

**IN THE HIGH COURT FOR ZAMBIA
IN THE COMMERCIAL DIVISION
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

CONTINENTAL AUTO SOLUTIONS LIMITED

PLAINTIFF

AND

BADWI CONSTRUCTION & TRANSPORT LIMITED DEFENDANT

**CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at
Lusaka the 5th day of February, 2020**

For the Plaintiff: Mr. K. Musabandesu of M & M Advocates

*For the Defendant: Mr. Y. Silomba of Messrs. Robson Malipenga and
Company*

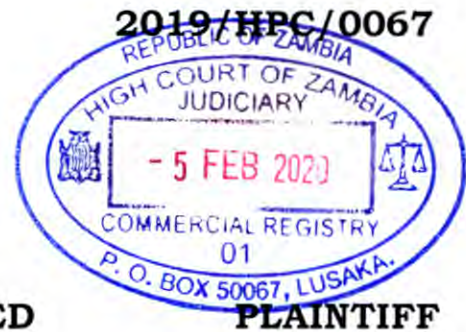
RULING

Cases cited:

- 1) *Sandy Kawayo and Kawayo Enterprises Limited v. First Alliance Bank Zambia Limited, SCZ Appeal No. 155 of 1997.*
- 2) *Nyampala Safaris Zambia Limited and 4 Others v. Zambia Wildlife Authority and 6 Others, SCZ/8/179/2003.*
- 3) *Metal Fabricators of Zambia v. Washington Mwenya Zimba, SCZ/170/2002.*
- 4) *Zambia Export and Import Bank v. Mkuyu Farms Limited and Others (1993-1994) Z.R. 36 (SC).*

Legislation cited:

- 1) *Order 36, rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
- 2) *Order 47, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*



There are two applications by the Defendant before this Court, namely, an application for an order for stay of execution of judgment and an application for leave to settle judgment sum in instalments.

The Summons for an Order for Stay of Execution of Judgment in Default was filed pursuant to Order 36, rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 47, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book), while the Summons for Leave to Settle Judgment Debt in Instalments was filed pursuant to Order 36, rule 9 of the High Court Rules. The two applications are supported by affidavits and skeleton arguments filed on 20th August, 2019. The Affidavit in Support of Summons for an Order for Stay of Execution of Judgment in Default was sworn by one Mohammed Jama Hersi, the Managing Director of the Defendant Company who deposed to the fact that by Default Judgment dated 29th March, 2019, this Court entered Judgment in favour of the Plaintiff in the sum of K180,000.00. That, soon after the Judgment was entered, the Defendant engaged the Plaintiff so that the Defendant could be paying in instalments and the Defendant had been making payments towards the Judgment sum. That, as at the date of filing the affidavit, the Defendant had paid K74,000.00 leaving a balance of K106,000.00. Copies of receipts for the said payments were collectively produced as exhibit "MJH1". In addition, that the Defendant has no capacity to liquidate the balance of the judgment sum in one lump sum due to financial constraints.

The deponent further stated that, it had come to the Defendant's knowledge that the Plaintiff had issued a Writ of *Fieri Facias*. As evidence of this averment, a copy of the of the Sheriff's Seizure Form was produced as exhibit "MJH2". Further, that the Defendant had since made an application before this Court for payment of the outstanding judgment sum in instalments. That he was advised by the Defendant's Counsel and verily believed the same to be true, that the said application cannot operate as a stay of execution of the Writ of *Fieri Facias*.

The Affidavit in Support of Summons for Leave to Settle Judgment Debt in Instalments was also sworn by Mohammed Jama Hersi, the Managing Director of the Defendant Company. It was his testimony that after entry of the default judgment, the parties herein engaged in some negotiations for the Defendant to pay the judgment sum in instalments and that several draft consent orders were exchanged between them but the parties failed to reach a conclusion and subsequently file a consent order to that effect. That, notwithstanding the foregoing, the Defendant had been making payments towards the judgment sum and had by the time of filing the application, paid the sum of K74,000.00 leaving a balance of K106,000.00. That, the Defendant has no capacity to liquidate the balance of the judgment sum in one lump sum due to financial constraints.

It was the deponent's further evidence that the monthly income and liabilities of the Defendant Company are as follows:

That, Order 47, rule 1 requires this Court to be satisfied that there are special circumstances which render it inexpedient to enforce the judgment or order by execution. Citing the case of *Sandy Kawayo and Kawayo Enterprises Limited v. First Alliance Bank Zambia Limited*¹, Mr. Musabandesu said that the Supreme Court, in dismissing an appeal for payment of a judgment debt in instalments, considered these two rules of practice and made the observation that while Order 36, rule 9 of the High Court Rules simply talks about the Court ordering payment in instalments for any sufficient reason, Order 47, rule 1 of the White Book requires the Court to be satisfied that special circumstances do exist as the facility to pay by instalments is not available as of right. That, it is required of the debtor to make out a good case for instalments.

Mr. Musabandesu submitted that as the Court considers the Defendant's Affidavit in Support of the application, the question which the Court should address its mind to is, whether the Defendant has shown in its Affidavit that special circumstances exist which render it inexpedient for the judgment creditor to enforce the debt by execution. Counsel drew the Court's attention to paragraph 9 of the Defendant's Affidavit in which the Defendant gave the amount of K45,000.00 as its monthly income and liabilities as amounting to K32,350.00. That, what the Defendant did not do, as required by Order 47, rule 1 of the White Book, was produce audited accounts or management statement of financial accounts, inclusive of the profit and loss accounts; balance sheet and cash flow statement to authenticate what the Defendant was saying in

paragraph 9 of the Affidavit. That, hence, it was the Plaintiff's submission that the Defendant's Affidavit fell short in demonstrating that special circumstances exist for this Court to exercise its discretion and grant the order for payment of judgment debt in instalments. Counsel submitted that this application is nothing else but an attempt by the Defendant to frustrate the Plaintiff from enjoying the immediate benefit of the fruits of its judgment. In support of his contention that there must exist good and convincing reasons as to why a stay of execution should be granted so as to deprive a successful litigant of the fruits of his judgment, Counsel cited two Supreme Court judgments of *Nyampala Safaris Zambia Limited and 4 Others v. Zambia Wildlife Authority and 6 Others*², and *Metal Fabricators of Zambia v. Washington Mwenya Zimba*³.

Counsel submitted that the Defendant had failed to show any special circumstances, and therefore, both applications lacked merit and should be dismissed with costs to the Plaintiff. Further, that the *ex-parte* Order staying execution of judgment granted to the Defendant on 20th August, 2019 be discharged forthwith.

In reply, Mr. Silomba drew the Court's attention to paragraph 7 of the Affidavit in Support of Summons for an Order for Stay of Execution of Judgment in Default and submitted that a reading of that paragraph showed that the Defendant had been making payments towards the judgment sum which at the time of filing of the Affidavit stood at K74,000.00, leaving a balance of K106,000.00, whose proof was exhibited thereto. That, this clearly showed that the

Defendant was willing and committed to settle the judgment sum. Further, that paragraph 9 of the same Affidavit showed that the Defendant could not afford to pay the judgment debt in one lump sum.

With regard to the two Supreme Court judgments cited by Mr. Musabandesu, Mr. Silomba submitted that the Defendant had advanced good and convincing reasons as to why a stay of execution should be granted. He urged the Court to consider that the Defendant had been paying the judgment sum and what was remaining was almost half of the judgment debt. He also urged the Court to consider the income and expenditure that the Defendant had indicated in the Affidavit in Support of the application. He craved the indulgence of the Court to confirm the *ex-parte* Order for stay which was granted on 20th August, 2019 and also prayed that this Court grants the Defendant the application to settle the judgment sum in instalments.

In the List of Authorities and Skeleton Arguments in Support of Summons for an Order of Stay of Execution of Judgment in Default, the Defendant argued that in the case of *Zambia Export and Import Bank v. Mkuyu Farms Limited*⁴, the Supreme Court held that a court may order a judgment debt to be satisfied by instalments upon sufficient cause being shown by the judgment debtor. That, in the case before this Court, the Defendant has not denied liability to the Plaintiff as evidenced by the contents of paragraphs 6 and 7 of the Affidavit in Support of the application for stay of execution, which

show that the Defendant has been paying towards the judgment sum herein. That, furthermore, in paragraphs 8 and 9, the Defendant, through its Managing Director, stated that the Defendant has no capacity to liquidate the balance of the judgment sum in one lump sum. That, additionally, the Defendant has supported this with a breakdown of its income and liabilities and the proposed instalment amounts. That, based on the foregoing, the Defendant had shown sufficient cause in accordance with the authorities cited in order to be granted a stay of execution so that the judgment debt can be paid in instalments. Further, that the Defendant had shown commitment to settle the judgment sum. Counsel prayed that this Court exercises its discretion to grant the Defendant a stay of execution of judgment and to grant the Defendant an order to pay the judgment sum in instalments.

I have considered the affidavits filed in support of the two applications herein and skeleton arguments also filed in support thereof. I have also considered the oral submissions by Counsel on both sides. It is not in dispute that this Court is vested with power under Order 36, rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 47, rule 1 of the White Book, to stay execution of the judgment herein and grant the Defendant an order to pay the judgment sum in instalments. However, in order to make such orders, the Defendant must satisfy the requirement of sufficient cause under Order 36, rule 9 of the High Court Rules as well as special circumstances under Order 47, rule 1 of the White Book. The question to be considered by this Court is, therefore, has the

Defendant provided the Court with sufficient cause as well as special circumstances to warrant the grant by this Court of a stay and order the payment of the judgment sum by instalments? In other words, has the Defendant made out a case for payment of judgment sum in instalments? To answer this question, an examination of the evidence adduced by the Defendant in the Affidavit filed herein is crucial. The Defendant has exhibited receipts of payments it made to the Plaintiff in both its affidavits as proof that it has so far paid K74,000.00 out of the judgment debt, leaving a balance of K106,000.00. However, as Counsel for the Plaintiff rightly submitted, while the Defendant has indicated its income and expenditure in the Affidavit in Support, it has failed to produce audited accounts or statements of accounts to prove to the Court that what it alleges to be its income and expenditure is indeed factual. Merely mentioning the Defendant's income and liabilities, without providing proof thereof, is not sufficient. Sub rule 3 of Order 47, rule 1 of the White Book provides as follows:

“(3). An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his.” (emphasis supplied by the Court)


It is clear from the above provision that the evidence to be provided by the applicant must be sufficient to substantiate the grounds for the application. In view of the above, I am in agreement with the

submission by learned Counsel for the Plaintiff that the Defendant's affidavit falls short in demonstrating that special circumstances exist for this Court to exercise its discretion and grant the application prayed for by the Defendant.

In view of the above finding, the two applications herein are dismissed with costs for lacking merit. The *ex-parte* Order staying execution of judgment granted to the Defendant on 20th August, 2019, is discharged forthwith.

Leave to appeal is denied.

Delivered at Lusaka this 5th day of February, 2020.


DR. W. S. MWENDA
JUDGE