Business Centre Branch and Stanbic Bank, Mkushi Branch through which a portion of the monies from the Government of the Republic of Zambia through the National Road Fund Agency was directed to be channeled. However, a perusal of the supporting Affidavit reveals that the only Bank Statements exhibited to the supporting Affidavit are "JM6" and "JM7" dated 16th September, 2016 and 11th October, 2016 respectively for Account Number 9130001718049 (previously Account Number 014003634401) maintained at Stanbic Bank Zambia, Lusaka Main Branch. The Defendant's Bank Statements for both Zambia National Commercial Bank, Lusaka Business Centre Branch Account Number 1868982500125 and Stanbic bank Zambia, Mkushi Branch Account Number 0140021573901 were not exhibited to any Affidavit.

In the circumstances, while the Defendant has gone a long way in presenting its financial status, the absence of Bank Statements from the Defendant's Zambia National Commercial Bank, Lusaka Business Centre Branch Account and Stanbic Bank Zambia, Mkushi Branch Account means that the Defendant has not placed before me a full and comprehensive statement of its financial affairs so as to enable me determine the Defendant's financial status. I, therefore, find that the Defendant has not shown sufficient reason for the Order to pay the Judgment sum herein by installments as proposed to be granted in the Defendant's favour.

The net result is that the Defendant's application to pay the Judgment sum herein by installments is refused and instead, the application is accordingly dismissed for lacking merit.

Costs are awarded to the Plaintiff.

Leave to appeal is granted.

Dated at Lusaka this 5th day of January, 2017.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE