



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

CIVIL CAUSE NO. 593 OF 2009

BETWEEN:

IAN SMITH PLAINTIFF

-AND-

APOSTLE T.L. KHOVIWA..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE H.S.B. POTANI

Tembo of counsel for the Plaintiff

Chidothi of counsel for the Defendant

Kamuloni, Court Clerk

Ms Chiphwanya, Secretary

RULING

This is the defendant's summons by which he seeks variation of mode of payment of judgment debt. The application by the defendant is supported by facts set out in an affidavit sworn by the defendant himself. Although the plaintiff has not filed any opposing affidavit, counsel in his written skeletal arguments and oral submissions opposes the application.

There is no dispute whatsoever that following the commencement of this action by the plaintiff against the defendant for a claim in the sum of K226,500.00, the parties on March 26, 2009, executed a consent judgment. That judgment essentially obliges the defendant to pay to the plaintiff the claimed sum of K226,500.00 plus K33,975.00 being party and party costs. The judgment also provides for payment of K130,275.00 by the defendant on March 30, 2009, and the remaining sum to be paid within 30 days from the date of the judgment. If this consent judgment was honoured to the letter, the debt should have been fully settled by April 26, 2009.

It is evident from the record that the defendant never lived up to the terms of the consent judgment as on April 2, 2009, the plaintiff took out a writ of *fiery facias* in order to enforce the judgment by way of execution. The defendant obtained an order for stay of execution and eventually took out the present application.

In a nutshell, the grounds advanced by the defendant in aid of his prayer to have the mode of payment varied that at the time he made the commitments in the consent judgment, he was expecting to receive substantial funds from his benefactors from outside the country but that never came to be due to current global financial crisis also known as credit crunch. With the current state of affairs, his main source of income and livelihood is his minibus business which generates a net monthly income of K40,000.00 which cannot enable him to meet his obligations as they currently stand in the consent judgment. He therefore proposes the mode of payment in the consent judgment to be varied so as to provide for monthly payments of K20,000.00.

In his opposition to the defendant's prayer, counsel for the plaintiff has

raised two grounds. Firstly, that the defendant's application has been irregularly made as the proper recourse would have been to make an application to pay debt by installments under section 11 of the Courts Act. Secondly, counsel faults the defendant for allegedly not disclosing in his affidavit his income, nature and value of his property and the extent of his other liabilities. With regard to the query that the application is irregularly made as the proper recourse would have been an application to pay debt by installments, the defendant has drawn the court's attention to the fact that it was actually the court, through the order of the Assistant Registrar made on April 16, 2009, which directed the defendant to proceed in the matter he has done. The record does indeed reflect this position. It is most likely that the court made such a direction considering that the parties had already demonstrated the spirit dialogue and flexibility by executing the consent judgment. The all important point is that the defendant cannot be faulted for simply following the court's direction.

As regards the alleged failure to disclose relevant information regarding the defendant's income, property he owns, its value and his other liabilities, it would not be entirely correct to say that the defendant has failed to give information that would assist the court to make an informed decision. This is the view of the court considering that the parties are coming from a background of having executed a consent order providing for the mode of payment the defendant seeks to be varied. The defendant in his affidavit has deposed that when he entered into the consent judgment, he was expecting to get the usual finances he gets from his foreign based benefactors but due to harsh economic conditions that have hit the world economy that never came to be. He has further disclosed that in the absence of such finances, he solely depends on his minibus business as his source of income. He has gone further to disclose the net income from the minibus as being K40,000.00 per month. It should also be noted that the defendant has also disclosed his other obligations that require financing being the church he leads and an orphanage he runs and supports. If the plaintiff was desirous of challenging the defendant's averments just stated, it was certainly open to the plaintiff to file an affidavit in opposition or to give notice to cross examine the defendant during the hearing. The second option would have in a way served the same purpose that would have been achieved through an application to pay debt by installments.

In the light of the foregoing, there is no basis for throwing out the defendant's application. The only question the court must consider is whether the K20,000.00 monthly payments the defendant proposes would be fair, just and reasonable in the circumstances of the case.

To begin with it is noted that the total sum of the debt is about K260,475.00. This does not include the element of interest which is embedded in the consent judgment. If the proposed K20,000.00 monthly payment is endorsed by the court, it would take about 13 months, that is, slightly over a year to have the debt fully paid. The court does reckon that it seems there is no dispute that the debt herein is of commercial nature and therefore the financial interests of the plaintiff need to be given due recognition and properly safeguarded. In this respect, the court must endeavor to see to it that the plaintiff recovers his dues within a reasonable short time lest the money lose its value. In the light of these observations, it is ordered that the mode of payment of the judgment debt herein be varied in such a manner that within 14 days from the date of service of this order, the defendant should make payment in the sum of K50,000.00 and the remaining balance to be settled through equal monthly installments of K30,000.00 on the 30th of each month the first such instalment to be paid on the 30th July 2009.

The question of costs has greatly exercised the court's mind. Although as a general rule costs ordinarily follow the event, that is, are awarded to the successful party, in this case it to be noted that the application has been wholly instigated by the defendant as such the defendant shall bear the cost. Put in other words, costs are awarded to the plaintiff.

MADE IN CHAMBERS this day of June 29, 2009, at Blantyre.

H.S.B. POTANI

JUDGE