

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 274 OF 2002**

**BETWEEN:**

**SASOL POLYMERS.....JUDGMENT CREDITOR**

**-and-**

**MALAWI DEVELOPMENT**

**CORPORATION.....JUDGMENT DEBTOR**

**CORAM: HON. JUSTICE A.C. CHIPETA**

**Makiyi; of Counsel for the Judgment Creditor**

**Dr. Mtambo; of Counsel for the Judgment Debtor**

**Matola; Official Interpreter**

**RULING**

On 26th February, 2002 the Judgment Debtor, Malawi Development Corporation, obtained an order of stay against enforcement of the judgment debt herein by way of execution. The order was issued under Order 47 rule 1 of the Rules of Supreme Court and it was conditioned on the Judgment Debtor taking out a summons to pay debt by instalments within seven days of its issue. This the Judgment Debtor did and I heard the said summons on 2nd May, 2002.

There are two affidavits which have been filed in support of the present application. The first one was sworn by Dr. Mtambo, of Counsel, on behalf of his client and the supplementary one has been sworn by a Mr Morris Mpokosa, Chief Accountant of the Judgment Debtor, who has among other things adopted Dr. Mtambo's affidavit as his own. There is a statement of cash flow exhibited as "MCM1" to the first affidavit intended to show that the means of the Judgment Debtor are such that it cannot settle the Judgment Debt at one go. In addition to this the deponent Mr Mpokosa personally attended the court and testified on oath at the hearing of this summons and he was subjected to searching cross-examination both on his oral testimony and on his affidavit evidence.

It is proposed by the Judgment Debtor in this application that the court should allow it to settle the judgment debt herein through payment of instalments at the rate of K500,000.00 every month. The Judgment Debtor is saying that it is itself currently indebted to the Development Bank of Southern Africa and to the European Investment Bank to the total tune of over K300,000,000.00 and that as per its cash flow exhibit "MCM1", whose figures are mostly in brackets, it is basically operating on borrowed funds.

Further explaining its position the Judgment Debtor disclosed that it has landed into the current liability due to acting as guarantor for one of its subsidiaries, Plastic Products Limited, in a business deal the latter struck with the Judgment Creditor. In the transaction in question Plastic Products Limited is said to have acquired raw materials which were misused and not accounted for by its responsible officers. As such since primarily Plastic Products Limited was expected to settle its own debts, it was Mr Mpokosa's evidence, that the debt herein did not therefore readily fall within the normal budget of the Judgment Debtor. Appreciating its liability as guarantor, however, and in the light of its present financial problems the Judgment Debtor said it could only afford to pay K500,000.00 every month and that it had already paid one such instalment in April 2002. In fact on the very day of the

hearing of this summons the Judgment Debtor's witness expected that another cheque of K500,000.00 would be ready as a second instalments.

On its part the Judgment Creditor was seriously opposed to the Judgment Debtor's proposal herein. Mr Makiyi, of Counsel, representing the Judgment Creditor first pointed out that the judgment debt herein arises from a trading debt which the present Judgment Debtor guaranteed with full appreciation of the consequences of default in payment by the principal debtor. The law regarding these types of debts he argued is very clear and that it is to the effect that courts ought to be reluctant to allow such debts to be settled by instalments. The rationale behind this, he said, is that doing so is as good as allowing the Judgment Debtor to stifle or to kill the business of the Judgment Creditor. Malawi Development Corporation, it was contended, as a big Statutory Corporation in Malawi ought to have known what it was going in for when it chose to guarantee the debt of its subsidiary company and should not therefore give the impression that it had nothing to do with this debt.

Beyond this it was Mr Makiyi's argument that from his cross-examination of the Judgment Debtor's witness it was clear that from exhibit "MC1", the cash flow, the witness could not state with precision the present income, the present expenses, and even the net profit or loss of the Judgment Debtor. He further pointed out that the witness did not bring documents to prove its mammoth indebtedness to the two banks mentioned earlier, which the witness had said were kept under lock and key at the office and which he added he could only have brought up if he had been so asked to bring them.

The Judgment Creditor expressed serious worry over the period of time it would take the Judgment Debtor to clear the judgment debt herein if the proposal herein was allowed. The judgment debt, standing as it does at USD97,902.38 plus 10% interest, which works to MK10,000,000.00 and above Mr Makiyi lamented that it would take some twenty months, which is close to two years, to clear this debt at the rate of instalments suggested.

It was thus submitted on behalf of the Judgment Creditor that the application to pay debt by instalments herein should not be allowed, but rather that it should be dismissed with costs.

I must say that although Mr Makiyi did not refer to any text book or case authorities in his arguments, I am aware that the principles that govern trading debts are somewhat stiffer than those that govern ordinary debts. Indeed the principles are to the effect that occasion should be rare when a debtor in this type of debt should be allowed to enjoy the facility of instalment settlement to the detriment of the Creditor when his own business is flourishing. It must be noted, however, that in exceptional cases, instalment payments will be allowed even for this type of debt.

I have taken time in this matter to seriously reflect on all the arguments offered for and against this application. Although I am well aware that as a guarantor the Judgment Debtor herein cannot effectively use that position as a shield against this suit from the Judgment Creditor, it has somehow bothered me that there is no evidence of any primary suit against the principal debtor and its results, if any, since this suit was instituted. It strikes me that if Plastic Products Limited has not even been sued and that thus its assets have not been put at any risk of execution, much as the Judgment Creditor may have been governed by considerations of prudence in commencing this action, I cannot help sensing that the course the Judgment Creditor has taken, as it were, has forced the guarantor into the first line of risk, which in a way is a greater risk than it had bargained for, when ideally, initially at least, the guarantor's line of risk should have been the second one or, in other words, the fall-back position line. This factor alone, even in a trading debt situation, would compel me to view a Judgment Debtor who is merely a guarantor a bit differently from a Judgment Debtor who is a principal debtor. In this case therefore much as the liability of the Judgment Debtor herein to the Judgment Creditor is rightly sealed, when it comes to enforcement it makes sense to me that the Judgment Debtor should highlight its true position in the matter especially where the Judgment Creditor has opted to spare the rod on the real culprit as appears to be the case here.

Turning to the question whether the Judgment Debtor has or has not established a basis for presenting this application and whether or not it has made a reasonable offer in the circumstances, it will be recalled that I have earlier attempted a summary of the evidence brought up in this case. It was, I think, quite helpful in this case that apart from affidavit evidence the Accountant of the Judgment Debtor came to court in person and testified on oath. Coming from the background that the judgment debt herein is in reality a transferred debt from a legal entity that has itself been spared from suit, a complaint by the Judgment Debtor that it has its own big debts to contend with alongside this one does not sound out of place at all. Even though the documents to prove the Judgment Debtor's loan liabilities to the Development Bank of Southern Africa and to the European

Investment Bank were not exhibited or otherwise presented in evidence, from the total sum of affidavit and oral evidence especially with benefit of live cross-examination of the witness proffered, I was able to gain a distinct impression that the Judgment Debtor is not merely trying to shun its responsibility in the matter. To my mind the seriousness of the Judgment Debtor's commitment in the matter was well demonstrated by the payments it had already started making even as its application was still in the process of being heard and determined. Much as K500,000.00 can be described as a small figure when one juxtaposes it to a liability of K10,000,000.00, I must confess that it is not so small that the Judgment Creditor can sneeze at it, especially when it did not even dare to first sue the principal debtor on it and has for

its own convenience chosen to expose the guarantor to first instance risk when otherwise entitled to second instance risk.

I am rather impressed that if the cheque that was expected to be ready on the day of hearing has been paid, it would mean that even before this application has been determined so far K1,000,000.00 has been paid out of the K10,000,000.00++ outstanding (i.e. 1/10th (one tenth) paid in two months). I am accordingly of the mind that the Judgment Debtor's application deserves to be given a chance, candid as it appears to be to me.

On the evidence currently before me I hold that the offer made by the Judgment Debtor to settle the judgment debt herein by instalments of K500,000.00 monthly is reasonable. Of course should the Judgment Debtor's financial situation improve, it will be beneficial even to the debtor itself to increase the rate of repayments. Thus while I order that, if the Judgment Debtor has already paid the K500,000.00 it was planning to pay on 2nd May, 2002, it should with effect from 1st June, 2002 be paying like sums every month to the Judgment Creditor by way of settlement of this judgment debt, I direct that this order be open to review six months down the line in case the financial situation of the Judgment Debtor be seen to improve. I order accordingly.

Pronounce in open Court this 16th day of May, 2002 at Blantyre.

**A.C. Chipeta**

**JUDGE**