



(COMMERCIAL DIVISION)
LILONGWE REGISTRY
COMMERCIAL CAUSE NO. 011 OF 2020

BETWEEN:

SAVENDA MANAGEMENT SERVICES LIMITED.....CLAIMANT

and

**ATTORNEY GENERAL (MINISTRY OF HEALTH AND
POPULATION..... DEFENDANT**

Coram: **Hon. Justice Charlotte Wezi Mesikano Malonda**

Mr. Kita, Counsel for the Claimant.

Mr. Maulidi, Counsel for the Defendant.

Mr. Nanga, Court Clerk

**ORDER ON APPLICATION TO FIX TIME WITHIN WHICH TO PAY THE JUDGEMENT
DEBT**

1. The Claimant filed an Application for the Court to fix time for payment of a judgement debt.
2. The Claimants application was made under Order 3 rule 6, as read with Order 23, Rule 9 of the Courts (High Court) (Civil Procedure) Rules 2017, herein referred to as the rules.
3. The claimant filed a sworn statement by Counsel Wapona Kita and skeletal arguments in support of the application. He exhibited 'WK1'.
4. The Defendant filed a sworn statement in opposition by Counsel Clement Maulidi.
5. I had the benefit of receiving oral submissions from both parties.
6. The claimant adopted their sworn statements and skeletal arguments in entirety.

7. Counsel Kita deponed the following in brief : that on 14th September 2020 Honourable Mtalimanja gave judgement against the defendant on several heads subject to the assessment by the Assistant Registrar but she in particular also gave judgement for the liquidated sum of £320,000,000 being costs of post bid evaluation exercise (I have confirmed with the exhibit **WK1**, and the correct amount is £320,000.00-in words three hundred and twenty thousand pounds and not millions as in the sworn statement) , that pursuant to the said judgement on assessment of damages , a hearing was conducted in the presence of both parties by the Assistant Registrar on 16th of December 2020, pursuant to the said assessment the Assistant Registrar on 28th February 2021 delivered her ruling on assessment of damages whereby she awarded the claimant the following damages:
 - a. £12,038,000.00 being expenses incurred in order to fulfill the requirements of the procurement proceedings; b. US\$15,018, 020 being loss of profits;c. US\$1,000,000,00 being expenses incurred in bid preparation;d.US\$1,000,000.00 being general damages for inconvenience.
8. He further depones that from the above awards, it means the total amount of British pounds and USA dollars awarded at £12,358,000.00 and \$US17,018,020.00 or equivalent Malawi kwacha at the prevailing rate at the time of payment, failing which the Secretary to Treasury, Mr Chancy Simwaka be committed to prison for contempt of court until he makes out the said payment.
9. During Oral submissions, the contempt of court application was abandoned by Counsel Kita. The Defendant had also objected to the committal proceedings being combined with the Order to fix time application.
10. The Defendant in the Sworn statement in opposition of Counsel Clement Maulidi deponed the following in brief ; that the present suit by the Claimant was commenced under Section 3 of the Civil procedure (suits for or Against Government Act), that a public officer can be sued under section 5 of the said Act, that the Claimant cannot execute against Government and that committal proceeding is a mode of execution, that the present application does not fall under

Section 5 of the said Act, that the present application is misconceived and an abuse of the court process.

Analysis and Finding

11. Considering that the contempt of proceedings were abandoned by the claimant, it is my considered view that the issue for determination for now is whether or not to fix time within which the Government should comply.
12. Section 3(1) of Civil procedure (Suits for or Against Government) Act provides as follows;

“(1) Save as may otherwise expressly be provided by any Act, suits by or against the Government shall be instituted by or against the Attorney General. Such suits shall be instituted and tried in the same manner as suits to which the Government is not a party.”

Section 8 of the Act further stipulates;

“When the decree is against the Government, or against a public officer in respect of such act, neglect or default as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified the court shall report the case for the orders of the Government. Execution shall not be issued on any such decree unless it remains unsatisfied for a period of three months computed from the date of the report.”

13. The Defendant argues among other things that a public officer sued under Section 5 of the CPA is protected from arrest unless section 8 above applies. Furthermore, a Decree under Section 8 of the Civil Procedure (Suits for or against Government) Act applies against public officers commenced under section 5 of the Act. The Defendant fears that if the court fixes time within which to pay, and Government fails to pay, then the Claimant intends to commit the secretary to Treasury to prison. Now that the committal proceedings have been abandoned, then what? It appears the Defendant’s argument relies on this legal position.
14. A party cannot execute against Government, see ***Sheriff of Malawi and Attorney General v Universal Kit Suppliers CC MSCA civil appeal number 6 of 2017.*** The MSCA held as follows:

"The applicable law in Malawi does not allow for execution against Government whether by way of writ of fieri facias or indeed garnishment; and a judgement creditor cannot lawfully levy execution against Government property in order to enforce judgement debts entered against Government;

15. Order 23 rule 9 of the rules provides as follows in relation to payment of judgement debt:

"A party shall comply with a Judgement or order for the payment of an amount of money, including costs, within 14 days of the date of the Judgement or order, unless –

(a) The judgement or order specifies a different date for compliance, including specifying payment by installments;

(b) Any of these rules specifies a different date for compliance;

or

(c) The court has stayed the proceeding or judgement."

16. I have gone through the court file, the pleadings, and the submissions and it is clear that Defendant has appealed against the Mtalimanja J decision. Both parties on their own admission and as well as after checking the court record, there is no appeal against the Assessment of the Registrar. There is also no suspension of execution application, nor order against both these Court orders. However, the Defendants argues that, once the appeal is successful, the assessment will fall off.

17. The Defendant in their oral submission stated that they have currently put in place an administrative mechanism of settling judgement debts. This mechanism is in collaboration with the Malawi Law Society, which enables a first-in-first out payment process. Hence the submission is that the Claimant should join the line of litigants owed money by the Defendant as the settling of a date by the court, would prejudice other litigants who are lined up for settlement of their debts by the Defendant.

18. Much as the Court commends the Defendant for coming up with a more procedural way of paying out awards, they have been unable to cite any legal

provision that makes this process more superior than the legal process. It is the position of this court much as any processes to settle the matter outside the court are encouraged, a litigant's hands are not tied, should they prefer to go the legal route as prescribed by the law. Even the Defendant has admitted that the administrative process is to achieve justice to those who are Judgement debtors against the Attorney General.

19. My reading of Section 8 of Civil procedure (Suits for or Against Government) Act:

“When the decree is against the Government, or against a public officer in respect of such act, neglect or default as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified the court shall report the case for the orders of the Government. Execution shall not be issued on any such decree unless it remains unsatisfied for a period of three months computed from the date of the report.

Both parties have submitted this provision, it is settled and I am agreeable to the position that there is no legal prohibition from fixing time within which government should comply, unless if there is a stay in the proceeding or judgement. This is especially read with Order 23 rule 9 (c):

“A party shall comply with a Judgement or order for the payment of an amount of money, including costs, within 14 days of the date of the Judgement or order, unless –(c) The court has stayed the proceeding or judgement.

20. I have gone through the court record and indeed the Ruling on Assessment of Damages is unchallenged. I have however corrected the figures to align the figures in this application, with those in the Ruling on Assessment of Damages dated 8th February 2021.

21. Notably, what is challenged on appeal is the substantive ruling which awarded £320,000 (three hundred and twenty thousand British pounds). I assert that in both cases, there is no stay of execution/suspension of enforcement on record.

I therefore do not find any legal reasoning behind dismissing the application fixing the time within which to pay the Assessment order by the Assistant registrar because an Appeal, is not an automatic suspension of enforcement.

22. This court has also read through the Order's to fix time in previous cases: see *Dumisani Building Contractor v Attorney General (Ministry of Education) and Secretary to Treasury civil cause No B671 of 2012, David Consulting Engineering v Roads Authority and Attorney General commercial cause no 75 and 251 of 2017, FISD Limited Company v Attorney General (Ministry of Agriculture, Irrigation, water and Development, commercial cause No 9 of 2019*. The fixed periods have ranged from 14 days to 21 days.

23. In consideration of the material before me this court will fix the time for payment of the debt in installments, as the following order.

Conclusion

24. **IT IS HEREBY ORDERED and DIRECTED** that the Secretary to Treasury, Mr Chancy Simwaka should within 30 days from service of this Order pay the Claimant the sums of £12,038,000.00 and \$US17,018,020.00 or equivalent Malawi kwacha at the prevailing rate at the time of payment in full or in installments.

In the event of disobedience with this order, the Claimant will initiate contempt of Court proceedings on application.

Made in Chambers this 12th Day of August, 2021



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Charlotte Wezi Mesikano Malonda

JUDGE