IN THE HIGH COURT FOR ZAMBIA 2016/HPC/0316

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

DON DALITSO DUMA PLAINTIFF

AND

FLOID MALEMBEKA DEFENDANT

Before the Hon Madam Justice Mrs. Irene Zeko Mbewe in Chambers

For the Plaintiff : *Mr. J Matalilo and Ms P Ngulube of Messrs Mumba Malila and Company*

For the Defendant : *Mr. K Mututwa of Messrs Sondashi and Company*

RULING

Cases Referred To:

1. *Southern Cross Motors Limited v Nonc System Technology Limited 2011/HK/223*
2. *Zambia Export and Import Bank v Mukuyu Farms Limited [1993/1994] ZR 36*
3. *Sunday Kawaya v First Alliance Bank Zambia Limited SCZ/8/2000*

4. *African Banking Corporation Zambia v Chat Milling Company Limited and 4 Others 2014/HPC/0357*

5. *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation) vs Hyper Food Products Limited and Two Others [1999] ZR 124*

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*

2. *Rules of the Supreme Court, 1999 Edition*

This is the Defendant's application for an Order to settle the judgment debt in instalments and for an order to stay execution of the Judgment herein. An ex parte Order to stay execution of the Judgment pending application to settle the judgment debt in instalments was granted on 26th April, 2018.

The Defendant in support of its summons filed a supporting affidavit. The salient facts are that following the Court Judgment of 2nd August 2017, Judgment was entered in favour of the Plaintiff in the sum of ZMW165,000.00. According to the Defendant, his business has been adversely affected by the economy and is in no position to liquidate the Judgment sum in one lump payment. A copy of his monthly income and expenditure was exhibited as "FM1" The Defendant proposes to settle the judgment sum by paying an

initial instalment of ZMW20,000.00 and thereafter monthly instalments of ZMW5000.00

The Plaintiff opposed the application by way of affidavit in which he deposed that the transaction leading to the proceedings took place in 2015 and all the while the Defendant has been elusive and effecting service of the Judgment of this Court proved challenging until 20th April 2018. It is deposed that the Defendant's application is intended to thwart the execution of the Judgment. According to the Plaintiff, the Defendant is misleading the Court into believing that he has no means to settle the judgment debt as the Plaintiff is aware that he runs different businesses including the selling of motor vehicles, supplying of different agro products and is a commercial farmer. The Court is urged to dismiss the Defendant's application.

The Defendant filed skeleton arguments in which they relied on **Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia** as read with **Order 47 Rule 1 Rules of the Supreme Court, 1999 Edition.** The Court's attention was drawn to the case of *Southern Cross Motors Limited v Nonc System Technology Limited*[1]

and Zambia Export and Import Bank v Mukuyu Farms Limited[2] in which the Court held that a Court may Order a judgment debt to be paid in instalments upon sufficient cause been shown by the judgment debtor. It is submitted that the Applicant has exhibited its statement of income and expenditure before contingencies and shown special circumstances in that proceeds from the sale of the motor vehicle in question was ploughed into other developmental projects.

In the Plaintiff's skeleton arguments, Counsel argues that the Defendant has not shown any sufficient reason in applying for settlement of the judgment sum in instalments. Counsel submits that the Orders relied upon are not intended to shield the judgment debtor of his responsibility to settle. Counsel contends that this requires evidence to be adduced such as the Defendant's income, nature and value of his property as well as liabilities for only then can a Court make an informed decision between the needs of the judgment debtor to be granted a stay of execution and the needs of the judgment creditor to obtain due and prompt satisfaction of his judgment debt. Counsel called in aid the case of *Sunday Kawaya v*

First Alliance Bank Zambia Limited[3] and *African Banking Corporation Zambia v Chat Milling Company Limited and 4 Others*[4]. It is the Plaintiff's prayer that the Court discharges the stay of execution and the application to pay the judgment debt in instalments.

At the hearing on 23rd May 2018, both Counsels made oral submissions which were more or less mirrored their respective skeleton arguments, and I shall therefore not restate them.

I have considered the affidavit evidence, skeleton arguments and oral submissions of the respective parties herein.

The Defendant's application to settle the judgment sum in instalments is made pursuant to **Order 36 Rule 9 of the High Court Rules Chapter 27 of the Laws of Zambia** and provides as follows:

> *"Where any judgment or order directs the payment of money, the Court or a Judge may, for sufficient reason, order that the amount shall be paid by instalments, with or without interest. Such order may be made at the time of giving judgment, or at*

anytime afterwards, and may be rescinded, upon sufficient cause, at any time. Such order shall state that, upon the failure of any instalment, the whole amount remaining unpaid shall forthwith become due".

Order 47 Rule 1 Rules of the Supreme Court, 1999 Edition 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,

(i) That there are special circumstances which render it inexpedient to enforce the judgment or order, or

(ii) That the Applicant is unable for 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 or order by writ if

fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit."

The Court is therefore clothed with jurisdiction to determine this application. The Court in exercising its discretion under *Order 36 Rule of the High Court Rules and Order 47 Rule 1 Rules of the Supreme Court, 1999 Edition,* is required to satisfy itself that sufficient cause or special circumstances have been shown by the applicant before an order to pay in instalments can be entertained. I have considered the case of *Zambia Export and Import Bank v Mkuyu Farms Limited and Others*[2] where the Supreme Court 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".

Both Counsels relied on the case of *Sunday Kawaya and Another v First Alliance Bank (Z) Limited*[3] where the Court held that the debtor must make out a good case for instalments which can be considered to be a sufficient reason.

The rationale for showing sufficient cause is that denying the Plaintiff the fruits of his Judgment is not to be taken lightly. The burden is on the judgment debtor to place assets, liabilities, and obligations against his income and assets. At this point, it is expected that the Defendant will make a full and frank disclosure.

In respect to what constitutes sufficient cause as detailed in **Order 36 Rule 7 High Court Rules, Cap 27 of the Laws of Zambia**, this to a large extent depends on the peculiar circumstances of each case. Some of the factors I have taken into consideration include the financial status of the Defendant, whether he has the means to settle the judgment debt, how long the proposed instalments will take to pay off the judgment debt, and if the Plaintiff will suffer hardship resulting from the length of time that the Defendant will settle. I have also looked at the age and nature of the judgment debt.

The Defendant argues that it has shown special circumstance in that the monies received from the Plaintiff were intended for certain developmental projects as the sale of the motor vehicle in question was a one off transaction and considering the passage of time since

the transaction took place, monies have since been expended. Conversely, the Plaintiff argues that there are no special circumstances that have been shown to warrant the granting of the application to pay the judgment debt in instalments.

From the facts deposed to in the Defendant's affidavit in support of the application, it shows that the Defendant is not in a position to pay the judgment debt in a lump sum and backed this with a statement showing his income and expenditure. However, the matter does not end there as I am required to balance the interests of the parties herein. The judgment debt arose from a motor vehicle transaction that occurred in October 2015 and Judgment was delivered on 2nd August, 2017. From that date, a period of over 10 months has lapsed, with the Plaintiff receiving no payment thus denying him the fruits of his Judgment.

The Defendant proposes to settle the judgment debt of ZMW165,000.00 in instalment payments with an initial payment of ZMW20,000.00 and thereafter monthly instalments of ZMW5000.00 translating into a period of over 2.5 years and when you include the waiting period of 10 months from date of Judgment, the total period

of time it will take to settle the judgment debt is approximately over 3 years and 4 months. I find this to be a long period time and flies in the face of the principle that an order for instalment payments must be on reasonable terms, and not at the comfort of any of the parties.

As the adage goes, justice shall be to all and not only one party. If I allow the Defendant to pay the judgment debt over the proposed period of 2 years and years and 6 months (2.6 years), it will result in undue hardship for the Plaintiff resulting in the further prolonged enjoyment of the fruits of his Judgment. In my considered view, this prolonged period is unreasonable. I am guided by the Supreme Court in the case of *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation) v Hyper Food Products Limited and Two Others*[4] 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."*

Against the backdrop of the factors I have considered herein, and on the totality of the evidence, the Defendant has adduced sufficient reason for the grant of the application to pay the judgment debt in instalments.

However, I invoke the powers of this Court under *Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia,* and Order the Defendant to pay the Judgment debt in ten (10) equal instalments on a monthly basis including interest, which interest shall be on a reducing basis, the first such instalment payable by 30th July 2018 and thereafter the 30th day of each subsequent month until full payment. In the event that the Defendant defaults in one payment, the whole amount will become due and the Plaintiff shall be at liberty to execute.

Costs are in the cause.

Dated this 14th day of June, 2018.

HON IRENE ZEKO MBEWE
HIGH COURT JUDGE