



**IN THE HIGH COURT OF MALAWI
(COMMERCIAL DIVISION)
LILONGWE REGISTRY
COMMERCIAL CASE NO. 52 OF 2020**

BETWEEN:

CHawezi Banda CLAIMANT

AND

MIKE MSUNGAMA PHIRI..... DEFENDANT

Coram: **Hon. Justice Annabel Mtalimanja**

Mr. Mtchuka George Mwale, Counsel for the Claimant

Mr. Edgar Kachere, Counsel for the Defendant

Mr. Eric Ndhrazi, Court Clerk

**RULING ON APPLICATION TO PAY JUDGMENT DEBT BY
INSTALMENTS**

1. On 5th May, 2020 the Claimant (enforcement creditor) commenced this action against the Defendant (enforcement debtor) claiming the principal sum of \$47, 200, being a debt outstanding, interest on this sum at 5% above

the commercial bank lending rate, collection costs and costs of the action. In his Defence, the enforcement debtor admitted owing the principal sum, but denied liability for the collection costs and interest as claimed. Upon the enforcement creditor's application, judgment on admissions was entered against the enforcement debtor on 30th July, 2020 for the principal sum, but the question of whether he is liable to pay collection costs was reserved pending the parties submissions on the same. The court will render a separate decision on the said claim for collection costs.

2. On the same 30th July, 2020, the enforcement debtor filed an Application, under O.28, r.59 of the Courts (High Court)(Civil Procedure) Rules 2017 (hereinafter referred to as the "Rules"), for permission to pay the judgment debt in instalments.
3. In the Sworn Statement filed in support of the said Application, the judgment debtor deposed that he is a businessman, mainly involved in the importation and sales of motor vehicles from different countries, principally the Republic of South Africa (RSA). The debt originates from a casual and unsecured arrangement under which the judgment creditor advanced the loan to him for the purpose of boosting his business.
4. He also deposed that he has failed to repay the loan on account of the financial and economic conditions currently obtaining in the business environment precipitated by the negative effects of the current covid-19 pandemic that have made it impossible for him to transact business. Some of his merchandize, including a motor vehicle (Toyota Fortuner), is stuck in RSA due to the lockdown and closure of borders. As such, he is not able

to import the same into Malawi for sale. Once the borders open and business resumes, he is more than willing to start servicing the debt since the lockdown will have been lifted. He is well informed that the lockdown may be lifted by the month end of August 2020, after which he will be able to flexibly transact business. He undertakes to liquidate the judgment debt in monthly instalments of \$1, 500 from the month end of August 2020.

5. He finally deposed that he can only manage the sum of \$1, 500 on account of the fact that he has subsisting liabilities including school fees for his daughter at Kamuzu Academy at K2, 250, 000.00 per term, school fees for his son at Paramount Primary School at K600,000.00 per term, monthly water bills of about K55, 000.00 and food and other family expenses at about K300,000.00.
6. The judgment debtor produced a bank statement (Exhibit MMP3) as evidence of his current situation. However, in cross-examination he conceded that the bank statement is not the true reflection of his financial position, in so far as it does not reflect the income of about K3 million that he generates from his stone cladding business.
7. The law on payment of a judgment debt by instalments is very clear and well settled. O.28, r, 58 of the Rules provides that the court may, on application, grant an enforcement debtor an order to pay a judgment debt by instalments. By O.28, r.61, the application should be supported by a sworn statement of the enforcement debtor's position.

8. As per O.28, r. 62, in deciding whether to grant the order the court shall consider the following: whether the enforcement debtor is employed; his means of satisfying the judgment debt; whether the judgment debt, including any interest, shall be satisfied within a reasonable time; his necessary living expenses and those of his dependents; his other liabilities and whether having regard to the availability of other enforcement means, making the order would be consistent with the public interest in enforcing orders justly. Further, the court should also be satisfied that the instalment order will not impose unreasonable hardship on the enforcement debtor. Finally, the court may also have regard to any other matters it considers relevant.

9. A reflection of the factors prescribed in O.28, r.62 is in essence an invocation to the court to, on one hand, assess the judgment debtor's financial capability to pay the judgment debt at once without unreasonably compromising his livelihood whilst on the other hand not unnecessarily hindering the judgment creditor from enjoying the fruits of his litigation. As Nyirenda J, as he then was, well captured this in *Leasing and Finance Company v Maltraco Limited* [1997] 2 MLR 250,

"...the sole task of the court in an application to pay debt by instalments is to balance the interest of the judgment-creditor and his unfettered right to recover the debt at once, against a genuine failure or inability to settle the debt at once on the part of the judgment-debtor upon a full factual frank and honest disclosure of the judgment-debtors means."

10. Further, a prayer by a judgment debtor for permission to pay the debt in instalments is a prayer for the court's discretion and most importantly a

prayer for sympathy. Wherefore, a judgment debtor must approach the court with clean hands.

11. Therefore, ideally, having secured judgment against the judgment debtor, the judgment creditor is entitled to enjoy the fruits of her litigation by being the judgment debt in full, at once. Permission to pay the debt in instalments cannot be granted as a matter of right, hence the rigorous requirement for the judgment debtor to make a full and frank disclosure of his financial position, to enable the court to effectively assess his capability to repay the judgment debt.

12. A perusal of the evidence produced by the judgment debtor leaves questions lingering about his genuine financial position. It will be recalled that in his evidence in chief the judgment debtor testified that he is involved in the business of importation of vehicles for sale in Malawi and produced a bank statement to showcase his financial position.

13. A scrutiny of the bank statement manifests two significant issues. Firstly, there is no discernable pattern of the deposits, both in terms of amounts and dates. The judgment debtor did not offer any explanation to aid the court's understanding of the document in relation to his income. This implicitly draws the court into the realm of speculation on the income of the judgment debtor, which I resist for obvious reasons. Secondly, the statement produced is for the period 11th January, 2020 to 19th May, 2020. Now, the judgment creditor commenced this action on 5th May, 2020 and this Application was filed on 30th July, 2020. It is curious why the judgment debtor did not produce an up to date statement.

14. In any event, I observe that within the bank statement period, the account was credited with amounts ranging from K93, 000.00 to K17, 300,000.00 on diverse dates. Without any explanation, it is a challenge to determine what is the income of the judgment debtor in a given period, as it relates to his capability to pay the judgment debt at once.

15. By his Sworn Statement and bank statement, the judgment debtor created the impression and indeed led the court into believing that his sole source of income is the motor vehicle importation business and that he only operates one bank account, the statement of which has been produced in evidence. However, in cross-examination he admitted that he also runs a stone cladding business, the proceeds of which he deals in cash. He reluctantly disclosed that he makes about K3 million per month from this business. In both cross-examination and re-examination, the judgment debtor failed to explain in clear and satisfactory terms why he failed to disclose this stone cladding business and the income that he generates therefrom.

16. I find that the fact that the judgment debtor operates a stone cladding business from which he generates a substantial income is a material fact that he ought to have disclosed in his evidence in chief. Seeing as the judgment debtor only disclosed this business and income upon being pressed in cross-examination, I find that he suppressed a material fact. It is fair and just to conclude and I do find that he intended to mislead the court into believing that his sole source of income was the motor vehicle

importation business, and consequently that he is incapable of paying the debt at once.

17. As indicated, an application for permission to pay a judgment debt in instalments is a plea for mercy, which must be applied for with clean hands. I find that the judgment debtor, having failed to disclose his other source of income, has not only failed to make a full and frank disclosure, but has also approached the court with unclean hands. For this reason, I am not satisfied that the judgment debtor is genuinely unable to settle the judgment debt at once.

18. A word about the judgment debtor's liabilities. It will also be recalled that he testified that his liabilities include school fees for his two children and monthly water bills at K55, 000.00 and food and other family expenses at K300, 000.00. The judgment creditor took issue with the Receipts for the school fees since they are in the name of the judgment debtor's wife. The judgment debtor explained that this is due to their internal family arrangement where he gives his wife cash to pay the school fees. Since families discharge household responsibilities as they deem fit and convenient, I find this to be a plausible and acceptable explanation. Of concern is the fact that the judgment debtor has not produced any evidence to substantiate the assertion that he spends K300,000.00 for food and other family expenses. The judgment debtor ought to have produced this evidence to buttress his case.

19. The crux of this Application is the judgment debtor's assertion that he is unable to repay the loan because his vehicle, earmarked for sale once

imported into Malawi, is stuck in RSA on account of the covid-19 travel restrictions. Whilst being cognizant of the global economic challenges brought by the pandemic, it is imperative to assess each matter on a case by case basis.

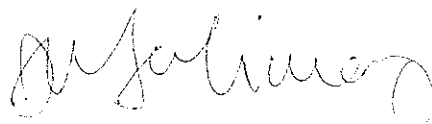
20. The genesis of the dispute between the parties is the loan agreement entered into on 6th February, 2020. In clause 3 thereof, the parties agreed that the judgment debtor would repay the loan in 2 instalments, i.e. 50% on 31st March, 2020 and the balance on 30th April, 2020. The proviso to this clause provided that the parties were at liberty to extend the repayment period to any date and in any event not later than 30th June, 2020. By the judgment debtor's own admission in cross examination, clause 3 was neither amended nor invoked to extend the repayment period.

21. I take judicial notice of the fact as part of the covid-19 preventive measures, the RSA imposed a lockdown (which included travel and cross-border movement restrictions) on 26th March, 2020. That the said lockdown adversely affected the judgment debtor's motor vehicle importation business and consequently his capability to service the loan as undertaken is plausible, *prima facie*. However, the adverse effects notwithstanding, the fact that the judgment debtor has the stone cladding business from which he also generates income compromises his submission that he is incapable of repaying the debt.

22. From the foregoing, it is my finding that the judgment debtor has failed to satisfy the court that he is genuinely unable to pay the judgment debt at once. I therefore decline to grant him permission to pay the judgment debt

in instalments. The Application is dismissed with costs to the judgment creditor.

Made in Chambers this 15th Day of September, 2020.

A handwritten signature in cursive script, appearing to read 'Annabel Mtalimanja', written in black ink.

Annabel Mtalimanja

JUDGE