

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

2011/HPC/0600



BETWEEN:

UNITED BANK FOR AFRICA (ZAMBIA) LIMITED PLAINTIFF
AND

EDMAN IBACK BANDA 1ST DEFENDANT
SAVENDA MANAGEMENT SERVICES 2ND DEFENDANT

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers

For the Plaintiffs: Mr D. Bwalya- Messrs Lloyd Jones & Collins

For the 1st & 2nd Defendants: Mr M. Nzonzo- Messrs ICN Legal Practitioners

RULING

LEGISLATION REFERRED TO:

- 1. Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition**
- 2. Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.**
- 3. Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

CASES REFERRED TO:

- 1. Sunday Kawaya V First Alliance Bank Zambia SCZ/8/208 of 2007.**

This is an application by the Defendants for an Order to Liquidate the Judgment Debt in instalments pursuant to **Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

The application is supported by an Affidavit sworn by Clever Mpoha the Director of the 2nd Defendant Company and Skeleton Arguments filed into Court on 19th July, 2016.

It is deposed by Mr Mpoha that on 17th August, 2012 this Court delivered a Judgment in favour of the Plaintiff against the 2nd Defendant for a sum of K5,362,585,369.44.

That currently, the 2nd Defendant Company does not have the capacity to wholly liquidate the Judgment Sum outstanding and its primary income from its various projects with the Government of the Republic of Zambia was not consistent and came in small amounts.

Moreover, that the 2nd Defendant Company had many other obligations to settle in terms of its salaries, other loan repayments and costs of running the business.

That in terms of the 2nd Defendant's income and liabilities, the 1st Defendant was in a position to settle K100,000.00 monthly towards the liquidation of the Judgment debt outstanding.

The Deponent lastly exhibited a schedule or cash flow projection for the 2nd Defendant Company based on its current statement of income and liabilities.

There is also an Affidavit in Opposition filed into Court on 19th January, 2017 sworn by Kalengo Simukoko the Country Head of Risk Management of the Plaintiff.

He stated that the Plaintiff commenced this matter on 5th October, 2011 and he exhibited an overdraft facility (the Overdraft Facility) that it availed to the 2nd Defendant in the sum of K7,500,000.00.

It was further deposed that the application to settle the Judgment Debt in instalments was unfair and unjust and the 2nd Defendant defaulted in paying the Overdraft Facility within 90 days.

That no part payment had been made since the year 2012 which was close to 5 years since the Court passed judgment in this matter.

Moreover, that the 2nd Defendant's proposal to settle the amount owed by paying K100,000.00 monthly was detrimental to the Plaintiff who had

already waited over 5 years to receive the money it loaned to the 2nd Defendant.

That it would be against the interests of justice for the amount owed by the 2nd Defendant to be paid in instalments as the Plaintiff would have to wait even more years in order to enjoy the fruits of the Judgment passed on 17th August, 2012 in its favour.

Counsel for the Defendants filed in Skeleton Arguments in support of the application. Counsel submitted that the 2nd Defendant had a Judgment debt of K5,362,585,369.44 and interest and should this Court find for the 2nd Defendant on the application it made under Order 47 of the RSC, the Judgment amount due would stand at K4,091, 185,369.44 and whichever amount would be ascertained as the amount due the 2nd Defendant's cash flow would be incapable of settling the amount due at once.

According to Counsel, in terms of Order 36 Rule 9 of the High Court Rules this Court was empowered to allow a judgment creditor time within which to settle its indebtedness by way of instalments. He also stated that the 2nd Defendant had exhibited in its Affidavit in Support its cash flow projections for the coming months based on its income and liabilities.

From the said projections it did not have the capacity to liquidate the judgment debt in instalments of K100,000.00 rebased. Thus on the basis of its income and liabilities and the need to continue as a going concern in order that it may remain viable and discharge its liability to the Plaintiff, he submitted that the proposed amount of K100,000.00 was reasonable in the circumstances.

The Plaintiff also filed Skeleton Arguments opposing the application to liquidate the judgment sum in instalments of K100,000.00.

Counsel contended that the law regarding the settlement of the judgment sum in instalments was well settled in **Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia** which provides that:

“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 instalments, 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 instalment, the whole amount remaining unpaid shall forthwith become due:

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

According to Counsel this provision allowed this Court the jurisdiction to permit payment of a money judgment by instalments which was discretionary and allowed the Court to order that a judgment debt be satisfied by instalments upon sufficient cause being shown by the judgment debtor.

Counsel further stated that the 2nd Defendant had failed to show any sufficient reason for this Court to grant its application as the debt owed by the 2nd Defendant had been due from 2011. That it was not justifiable for the 2nd Defendant to present a statement of its cash flow projections from the year 2016 to June, 2017 as a ground for not liquidating an amount of money that should have been paid over 5 years ago.

He also cited **Order 47 Rule 1 (3) of the Rules of the Supreme Court of England (White Book) 1999 Edition** which provides that:

“An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing

his income, the nature and value of any property of his and the amount of any other liabilities of his.”

He also stated that this Order required the Court to be satisfied that there were special circumstances which rendered it inexpedient to enforce the judgment or order by way of execution or that the applicant was unable from any cause to pay the judgment debt.

He also added that the matter proceeded from the premise that the judgment creditor was entitled to more or less immediate payment which could be exacted by writ of execution such as a Writ of *feri facias*. However, there may be cases where the harshness of an execution and its harmful consequences could be avoided without keeping the creditor out of their money while ensuring that the money was recovered within a reasonable period.

He also added that leave of Court to settle judgment debt by instalments was not available as a matter of course. The Judgment debtor should make out a good case for instalments which could be considered to be sufficient reason or special circumstances. It is not enough that the judgment debtor would like its business to go on as usual so that it is not inconvenienced or its affairs interrupted in any way as was stated by the Supreme Court in the case of **SUNDAY KAWAYA V FIRST ALLIANCE BANK ZAMBIA (1)**.

During the hearing on 27th February, 2017 both Counsel for the Defendants as well as Counsel for the Plaintiff were before Court and each of them relied on their respective Affidavits and Skeleton Arguments on record which I have considered.

The main issue for this Court to determine is whether or not the Defendants have made out a case with sufficient reason for them to be allowed to liquidate the judgment sum in monthly instalments of K100,000.00.

This application was made pursuant to **Order 36 Rule 9 of the High Court rules, Cap 27 of the Laws of Zambia** which has been cited above.

This provision gives this Court the discretion to allow a Defendant with sufficient reason to liquidate a Judgment sum in instalments and where there is a default this would entail that the whole judgment sum would become due at once and there would be no entitlement on the part of the Defendant to a stay of execution.

In this case, Judgment was given in favour of the Plaintiff on 17th August, 2012 and the Defendants appealed and Judgment of the Supreme Court was delivered in 2016 still in the Plaintiffs favour.

I note from the record that **Order 3 Rule 2** allows me to make any order necessary to do justice and based on this order I have taken note of all the payments made by the 2nd Defendant after 10th October, 2011 and also into Court before arriving at what is finally due to the Plaintiff.

The record clearly shows that at the time that my learned brother A. M. Wood J (as he then was) made the decision that the 2nd Defendant owed the Applicant K5,362,585,369.44 it was based on the Bank Statement before him filed into Court in the Affidavit in support of Originating Summons dated 5th October, 2011 and Affidavit in Opposition dated 29th November, 2011. The payments made by the Defendant by Bank Transfer from its Accounts at Standard Chartered Bank to its Account with the Plaintiff Bank are as follows:

14 March, 2011	K100,000,000.00
30 June, 2011	K500,000,000.00
25 July, 2011	K228,600,000.00
10 October, 2011	<u>K500,000,000.00</u>
Total	K1,328,600.000.00

As the 2nd Defendant was availed an Overdraft Facility of K7,500,000,000.00 and K1,328,600,000.00 had been paid, Judgment in favour of the Plaintiff against the 2nd Defendant for the sum of K5,362,585,369.44 together with contractual interest was entered.

However, I note that the 2nd Defendant has brought evidence to show that whilst this matter was in Court and after the parties had filed all the documents on which the decision by my learned brother was arrived at the 2nd Defendant continued to make deposits into its Account with the Plaintiff Bank herein which amount to K2,100,000,000.00 (unrebased). The Bank Statement of the 2nd Defendant in the Plaintiff Bank exhibited to the Composite Affidavit in Support of Summons for Matters Arising after Judgment and for Stay of Execution of Writ of *Fifa* filed into Court on 19th July, 2016 marked as "CM2" shows that after commencement of the action herein on 5th October, 2011 the following further deposits were made by the 2nd Defendant:

13 October, 2011	K1,000,000,000.00
24 April, 2012	K 550,000,000.00
30 April, 2012	K <u>550,000,000.00</u>
Total	K2,100,000,000.00

I further note from the record that from the date this application was heard on 27th February, 2017, the 1st Defendant has made additional payments into Court of K3, 200,000,000.00 to liquidate the Judgment sum.

The payments into Court were made by Notice of Payment into Court as follows:

21 March, 2017	K 700,000.00
30 October, 2017	K2,500,000.00

When A. M. Wood J (as he then was) entered Judgment for the Plaintiff against the Respondent for the sum of ZMK5,362,585,369.44 on 17th August, 2012 he was unaware that further payments had been made in October 2011 and April 2012 by the 2nd Defendant totalling K2,100,000,000.00.

From the foregoing the 2nd Defendant has paid a total of K6,628,000.00 towards the Overdraft Facility of K7,500,000.00 and interest. **The balance outstanding is therefore K871,400.00 together with interest.** In Judge Wood's Judgment he ordered that the Judgment sum of K5,362,585.44 (then ZMK5,362,585,369.44) was to accrue contractual interest from 5th October, 2011 to date of Judgement (i.e. 17th August, 2012) and thereafter at the average lending rate as determined by Bank of Zambia up to date of full payment.

The amount outstanding and due from the 2nd Defendant to the Plaintiff must therefore be computed at the interest rates stipulated in the said Judgment but taking into account the date when the various payments were made by the 2nd Defendant. For avoidance of doubt payments were made as follows:

(a) 14 th March, 2011	K 100,000.00
(b) 30 th June, 2011	K 500,000.00
(c) 25 th July, 2011	K 228,600.00
(d) 10 th October, 2011	K 500,000.00
(e) 13 th December, 2011	K1,000,000.00
(f) 24 th April, 2012	K 550,000.00
(g) 30 th April, 2012	K 550,000.00
(h) 21 st March, 2017	K 700,000.00
(i) 30 th October, 2017	K2,500,000.00

I have perused and considered the 2nd Defendant's projected income and liabilities between July, 2016 and June, 2020. I also note the submission by Counsel for the Defendants that the delay in settling the Account was due mainly to the appeal which was before the Supreme Court and the Order for Stay of execution and that as interest continues to accrue the Plaintiff will not be prejudiced.

Despite the fact that the Defendants have exhibited the 2nd Defendant's Cash Flow to 30th June, 2020 I am not satisfied that sufficient cause has been shown that the Judgment debt will be paid within a reasonable time.

While I appreciate the fact that the matter was on appeal to the Supreme Court, I am of the considered view that a proposal to pay instalments of K100,000.00 monthly is not only unreasonable but would be unfair to the Plaintiff Bank as it would take a long time for the principal debt to be liquidated when the Overdraft Facility was given to the 2nd Defendant in December, 2010.

For the foregoing reasons I find no merit in the application of the Defendants and dismiss it accordingly.

The outstanding amount of K871,400.00 together with interest must be paid forthwith.

The *Ex-parte* Order for Stay of Execution of the Writ of Possession which I granted on 20th July, 2016 is hereby discharged.

Costs for and incidental to this application are for the Plaintiff and same are to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 22nd day of January, 2018.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE