

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT KABWE AND LUSAKA
(Civil Jurisdiction)

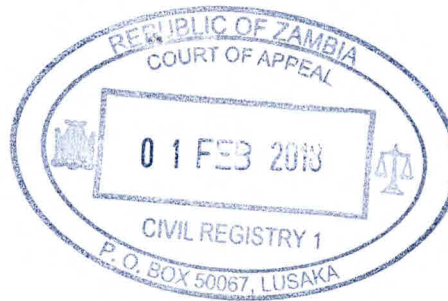
APPEAL NO. 069/2017

BETWEEN:

MIYOMBO INVESTMENTS LIMITED

AND

ECOBANK MALAWI LIMITED



APPELLANT

RESPONDENT

Coram: Mchenga, DJP, Mulongoti and Sichinga JJA

On 4th October 2017 and 1st February 2018

For the Appellant: M. Mutemwa SC, Mutemwa Chambers

For the Respondent: A. Shonga Jnr. SC, with S. Lungu, Shamwana & Company

J U D G M E N T

Mchenga, DJP, delivered the Judgment of the court.

Cases referred to:

1. Communication Authority v Vodacom Zambia Limited, SCZ Judgment No. 21 of 2001
2. Edgar Hamuwele (Joint Liquidator of Lima Bank Zambia Limited (In Liquidation)) and Another v Ngenda Sipalo and Another, SCZ Judgment No. 4 of 2010
3. Sharp v Wakefield House [1981] A.C. 17
4. Attorney General v Achiume [1983] Z.R. 1
5. House v R [1936] 40, 55 CLR 499
6. Zulu v Avondale Housing Project [1982] Z.R. 172

7. **Zambia Telecommunications Company Limited v Aaron Mweene Mulwanda and Another, SCZ Judgment No. 7 of 2012**
8. **Nkolongo Farms Limited v Zambia National Commercial Bank and two Others, SCZ Judgment No. 19 of 2007**
9. **S Brian Musonda (Receiver of First Merchant Bank (In liquidation) v Hyper Food Products and Two Others [1999] Z.R. 124**
10. **Aetna Financial Services Limited v Feigeiman and Others [1986] LCR(comm) 276**
11. **Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others [1987] LRC (const.) 822**

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia

The circumstances surrounding this appeal can be summarised as follows; on 29th May 2014, Miyombo Investments (Malawi) Limited, obtained a short-term loan facility for US\$15,000,000.00 from the respondent. The loan was at an interest rate of 11.5% and repayable in 12 months. Further, it was secured by a corporate guarantee issued by the appellant, Miyombo Investments Limited.

Miyombo Investments (Malawi) Limited defaulted on the loan and in March 2016, the respondent issued a demand notice for US\$13,137,788.74, plus interest. The respondent subsequently commenced an action against Miyombo Investments (Malawi) Limited in the High Court of Malawi and obtained Judgment on 6th October 2016.

In April and July 2016, the respondent took out demand notices to the appellant for US\$13,137,788.74 plus interest. The appellant did not respond and on 24th November 2016, the respondent took out a writ against the appellant in the High Court in Zambia. They claimed US\$14,277,835.30, plus interest at 11.5% and costs which was said to be owing as at 31st October 2016.

After reconciling the amounts owing, a consent Judgement, in the sum of US\$11,248,403.88, plus interest at 11.5% per annum, was entered into on 31st March 2017. It was also agreed that the appellant was at liberty to apply to settle the Judgment debt in instalments, within 14 days. On 10th April 2017, the appellant, applied to settle the Judgment debt by instalments.

The appellant proposed to settle the debt as follows: US\$750,000 in the year 2018, US\$1,800,000.00 in 2019, US\$ 2,900,000.00 in 2020, US\$4,200,000.00 in 2021, US\$3,600,000.00 in 2022 and the balance, if any, in 2023. After hearing the parties, the trial Judge ordered that the Judgement debt be settled in four quarterly instalments, the first being due on or before 1st October 2017. She also directed that should there be default, the whole amount would fall due.

This appeal is against the order that the Judgment debt be paid in four quarterly instalments. It is contended that the trial Judge misdirected herself when she ordered that it be paid in quarterly instalments.

At the hearing, Mr. Mutemwa SC, relied on the appellant's Heads of Argument filed on 29th June 2017, which he complimented with oral submissions.

The gist of his submission was that the essence of **Order 36 of the High Court Rules**, is to allow a Judgment debtor who cannot make a single payment, pay in instalments. This is achieved by a Judge coming up with a payment plan, that can be met; the cases of **Communication Authority v Vodacom Zambia Limited¹** and **Edgar Hamuwele (Joint Liquidator of Lima Bank Zambia Limited (In Liquidation)) and Another v Ngenda Sipalo and Another²** were referred to. He also referred to **Sharp v Wakefield³**, **Attorney General v Achime⁴** and **House v R⁵** and submitted that the trial Judge did not exercise her discretion judiciously when she came up with the plan that the Judgment debt be paid in four quarterly instalments. In arriving at that decision, she did not take into consideration all material issues, neither did she fairly evaluate all the evidence before her.

He pointed out that the trial Judge failed to consider the fact that the appellant's core business, the supply of fertilizer, had been greatly affected by a change in Government policies in the sector. Neither did she consider the appellant's desire, as a result of the changes, to commercialise their activities in 2018. Further, the order that the Judgment debt be settled within 12 months is indicative that what she considered was the respondent's position and not that of the appellant.

State Counsel also submitted that the trial Judge neglected to give reasons of how she arrived at 12 months as the period within which the debt should be paid. Had she properly evaluated the evidence before her, she could not have come to that conclusion.

He then referred to **Zulu v Avondale Housing Project⁶**, **Zambia Telecommunications Company Limited v Aaron Mweene Mulanda⁷** and

Nkolongo Farms Limited v Zambia National Commercial Bank and two Others⁸ and **S Brian Musonda (Receiver of First Merchant Bank (In liquidation) v Hyper Food Products and Two Others⁹** and submitted that though we are an appellate court, we can interfere with the trial Judge's findings because she did not consider all the evidence before her before arriving at her decision. That being the case, she did not exercise her discretion as required by **Order 36 rule 9 of the High Court Rules.**

He concluded by urging us to uphold the appeal and set aside the payment plan by the trial Judge. We were urged to substitute it with the payment plan proposed by the appellant.

On behalf of the respondent, Mr. Shonga SC and Mr. Lungu addressed the court orally, complementing the respondent's Heads of Argument filed on 27th July 2017. The first point they made was that under **Order 36 rule 9 of the High Court Rules**, a Judge acting in exercise of discretion is not limited to deciding whether the Judgment debt can be paid in instalments, the Judge must also decide what those instalments should be.

They agreed that even if we are an appellate court, we have the power to review the trial Judge's exercise of discretion. Notwithstanding, they referred to the cases of **Aetna Financial Services Limited v Feigeiman and Others¹⁰** and **Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others¹¹** and submitted that an appellate court can only interfere with a trial Judge's exercise of discretion if; the principles of law governing the application of discretion were

misapplied; the decision was based extraneous or irrelevant matters; or there was a mistake of fact or material evidence was not taken into account. They submitted that none of these situations arose in this case.

Counsel also submitted that the appellant's argument that the trial Judge failed to properly exercise her discretion, is not supported by the evidence. Examination of her ruling shows that though she did not accept the appellant's payment proposal, she found that it was a case in which it was fit to allow the Judgment debt to be paid by instalments. They also made reference to various portions of her ruling and submitted that it is not correct to claim that she did not give reasons for her decision or that she did not take the appellant's position into consideration when arriving at her decision.

Further, they submitted that the trial Judge's ruling shows that she did evaluate the evidence before her and found that it would have taken the appellant six years to liquidate the Judgement debt and this would have been an injustice on the respondent. They ended by submitting that there is no basis for interfering with the lower court's decision and this appeal be dismissed.

We have considered the evidence on record and the submissions by counsel. It is common cause that when the trial Judge ordered that the Judgment debt of US\$11,248,403.00 plus interest at 11.5% be paid in four quarterly instalments, she was acting in exercise of discretionary powers. It is also common cause that as an appellate court, we can, in certain circumstances, review the exercise of discretion by a trial Judge.

In this case, we have been invited to review the exercise of discretion by the trial Judge on the ground that it was not exercised judiciously. It was submitted by Mr. Mutemwa SC that all the issues material to the determination of the application were not taken into account and that there was an unbalanced assessment of the evidence. It was also submitted that the trial Judge did not advance reasons of how she arrived at the four quarterly instalments.

We agree with Mr. Mutemwa SC's submission that when the trial Judge was considering the application to pay a Judgment debt in instalments under **Order 36 rule 9 of the High Court Rules**, she was acting in exercise of her discretionary powers and she was supposed to act judiciously. We also agree with his submission that where a court is acting in exercise of discretionary powers and matters material to the determination of the issue before it have not been taken into account or where there has been an unbalanced evaluation of the evidence, then such court has not exercised its discretion judiciously. The decision is then amenable to review and the Court of Appeal has the power to interfere with the trial Judge's findings. This is the cumulative effect of the principles set out in **Communication Authority v Vodacom Zambia Limited¹**, **Attorney General v Achime⁴**, **Zambia Telecommunications Company Limited v Aaron Mweene Mulanda⁵** and **S Brian Musonda (Receiver of First Merchant Bank (In liquidation) v Hyper Food Products and Two Others⁹**.

In her ruling, the trial Judge recounted the contents of the affidavit in support of the appellant's application to pay the Judgment debt in instalments deposited by their Executive Director. She also referred to the attachments to the affidavit that

included a cash flow projection and the appellant's historical debt and assets. At page R10 of the ruling, she pointed out as follows:

"In considering the Defendant's application I have to consider as to what constitutes "sufficient reason" as envisaged under Order 36 Rule 9 High Court Rules, Cap 27 of the Laws of Zambia. The factors I have taken into consideration is the financial status of the Defendant and whether the Judgment debtor has the means to pay the Judgement debt immediately or in the future; whether the Judgment debtor will comply with the Order for payment by instalments, how long the proposed instalment payments will take to pay the debt ; whether or not the Judgment Creditor will suffer hardship by the proposed length of time, the age and nature of the debt, the facts adduced against the application by the Judgment Creditor."

Thereafter, the trial Judge considered the respondent's assertion that the appellant was not entitled to an order allowing them to pay the Judgment debt in instalments because full disclosure of their assets and liabilities had not been made. She also considered the assets, liabilities, income and expenditure of the appellant. She found that some of the documents, which were exhibited in court setting out assets, liabilities, income and expenditure of the appellant were either vague or inadequate and she assigned her reasons for such findings. She then considered the appellant's cash flow plan and came to the conclusion that they could not settle the Judgment debt in one instalment.

Having accepted that the Judgment debt could not be paid in one installment, she then considered the instalment payment plan. She found that there were no earnings indicated for the year 2017. At page R13, she observed as follows:

"It is trite that an order for instalment payments must be on reasonable terms and not at the dictates or whims of any party or the comfort of any of the parties. I am mindful of the Defendant's impecunious position and at the same time the Plaintiff should not be denied the enjoyment of the fruits of its Judgment."

She also noted that the proposal that the Judgment debt be paid over a period of 5 years would not be reasonable for a loan obtained in 2014. We find, that it cannot, in the circumstances be seriously argued that the trial Judge did not assign reasons for how she arrived at the four quarterly instalments. The loan was for a year, 3 years down the line it had not been paid and the appellant was asking for 5 years more to pay the Judgment debt.

As regards the argument that there was unbalanced assessment of the evidence, we find that there was a balanced assessment of the evidence. The trial Judge did not accept the respondent's argument that the appellant be denied the opportunity to pay the Judgment debt by instalment because they did not make a full disclosure of their assets and liabilities. She then pointed out particular inadequacies in the disclosure and still granted the application that the Judgment debt be paid by instalments. The mere fact that she did not accept the appellant's payment plan cannot be a basis for finding that there was an unbalanced assessment of the evidence.


From the foregoing, we find that it cannot be seriously argued that the trial Judge did not consider all the issues material to the determination of the appellant's application to pay the Judgment debt in instalments. Her ruling shows that she took the appellant's financial position and the age of the debt. In our view, these considerations were material.

We agree with Messrs Shonga SC and Lungu's submissions, which are anchored on **Aetna Financial Services Limited v Feigeiman and Others**¹⁰, that the appellant


has not demonstrated that the trial Judge failed to apply the principles governing the exercise of discretion to warrant our interfering with her decision that the Judgment debt be paid in four quarterly instalments. In addition, the appellant's argument that material evidence was not taken into account is not supported by the text of her ruling.

We find no merit in this appeal and we dismiss it. We uphold the trial Judge's decision that the Judgment debt be paid in four quarterly instalments with the first instalment having been due on or about 1st October 2017.

Costs to the respondent.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
J. Z. Mulongoti
COURT OF APPEAL JUDGE


.....
D.L.Y. Sichinga SC
COURT OF APPEAL JUDGE