



**IN THE HIGH COURT OF MALAWI  
COMMERCIAL DIVISION  
BLANTYRE REGISTRY  
COMMERCIAL CASE NUMBER 396 OF 2020  
(Before Msungama, J)**

**BETWEEN:**  
**ETHYO TRUST .....CLAIMANT**  
**AND-**  
**ICL MALAWI LIMITED ..... DEFENDANT**

**Coram**

Justice M.T. Msungama  
 Chidothe, of Counsel for the Claimant / Judgment Creditor  
 Nampota, of Counsel for the Defendant / Judgment Debtor  
 Makombe, Court Clerk

**RULING**

1. In this matter, the Defendant asked for and the court granted it a period of seven days within which to file written submissions which it wished to make after the hearing of an application for an order to pay judgment debt by instalments. By the close of business on the seventh day which fell due on 21<sup>st</sup> March, 2022, there were no written submissions filed. I have taken it that the Defendant no longer wished to file the said submissions and thus allowing me to determine the application in the absence of the written submissions.
  
2. The Defendant, at all material times, had been occupying premises owned by the Claimant as a tenant. The premises were being used as offices for its business. It has since vacated the premises. Along the way during the tenancy, the payment of rentals for the premises became problematic and as a result these fell into arrears prompting the Claimant to sue the Defendant for the accrued rentals. After being served with court process, the Defendant made a partial admission by admitting owing the Claimant the

sum of MK12,899,112.00. The court entered a judgment for the admitted sum and ordered that the matter should proceed further in respect of the other claims that were not admitted by the Defendant such as the claim for interest, collection costs and party and party costs. The Defendant then filed and served the Claimant a request to pay the admitted sum by way of monthly instalments of MK350,000. This request was rejected by the Claimant. This is, therefore, an application by the Defendant that it be allowed to pay the adjudged sum by monthly instalments of MK350,000. The Defendant's application is opposed by the Claimant.

3. The Defendant's application is backed by a sworn statement sworn by the Defendant's Managing Director. The gist of the application is that the Defendant has for some time now been sailing through troubled financial times and has been making losses since the year 2016. Its financial woes have been exacerbated by the advent of the covid 19 pandemic which recently wreaked havoc across the globe. The Defendant contends that it made proposals to the Claimant for settlement of the rental arrears by monthly installments of MK350, 000 which was rejected by the Claimant. The Defendant feels the rejection was unreasonable especially when one considers the current financial position of the Defendant and also the fact that the Defendant has been on the premises for a long time. The Defendant further states that it issued a cheque for the sum of MK350, 000 in favour of the Claimant but the Claimant insisted that the said payment be made through its legal practitioners, M/s Chidothe & Chidothe. The Defendant, in view of the position taken by the Claimant, which was confirmed by the Claimant's legal practitioners, assumed that the cheque had been rejected but was surprised to hear later that the cheque had been deposited and had been referred to drawer by the Defendant's bankers. The Defendant has indicated that so far it has paid the Claimant MK950,000. I can only assume that this sum is not included in the amount that has been admitted and in respect of which the Claimant has obtained judgment
4. The Defendant has deponed that it has no assets except for furniture and office equipment which, in its opinion, are of very little value. Exhibit GN9A attached to the deponent's sworn statement shows that the depreciated value for these assets is around

MK12.5 million. The deponent further indicates that the Defendant has additional liabilities owing to third parties. These are listed as follows:

- a) PAYE – MK5 Million
- b) Pension arrears- MK13 Million
- c) Personal loans due to the Managing Director- MK20.8 million
- d) Teveta- MK3.6

5. The deponent further states that when vacating the premises, the Defendant left on the premises fixed assets valued at around MK2.6 million which it wants to have set off against the amount that has been admitted.
  
6. According to the Defendant, the above facts justify the court to proceed to exercise its discretion in its favour and allow it to service this debt by the proposed sum of MK350,000 per month. According to counsel Nampota, if the Defendant is not allowed to pay the debt by the proposed monthly instalments, the following unpleasant consequences will follow:
  - a) the Defendant will be placed in an insolvent state and that will be tantamount to impinging on its rights and unjustly uphold the Claimant's right to recover the judgment debt;
  - b) the Claimant is unlikely going to realize its right to its dues because of the insolvency; and
  - c) the court will have failed to balance the interests of the parties in the matter
  
7. The application to pay by the proposed installments is opposed by the Claimant principally on the ground that it will take an unreasonably long time (around forty months) to have the judgment debt liquidated. This, in the opinion of the Claimant, would not make any business sense.

8. The issue for the determination of this court is whether or not to allow the Judgment Debtor time in which to settle the judgment debt at the proposed or at any other rate the court may find appropriate regard being had to all the circumstances obtaining in this matter.
9. The Courts Act confers express jurisdiction on the High Court to order payment of any judgment debt by instalments <sup>1</sup>.
10. Where a judgment debtor requests the court to grant it time for settlement of a judgment debt under CPR 2017, the position is similar to the one where the court is considering an application to have a judgment debt settled by installments. Therefore, the principles expounded by our courts in respect of applications for settlement of judgment debts by instalments are applicable. The guiding principles were summarized as follows in *Leasing & Finance Co. v Maltraco Ltd*<sup>2</sup>:
  - a) the court must balance the interest of a judgment creditor to recover the debt against genuine inability to settle on the part of the judgment debtor;
  - b) the court must be very cautious and reluctant to allow instalments in a trading debt; and;
  - c) the judgment debtor must approach the court with clean hands and make full and frank disclosure of its financial position because he is seeking the sympathy of the court.
11. It must be observed that when we are talking about balancing the interests of the parties, the beginning point is that the judgment sum is ordinarily due and payable. The judgment creditor is ordinarily entitled to enforce his judgment through the several

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<sup>1</sup> S.11 (a) (x) of the Courts Act

<sup>2</sup> [1997] 2 MLR 250 (HC)

means at his disposal including, but not limited to, enforcement money orders<sup>3</sup>, seizure and sale orders<sup>4</sup>, third party debt orders<sup>5</sup>, charging orders<sup>6</sup>, appointment of receivers<sup>7</sup>, an order for possession of land<sup>8</sup>, an order for delivery of goods<sup>9</sup>, and insolvency proceedings under the insolvency legislation. Ordinarily, an order to pay a debt by instalments is an interference with the judgment creditor's right to enforce a judgment which is in his favour. Therefore, this interference should only be ordered by the court in face of exceptional circumstances. The decision as regards whether to allow a debtor to pay by instalments cannot, therefore, be made only on the basis of what the debtor is able to pay, but also looking at the judgment creditor's right to enforce a judgment that has been passed in his favour.

12. In a case where the judgment debtor is not in a position to pay anything meaningful, the correct thing for the court to do is not to interfere with the judgment creditor's right to seek enforcement of the judgment by the means that are available to him and which he deems appropriate.
13. Where the debtor is in a precarious financial position, the interests of other creditors of the debtor and possibly of the its workforce and suppliers should be considered bearing in mind the fact that these interests can be taken care of by the winding up regime which is supervised by specialist courts. In the circumstances, the said third party interests should rarely be a justification for granting a debtor time to pay a debt by instalments.
14. The court should also take into consideration whether or not the debt will be paid with interest since the creditor will be kept out of his money for a period of time.

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<sup>3</sup> O. 28 r. 3 CPR

<sup>4</sup> O. 28 r. 6 CPR

<sup>5</sup> O. 28 r. 10 CPR

<sup>6</sup> O. 28 r. 21 CPR

<sup>7</sup> O. 28 r. 29 CPR

<sup>8</sup> O. 28 r. 37 CPR

<sup>9</sup> O. 28 r. 41 CPR

15. In the present matter, although I sympathize with the situation in which the judgment debtor finds itself in, there are circumstances which militate against granting it the order it seeks. These include the following:

- a) When you add the liabilities, which have been disclosed by the Defendant, to what is owing to the Claimant, the total comes to around MK54 Million as against assets of MK12 Million. This means the Defendant herein is technically insolvent.
- b) There are no indications about what prospects the Defendant has to turn around its fortunes or indeed where it will be getting the sum of MK350, 000 which it proposes to be paying every month. There is no schedule of the kind of income that it expects to be making on monthly basis and what its monthly expenses will be in order to give the court a clear picture that it is in fact able to fulfill this proposed undertaking.

The financial position of the judgment debtor started to deteriorate way back in 2016 when it made a loss of MK57 million. Ever since that period, according to the copies of the company's account which have been made available to the court, it has not performed well. Therefore, to bring the angle of covid 19 as one of the primary causes of its miserable financial performance is, in my considered view, not in tandem with the facts on the ground. There are no facts made available to the court that once the covid 19 menace is no longer there the Defendant's financial performance will place it in a better financial position.

- c) The sum that has been admitted does not carry interest and as such an order allowing the defendant to pay by the proposed instalments will result in the judgment creditor losing out during the time that it will be kept out of its funds
- d) The proposed repayment period, almost forty months, does not make any business sense especially when you look at the interest of the judgment creditor. In order for

a judgment debtor to obtain the benefit of an instalment order the court needed to be presented with a reasonable repayment plan backed up by evidence that the judgment creditor can be expected to receive what is owed to it within a reasonable time. To that extent, the interests of the judgment creditor are paramount. In this matter the repayment plan that has been presented would not, in my view, be helpful to the judgment creditor.

16. In the circumstances, this court declines to exercise its discretion in favour of the Judgment Debtor and proceeds to dismiss the prayer for settlement of the judgment debt by instalments. Costs in relation to this application are for the Judgment Creditor.

Pronounced in open court this 25<sup>th</sup> day of March, 2022 at the High Court, Commercial Division, Blantyre in the Republic of Malawi.



**M.T. Msungama**

**JUDGE**