

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2357 OF 1997

BETWEEN:

THE REGISTERED TRUSTEES OF SMALLHOLDER FARMERS FERTILIZER
REVOLVING FUND OF MALAWI (SFFRFM)
.....PLAINTIFF

- and -

THE REGISTERED TRUSTEES OF TOBACCO ASSOCIATION OF MALAWI
(TAMA).....DEFENDANT

CORAM: CHIMASULA PHIRI J.

Msowoya of Counsel for the plaintiff
Chilenga of Counsel for the defendant
Mrs Malani – official interpreter.

RULING

Chimasula Phiri J,

This is an originating summons by the defendant to vary the consent order for paying of debt by instalment. It is made pursuant to Section 11(x) of the Court Act and inherent jurisdiction of the court. There is an affidavit of the defendant's Financial Controller in support of the application. The plaintiff opposes the application.

The affidavit in support of this application states as follows:-

2. *That the defendant's Association is indebted to the plaintiff in the sum of K63,871,336.00 after having made payment by instalments on judgment debt for K157,371,336.00 since 23rd August 1999.*
3. *That the defendant's Association is unable to continue payment of the instalments at the rate set out in Consent Order due to changed circumstances.*
4. *That the defendant's Association relies on TAMA levy from its members which has been reduced from 85% of 1USCent/kg to 70% 1USCent/kg with effect from 2005 growing season.*
5. *That the Malawi Government has transferred the tobacco classification levy from TAMA to Tobacco Control Commission with effect from 2005.*
6. *That the Malawi Government has further introduced voluntary membership to grower association with the result that mandatory membership to the defendant association has ceased thereby reducing the defendant's revenue base.*
7. *That as a result of the above seismic structural changes to the tobacco industry, the tobacco levy income of the defendant Association has dropped by 50% (Letter from Tobacco Control Commission exhibited).*
8. *That the defendant Association has a loan portfolio of K408.7 million as of 1st August 2005 arising out of guarantees for fertilizer and truck loans to its members which it cannot service from the reduced income. The loan portfolio is as follows:*
 - *Truck loan (PTA Bank/Reserve Bank) US\$2,188.107: MK273.5m*
 - *Fertilizer Loan 1 (Farmers World) US\$570.915: MK 71.4m*

- Fertilizer Loan 1 (SFFRFM)

MK 63.8m

8. *That the levy income has dropped by 50% that the defendant's Association had a loan portfolio of K427 million as of 1st March 2004 arising out of a guarantee for fertilizer to its members.*
9. *That in the light of paragraphs 4 – 7 hereof, it is just and appropriate that the loan be rescheduled for the period between 2006 – 2008 to allow investment and diversification of the Association.*
10. *That the full financial position outlined in financial capacity situational analysis presented to TAMA Council on 1st September 2005 is exhibited.*
11. *That the defendant would like to propose that the loan be repaid in the following manner:-*

<i>30th September 2005 -</i>	<i>None</i>
<i>30th September 2006 -</i>	<i>K 5,000,000.00</i>
<i>30th September 2007 -</i>	<i>K 5,000,000.00</i>
<i>30th September 2008 -</i>	<i>K15,700,000.00</i>
<i>30th September 2009 -</i>	<i>K15,700,000.00</i>
<i>30th September 2010 -</i>	<i>K15,700,000.00</i>
<i>30th September 2011 -</i>	<i>K15,700,000.00</i>
<i>30th September 2012 -</i>	<i>K 1,771,336.00</i>

12. *That the defendant has no money to service the debt now hence the proposal. The defendant's revenue base has been adversely affected by the removal of the levies and reduction of the TAMA levy.*
13. *That it is just and proper that payment of the debt be rescheduled and varied as proposed in paragraph 11 hereof due to lack of funds.*

WHEREFORE I pray for an order that the defendant be allowed to service the debt in proposed manner.

The plaintiff's affidavit in opposition was sworn by counsel and it states as follows:-

2. *I depose to matters of fact of my own personal knowledge.*
3. *The original action herein was commenced against the defendant on October 10 1997 by way of Writ of Summons.*
4. *As is clear from the Amended Statement of Claim available on the court file the plaintiff's claim from the defendant was for the following:-*
 - a) *K60,047,704.00 balance of debt.*
 - b) *K32,074,023.00 being interest accrued on the principal debt as of September 30, 1997.*
 - c) *Interest on (a) above has continued to accrue at the bank's lending rate from October 1, 1997 until full payment.*
 - d) *Damages for breach of contract.*
 - e) *Costs in the action.*
5. *About two years later the parties reached a compromise of the action which was recorded in a Consent Order dated August 23, 1999. A copy of the said order is now produced and exhibited marked AAPM1.*
6. *AAPM 1 did not provide for room for any future variation.*

7. *AAPM 1 did not provide for liberty to apply to the court.*
8. *The compromise in AAPM 1 was reached at openly with full knowledge and not by mistake.*

WHEREFORE I pray that this honourable court dismisses the Originating Summons herein with costs.

The Consent Order exhibited as APPM 1 reads as follows:-

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.....PLAINTIFF

- and -

THE REGISTERED TRUSTEES OF TOBACCO ASSOCIATION OF MALAWI (TAMA)

.....DEFENDANT

CONSENT ORDER

Referring to the Out-of-court settlement herein and the parties consenting to an order in terms hereinafter appearing:-

IT IS ORDERED that

1. *there shall be a judgment for the plaintiff in the sum of one hundred and fifty seven million three hundred and seventy-one thousand three hundred and thirty six Kwacha K(157,371,336);*
2. *the defendant shall pay the plaintiff the said sum of K(157,371,336) (being K57,498,143 claim and K99,423,193 agreed interest) as follows:-*
 - (a) *K10,000,000 on the date hereof;*
 - (b) *K1,000,000 on or before 3rd September 1999;*
 - (c) *The balance of the debt shall be paid as follows:*
 - (i) *K16,7 million on 30th September 2000;*
 - (ii) *K16,7 million on 30th September 2001;*
 - (iii) *K16,7 million on 30th September 2002.*
 - (iv) *K16,7 million on 30th September 2003; and thereafter the balance in the sum of K79,571,336 shall be paid at the rate of K15,7 mullion per annum on the 30th day of September in each and every subsequent years.*

Provided that in the event of any default or delay of more than thirty (30) days on the part of the defendant in paying any of the said instalments on their respective due dates, then such instalments shall attract interest charges at the commercial bank lending rates from the date of default to the actual date of payment.

3. *The defendant shall pay costs such costs to be agreed failing which to be taxed.*

Dated this 23rd day of August 1999

(SIGNED)

.....

WILSON & MORGAN

*LEGAL PRACTITIONERS FOR
THE PLAINTIFFS*

(SIGNED)

.....

KADZAKUMANJA & COMPANY

*LEGAL PRACTITIONERS FOR
FOR THE DEFENDANTS*

(SIGNED)

.....

REGISTRAR

Both parties submitted skeleton arguments and highlighted them in their oral submissions.

The defendant's main thrust is that the defendant has been servicing the debt since 1999 but circumstances have changed unfavourable against it so that payment is not possible this year. The defendant wishes the instalments to be reviewed downwards due to those changed circumstances. Therefore, the defendant is seeking an order that the payment of the debt be rescheduled and that the Consent Order be varied.

The plaintiff's main argument is that the application is misconceived since there was a Consent Order. It is irregular to commence Originating Summons using the same action that was already compromised.

ISSUES

This court is called upon to determine:-

- (i) Whether or not the Consent Order has a force of a contract?
- (ii) Whether on the facts as deponed to there is any matter that would justify the variation of a valid contract and therefore variation of the Consent Order?
- (iii) Whether or not the defendant ought to have commenced a fresh action in order to seek the remedies it is looking for?

THE LAW AND ITS APPLICATION

The High Court has power to direct payment of any judgment debt by instalments – **vide** Section II(x) of the Courts Act. Such an application is made to a judge in open court. The current application is made to a judge in chambers. Therefore, it cannot be said to have been made under Section II(x) above-mentioned. The defendant has also based this application on the inherent powers of the Court. I presume these are the inherent powers to provide justice according to law. Therefore, I will proceed to consider the issues as indicated above.

EFFECT OF SETTLEMENT OR COMPROMISE

Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement made between them made for good – **Re Hearn de Bertodane vs Hearn** (1913) 108 LT 452 at 454.

Its effects are to put an end to the proceedings, for they are spent and exhausted. Further, to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms – **Green vs Rozen** [1955] 2 ALL E.R 797. Furthermore, a settlement or compromise supercedes the original cause of action.

The Consent herein was executed by the parties and endorsed by the court. The agreement of the parties acquired recognition of the court and thereby issued as a court order. In terms of **Practice Direction (Decrees and Orders: Agreed Term) 1972 1 WLR 1313** one of the reasons parties sometimes wish to make their agreements a rule of court is that reference can be made to it in the event of some future application for a provision made the subject of the order.

*In **Re Mitchell Exp Colen** [1910] Sol Jo. 252 cited in **Le Horne** (bankrupt) [2000] 4 ALL ER 550 the court considered a case for payment of a debt by instalments under Section 5(2) of the Debtors Act 1869. An assignee of the Judgment Creditor sought to have the instalment order discharged in order that he might pursue other remedies open to him for obtaining the payment of the debt. The report is short, but it appears that the issue for decision was whether the court had power to rescind or vary its earlier order for payment by instalments.*

*Although a variation application involves consideration of the position **de novo**, the basis upon which the original consent order was made is something which the court can (and should look) when considering the application. It is one of “all the circumstances which the court can take into account”. **Lewis –vs- Lewis** [1977] 1 WLR 409.*

*In **S –vs- S** [1987] 2ALL ER 312, the court ordered variation of a consent order on periodic instalments of maintenance.*

*In **Payne –vs- Payne** [1968] 1ALL ER 1313, the court ordered variation of a consent order of maintenance in order to reflect the husband’s actual salary.*

It is the defendant’s submission that the rationale behind this application is to avoid injustice which may be caused due to strict adherence of the Consent Order in a situation where the defendant’s financial situation has greatly changed. The defendant further submits that there is need to balance this with injustice which the plaintiff may suffer if it does not receive its annual instalment considering that the plaintiff has received sums of money since 1999 and this is the 6th year.

Furthermore, the defendant submits that the association has a unique role in that it has the responsibility of looking after tobacco farmers who provide the forex backbone to this country. If the association was to pay this year's instalment as agreed in 1999 the association may be wound up thereby causing great suffering to the Malawi tobacco industry. In short, the defendant submits that it has a socio-economic human right impact.

The plaintiff has responded by submitting firstly that the issue of socio-economic right of the tobacco farmers was not stated in the affidavit of the defendant or in its skeleton argument. It is a surprise dimension in the case. I agree with this observation. Civil procedure requires both parties to clearly delimit the parameters of their arguments through pleadings and advance skeleton argument. Even if the defendant were to be allowed to advance this argument, this court would have problems to impute judicial notice. The contention is factual and it would have been imperative for the defendant to establish supportive facts. Secondly, if bankruptcy is a natural consequence of the defendant's inability to repay a loan, should courts block that process? If that were allowed it would encourage a bad culture of non-repayment of loans.

Under paragraph 391 of **Halsbury's Laws of England** fourth edition – volume 37 it is clearly provided that an agreement for a compromise may be enforced or set aside on the same grounds and in the same way as any other contract. A consent judgment or order is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the court and its force and effect derives from the contract between the parties leading to, or evidenced by or incorporated in the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action – **vide** – paragraph 390 **Halsbury (ante)**. This position is sharply different from matrimonial cases where power is derived from the court order. The cases relied upon by the defendant as authority for the contention that consent order can be varied relate to matrimonial cases for maintenance.

This court has considered whether the facts deponed in the affidavit of the Financial Controller would justify the variation of a valid contract. When can a valid contract be varied? Without being exhaustive, the most common circumstances include contracts entered into by

mistake or fraud or under duress. The mistake referred to here is not just a mere wrong decision. In the present case, none of the factors, which would vitiate a contract, exist. In **Halsbury's Laws of England**, fourth edition volume 26 paragraph 562 a judgment or order made by consent may be set aside if the agreement was illegal as against public policy or was obtained by fraud or misrepresentation or non-disclosure of material facts which there was an obligation to disclose, or by duress or was concluded under a mutual mistake of fact, ignorance of a material fact or without authority. If the court were to extend its legal jurisdiction and venture into equity, would it be inequitable for the plaintiff to demand repayment of a debt truly and justly owed to it by the defendant? This is purely a commercial transaction and there is nothing inequitable or unjust or unfair to press for a repayment of a loan. As already indicated in this ruling, if bankruptcy is a natural consequence of inability to service a debt, that is not inequitable. The financial woes of the defendant are not an equitable factor warranting court's intervention. Assuming that the financial hardship of the defendant is a genuine ground because it has been caused by factors beyond the control of the defendant e.g. change in Government policies resulting in poor financial base for the defendant's revenue, is the current summons properly commenced? Paragraph 562 (**ante**) of **Halsbury's Laws of England** provides that a consent order may be set-aside in a fresh action. The defendant in its submissions quoted **Bhima –vs- Bhima** 7 MLR 163 where the Malawi Supreme Court of Appeal held that a consent order cannot be set aside by summons but by fresh action. In the view of this court, this is self-explanatory. The defendant purportedly wished to comply with this procedural requirement by bringing this originating summons. The error, unfortunately, the action was brought on the existing matter. The merits of the financial position of the defendant could have been probed had the defendant commenced a fresh action. In the absence of a clause permitting either party to seek review or variation of the consent order within the agreement itself, the defendant cannot be heard as seeking such a variation.

I dismiss the summons with costs to the plaintiff.

MADE in chambers this 22nd day of November 2005 at Blantyre.

Chimasula Phiri

JUDGE