

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA

2016/HPC/0558

(Civil Jurisdiction)

IN THE MATTER OF: ORDER 50 RULE 9A SUPREME COURT RULES OF ENGLAND 1999

IN THE MATTER OF: ORDER 88 RULE 5A SUPREME COURT RULES OF ENGLAND 1999

IN THE MATTER OF: AN APPLICATION FOR ENFORCEMENT OF CHARGING ORDER BY SALE OF MINE AND MINING RIGHTS UNDER MINING LICENCE NO. L3913- HQ-SGL

BETWEEN:

CAROLINE MARSH

APPLICANT

AND

LM KRISTALS LIMITED

RESPONDENT

For the Applicant: Mrs N.N. Mbaio- Messrs Nkusuwila Nachalwe Advocates.

For the Respondents: No Appearance.

JUDGMENT

LEGISLATION REFERRED TO:

1. Order 88 Rule 5A of the Rules of the Supreme Court of England 1999 Edition.
2. Order 50 Rule 9A Supreme Court Rules of England 1999 Edition.

CASES REFERRED TO:

1. Gill v Continental Gas (1872) L. R 7 Ext. 332.
2. Midlands Bank PLC v Pike (1988) 2 All E.R 434.

By an Originating Summons pursuant to **Order 50 Rule 9A of the Rules of the Supreme Court 1965, (White Book) 1999 Edition** filed into Court on

28th November, 2016, the Applicant is claiming the following reliefs against the Respondent:

1. Payment of Thirty Thousand United States Dollars (US\$30,000) inclusive of interest, costs due and owing to the Applicant by the Respondent being money unpaid on the amount pursuant to a Ruling dated 20th April, 2016.
2. Delivery up by the Respondent to the Applicant of the charged property an rights thereon.
3. Order for the sale of the said charged property.
4. Any further or other relief the Court may deem fit.

There is an Affidavit in Support of the Originating Summons sworn by Caroline Marsh the Applicant.

She deposes that on 20th April, 2016 she received a Ruling against the Respondent in the High Court in cause No.2016/HPC/0019 in which the Court ruled that the Respondent should pay \$100,000.00 together with interest and costs.

Exhibit "CMI" was a true copy of the Ruling aforementioned and to date the Respondent only paid US\$70,000.00 and had since refused or neglected to make a further payment as demanded of them by the Court ruling even after making numerous demands.

That she had applied to obtain against the Respondent a charging order Nisi and the Respondent was given an opportunity to show cause why the said Charging Order should not be made Absolute by the Court.

That the Respondent failed to appear or file any cause not to make the Order Absolute, following which the Court proceeded to hear her Advocates and made the Order Absolute against MIKU Mine situate at plot No. 2 Lufwanyama belonging to and run by the Respondent under the Mining

Licence No. L3913- HQ-SGL for the recovery of US\$30,000.00 together with interest and legal costs.

Exhibits "CM2" and "CM3" were true copies of the Licence and the Charging Order Absolute mentioned. That despite obtaining a Charging Order Nisi and Absolute against the Respondent and duly serving them on their Advocates the Respondent ignored to make any payments towards the sum in the Ruling and had deliberately not made any response to her demands.

That she had been advised that the only way she could enforce the charging Order Absolute against the Respondent was by making an application in this Court for the sale of the Property charged.

That indeed the Respondent had acted unreasonably and that he had no other means of obtaining the money from them so as to enjoy the fruits of the Ruling apart from selling the property.

That the Respondent will not willingly pay the debt without the Court compelling it to do so through the power of sale and that from the Respondent's actions throughout the process it was highly unlikely that the Respondent would pay the balance which left the Deponent with no option but to seek an Order for sale from this Court.

That she had undertaken due diligence and had not found any Creditor who had entered a charge or who had registered their interests whatsoever against the licence, rights and interest that he had lawfully charged and belonged to the Respondent.

That she had shown before Court that she had sufficient grounds and reason to seek the power of sale of the charged property and that it was in the interests of justice that the reliefs sought in the Originating Summons be granted so that she could enjoy the fruits of the Court's Ruling and recover what was lawfully hers.

There was no Affidavit in Opposition filed into Court by the Respondents.

Counsel for the Applicant filed Skeleton Arguments into Court on 28th November, 2016. She submitted that this application had been made pursuant to Order 50/9A/18 and that a charging order is one of the most commonly used methods of enforcing a Judgment for recovery of money where the Judgment Debtor had no ready cash to satisfy a Judgment Debt but had some assets of value.

Further that once it was granted, it would create a security over the relevant assets of the Judgment Debtor to the extent of the amount of the Judgment debt. After this a Judgment Creditor would then be entitled to apply for an order for sale of the charged assets and so release the sale proceeds to discharge the Judgment Debt (after discharging from the sale proceeds and any pre-existing charges on the assets).

Counsel submitted further that they were aware that a Chargee was only entitled to recover what was due to them and nothing more was espoused in the case of **GILL V CONTINENTAL GAS (1)**.

Moreover, that where a party obtained a charging order the law provided that enforcement was by way of sale. In the same vein, an application for an order of sale had its commencement and procedure governed by **Order 50/9A of the Supreme Court Rules of England 1965, (White Book) 1999 Edition**.

That it provided that:

“(1) Proceedings for the enforcement of a charging order by sale of the property charged must be begun by Originating summons...

(2) The provision of Order 88 shall apply to all such proceedings.”

That in the case of **MIDLANDS BANK PLC V PIKE (2)** the Court was of the view that a person entitled to a charging order on the share of a co- owner in the proceeds of land had a proprietary interest in that share and is a

"*person interested*" who is entitled to apply for an order for sale of the land...it is under that provision that a Charging Order in such circumstances is usually enforced.

According to Counsel for the Applicant, the rule in the Midlands case seemed to be reflected in applications for sale of charged property even though the same was not land and that their understanding came from Order 88 Rule 5A which is titled "*Action for the enforcement of charging order by sale.*"

Under that Order, a Charging Order had the effect of and was enforceable in the same manner as an equitable charge created by the Debtor by writing under his hand. The order further admits that the usual manner in which a charge is enforced is by an Order of sale.

In the case before this Court, the Applicant obtained a Charging Order Absolute against the Respondent and now desires to enforce the said Charging Order. In the light of the above law, the only requirements were that the Applicant must satisfy the Court herein that she has successfully obtained a Charging Order and that the Applicant was entitled to a sum of money against the Respondent.

She submitted that this was a Charging Order which was obtained and that even after obtaining the Order and serving it on the Respondent's Advocates, it had neglected to pay the balance of US\$30,000.00 interest and costs being the sum of money ordered by the Court to be paid to the Applicant as can be seen from the Affidavit in Support of the Originating Summons filed by the Applicant.

Moreover that where the Applicant had obtained the Charging Order Absolute, the law provides that the only way to enforce it was by way of sale having established the relation of a Chargee and Chargor between the parties.

Pursuant to the law as discussed, the Applicant herein desired to enforce her rights to sale over the charged property so that she could recover what

the Court had ordered the Respondent to pay to her together with interest and costs.

It is therefore, Counsel's submission that the Applicant satisfied the requirements to apply for an order of sale of charged property and urged this Court to grant the remedies pleaded by the Applicant in her Originating Summons and the Supporting Affidavit which include among other reliefs, an Order of Sale of Miku Mine and the licence which stands charged as at 28th October, 2016.

The Respondent did not file in any Skeleton Arguments.

During the hearing on 25th January, 2017 Counsel for the Applicant, Mrs Mbao was before Court but Counsel for the Respondent did not appear before Court despite the Affidavit of Service filed into Court on 24th January, 2017 which showed that the Notice of Hearing was served on 12th January, 2017.

Counsel for the Applicant relied on the Affidavit in Support and Skeleton Arguments filed into Court on 28th November, 2017.

I have considered the affidavit evidence as well as the Skeleton Arguments filed into court by Counsel for the Applicant. There was no appearance by Counsel for the Respondent or the Respondent itself. This Court was able to proceed under Order 35 Rule 1 (2).

It is not in dispute that by the Ruling dated 20th April, 2016 the Applicant was awarded Judgment on Admission in the sum of US\$100,000.00 with interest at the Libor rate of 10% per annum from the date of the Writ to the date of Judgment.

It is also not in dispute that to date the Respondent had only paid US\$70,000.00 and had since refused to make further payment as demanded of them by the Court Ruling.

The application before Court was made under **Order 50/ 9A and Order 88 Rule 5A of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition.**

Order 50/9A provides that:

“(1) Proceedings for the enforcement of a Charging Order by sale of the property charged must be begun by Originating Summons...

(2) The provision of Order 88 shall apply to all such proceedings.”

Whilst Order 88 Rule 5A provides for *“an action for the enforcement of a Charging Order by Sale.”*

The above provisions allow an Applicant to charge the property or assets of the Debtor as one of the modes of enforcing a Judgment or order for payment of money to the Creditor.

The law further indicates that a charging order by sale is however an indirect mode of enforcement since it provides the Creditor with security in whole or part over the Debtors property.

However the Judgment Creditor cannot get any more than the Debtor could honestly give him as was stated in the case of **GILL V CONTINENTAL GAS (1)** cited by Counsel for the Applicant.

I agree with Counsel for the Applicant that having obtained a Charging Order Absolute it is now for the Applicant to show that she is now entitled to a sum of money against the Respondent.

In arriving at my decision on whether to grant the Applicant an order of Sale of charged property, I have considered the Ruling dated 20th April, 2016 in favour of the Applicant herein and the fact that the Respondent only paid US\$70,000.00 leaving a balance of US\$30,000.00.

I have also noted the Charging Order Absolute dated 28th October, 2016.

In view of this I am satisfied that an Order of sale of the charged property can be granted.

I therefore order that the Applicant has the power to sale the charged property to get the sum of US\$30,000.00 plus interest thereon at the short term deposit rate from 28th November, 2016 to the date of Judgment and thereafter at the rate determined by Bank of Zambia.

Costs awarded to the Applicant.

Delivered in Chambers at Lusaka this 23 day of October, 2017.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE