

HIGH COURT  
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**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**Blantyre Registry**

**Commercial Case No. 281 of 2020**

**(Before Honourable Justice Dr. Mtambo)**

**BETWEEN:**

**FARMING AND ENGINEERING SERVICES LIMITED.....CLAIMANT/ENFORCEMENT CREDITOR**

**-AND-**

**NCHALO GREENBELT LIMITED.....DEFENDANT/ENFORCEMENT DEBTOR**

**-AND-**

**AGRICULTURAL DEVELOPMENT AND MARKETING**

**CORPORATION (ADMARC).....THIRD PARTY**

**CORAM: D.H. SANKHULANI, ESQ., ASSISTANT REGISTRAR**

Mr. Kaliwo, of Counsel for the Claimant/Enforcement Creditor

Mr. Chikaonda, of Counsel for the Defendant/Enforcement Debtor

Third Party, absent

Mr. Ntonya, Court Clerk

**Sankhulani, AR**

## **RULING ON AN APPLICATION FOR A FINAL THIRD PARTY DEBT ORDER**

### **Introduction**

This ruling follows hearing, to show cause why the interim third party debt order herein should not be made final, that was held herein. In other words, this ruling is on the present application by the Claimant for a final third party debt order.

### **Background Information**

The Claimant commenced the present action by way of a specially-endorsed summons, claiming, *inter alias*, a total of K165,069,733.54 being money owing from the Defendant for goods and services supplied and rendered, respectively, to it.

Subsequently, a default judgment was entered in favour of the Claimant for, *inter alias*, the sum of K165,069,733.54 aforesaid.

Pursuant to the default judgment herein, the Claimant applied for, and was granted, an interim third party debt order against the Third Party herein. Thus the Third Party herein is only a third party in the third party debt proceedings herein.

Hearing to show cause why the interim third party debt order herein should not be made final took place in the presence of the Claimant and the Defendant, both of whom appeared through Counsel. Of course, the Defendant did not make any representations at the hearing of the present application. Third Party did file a sworn statement in opposition to the present application for a final third party debt order. However, it did not attend hearing of the application.

After the said hearing, the matter was adjourned to today's date for a ruling. Hence this ruling.

### **Issues for Determination**

- Whether or not the sworn statement in opposition to the present application ought to be considered by this Court.
- Whether or not the interim third party debt order herein ought to be made final.



**Whether Or Not The Sworn Statement In Opposition To The Present Application Ought To Be Considered By This Court**

The Claimant contends that the Third Party's sworn statement in opposition to the present application ought to be disregarded, on two grounds, which I shall deal with separately.

The first ground upon which the Claimant challenges the Third Party's sworn statement herein is that it contravenes **Order 28, rule 10(4)** of the **Courts (High Court) (Civil Procedure) Rules 2017** in that it was served on the Claimant two days before the date of hearing of the present application. Unfortunately for the Claimant, however, the said rule ends with sub-rule (2), and, so, does not have sub-rule (4). I, therefore, find the Claimant's contention on this first ground to be untenable for having been raised under a non-existent legal provision.

The second ground upon which the Claimant challenges the Third Party's sworn statement herein is that the Third Party did not attend hearing of the present application, in order to make its submissions in opposition to the application. I am, however, unable to agree with the Claimant on this. Ordinarily the Third Party should, indeed, have appeared to adopt its sworn statement and make submissions in opposition to the present application. However, third party debt proceedings are in a species of its own. So, practice before the courts has shown that a third party does not, or is not required to, attend a hearing of an application for a final third party debt order. It will suffice if the third party files and serves a sworn statement on the application. And the court will rely on the third party's sworn statement, even though the third party has not attended to adopt its sworn statement and to make its submissions on the application. That is what obtains in practice. In my most-considered opinion, there is a good justification for this approach. As I understand it, a third party in third party debt proceedings is not a party to the dispute/matter that found itself before the court. Rather, a third party in third party debt proceedings is a stranger to the dispute/matter who is believed to hold money belonging to a party to the dispute/matter required to pay money to the other. Therefore, insisting upon a third party's attendance at a hearing for a final third party debt order would be tantamount to forcing strangers to disputes/matters to incur unnecessary costs in disputes/matters not concerning them, which would clearly be unfair. This explains why courts generally dispense with the attendance of third parties at hearings for final third party debt orders. In the premises, I find the Claimant's contention on this second ground to be untenable. On the foregoing, I find that, in this Court's determination of the present application, the Third Party's sworn statement in opposition to the application ought to, and will, be considered.

## Whether Or Not The Interim Third Party Debt Order Herein Ought To Be Made Final

The Claimant did challenge the Third Party's sworn statement in opposition to the present application on the two grounds dealt with under the immediately foregoing issue for determination. In the alternative, the Claimant contended that, even if the said sworn statement was considered by this Court, the sworn statement does not contain substance warranting this court to refuse granting a final third party debt order. I shall, therefore, below deal with the issue as to whether or not the interim third party debt order herein ought to be made final.

I begin by outlining what comes out clearly from the Third Party's sworn statement in opposition to the present application. The Defendant and the Third Party did separately enter into two separate contracts where by the former was to supply the latter with seed cotton. Because the Third Party was using loan facilities from the Export Development Fund (EDF), it has already paid the Defendant K2,316,501,612.71 against its obligation under the two contracts to pay it a total of K1,180,000,000.00, whilst the Defendant has only supplied to the Third Party seed cotton worth K75,137,700.00. The aforesaid sum of K2,316,501,612.71 had been paid by 18<sup>th</sup> May, 2020. All this is not in contention.

The gist of the Third party's contention, therefore, is that it cannot pay any money to the Claimant under the present third party debt proceedings because it has already overpaid the Defendant who, to make matters worse, is yet to fulfil its obligations under the said two contracts. Hence the Third Party's opposition to the making of a final third party debt order herein. The Claimant, on the other hand, contends that overpayment is no good ground for refusing the granting of a final third party debt order. According to the Claimant the two contracts are still running.

In my opinion, however, the fact that the Third Party has already overpaid the Defendant is of material importance herein. By 18<sup>th</sup> May, 2020, the Third Party had already made the overpayment in question. This means that by 2<sup>nd</sup> December, 2020, which is the date when the interim third party debt order herein was served on the Third Party, the Third Party had already overpaid the Defendant under the two contracts, as above indicated. Now, how a third party debt order operates, as I understand it, is that it attaches money that is payable by the third party to the enforcement debtor at the time of service of the order on the third party (see **Order 28, rule 13(4) of the Courts (High Court) (Civil Procedure) Rules 2017**). In other words, for a third party debt order to be tenable, there must exist, at the time of service of the interim third party debt order, a creditor/debtor relationship between the enforcement creditor and the third party. In the present matter, as it has been mentioned above, by the time the interim third party debt order herein was served on the Third Party, the Third Party had already overpaid the Defendant (the enforcement debtor herein) under the two contracts in question



herein. This means that at the time when the Third Party was served with the interim third party debt order herein, it did not owe the Defendant any money. In fact, it was the Defendant who was indebted to the Third Party, because of the overpayment and, most importantly because of its non-performance of its obligations under the two contracts. Therefore, at the time of service of the interim third party debt order, the Defendant was not a creditor of the Third Party herein. There was, therefore, just like it is the case now, no money that was due from the Third Party to the Defendant, at the time of service of the interim third party debt order herein. I so opine and find. My final finding, therefore, is that the interim third party debt order herein ought not to be made final.

### **Final Order**

In view of the immediately foregoing finding, I hereby set aside the interim third party debt order herein dated 1<sup>st</sup> December, 2020.

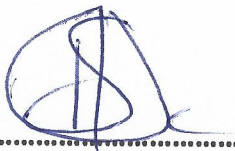
Further, I order that the Third Party herein be, and is hereby, discharged.

The present application for a final third party debt order fails in its entirety, and is dismissed, accordingly.

### **Costs**

These are in the court's discretion, although they usually follow the event. Although the present application has been dismissed, the Claimant shall have costs of these third party debt proceedings, those of the just-dismissed application inclusive, in all of which costs the Defendant is hereby condemned. The reason is that the Defendant has been put to an expense through the third party debt proceedings because of non-payment by the Defendant.

Delivered in Chambers at Blantyre Registry of the Commercial Division of the High Court this 20<sup>th</sup> day of January 2021.



**D.H. SANKHULANI**

**ASSISTANT REGISTRAR**

