IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NUMBER 5542 OF 2010

BETWEEN

LASTON MZEMBE.....PLAINTIFF

-AND-

MRS L. KACHEPA.....1ST DEFENDANT
MACDONALD KACHEPA.....2ND DEFENDANT
KEN KACHEPA.....3RD DEFENDANT
NELSON KACHEPA.....4TH DEFENDANT

Coram: Hon Justice Dr. C.J.Kachale, *Judge*
Zapinga, of Counsel for the Plaintiff
Silungwe, of Counsel for the Defendants
Tembwe, Court Clerk

RULING ON APPLICATION TO PAY JUDGMENT-DEBT BY INSTALMENTS

On 23rd March 2015 my court heard the Defendants' Summons to Pay Judgment-Debt by Instalments. Counsel for the Defendants has filed a brief affidavit to the effect that his clients lack the capacity to satisfy the judgment debt at once. In fact the evidence suggests that of the four defendants only the second (Macdonald Kachepa) is in employment earning K50, 000 per month. No documentary proof to substantiate that income has been adduced, allegedly because his employers do not provide any pay slips.

The decision of *Nyirenda, J* (as he then was) in ***Leasing and Finance Co-v-Maltraco Ltd*** **[1997] 2 MLR 250** has been cited to explain the principles applied in this nature of proceedings. At page 253 the learned judge summarized the law thus:

> "My view is that the sole task of the court in 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. Perhaps a court ought to be more cautious and more reluctant to allow instalments in a trading debt, like the present...A prayer by a judgment-debtor for instalments, is a prayer for the court's discretion and most importantly it is a prayer for sympathy. Wherefore a judgment-debtor must approach the court with clean hands..."

In considering the present application it would be remiss to omit to mention the curious circumstances in which the matter was argued in my chambers. In the first place counsel for the defendants revised the proposed instalments from K50, 000 per month to K100, 000 on account of the plaintiff's refusal to accept the lower offer outside my chambers. For his part counsel for the plaintiff indicated in his presentation that his client (who was in attendance) was not prepared to consider instalments, unless the debt could be liquidated within four months. Nevertheless counsel urged the court to consider favourably the applicant's offer of K100, 000 instalments, despite his client's unequivocal unwillingness to accept the instalments proposed by the judgment-debtors. It was disclosed by counsel that the reason his client insisted on attending my chambers was because the two had failed to agree on the acceptable level of instalments.

There are two issues arising from the arguments and suggestions of both lawyers. To begin with there is a clear confusion about the nature and purpose of the present summons manifested by the purported bargain between the parties as they awaited an appearance in my chambers; when the application is lodged with the court the acceptability or reasonableness of the proposed instalments is a matter placed within the exclusive discretion of the court. The judgment-creditor's opinion on the reasonableness or otherwise of the proposed instalments is not critical per se to the court's decision on that question. In that vein, it is superfluous to engage in any haggling as a basis for the application. (However, the summons of itself does not oust the freedom of the litigants to seek to reach an amicable out of court arrangement on the same issue). If this approach was adopted the court would have been spared the embarrassment generated by counsel on both sides in the conduct of the summons.

The second and more significant issue thrown up by the address of counsel relates to the importance of instructions from clients in the conduct of cases: it is quite shocking for a lawyer to seek to advance a position in clear disagreement with his client's clearly stated views. Professional etiquette would dictate that where counsel finds it impossible to prevail upon his client concerning a given issue, may be it would be appropriate to seek to be discharged. It is definitely not competent for counsel to deliberately ignore the views of the litigant on matters which the latter should properly have the final say. In the present proceedings the court would note that the decision by counsel to bring along his client into my chamber greatly mitigated any appearance of unprofessionalism generated by his refusal to advance the litigant's position.

Of course, as earlier noted, those views (of the plaintiff) are not consequential to my determination of the summons to pay debt by instalments; nevertheless the conduct of counsel to purportedly trash those views on the expected mode of settlement of the judgment-debt is wholly unethical and unacceptable. The duty of counsel is to do just that, namely to counsel or advise the litigant and offer him the legally acceptable options obtainable within a given factual or legal scenario; the choice whether one option is acceptable or not resides with the litigant. The court observed the obvious lack of refinement in the plaintiff, which may explain counsel's eagerness to ignore his opinions, but that is quite unconscionable-in this court's opinion such ordinary and unsophisticated clients should command a greater duty of care in the conduct of their cases since their fate quite literally rests with the professional competence and diligence of counsel.

Having said all that the court must still determine the present summons on the basis of the materials on the record. In my considered opinion the wisdom of *Justice Nyirenda* (as he then was) quoted earlier clearly establishes that the discretion to order payment by instalments must be exercised with great caution. In the first place the judgment-debtor must furnish a fully frank and factually honest disclosure of its income and generally approach the court with clean hands. Above and beyond this, the application is really premised on nothing but the sympathy of the court towards the applicant. In order for such sympathy to be evoked that is why the mendicant must be forthright and above board in approaching the court.

It is quite interesting in this application that apart from a blank allegation of lack of means and the unsubstantiated income of the second defendant being K50, 000 per month nothing else has been produced to support the summons. It therefore becomes rather curious when the same applicants suggest through counsel that they are prepared to pay K100, 000 per month; where will that extra money come from? Put differently, would one be entitled to question the forthrightness of the information furnished in support of the present summons based on the apparent willingness of the applicants to accommodate larger installments to clear the debt? Are these litigants worthy of the court's sympathetic intervention against another successful litigant who has as of right been entitled to the judgment sum since 23rd October 2012? In my court's opinion these are not straight forward questions at all but the aid of the precedent discussed before would be critical.

Thus in ***Leasing and Finance Co-v-Maltraco Ltd*** (as above) in granting the prayer of the judgment-debtor the court considered the fact that the applicant '*had made, though not exhaustive, a sufficiently honest full and frank disclosure of its assets and liabilities....I also bear in mind that the proposed instalments are not at all unreasonable*' (at page 253). In reaching that conclusion the court disregarded previous defaults by the judgment-debtor and evidence suggesting misplaced priorities that rendered it difficult for them to liquidate the debt hitherto. Nevertheless, even though it was a trade debt, the application was still upheld.

Coming to this case it is worth considering the terms of section 65 of the Courts Act which stipulates that '*every judgment in civil proceedings shall carry interest at the rate of five per centum per annum or such other rate as may be prescribed*'; while the plaintiff crave instant satisfaction of the judgment debt, it is obvious that any loss arising from the delayed implementation of the decision of 23rd October 2012 will be duly compensated in law by the judgment-debtors. The initial debt (before interest) was K690, 000. Within seven months (minus interest which must be computed) the whole sum would be liquidated; such a proposal sounds quite reasonable to my court.

Conclusion

On the preceding premises, therefore, the summons to pay debt by installments is accordingly upheld. The entire judgment sum (plus interest at the statutory prescribed rate of 5% p.a.) will be liquidated by monthly instalments of K100, 000, the first instalment being payable on 31st March 2015 and subsequent ones falling due on the last day of each month from April 2015 till the debt is exhausted.

Costs are for the plaintiff.

Made in chambers this 24th day of March 2015 at Lilongwe.

***C.J.Kachale*, PhD**

JUDGE