



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 534 OF 2012**

**BETWEEN**

**BARLOWORLD EQUIPMENT LIMITED.....PLAINTIFF**

**AND**

**MKAKA CONSTRUCTION COMPANY LIMITED.....DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

**Mr. Chinangwa, of Counsel, for the Plaintiff**

**Ms. Mbendera, of Counsel, for Defendant**

**ORDER**

*Kenyatta Nyirenda , J.*

This is an application by the Defendant [Hereinafter referred to as the "Judgement Debtor"] to pay debt by instalments. The application is supported by an affidavit sworn by the Judgement Debtor's Finance Manager, Mr. Gospel Mavutula [Hereinafter referred to as the "Judgement Debtor's Affidavit"].

The Plaintiff [Hereinafter referred to as the "Judgement Creditor"] commenced this action on 14th December 2012 claiming the sums of US\$ 124, 167.18 (being K 42,527,259.15) 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 Judgement Debtor filed its defence on 27th August, 2013. The Judgement Debtor paid part of the amount and remained with a balance of K16,909,952. 92 on the Machine Sales Account and K6,205,236.81 as balance on Part and Services Account, making the total sum to K23, 115,189.73.

The matter went for mediation and a mediation agreement dated 17th June 2014 was executed whereby the Judgement Debtor undertook to pay the Judgement Creditor a sum amounting to US\$97,125.00 in ten instalments. The payments were set to begin from the month of May 2014 and end in February 2015. As at October



2015, the Judgement Debtor had managed to pay part of the debt leaving the balance at US\$34,216.59. The Judgement Creditor then moved the Court to enforce the mediation agreement but the Judgement Debtor obtained an order dated 2nd February 2016 staying the execution pending an application to pay the debt by instalments.

In paragraphs 7 and 8 of the Judgement Debtor's Affidavit, the Judgement Debtor provides reasons for its failure to pay as agreed at mediation:

- "7. ***THAT*** due to unforeseen circumstances, the depreciation of the Kwacha and the harsh environment, the defendant was unable to pay the said amounts on time. However even though the defendant is facing some difficult challenges and is not able to pay the plaintiff the debt in full, it is still willing to pay the debt by installments. I hereby exhibit a copy of the defendant's Bank statement of Account as of 1<sup>st</sup> January, 2016 marked "***GM2***".
8. ***THAT*** further to paragraph 7 above, the defendant is owed money by a number of debtors including the Malawi Government in the sums of ***MK645.7 Million*** of which its liabilities are ***MK 432.8 Million***. I hereby produce and exhibit hereto copies of the Debtors Summary as at February, 2016 marked "***GM3***". "

It is proposed by the Judgment Debtor that the Court should allow it to settle the judgment debt by instalments within 12 months, namely, K 1,000,000.00 in 1st month, K3,200,000.00 in 2nd month, K2,500,000.00 in 3rd month, 4th month, 5<sup>th</sup> month, 6th month, 7th month, 8th month, 9th month, 10th month and 11th month respectively and K 1,522,400.00 in 12th month.

The Judgement Creditor is opposed to the application and it, accordingly, filed an affidavit in opposition sworn by Mr. Peter Chinangwa [Hereinafter referred to as the "Judgement Creditor's Affidavit"]. The opposition is mainly based on the following grounds:

- (a) the Judgement Debtor has not disclosed what the unforeseen circumstances are, how the depreciation of kwacha has affected its income and what the harsh economic environment is and how all these alleged factors have affected payment of the sums owing to the Judgement Creditor;
- (b) the Judgement Debtor has not disclosed the source of his income from the date of the order of payment in instalments, if granted;

- (c) although the Judgement Debtor has exhibited a statement of account it holds with the Malawi Savings Bank, it does not say whether it has other accounts with other banks in Malawi and abroad;
- (d) the Judgement Debtor does not disclose whether the income flow as is appearing in the statement is subsistent or would continue for the rest of the period it is praying for in the present application;
- (e) the Debtors Summary is not sufficient disclosure of the existence of the debts therein referred: there was more required to be exhibited than a mere summary prepared by the the Judgement Debtor itself; and
- (f) the present application to pay debt by instalments is preceded by a similar arrangement made during mediation session and the same was defaulted.

The legal principles which guide a court when considering an application to pay debt by instalments are very clear: see **B. P. Malawi Limited v. Riaz Muhamed t/a Ninkawa Bulk Logistics, Commercial Cause Number 160 of 2010 (unreported)** and **Leasing and Finance Co. v. Maltraco Ltd [1997]2 MLR250**. In such an application, the Court is called upon 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. A judgment debtor is required to come to court with clean hands by disclosing all material facts pertaining to his or her means. The full and frank disclosure of such facts is meant to enable the Court to assess if indeed there is a genuine failure or inability to pay the judgment debt at once.

On the other hand, the judgment creditor has an obligation to assist the Court in verifying whether or not whatever has been disclosed by the judgment debtor is a full, frank and honest representation of the judgment debtor's means: see **Mzungu v. Kaledzera(2001-2007) MLR (Com series) 202**. Where the judgment creditor fails to challenge the financial position as presented by the judgment debtor and the Court is satisfied that judgment debtor's position is accurate, an order should be made allowing the judgment debtor to pay debt by instalments.

In the present case, the Judgement Creditor contends that the Judgement Debtor would be able to pay the whole debt in three months. The contention appears to be premised on paragraph 12.2 of the Judgement Creditor's Affidavit which reads:

*"if the summary of debtors is something to go by, it would appear that in 90 days' time, substantial amount of the debts will be due and receivable to the defendant, which in the end would make them able to settle the debt in the present case. "*-  
Emphasis by underlining supplied

It is not uninteresting to note that the Judgement Creditor breathes hot and cold in the same breath: see paragraph 12.1 of the Judgement Creditor's Affidavit which states that *"the debtors summary is not sufficient disclosure of the existence of the debts therein referred"*. Clearly, the Judgement Creditor is attacking the summary of debtors as being unreliable. How then can the same be the basis for the order that the Judgement Creditor seeks? To my mind, the Judgement Creditor has failed to provide material to support its contention that the Judgement Creditor can pay the debt in a period of three months without adverse consequences, financial or otherwise, to its operations.

In the circumstances and based on the evidence before me, I hold that the offer made by the Judgment Debtor to settle the judgment debt in twelve months is reasonable. Consequently, the Court allows the application that the Judgement Debtor pays the judgment debt in twelve monthly instalments as follows:

- 1<sup>st</sup> month -MK 1,000,000.00
- 2<sup>nd</sup> month -MK.3,200,000.00
- 3<sup>rd</sup> month -MK.2,500,000.00
- 4<sup>th</sup> month -MK2,500,000 .00
- 5<sup>th</sup> month -MK2,500,000.00
- 6<sup>th</sup> month -MK.2,500,000.00
- 7<sup>th</sup> month -MK2,500 ,000.00
- 8<sup>th</sup> month -MK2,500,000.00
- 9<sup>th</sup> month -MK2,500,000.00
- 10<sup>th</sup> month - MK2 ,500,000 .00
- 11<sup>th</sup> month - MK2,500,000.00
- 12<sup>th</sup> month - MK 1 ,522,400.00

The first instalment shall be paid on 22nd December 2016. I order accordingly.

Pronounced in Chambers this 13th day of December 2016 at Blantyre in the Republic of Malawi.

  
**Kenyatta Nyirenda JUDGE**