



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NO 174 OF 2017

BETWEEN:

ECO BANK MALAWI LIMITED

CLAIMANT

-and-

SUHAIR FARUK MAKANI T/A MAKBROS

DEFENDANT

CORAM:

HON. JUSTICE J. ALIDE

Mr. T. Roka, of Counsel for the Claimant
Mr. G. Makiyi, of Counsel for the Defendant
Mr. B. Ntonya, Court Clerk

Judgement

This matter comes before this court pursuant to the direction of the Supreme Court of Appeal in **Ecobank Malawi Limited v Suhail Faruk Makani t/a Makbros**, MSCA No. 68 of 2018. A bit of background is very important in this regard because of the unique circumstances in which this application has been brought before this court.

By an oral agreement made on or about 22nd November 2016, the defendant sought, and the claimant advanced, an overdraft facility to the defendant in the sum of K39, 165,000. It was agreed that the said facility was going to be cleared within 7 days. At the end of the 7 days, the defendant failed to honour the agreement and the said amount remained unsettled. Time passed. Due to the accumulation of interest, penalty and bank charges, the amount on the account rose to K58, 179,116.60.

On 15th June 2017, the claimant commenced proceedings in this court to recover the said sum of K58, 179,116.60 and interest thereon at the claimant's base lending rate in effect from time to time increased by 10%. The defendant did not enter or file any defence to the claim.

On 4th July 2017 the defendant filed summons to pay the debt by instalments. The hearing of the summons was set down for 16th November 2017. In the meantime, the claimant had obtained a default judgment on the sum of K58, 179,116.60. However, on 24th August 2017, the court ordered a stay of execution of the default judgement, and also stayed garnishee proceedings that had been commenced, pending the hearing and determination of the application to pay the debt by instalments.

On 31st May 2018, the court delivered its judgement and ordered that:

“the defendant pays the judgement debt in monthly instalments of K1,200,000.00 until the debt is fully repaid or until such a time that the claimant can produce to this court evidence to show that the defendant's financial position has improved considerably to compel him to pay larger amounts.”

The claimant was not satisfied with the order and filed an appeal at the Supreme Court of Appeal. Among other things, the claimant contended that:

- (a) the learned Judge in the court below erred in ordering payment of debt by instalments after glaring non-disclosures of the respondent's true financial position were unearthed during the evidence;
- (b) the learned Judge erred in failing to consider the size of the debt; and
- (c) the repayment period when ordering the instalment payments; and the decision of the court was against the weight of the evidence.

On the other hand, the defendant contested the appeal and submitted that the same was questioning the exercise of discretion by the court below. It was submitted that the Supreme Court of Appeal could not interfere with the exercise of discretion by the court below. It was argued that its only course would be to simply confirm the same. The defendant then called upon the Supreme Court of Appeal to uphold the decision of the High Court.

The Supreme Court of Appeal considered the matter and issued its decision as follows:

- (a) the Court did not find any merit in the defendant's argument and submission that the appeal involved the exercise of discretion by the court below in respect of which the Supreme Court could not interfere but uphold the same;
- (b) the order of the court below was not premised on full factual frank and honest disclosure of the defendant's financial means. The court sustained the claimant's appeal in respect of its submission that the court erred in ordering payment of the debt by instalments after glaring non-disclosures of the defendant's true financial position were unearthed during evidence;
- (c) the court below did not appear to have considered and taken into account, and balanced the interest of both the claimant and the defendant. The court noted that the court below erred in this regard and sustained the claimant's argument that the court below had failed to consider the size of the debt and repayment period when ordering the payment by instalments; and finally
- (d) that the court was of the view that decision of the court below was against the weight of the evidence.

In effect, the Supreme Court of Appeal allowed the claimant's appeal in its entirety.

Having disposed of the contentious issues in the appeal, the Supreme Court of Appeal agonized over the appropriate reliefs to be directed to the claimant. It could not order payment of any specific sum and consider it to be an appropriate one because the sum of K1, 200,000.00 that was ordered by the court below was not based on a full factual frank and honest disclosure of the financial means of the defendant. Likewise, the court could not set aside the order of the court below because then, there was going to be no court order to compel the defendant to service the debt.

Ultimately, the Supreme Court of Appeal proceeded and varied the order of the court below pursuant to section 22(1) (a) of the Supreme Court of Appeal Act by requiring that, within 30 days, there shall be a determination by this court of the true financial status of the defendant based on a full factual frank and honest disclosure of the financial means of the defendant to establish whether, having regard to such full factual frank and honest financial status of the defendant herein, he should be required to:

- (a) liquidate the entire debt herein at once;
- (b) or whether the amount of monthly instalments ordered by the court below should be increased to allow the debt herein to be paid in a shorter period; or
- (c) whether he should continue to liquidate the debt herein by paying monthly instalments of K1, 200,000.00.

By way of proceeding from the direction of the Supreme Court of Appeal, this court ordered both parties to file fresh sworn statements and skeleton arguments in respect of the application, and it

set the matter for fresh hearing. The parties duly complied and the application came before this court for reconsideration.

In his sworn statement in support of the application, the defendant has detailed down his financial status and means, and prayed to this court to allow him settle the judgement sum through monthly instalments. The defendant submitted that he had changed employment since the previous order of the court and that his financial standing had slightly improved. He submitted that his monthly income had risen to K2, 200,000. He stated that the said amount mainly goes towards food and upkeep for the family, electricity, water and airtime. The rest of the out-goings such as housing, school fees for his children, transport and fuel were met by his employers. The defendant exhibited to the court his contract of employment which corroborated his sworn statement on the salary, and the other out-goings such as housing, school fees, transport and fuel.

The defendant explained that having regard to the monthly salary and outgoings, the best that he can afford to liquidate the current indebtedness is through monthly installments in the sum of K1, 345,000. 00. This is about K145, 000 more than what was previously ordered by the court. The defendant further stated that so far, since the order of the court to pay the debt by instalments was issued, he had paid the total sum of K13, 200,000.00. He however complained that despite such payments, the debt keeps increasing because the claimant keeps charging the defendant interest in the sum of K1, 740,000 per month.

One issue that was specifically highlighted by the defendant was about his previous involvement in Woolies Foods Limited. The defendant explained that he was once a Shareholder, Director and Company Secretary for the company until August 2017 when he sold his shares and resigned from the positions he held in the company. The defendant acknowledged that he did not disclose the information regarding his involvement in Woolies Foods Limited in the previous submission because he was advised by his legal counsel then that he only needed to disclose his monthly income expenses having sold his shares in the company in August 2017.

On its part, the claimant also filed a sworn statement and skeleton arguments basically disputing the financial disclosures made by the defendant. The claimant submitted that the defendant had not made a full frank and honest disclosure regarding his financial status. It further submitted that with the current state of the debt, inclusive of interest, standing at K138, 926,969.25, the proposed amounts were not enough to liquidate the said debt within reasonable timelines. The claimant further submitted that it was not correct for the defendant to claim that he was servicing the debt because he had stopped doing so in September 2018. Overall, the claimant rejected the claimant's submission in its entirety.

Having heard and considered the parties herein, the question that this court needs to answer is whether the defendant has submitted his true financial means and status based on a full factual frank and honest disclosure. And having regard to such information, this court must decide whether the defendant should be required to either:

- (a) liquidate the entire debt herein at once; or
- (b) increase the monthly instalments ordered by the court below to allow the debt herein to be paid in a shorter period; or
- (c) continue to liquidate the debt herein by paying monthly instalments of K1, 200,000.00.

Order 28 rule 59 of the Courts (High Court) (Civil Procedure) Rules provides that the court may issue an order authorizing the satisfaction of a judgement debt by instalment. Rule 62(1) states that in deciding whether to make such order a court shall have regard to whether the enforcement debtor is employed; his means of satisfying the judgement debt; whether the judgment debt including any interest shall be satisfied within a reasonable time; the necessary living expenses of the enforcement debtor and the enforcement debtor's dependents; other liabilities of the enforcement debtor; and where the applicant is the enforcement debtor, whether having regard to the availability of other enforcement means, making the order would be consistent with the public interest in enforcing orders justly.

Order 28 rule 62(2) states that in deciding whether to make an instalment order, a court may also have regard to any other matters that a court considers relevant. Rule 63 provides that in deciding the amount and timing of instalments, a court shall be satisfied that the instalment order will not impose unreasonable hardship on the enforcement debtor.

In **Leasing and Finance Company Limited v Maltraco** [1997]2 MLR 250 it was held that in considering an application to pay a debt by instalments, the court observed that:

- (a) it must balance the interest of a judgement creditor and his unfettered right to recover the debt at once, against a genuine failure by the judgment debtor to settle the debt at once upon full factual frank and honest disclosure of his means;
- (b) it ought to be more cautious and more reluctant to allow instalments in a trading debt;
- (c) a prayer by a judgement debtor to pay a debt by instalment is in essence a prayer for the court's discretion, and most importantly it is a prayer for sympathy; and
- (d) a judgement debtor ought to approach the court with clean hands and must disclose all the material facts in respect to his financial standing.

In **Chikowa Produce Limited v Maldeco Aquaculture Limited** HC (Principal Registry) Civil Cause No. 150 of 2013, it was held that generally a party applying to pay a debt by instalments must make frank disclosure of assets and liabilities.

In **Stansfield Motors v National Bus Company Limited** HC (Commercial Division) Commercial Case Number 15 of 2014 several factors were considered which would help the court determine whether it must decline an application to pay a debt by instalments. Some of these is where:

- (a) the judgment debtor's financial means are enough to pay the judgement debtor in full;
- (b) if it is obvious that the judgment debtor would not be able to comply with the instalment order;
- (c) if the time for payment is unreasonable;
- (d) if the proposed instalments will not result in a net reduction of the judgement debt because of the amount of interest that continues to run on the judgment debt; and
- (e) where the judgement creditor will suffer hardship by the amount of time it would take to pay off the debt by instalment.

In **Patrick Zachepa v Leyland DAF Malawi Limited** HC Civil Cause No. 3797 of 2001, an application to pay a debt by instalment was rejected by the court because the 20 month period that was requested by the applicant was deemed too long.

In a nutshell, in considering an application for payment of a judgement debt in instalments, the court is called upon to look at wide ranging issues as regards the matter. However it is very clear, and I can say it here without any measure of hesitation that a full factual frank and honest disclosure of financial means of a judgement debtor is one of the most important, if not the most important, ingredient at the core of the law relating to the courts' determination of applications of payment of a debt by instalment.

In **Ecobank Malawi Limited v Suhail Faruk Makani t/a Makbros**, the appeal indicated herein, the Supreme Court of Appeal on page 17 observed as follows;

"To be meaningful, a full factual frank and honest disclosure of the judgment debtor's means should ideally be voluntary; and a judgment debtor should avoid being pressed on cross examination to disclose his financial position when such disclosure could have been made voluntarily."

This court has considered the defendant's submission in this matter. It must be mentioned on the onset that there is not much of a difference in terms of the information that has been submitted now from the information that was presented to the court when it was hearing the initial application. The only variation is that this time around, the defendant has informed the court that his financial position has slightly improved. He submitted that he was in a position to add another K145, 000 on the sum of K1, 200,000.00 to make it K1, 345,000.00 per month. The defendant has further furnished details of his involvement in Woolies Foods Limited in the current application.

In respect of his business that he was trading under and on which he borrowed the sums in question, Makbros, the defendant did not present any accounts in respect of the same. In cross examination he told the court that the business was not operational. Asked at to whether it was deregistered he

responded that the business was not deregistered but just ceased trading and had no accounts or anything because it was not simply trading.

On the issue of his involvement with Woolies Limited, the defendant claimed in cross examination that he no longer had any interest in the said company having ceased to be a Director, Shareholder and Company Secretary in 2017. The defendant exhibited copies of the resolution of the board, letter of his resignation as Director and Company Secretary, and the Share Transfer Agreement. These were exhibited as SFM1B. The agreement allegedly shows that the defendant had transferred his shares to the one Mohammed Faruk Makani. This is where the matter became suspicious to this court.

Firstly, this court wonders whether the transfer of shares in Woolies Foods Limited was made in good faith or in anticipation of the application to pay the debt by instalments that was set for November 2017. This court has noted that this action was commenced in June 2017. The application to pay the debt by installment was made in July 2017. The transfer of shares and the defendant's resignation as Director and Company Secretary of the company occurred in August 2017.

Secondly, a close scrutiny of the alleged Share Transfer Agreement showed that the document had been tampered with. The first page of the said agreement is very clear. It contains the introductory part and two recitals, A and B. The spacing and the font of the text used are very clear. The page further shows a dark dotted line on the left margin running from the top to the bottom of the page. It is very clear that the original document was bound and the dotted line was an image of the binding strip running from the top of the page down. This page was duly stamped by the Registrar of Companies.

The second page is a different story altogether. The font of the text and line spacing are different. The dark dotted line on the left margin running from the top to the bottom of the page is not there. The page looked very clean and fresh. There is no indication whatsoever that this page was from the very same document that the first page had come from. This was also the case with the third page of the document.

Then, the fourth page changes and bares the same font of the text and the spacing as the first page. The dark dotted line on the left margin running from the top to the bottom of the page is also clear on this page and the document once again appears to be a copy of an original. Page five of the document is as good as the second and third page. The spacing, the font and everything on the same are not in sync with the first and fourth page. Pages 6, 7 and 8 and the rest of the document is as good as the first and fourth.

During cross examination, the defendant could not explain the glaring suspicious differences in the pages. When asked if the said pages looked like they were from the same document, the defendant confirmed that they did not. It was very clear that the original Share Transfer Agreement exhibited to the court was 'doctored'. It contained pages that were not part of the original

document. It was very apparent that some pages had been removed, and new pages separately typed and slotted into the exhibited document. That is why there were such glaring differences. As a matter of fact, this was a very clear attempt by the defendant to mislead the court. This kind of conduct borders on criminality.

Thirdly, this court observes that the said “sale” and “transfer of shares” was made by the defendant to one Mohammed Faruk Makani. This was a direct relation. To this court, there is a very clear hazard of collusion in this regard. This, coupled with the defendant’s attempts to mislead this court through the antics noted in the exhibited Share Transfer Agreement points to the fact that the defendant has not been honest and truthful in his presentation of this application to this court.

It is very clear, on the above basis, that this court’s quest to have the defendant’s full factual frank and honest disclosure of his true financial means and position is nothing but a venture in pursuit of futility. We have not seen any honest attempt by the defendant to voluntarily disclose his true financial means to this court. What we have seen is an attempt to mislead this court through seemingly doubtful testimony throughout the proceedings, and submission of a fraudulent document. It is baffling to this court that after the observations of the Supreme Court of Appeal on the defendant’s earlier testimony, the defendant had the courage to still try and stick to his dishonorable conduct. This is very unfortunate.

In **National Bank of Malawi v Jumbe** [2005] MLR 315 the court, refused to order payment of debt by installment due to among other things, the defendant’s failure to disclose his full assets. The court had this to say:

“That as it may be, that it would take too long in such a trading or commercial debt and that there is no supporting evidence of the defendant’s financial information coupled with the tendency I observed of not disclosing his full assets, I find it difficult to hold in favour of the defendant. In fact, this being a commercial debt special circumstances must be shown why the application must succeed. In my view, this has not been accomplished.”

Given the defendant’s failure to give a full factual frank and honest disclosure about his financial means, this court finds it difficult to confirm the continued payment of the monthly sum of K1, 200,000 that was initially ordered by the court, or to order the payment of the monthly sum of K1,345,000 prayed for by the defendant. It is my considered view that this is a matter in which payment by instalments should not be allowed, and should not have been allowed in the first place because there was, and there is, no true basis upon which this court can exercise that function.

Let me further indicate that, even if there was a full factual frank and honest disclosure of the defendant’s financial means herein, I was still not going to confirm the monthly payments of K1, 200, 000, or the proposed K1, 345, 000 for two reasons.

Firstly, the manner in which the defendant acted in the obtaining of the overdraft facility, his unconvincing explanation to this court on how he used the money, and the overall manner in which the defendant conducted himself during the course of these proceedings remain very suspicious.

Clearly, everything points to the fact that this was an orchestrated scheme to skin the defendant of its funds with a view of coming to this court to apply for the repayment of the same by installments. It was a premeditated act. This court should not, and cannot, be used as a facilitating party to such ill premeditated and questionable conduct to the detriment of commerce in this country.

Secondly, looking at the judgement debt vis-à-vis the monthly repayments in the sum of K1, 200, 000, or the proposed monthly repayments in the sum of K1, 345,000, it would be very unlikely that the defendant would ever be able to repay the judgement debt in full taking into account the interest that keeps accumulating on the account. This is a fact that the defendant acknowledges. In that regard, I do not see any difference that the proposed monthly sum of K1, 345,000 would make. It surely would not, not in this lifetime. Therefore, it would not have made any commercial sense for this court to order such monthly repayments looking at the judgement debt.

In conclusion, it is this court's finding that the defendant has failed to give a full factual frank and honest disclosure of his financial means. Accordingly, the application to pay the judgement debt herein by installments is hereby declined. In line with the direction given by the Supreme Court of Appeal, it is this court's order that the entire judgement debt herein be liquidated at once. Costs are awarded to the claimant.

Delivered in Blantyre this.....13th.....day of.....April.....2021.


Jabbar Alide
JUDGE

