



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

CIVIL CAUSE NO. 534 OF 2012

BETWEEN

BARLOWORLD EQUIPMENT LIMITED CLAIMANT

AND

MKAKA CONSTRUCTION COMPANY LIMITED DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chinangwa, of Counsel, for the Claimant

Ms. Mbendera, of Counsel, for Defendant

ORDER

Kenyatta Nyirenda, J.

This is this Court’s ruling on a preliminary objection raised by the Defendant.

A brief outline of the background to this matter is as follows. On 14th December 2012, the Claimant sued the Defendant for the sums of US\$ 124, 167.18 (being K42,527,259.15) on the Machine Sales Account and K 10,577,403 on the Parts and Services Account, being the balance that remained due and payable. The Defendant paid part of the amount and remained with a total balance of K23,115,189.73.

The parties then executed a mediation agreement dated 17th June 2014 whereby the Defendant was ordered to pay the Claimant the sum of US\$97,125.00 in ten instalments beginning from the month of May 2014 to February 2015. As at October 2015, the balance was US\$34,216.59.

By its application dated 27th April 2016, the Defendant moved the Court for an order to pay the debt then amounting to K28,222,400.00 in twelve months. The Court allowed the application and ordered that the Defendant to pay the judgment

debt in twelve monthly instalments [Hereinafter referred to as the “Payment Schedule”] as follows:

- 1st month – K 1,000,000.00
- 2nd month – K3,200,000.00
- 3rd month – K2,500,000.00
- 4th month – K2,500,000.00
- 5th month – K2,500,000.00
- 6th month – K2,500,000.00
- 7th month – K2,500,000.00
- 8th month – K2,500,000.00
- 9th month – K2,500,000.00
- 10th month – K2,500,000.00
- 11th month – K2,500,000.00
- 12th month – K1,522,400.00

On 3rd November 2017, the Claimant filed with the Court an application, made under s. 16(1) of the Courts Act as read with Order 30, rule 5, of the Courts (High Court) (Civil Procedure) Rules (CPR) for an order of committal of the Defendant’s Managing Director to prison for contempt of court. The application is supported by a sworn statement of Mr. Alexius Ernest Nampota [Hereinafter referred to as the “Claimant’s statement”].

It is the case of the Claimant that the Defendant is in contempt of court in that it has defaulted on the last three monthly instalments. This is to be found in paragraphs 9 to 16 of the Claimant’s statement and these paragraphs read as follows:

- “9. ***THAT*** the defendant made several payments in compliance with the order, and the last time the defendant made payment was on the 11th August 2017.
- 10. ***THAT*** the said payment was made through a cheque number 003870. Now produced to me is a copy of the cheque marked as ***AEN 2***
- 11. ***THAT*** the payment in paragraph 8 above is the 9th monthly instalment under the order.
- 12. ***THAT*** the 10th Monthly payment was due on the 30th September 2017 whereas the 11th monthly payment was due on the 31st October 2017, under the order on the payment by instalment made by this court.

13. ***THAT*** the defendant has deliberately decided to ignore the order made under its own prayer by deliberately deciding not to honour the order by remitting the 10th and 11th months payments when the same were due.
14. ***THAT*** I verily believe that there is no other reason for the defendants' contemptuous, deliberate and flagrant defiance of the Court order than to deliberately defeat the administration of justice, taking into account that this payment scheme was proposed by themselves.
15. ***THAT*** this contemptuous, deliberate and flagrant defiance of the court order is also manifested in the fact that this is the second time disregarding an order of the court following their disobedience of the mediation agreement issued by the court.
16. ***THAT*** I verily believe that this is a clear act of contempt of court authority on the part of the defendant.
17. ***THAT*** I therefore verily believe that it will serve the best interests of justice if an order is granted committing the defendant's Managing Director to prison for a period of 6 weeks or such other period as the court may deem fit."

Hearing of the application was set for 29th January 2018. Meanwhile, on 26th January 2018, the Defendant filed with the Court a Notice of Preliminary Issue. The preliminary issue is worded thus:

"Whether the respondent is indebted to the claimant in view of the fact that the total debt as per the schedule of monthly instalments included sheriff fees which were already paid directly to the Sheriff of Malawi"

The Defendant's Finance Manager, Mr. Gospel Mavutula, filed a sworn statement dated 26th January 2018 in support of the preliminary issue [Hereinafter referred to as the "Defendant's statement"]. The Defendant's statement is couched in the following terms:

4. ***THAT*** with reference to paragraph 3 above, as per the monthly instalments, the total amounted to MK28, 222,400.00. However the claimant's claim was for MK22, 229,149.86.
5. ***THAT*** the said schedule of installments as per paragraph 3 above inadvertently included sheriff fees since at the time, the sheriffs had levied executed on the respondent. The said schedule had earlier been presented to the sheriffs but was rejected.

6. ***THAT*** the sheriff fees were therefore paid by the respondent directly to the sheriffs at which point the same ought to have been deducted from the schedule of monthly instalments.
7. ***THAT*** further to the paragraphs 5 and 6 above, the said schedule was the one that was inadvertently presented before the court in the application to settle the debt through instalments. There is now produced and exhibited hereto a copy of the acknowledgement of receipt by the sheriff of Malawi the sum of MK3, 454,371.80 marked “GM 1”
8. ***THAT*** if we are to deduct the said sum of MK3,454,271.80 from MK28,222,400.00 we would remain with MK24,768,028.20
9. ***THAT*** to date the respondent has so far settled the sum of MK24, 200,000.00 which sum includes the 10th installments. There is now produced and exhibited hereto a copy of the instalments summary status marked “GM 2”
10. ***THAT*** in light of the preceding paragraphs, it is clear that the respondent has so far settled monthly instalments in excess of the claimed sum of MK22, 229,149.86
11. ***THAT*** in light of the foregoing, the following facts are clear and unequivocal;
 - 11.1 The schedule of monthly instalments inadvertently included sheriff fees in sum of MK3, 454,371.80 which sum was paid directly to the sheriffs;
 - 11.2 The respondent has demonstrated that it has been settling the monthly instalments which total amount now stands at MK24,200,000.00;
 - 11.3 The instalments settled by the respondent are in excess of the claimant’s claimed figure of MK22, 229,149.86;”

The Claimant filed a supplementary sworn statement dated 31st January 2018 in which it denies that the judgement debt included sheriff fees.

The principle purposes of the law of contempt of court is to preserve an efficient and impartial system of justice, to maintain public confidence in the administration of justice as administered by the courts, and to guarantee untrammelled access to the courts by potential litigants. A contempt of court is an offence of a criminal character. A man may be sent to prison for it: see Order 30, r.17, of CPR, **Mpinganjira v. Lemani and Another [2000-2001] MLR 295**, **Knight v. Clifton [1971] Ch.D 700** and **Re Bramble Ltd [1970] Ch. 128**. It is, therefore, necessary that before an alleged contemnor is committed, the Court must be satisfied that the default in payment of the outstanding monthly instalments was deliberate and willful defiance of the Order.

Having reviewed the affidavit evidence in this case and having considered the submission by Counsel on behalf of their respective clients, I entertain great doubts that the default was contemptuous. It is not uninteresting to note that the Defendant religiously complied with the Order: it only stopped making payments after the sum of K24,200,000.00 had been settled. The Defendant believes, on good grounds, that the Schedule of Payments included sheriff fees.

In the premises, and having regard to the foregoing, it is ordered that the parties should carry out joint calculations with a view of finding out whether or not the Schedule of Payments included sheriff fees. It is ordered that the joint calculations be done within 7 days hereof.

In the event that it is found that the Schedule of Payments did not include sheriff fees and proceeding on the basis that the Defendant has so far settled the sum of K24,200,000.00, then the Defendant shall pay the outstanding debt (K4,022,400.00) in two monthly instalments, with the 1st instalment in the sum of K2,500,000.00 being paid not later 31st March 2018 and the 2nd instalment in the sum of K1,522,400.00 being paid not later than 30th April 2018.

Pronounced in Chambers this 7th day of March 2018 at Blantyre in the Republic of Malawi.


Kenyatta Nyirenda
JUDGE