

IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (CIVIL JURISDICTION)

2018/HP/2084

BETWEEN:

AUTO GUARD ENGINEERING SERVICES

PLAINTIFF

AND

CLA COMMERCIAL VEHICLES



DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE PLAINTIFF: MR. CAPTAIN I. M. CHOOKA OF MILIMO CHOOKA
 & ASSOCIATES

FOR THE DEFENDANT: MS. N. CHILESHE OF PAUL NORAH
 ADVOCATES

RULING

Cases Referred To:

1. *Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Ellias Andrew Spyron and Mary Ann Langley Spyron (1993-1994) Z.R. 36 (S.C.).*
2. *Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Another (1993-1994) ZR 36.*

This is the defendant's application for an order to liquidate judgment sum in instalments pursuant to Order 3 Rule 2 and Order 36 Rule 9 of the High Court Rules of the High Court Act,

Chapter 27 of the Laws of Zambia. The said application is supported by an affidavit dated 23rd July, 2019 deposed to by one Siakamwi Chikuba, the director in the defendant company.

It was deposed that on 3rd July, 2019, this Court issued a judgment on admission against the defendant company in the sum of K350,000.00. It was deposed that the defendant, however, has no stable monthly income as it is a company that gets remunerated as and when clients pay for commodities supplied. It was deposed further that given the defendant company's financial situation and outgoings, it is unable to pay the judgment debt entered against it in one lump sum as the company must pay rentals as well as employee salaries with great difficulty.

It was also deposed that from its projected inflow, the defendant can liquidate the balance of the judgment sum of K262,500.00 into equal monthly instalments spread out into 6 months from the date this honourable Court shall grant the order to pay judgment sum in instalments as herein sought. The deponent craved the indulgence of this Court to grant an Order to liquidate judgment sum in six monthly instalments from the date of the order herein sought.

On the other hand, the plaintiff filed an affidavit in opposition dated 29th July, 2019, deposed to by Vincent Lubinda, the Managing Director in the plaintiff company. He deposed that the subject matter of the agreement between the parties herein was in form of trucks which were brought to the plaintiff by the defendant for modification and customisation, so that the trucks could then be supplied to ZESCO.

It was also deposed that in carrying out the works as commissioned by the defendant, the plaintiff had to use its own resources and finances to purchase the materials required for the customization and that the bulk of these materials were imported from the Republic of South Africa at a time when the exchange rate was approximately ZMW10.00 to USD1.00. It was deposed further that after the services were rendered by the plaintiff and the trucks were handed over to the defendant, the latter delivered the customized trucks to ZESCO and in due course, ZESCO made full payment for the trucks in question. It was deposed further that despite receiving payment, the defendant did not fulfil its obligations to the plaintiff such that from the date of the plaintiff's demand up to date of judgment, the defendant did not make any effort to pay any portion of the amount which it admitted to be due and owing to the plaintiff. It was also deposed

that the failure and or refusal by the defendant to settle the amount owed to the plaintiff has caused the plaintiff to operate at a substantial loss which has inevitably affected the plaintiff's financial position and has exposed it to multiplicity of third party claims resulting from the plaintiff's failure to fulfil its own contractual obligations to its service providers and other suppliers.

It was also deposed that the kwacha has also substantially lost value against the United States Dollar such that what the plaintiff owed its suppliers in 2017, and early 2018, is not what it owes them today. That the amount admitted by the defendant plus the amount due to the plaintiff in terms of accrued interest, does not in any way assist the plaintiff to cover the losses it has incurred and which it continues to incur to third parties as a result of the defendant's refusal to pay the plaintiff at the point when it received payment from ZESCO for the consignment of trucks. It was deposed that the defendant has not acted in good faith towards the plaintiff at all.

Further, that the defendant has not provided anything to show that there are special circumstances for this Court to deprive the plaintiff of the fruits of its judgment and that it will not be in the interest of justice for this Court to make an order whose effect

will be to continue depriving the plaintiff of the working capital it needs for its business to stay afloat.

It was also deposed that the plaintiff personally engaged the defendant to liquidate the debt in instalments on numerous occasions but all this was for nought. That it will not be prudent for the plaintiff to start banking on the defendant's future unconfirmed payments for the satisfaction of the admitted sum especially that by its own admission, in paragraph 5 of the affidavit in support, the defendant does not have a stable income which will allow it to make consistent monthly payments. It was deposed that the prospect of further default and inconvenience to the plaintiff is therefore too high.

It was deposed that this is not a proper case for this honourable Court to stay the sale of seized goods because the defendant has not demonstrated any sufficient cause for the granting of an order for stay.

Counsel, on behalf of the defendant, filed skeleton arguments dated 2nd August, 2019. He submitted that the law indeed allows a judgment debtor to apply to the High Court for an order to pay the judgment debt in instalments as per Order 36 Rule 9 of the HCR. He went on to state that the said Order 36 Rule 9 clearly

shows that in order for a party to be entitled to the grant of an order to stay execution and to be granted leave to pay the judgment debt in instalments, the applicant must demonstrate that there is sufficient cause for the granting of such an order. The case of **Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Ellias Andrew Spyron and Mary Ann Langley Spyron (1993-1994) Z.R. 36 (S.C.)**¹, was cited in which the Supreme Court held that:

“It is quite clear from this order that a court may order that a judgment debt be satisfied by instalments upon sufficient cause being shown by the judgment debtor.”

Counsel submitted that the crucial requirement is that the defendant has to give sufficient cause for the Court to grant the order in its favour. That a review of the affidavit filed in support of the defendant’s application reveals that the only reason the defendant is making this application is because, in the first place, the defendant does not have the funds to satisfy the judgment debt, secondly, that it does not have a steady stream of income and thirdly, that it has obligations to other creditors such as the landlord and its workers in terms of rentals and salary obligations respectively. It was submitted that by its own admission, the defendant does not have the means to liquidate the judgment debt even if an order was to be made by this Court.

He added that in stating this, the defendant has fallen short of providing the information which is required by this Court to make an informed decision as to the proper balance to be struck between the parties. That this is therefore not a proper case for this Court to grant the defendant's application.

Counsel also submitted that in order to grant the defendant an order to pay a judgment debt in instalments, this Court must balance the economic welfare of the judgment debtor against the plaintiff's economic welfare and the right to have its judgment satisfied at the earliest possible opportunity. Counsel called upon the Court to weigh the interests of the parties and decide where the convenience lies. He added that this balancing act must always be influenced by the settled position of the law of this country to the effect that a successful litigant ought not to be deprived of the fruits of his judgment except where there are special circumstances for doing so.

It was submitted further that the plaintiff has been kept away from his working capital for a long time and its business has suffered and continues to suffer. That while the defendant was evading its payment obligations to the plaintiff, it neglected to consider that the plaintiff had to procure the materials from third parties and these materials were procured in foreign currency as

the defendant is well aware. Counsel submitted that the losses suffered by the plaintiff as a result of the defendant's actions will therefore not be fully satisfied by the success of the plaintiff in this action because the exchange rate has fluctuated significantly from the date of procurement of the materials to the date when the plaintiff will finally pay its suppliers.

Counsel submitted that in view of the circumstances, the balance must weigh in favour of the Court allowing the plaintiff not to be deprived of the fruits of its judgment.

When the matter came up for hearing on 3rd December, 2019, Counsel on behalf of the defendant, submitted that this was an application for an order to pay judgment sum in instalments pursuant to Order 3 rule 2 of the HCR supported by an affidavit dated 23rd July, 2019. Counsel went on to state that out of the K350,000.00 judgment sum, the defendant has liquidated half of the said judgment sum which money was paid into Court. Counsel contended that this was a sign of good faith on the part of the defendant and that the Court can exercise its discretion to allow the defendant pay the balance in equal instalments spread over a period of 6months. It was submitted that the reason for this is that the defendant company is experiencing financial

hardship but that the defendant is committed to abide by the Court Ruling to pay the said sum in instalments.

On the other hand, Counsel on behalf of the plaintiff contended that the plaintiff has filed an affidavit in opposition dated 29th July, 2019 as well as skeleton arguments dated 2nd August, 2019. He submitted that he will entirely rely on the same and prayed that this Court dismiss the defendant's application with costs.

I have carefully considered the affidavit evidence as well as the skeleton arguments made on behalf of the plaintiff; and submissions from Counsel on both sides. This matter has been made pursuant to Order 3 Rule 2 as well as Order 39 Rule 9 of the HCR.

Order XXXVI Rule 9 provides as follows:

***“Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance.*”**

Counsel for the plaintiff referred us to the Supreme Court decision in the case of **Zambia Export and Import Bank Limited v Mkuyu Farms Limited and Another (1993-1994) ZR 36²** in which it was held as follows:

“The Court may order that a judgment debt be satisfied by instalments upon sufficient cause being shown by the judgment debtor....

This would involve examination on oath of the respondents as to their means or liability to liquidate the debt in one lump sum.”

It is trite that in an application to liquidate judgment debt in instalments, the judgment debtor must show or demonstrate sufficient cause why the judgment should be settled in instalments. In this case, it was deposed that the defendant has no stable monthly income as it is a company that gets remunerated as and when clients pay for commodities supplied. It was also deposed that given the defendant's financial situation, it was unable to pay the judgment debt in one lump sum as the company pays rentals as well as employee salaries with difficulty.

I am of the considered view that the defendant company herein has not demonstrated sufficient cause why the judgment debt should be settled in instalments. The defendant has stated that it is remunerated as and when clients pay for commodities supplied. What would happen to the plaintiff, who is the

judgment creditor herein, if the defendant is not remunerated by its clients? I agree with the plaintiff that paragraph 5 of the defendant's affidavit in support just demonstrates that the prospect of further default and inconvenience to the plaintiff is high thereby depriving the plaintiff the fruits of its judgment.

The learned author of the book *Zambian Civil Procedure Commentary and Cases* vol. II, Hon. Justice Patrick Matibini, stated, at page 1395-1396, as follows:

“While payment of the judgment debt by instalments may be attractive, especially for the judgment debtor, the obvious downside or drawback always is the risk or danger of default. As much as a minor default may justify the costs involved in attempting to enforce payment, however, a major default may leave the judgment creditor worse off than he would have been, had judgment been executed immediately.”

It has been deposed on behalf of the plaintiff company that the failure by the defendant to settle the amount owed has caused the plaintiff to operate at a substantial loss and that the kwacha has substantially lost value such that what the plaintiff owed its suppliers is not what it owes them today. It was also deposed that the plaintiff has engaged the defendant numerous times to try and persuade it to liquidate the debt in instalments so that the plaintiff company could keep afloat but that that was in vain.

I am therefore of the considered view that if this Court were to order that the judgment sum be paid in instalments, the judgment creditor would be left in an even worse position.

It is for these reasons that this application fails.

Delivered at Lusaka this 21st day of May 2020

Elita Phiri Mwikisa
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ELITA PHIRI MWIKISA
HIGH COURT JUDGE