

IN THE HIGH COURT FOR ZAMBIA

2015/KHC/0010

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(Commercial Jurisdiction)



BETWEEN:

AFRIGENT TECHNICAL SERVICES LIMITED

PLAINTIFF

AND

MAZ MINIG AND CONSTRUCTION LIMITED

DEFENDANT

Before the Honourable Mr. Justice W.S Mweemba in Chambers at Lusaka.

For the Plaintiff : Mr. S.A.G. Twumasi – Messrs Kitwe Chambers.

For the Defendant : Mr. G. Kalandanya – Messrs G.N. Legal Practitioners.

R U L I N G

LEGISLATION REFERRED TO:

1. ORDER 45 RULE 7 OF THE RULES OF THE SUPREME COURT OF ENGLAND, WHITE BOOK, 1999 EDITION.
2. ORDER 47 RULE 7 OF THE RULES OF THE SUPREME COURT OF ENGLAND, WHITE BOOK, 1999 EDITION.

CASES REFERRED TO:

1. WORKERS DEVELOPMENT CORPORATION (ZCTU) LIMITED V MKANDAWIRE (1999) ZR 132.
2. OAK LIMITED V AMANITA ZAMBIA LIMITED AND OTHERS (2011) ZR VOL. 1-170.
3. BENABO V WILLIAM JAY & PARTNERS LIMITED (1941) CH. 54.
4. DEMPSTER V DEMPSTER (1990) THE INDEPENDENT, NOVEMBER 9, C.A.
5. RE TRUCK; CENTURY INSURANCE COMPANY V LARKIN (1910) 1 Ir. R. 91.

The delay in delivery of this Ruling is regretted but it is on account of the pleadings having been misplaced.

This is an application by the Defendant to raise preliminary issues on the irregularity of the Plaintiffs Notice of Motion for Leave to issue a Writ of Sequestration. The application is made pursuant to Order 45 Rule 7 (7) and Order 45 Rule 7 (6) of the Rules of the Supreme Court of England, White Book 1999 Edition and is supported by Skeleton Arguments dated 2nd February, 2016.

It is submitted that the Order made by the Court on 12th December, 2015 directing the Defendants to pay K404,396.33 into Court is not endorsed with a Penal Notice so as to found an application for leave to issue a Writ of Sequestration as provided by Order 45 Rule 7 (7) of the Rules of the Supreme Court of England, White Book, 1999 Edition. It is therefore contended that the Plaintiffs application for leave is incompetently before this Court and must be dismissed with costs.

It is also contended that the Courts Order of 12th November, 2015 was not served upon the Defendant itself at its registered office or at all. That this fact has been conceded by the Plaintiff in its submission in support of the application for leave to issue a Writ of Sequestration. It is submitted that the failure by the Plaintiff to effect service in terms of Order 45 Rule 7 (6) of the Rules of the Supreme Court of England, White Book, 1999 Edition makes it untenable to move the Court by way of Writ of Sequestration as there was no compliance with the said Rule by the Plaintiff.

The Plaintiff opposed the application and filed Skeleton Arguments dated 29th April, 2016. The Plaintiff relied on Order 47 Rule 7 (6) of the Rules of the Supreme Court of England, White Book, 1999 Edition and referred to the case

of **WORKERS DEVELOPMENT CORPORATION (ZCTU) LIMITED V MKANDAWIRE (1)**.

It is submitted that whilst a Penal Notice must be endorsed on the Order requiring a party to comply with an Order of the Court in terms of Order 47 Rule 7 (6) of the White Book, the Court had an inherent power to control the proceedings before it and therefore the Order made by the Court must be obeyed by the Defendant. The Plaintiff cited the case of **WORKERS DEVELOPMENT CORPORATION (ZCTU) LIMITED V MKANDAWIRE (1)** where the Supreme Court observed that the Court has inherent power to regulate its own proceedings in any matter. It is contended that in this case the Court ordered for the payment of the said amount onto Court to protect the subject matter and the integrity of the proceedings.

That if the Defendant is allowed not to comply with the Court Order therein, it is regrettable as the integrity of the proceedings will be put at risk.

The Plaintiff further submits that the Preliminary Issues raised by the Defendant are merely intended to delay the compliance by it of the Order made by the Court. It is contended that as the Commercial Court was established in the High Court to afford the parties a fast track disposal of matters, this matter should not be delayed.

The case of **OAK LIMITED V AMANITA ZAMBIA LIMITED AND OTHERS (2)** was cited. In that case N.K. Mutuna, J (as he then was) said that:

“The Commercial List was introduced as fast track Section of the High Court to assist in the speedy disposal of commercial matters”

It is submitted that where the Defendant is deliberately using methods to delay the enforcement of the Order of the Court, the Court can enforce the same by its inherent powers to control the proceedings before it.

I have considered the Preliminary Issues raised by the Defendant as well as the Authorities cited and the submissions on behalf of the parties. The issues raised are simple. The Defendant contends that the Plaintiff's application for leave to issue a Writ of Sequestration is incompetently before the Court and must be dismissed with costs because the Court Order made by F.M. Chishimba J, (as she then was) on 12th November, 2015 was not endorsed with a Penal Notice and the said Order was not served upon the Defendant itself at its registered office or at all. The Defendant cites Order 45 Rule 7 (7) and Order 45 Rule 7 (6) of the Rules of the Supreme Court of England, White Book, 1999 Edition.

The Defendant is on firm ground is making these contentions. Order 45 Rule 7 (6) of the White Book, 1999 Edition provides that:

"It is a necessary condition for the enforcement of a Judgment or Order under r.5 by way of sequestration or committal, that the copy of the Judgment or Order served under this rule should have the requisite Penal Notice prominently indorsed thereon".

The Penal Notice must be indorsed on the copy for service of all orders which are required to be served whether personally or not. In the case of **BENABO V WILLIAM JAY & PARTNERS LIMITED (3)** it was held that this rule applies, even where the "Defendant" is a limited liability company.

Whilst the Court has inherent power to regulate its own proceedings in any matter the case of **WORKERS DEVELOPMENT CORPORATION (ZCTU) LIMITED V MKANDAWIRE (1)** cited by the Plaintiff can not come to its aid because the Court has no discretion to dispense with the Penal Notice where the Judgment or Order requires the person to do an act. In this case the Defendant was required to pay into Court the sum of K404,396.33 within 30 days of the Courts Order of 12th November, 2015.

I refer to the case of **DEMPSTER V DEMPSTER (4)** in which it was stated that:

“The Court has a discretion under Order 45 Rule 7 (6) to dispense with the failure to incorporate a Penal Notice in a Judgment or Order requiring a person to abstain from doing an act but it has no such discretion to dispense with the Penal Notice where the Judgment or Order requires the person to do an act”.

The Court Order of 12th November, 2015 which required the Defendant to do an act i.e payment into Court did not have a Penal Notice as required by Order 45 Rule 7 (7) of the White Book.

With regard to service, Order 45 Rule 7 (6) of the White Book, 1999 Edition provides that:

“In the case of a Judgment or Order requiring an individual to do or abstain from doing an act, the requisite documents must be served on that person personally...”

In the case of a Judgment or Order requiring a body corporate to do or abstain from doing an act, the requisite documents must be served on the body corporate in order to found an

application for a Writ of Sequestration against the corporate property, and if it is sought to proceed by way of a Writ of Sequestration against the property of any director or other officer of that body... the requisite documents must be served personally on that director or officer”.

The Plaintiff submitted that the Defendants and their Advocates were present in Court when the Court Order was made on 11th November, 2015. The fact that one or more of the directors of the Defendant Company and the Advocates were in Court when the Order was made does not aid the Plaintiff. In the case of **RE TUCK; CENTURY INSURANCE COMPANY V LARKIN (5)** it was stated that:

“The fact that the person was present in Court when the Order was made is not sufficient to dispense with service of the Order”.

It follows that the knowledge by the Defendant and its Advocates of the existence of the Order for payment of the sum of K404,396.33 into Court did not clothe the Court with power to dispense with the requirement of personal service.

As the Plaintiff did not comply with the procedural rules on the need for a Penal Notice to be endorsed on the Court Order of 12th November, 2015 in accordance with the provisions of Order 45 Rule 7 (7) and further failed to comply with the procedural rules on service of a Court Order requiring the Defendant to pay into Court the sum of K404,396.33 as required by Order 45 Rule 7 (6) of the Rules of the Supreme Court of England, White Book, 1999 Edition, the Plaintiff's application for leave to issue a Writ of Sequestration

against the property of the Defendant and its directors is not properly before me.

The Preliminary Issues raised by the Defendant succeed. As the Preliminary Issues have succeeded, I find no basis for entertaining the Plaintiffs application for leave to issue a Writ of Sequestration and I accordingly dismiss it.

Whilst the Plaintiff did not comply with the procedural rules on service of the Court Order and the endorsement of a Penal Notice on the Court Order, it is clear that the Defendant did not comply with the Court Order dated 12th November, 2015. Had the Defendant obeyed the said Court Order the Plaintiff would not have made the application for leave to issue a Writ of Sequestration. In the circumstances I award costs to the Plaintiff. These are to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 25th day of January, 2017.

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WILLAIM S. MWEEMBA
HIGH COURT JUDGE