

IN THE HIGH COURT FOR ZAMBIA

2009/HK/307

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

IN THE MATTER OF: THE LAW OF DISTRESS AMENDED ACT, 1888

AND

IN THE MATTER OF: THE PREMISES KNOWN AS PLOT NO. 4670
JACARANDA DRIVE, BUYANTANSHI, KITWE

AND

IN THE MATTER OF: THE RENT ACT, CAP 206 OF THE LAWS OF
ZAMBIA AND SECTION 14 OF THE RENT ACT NO.
10 OF 1972

BETWEEN:

AFRICAN LIFE FINANCIAL SERVICES LIMITED - APPLICANT

AND

FAITH SIMBAO AND 14 OTHERS - RESPONDENTS

ANDREW MWANGO - CLAIMANT

Before Hon. Mr. Justice I. C. T. Chali in Chambers on the 9th day of March,
2011

For the Appellant: Mr. C. Chali - Nkana Chambers

For the Respondents: Not Present

For the Claimant: Mr. D. Mazumba - Messrs Douglas and Partners

JUDGMENT

Text referred to;

1. *Halsbury's Laws of England 4th Edition, Volume 13*

In these proceedings I shall refer to the Landlord as the Applicant and the Tenants as the Respondents, which is what the parties ought to be called in proceedings of this nature.

On 26th May, 2009 the applicant took out an originating notice of motion under the Rent Act, Chapter 206 of the Laws of Zambia seeking, *inter alia*, leave of the Court to issue a warrant of distress against the Respondents as occupiers of the Applicant's Buyantanshi Flats at Plot Number 4670 Jacaranda Drive, Kitwe to recover rent arrears in various amounts owed by the Respondents. In the affidavit of Denise Chilimboyi in support of the originating notice of motion, the occupier of Flat 13 was named as Chileshe Bwembya who at the time was said to be owing K24,500,000=00 in rent arrears.

On 11th June, 2009 when an attempt was made to effect service of the originating process, the occupier of Flat 13 is said to have refused to sign the acknowledgement of service form.

On 21st July, 2009, a Consent Judgment was filed into Court signed by the Advocates for the parties and was duly indorsed by the Judge on 27th July, 2009 in the following terms;

1. **That the tenants shall pay to the landlord the current monthly rental and the same to be payable at the end of every month commencing 31st July, 2009;**
2. **That the tenants shall pay to the landlord the unpaid rental arrears within 18 months from 31st July, 2009 and**

the said arrears shall be paid in equal monthly installments;

3. That the monthly rental payments in Clause 1 shall be paid together with the rental arrears in Clause 2 aforesaid.

On 22nd January, 2010, the Applicant filed summons for leave to issue warrants of distress against the occupiers of four of the said flats, including one Benedict Chileshe who was said to be owing K28,700,000=00 as at 30th July, 2009 for Flat 13.

Leave was duly granted by the Learned Deputy Registrar on 8th February, 2010 and the warrants were accordingly issued.

On being visited at Flat 13 by the Bailiffs in the course of executing the warrant of distress, ANDREW MWANGO, now the Claimant, filed a Notice of Claim to the goods that were seized and applied for the stay of sale thereof pending the hearing and determination of the interpleader proceedings.

In his affidavit in support of the interpleader proceedings, the claimant deposed, without indicating when he took occupation of the flat, that he was the occupier of Flat 13 having taken over occupation thereof from the widow of the previous tenant, Benedict Chileshe, who had died on 29th May, 2007. He said he had never defaulted in paying the rent and that the execution was in respect of monies owed by the late Chileshe.

In the Applicant's opposing affidavit to the said claim sworn by MALOZI F. CHINGEZHI, the Applicant's Regional Manager, Copperbelt, it is said that the warrant of distress was properly directed and executed on the intended flat and tenant; and that the Claimant is not known by the Applicant as the occupier of its flat because he occupied the flat without

its knowledge or consent and that he was not paying any rent since he occupied the flat.

In his ruling on the interpleader proceedings dated 18th May, 2010, the Learned Deputy Registrar posed the question whether the Claimant's goods could be seized and sold in execution of the warrant of distress. He found as a fact that the claimant had occupied the flat without the consent or authority of the Applicant. He, however, concluded that the Applicant, through its officers, knew of the Claimant's occupation and ratified it. He also said that although the warrant was properly directed as regards the property in issue, the critical issue was who was the debtor. He found the Claimant was not the debtor of the amount claimed and he accordingly allowed the claim and ordered the release of the Claimant's goods to him. He also awarded the costs of the interpleader proceedings against the Applicant.

The Applicant appealed against that Ruling on the following grounds (paraphrased):

- 1. That the Learned Deputy Registrar erred both in law and on the facts when he held that the execution against the Claimant's goods was erroneous and irregular when the said execution was directed at the correct flat and intended tenant;**
- 2. That the Learned Deputy Registrar erred both in law and on the facts when he made a finding of fact that the Applicant had ratified the Claimant's occupation after the Applicant received rental payments from the Claimant when the said payments were made and acknowledged in the name of Benedict Chileshe;**

3. That the Learned Deputy Registrar misdirected himself when he held that the Claimant had never defaulted for his tenancy because such holding was not supported by evidence.

I propose to deal with the grounds of appeal in reverse order.

With regard to Ground 3, as I have earlier said, the Claimant did not disclose when he took occupation of the flat. He did not disclose how much rent he had been paying and how much was paid up to the time the warrant was being executed to show that he had not defaulted on rental payments. The Claimant's affidavit evidence was that the tenant known to the Applicant, Benedict Chileshe, died on 29th May, 2007 and that the widow continued living in the flat until later when he took occupation thereof. Some documents, for example, from furniture suppliers, exhibited to his affidavit show the Claimant was in occupation of the flat in November, 2009 but that may not necessarily be the starting point of his occupation. He did not himself exhibit any receipts of rentals paid in his own name for the Deputy Registrar to have concluded that he was not in default. Such a finding was, indeed, not supported by any evidence on the record and was wrong.

As for ground 2, the Claimant exhibited Receipt No. 9480 dated 24th May, 2009 issued by SATURNIA REGNA PENSION TRUST FUND as proof that he was paying his rentals. Part of that receipt reads:

**“Received from Benedict Chilseshe (Mr. Mwango Andrew)
The sum of Two Million One Hundred Thousand Kwacha.**

Allocation: Being rental payment for Zambia Sugar Flat 13”.

In my view this is acknowledgment that the flat was being officially occupied by Benedict Chileshe. It is not proof of ratification of the Claimant's occupation. There is no evidence that the Applicant's officers were visiting the flat to acquaint themselves as to who was in actual occupation thereof. The Learned Deputy Registrar's finding as to ratification was also an error.

On Ground 1, firstly, having earlier determined that the Claimant had not adduced evidence that since the date of his occupation of the flat he had punctually and diligently been paying the rent due and that he was up to date with such payments, my view is that the warrant of distress was properly issued and executed.

Secondly, a Consent Judgment was signed on behalf of the Respondents, including the occupier of flat 13. The Claimant did not challenge that judgment as including him. On default of the terms thereof, the Applicant was entitled to execute the same against the Claimant who happened to be the occupier. As already indicated herein, there was no evidence of non-default.

Thirdly, and more importantly, the Learned authors of HALSBURY'S LAWS OF ENGLAND, 4th Edition Volume 13 have the following to say regarding the remedy of distress at paragraph 202:

“The right of the landlord to distrain for arrears of rent arises at common law and need not be expressly reserved. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due” (emphasis added).

Further at paragraph 206, they state:

“The common law right of distress for rent in arrear is a right for the landlord to seize whatever movables he finds on the premises out of which the rent or service issues and to hold them until the rent is paid or the service performed”.

And lastly at paragraph 227 as to goods liable to be distrained upon:

“Under the common law a landlord can prima facie seize and distrain for rent in arrear all goods and chattels found on the premises out of which the rent issues; the goods and chattels may be the property of the tenant, or of a stranger, the landlord being entitled to have recourse to all chattels actually on his tenant’s premises without reference to their ownership”.

The statement of the law is very clear and I only need to add that in my view the Claimant’s goods were rightly captured under the law.

In the circumstances, the appeal is allowed. The Ruling of the Learned Deputy Registrar is accordingly reversed. The Applicant shall have its costs against the Claimant, to be taxed in default of agreement.

Delivered at Kitwe in Chambers this 9th March, 2011

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I. C. T. CHALI
JUDGE