

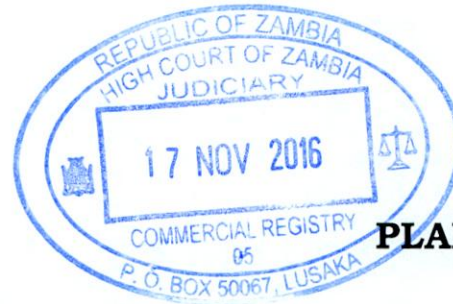
**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
AT LUSAKA**

2016/HPC/0096

(Commercial Jurisdiction)

BETWEEN:

JOHN MICHAEL MITCHELL



PLAINTIFF

AND

FELIX NICHOLAS MFULA

DEFENDANT

Before the Honourable Justice Irene Z Mbewe in Chambers on the
17th day of November, 2016

*For the Plaintiff: Mr A Kearns of Messrs Willa Mutofwe &
Associates*

*For the Defendant: Mr Mulikita of Messrs M Chalwe and
Company Advocates*

R U L I N G

Cases Referred to:

1. *Sunday Kawaya and Another v First Alliance Bank (Z) Limited
SCZ/8208 of 1997*
2. *Zambia Export and Import Bank v Mukuyu Farms Limited and
Others [1993/1994] Z.R. 36.*

Legislation Referred to:

1. *High Court Rules of Zambia, Cap 27 of the laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

On 1st June, 2016, I entered judgment on admission in favour of the Plaintiff against the Defendant in the sum of British Pounds Sterling GBP50,000 less the ZMW100,000 that was paid by the Defendant in September, 2015. This arose from the acquisition of a proprietary interest in Prifex Hotels Kasama by the Plaintiff in April 2009 which consideration failed. Following the said judgment on admission, the Plaintiff issued a writ of fieri facias on 26th August, 2016, and a stay of execution was granted on 26th August, 2016 pending the application to the judgment debt in instalments. On the 19th September, 2016, the ex parte stay of execution was discharged for procedural irregularity.

This is an application by the Defendant to settle the judgment sum, interest and costs in instalments. The application is made by way of summons and supporting affidavit of means filed on 26th August, 2016 made pursuant to **Order 36 Rule 9 of the High Court Rules Cap 27 of the Laws of Zambia**. In support of the application the Defendant also filed skeleton argument on 29th August, 2016.

The Plaintiff's response was by way of an affidavit in opposition and skeleton arguments filed on 5th September, 2016. The affidavit in support was sworn by Felix Nicholas Mfula the Defendant herein.

The gist of the evidence was that he is a proprietor in Prifex Hotels Limited a registered business and that as at 24th June, 2013 the hotel is valued at K19,710,756 as shown in the valuation report (exhibit "**FNM 1**"). It was deposed that the deponent was in the process of disposing of his interest in the said hotel and that the proceeds would be sufficient to cover his indebtedness to the Plaintiff. It was deposed that the Defendant was willing to settle the judgment debt in monthly instalments of K3000 pending the sale of the hotel.

The application was opposed by way of affidavit deposed by John Michael Mitchell the Plaintiff herein. It was deposed that contrary to the assertions of the Defendant, Prifex Hotels was not a limited company (Exhibit "**JMM1**"). It was deposed that in March 2014 the Defendant had received financial funding of K600,000 in which the Defendant had made an undertaking to refund or repay the Plaintiff in which the Plaintiff only received a sum of K100,000. It was deposed that the valuation report dated June 2013 exhibited as "**FNM1**" in the Defendant's affidavit in support of the application to pay in instalments, was outdated. It was also deposed that the Defendant had on several occasions made undertakings to settle the debt and had previously informed the Plaintiff that a buyer for the hotel had been found.

It was deposed that the Defendant had not disclosed to the Court his revenue, liabilities and assets to demonstrate his current

financial standing which is contrary to **Order 47 Rule 1 and 3 of the Rules of the Supreme Court, 1999 Edition.**

It was deposed that the Defendant had offered a monthly instalment payment of K3000.00 without stipulating a defined commencement date. It was further deposed that the Plaintiff was nearly 68 years of age and in poor health and that the proposed repayment would take 23 years to extinguish. The Plaintiff opposed the application on the grounds of unreasonableness and urged the Court to dismiss the Defendant's application to pay the judgment debt in instalments, with costs and interest to the Plaintiff.

The matter was heard on the 29th September, 2016 and both parties relied on their respective affidavits filed into Court and skeleton arguments. Counsel for both parties made viva voce arguments.

In advancing arguments in favour of the application, Counsel for the Defendant relied on the affidavit evidence and skeleton arguments. Counsel placed reliance on **Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia.** The Court's attention was drawn to the case of **S.Brian Musonda (Receiver of First Merchant Bank (In Liquidation) vs Hyper Food Products Limited and Two Others** where it was held that:

"It is not contrary to law or to the rules for the Court to exercise its equitable jurisdiction of affording relief where a

judgment debtor can pay within a reasonable time even if it results in fettering the judgment creditors' freedom of inflicting a remedy of their own choice or preference."

It was submitted that the Defendant has made reasonable steps to look for buyers to dispose of his interest in Prifex Hotels Limited, the proceeds of which would cover the Defendant's obligations to pay the judgment debt. Counsel reiterated that the Defendant was committed to liquidating the judgment debt in instalments.

In response, Counsel for the Plaintiff more or less repeated what was stated in the Plaintiff's affidavit in opposition and the skeleton arguments. The Plaintiff relied on **Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia** as read with **Order 47 Rule 3 of the Rules of the Supreme Court**. Counsel drew the Court's attention to the case of **Kawaya and Another v First Alliance Bank (Z) Limited** where the Court held that:

"there may be cases where the harshness of an execution and its harmful consequences can be avoided without keeping the creditor out of his money and while ensuring that the money is recovered within a reasonable period. This facility not available as of right, the debtor must make out a good case for instalments which can be considered to be a sufficient reason as special circumstances".

Counsel for the Plaintiff argued that the Defendant had not advanced any good and sufficient reasons to warrant an order to pay the judgment sum by instalments. It was further argued that as a matter of procedure and in any application made pursuant to **Order 36 of the High Court Rules, Cap 27 of the Laws of Zambia** as read with **Order 47 Rule 3 of the Rules of the Supreme Court**, the applicant must disclose both his income and liabilities showing in detail the Defendant's income, nature and value of all his property as well as details of his indebtedness to other persons apart from the Judgment Creditor. Counsel argued that the Defendant had failed to adduce any evidence to this effect. The Plaintiff prayed that the Defendant's application to settle the judgment debt in instalments be dismissed with costs to the Plaintiff.

I have considered the affidavit evidence, skeleton arguments and viva voce arguments of both Counsels. The Defendant's application to settle the balance of the judgment sum is made pursuant to **Order 36 Rule 9 of the High Court Rules Chapter 27 of the Laws of Zambia** which provides as follows:

“Where a judgment is given or an order made for the payment by any person of money, and the court is satisfied on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution-

- (a). *that there are special circumstances which render it inexpedient to enforce the judgment or order, or*
- (b). *that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the court may by order, stay the execution of the of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit”.*

The above Order shall be read with **Subrule 1 and 3 of Order 47 Rules of the Supreme Court** which provides as follows:

- “(1) Where a judgment is given or an order made for the payment by any person of money and the court is satisfied on an application made at the time of the judgment or order at any time thereafter by the judgment debtor or other party liable to execution that the applicant is unable from any cause to pay the money then notwithstanding anything in rule 2 or 3 the Court may by order stay the execution of the judgment subject to such condition as the Court thinks fit.*
- “(3). 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".

The issue for my determination is whether the Respondent meets the criteria set out in **Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia** as read with the corresponding **Order 47 Rule 1 and 3 of the Rules of the Supreme Court, 1999 Edition.**

In ascertaining whether the Defendant has shown sufficient cause, a perusal of the relevant paragraphs of the affidavit of means filed into Court on 26th August, 2016 and deposed by Felix Nicholas Mfula the Defendant herein read as follows:

- "4. That due to unforeseen circumstances, I was unable to repay the said money when the Plaintiff demanded for the said payment.*

- 5. That I am the proprietor in Prifex Hotels Limited a registered business situated in Kasama, Northern Province of Zambia.*

7. *That I am engaged in the process of negotiating with prospective buyers who are interested in purchasing the said Prifex hotels Limited.*
8. *That upon the sale of the said Prifex Hotel Limited I will obtain sufficient funds to repay the Plaintiff herein.*
9. *That the proceeds of the proposed sale will be sufficient to cover my obligations to repay the Plaintiff herein.*
11. *That I am further willing to settle the judgment debt by paying monthly instalments of K3000 until I have finalised the said sale of the Prifex Hotel Limited and obtained funds to settle the debt in full."*

From the paragraphs stated aforesaid, and in terms of **Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia**, the applicant ought to demonstrate some sufficient cause or special circumstances which renders it desirable to make an order to pay a judgment debt in instalments. This requires evidence to be adduced such as the applicant's income, nature and value of his property, as well as details of indebtedness to other persons apart from the judgment creditor. In that respect, I am in agreement with the Counsel for the Plaintiff that as a matter of procedure and as required by the law, the Defendant has not provided this Court with

any evidence of means, income, nature and value of all his property as well as details of his indebtedness with other persons.

The facility to pay in instalments is not available as a matter of course. The Defendant has proposed the monthly instalment of K3000 which the Plaintiff contends has no commencement date and would take approximately twenty three (23) years to discharge. In support of the application to pay in instalments, Counsel for the Defendant cited the case of **S.Brian Musonda (Receiver of First Merchant Bank (In Liquidation) vs Hyper Food Products Limited and Two Others** where it was held inter alia that it is not contrary to law where a judgment debtor can pay within a reasonable time. I find that the Defendant's proposal to pay monthly instalments of K3000 in my view cannot be termed a reasonable period.

I have observed that the Defendant last payment towards settlement of the debt was in the sum of K100,000.00 in September 2015 as confirmed in the statement of claim dated 3rd March, 2015, and this in itself shows a lack of seriousness in discharging the debt. In my view, the Defendant is bent on procrastinating the same without any justifiable nor satisfactory or special circumstance as demonstrated by the proposal to pay monthly instalments of K3000.

Counsel for the Defendant argued that the Defendant intends to dispose of his interest in Prifex Hotel and thereafter settle his indebtedness. It is not enough to vaguely state that there are ongoing negotiations with prospective buyers in view of the fact that these negotiations have been ongoing since April 2009 as evidenced by paragraph 10 of the Plaintiff's affidavit in support of the application to enter judgment on admission filed on 3 March 2016 which was not disputed by the Defendant.

Counsel for the Plaintiff drew the Court's attention to the case of **Sunday Kawayo and Another v First Alliance Bank (Z) Limited** in which the Supreme Court held that the debtor must make out a good case for instalments which can be considered to be a sufficient reason or special circumstance. I concur with the principle in the cited case, and find that the Defendant has failed to show sufficient reason or special circumstances, and I see no reason why the Plaintiff should be denied the fruits of his judgment. I am fortified in my finding by the Supreme Court case of **Zambia Export and Import Bank v Mkuyu Farms Limited and Others** where it was held that:

"it is quite clear from this order that a court may order a judgment debt to be satisfied by instalments upon sufficient cause being shown by the judgment debtor".

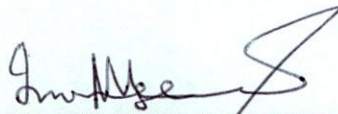
The sum total is that the requisites of **Order 36 Rule 9 of the High Court Rules** and **Order 47 Rule 1 and 3 of the Rules of the**

Supreme Court have not been met, and this makes it an improper case for granting the application for the settlement of the Judgment debt in monthly instalments. I agree with the submission by Counsel for the Plaintiff that the application ought to fail. By way of conclusion, I find no merit in the Defendant's application and I accordingly dismiss it.

Costs granted to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 17th day of November, 2016



JUSTICE IRENE Z MBEWE
HIGH COURT JUDGE