

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

(Civil Jurisdiction)

2016/HPC/0217



BETWEEN:

FRASER ASSOCIATES

(Suing as a Firm)

PLAINTIFF

AND

DATONG CONSTRUCTION LIMITED

DEFENDANT

**CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at
Lusaka on the 20th day of August, 2020.**

*For the Judgment Creditor: Mr. O. Sitimela, Ms. T. Sakala and Ms. N.
Mutambo of Fraser Associates*

*For the Judgment Debtor: Ms. M. Phiri of Messrs. Makebi Zulu
Advocates*

RULING

Cases referred to:

1. *Vancouver A & W Drive-Ins Ltd v. United Food Services Limited* (1981) 13 BLR 89.
2. *Edwards v. Picard* (1909) 2 K.B. 903 (C.A.).
3. *Re Shepherd* (1880) 43 Ch. D 131.
4. *Maclaine Watson and Co. Ltd v. International Tin Council* (1988) 3 All E.R 257.
5. *Archer v Archer* [1886] WN 66.
6. *Bullus v Bullus* (1910) 102 LT 399.
7. *Southern Cross Company Limited v. Nonc Systems Technology Limited* (2012) Vol. 3 Z.R.524.
8. *Zambia Export and Import Bank v. Mkuyu Farms Limited and Others* (1993/1994) Z.R. 36.

Legislation cited:

1. *Order 30, rule 3 of the Rules of the Supreme Court of England and Wales, 1999 Edition (White Book).*
2. *Order 30, rule 3 (3) and (4) of the White Book.*
3. *Order 30, rule 6 of the White Book.*
4. *Order 30, rule 1 of the White Book.*
5. *Order 51, rule 1 of the White Book.*
6. *Practice Note 51/1/3 of the White Book.*
7. *Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.*
8. *Practice Note 30/1/7 of the White Book.*
9. *Order 36, rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia (High Court Rules).*
10. *Order 47, rule 1 (3) of the White Book.*

Publications referred to:

1. *E.R. Edinger (1988), The Appointment of Equitable Receivers: Application of Rules of Exercise of Pure Discretion, Vol. 67, page 306.*
2. *Patrick Matibini, Zambian Civil Procedure: Commentary and Cases (LexisNexis, 2017) page 1386.*
3. *E. A. Martin (Editor), Oxford Dictionary of Law, 5th Edition (Oxford: Oxford University Press, 2002).*
4. *Halsbury's Laws of England, 5th Edition, [London: Butterworths LexisNexis, 2009], Volume 11, paragraphs 338, 1497, 1499 and 1501.*

There are three applications being considered by the Court in this ruling. The first and second applications were made at the instance of the Judgment Creditor herein. These are, an application for an order of interlocutory injunction and an application for appointment of receiver by way of equitable execution (hereinafter referred to as the “First Application” and “Second Application”), respectively.

The third application (hereinafter referred to as the “Third Application”), is an application for an order of payment of judgment sum in instalments, and was made at the instance of the Judgment Debtor.

The First Application was made pursuant to Order 30, rule 3 of the Rules of the Supreme Court of England and Wales, 1999 Edition (hereinafter referred to as the “White Book”); and was filed into court on 16th April, 2020.

In the First Application, the Judgment Creditor is craving an order that the Judgment Debtor, whether by its servants, agents or any of them or otherwise, be restrained by injunction, until the appointment of a Receiver or further Order, from assigning, charging or otherwise dealing with all of its property, or assets wheresoever found both within and outside Zambia and that the costs of the First Application be for the Judgment Creditor.

The First Application is supported by an affidavit of even date (hereinafter referred to as the “First Affidavit in Support”), sworn by one Fraser Chishimba, a Senior Partner in the firm of the Judgment Creditor, whose testimony is that he is relying on his affidavit in support of appointment of a receiver, filed into court on 9th April, 2020, and that he repeats the contents therein.

In addition, Mr. Chishimba averred that the Judgment Debtor has no real intention of performing its obligations under the judgment and that, as long as current management is in control of the assets of the Judgment Creditor, there is real risk of assets being

dissipated to avoid satisfaction of the judgment. That, the Judgment Debtor has since made an attempt to obtain a stay of execution before the Court of Appeal, pending a frivolous application to institute Third Party Proceedings to which the Judgment Creditor is not a party.

The deponent finally averred that the Judgment Debtor's current management has never shown any real intention to pay the judgment sum, and likelihood exists that it will stop at nothing to continue its efforts to frustrate the Judgment Creditor.

The First Affidavit in Support is augmented by Skeleton Arguments and a List of Authorities, also filed into court on 16th April, 2020. Referring the Court to Order 30, rule 3 (3) and (4) of the White Book, Counsel for the Judgment Creditor submitted that the effect of the said Order is that pending the hearing and determination of an application for the appointment of a receiver, an applicant may take out an application such as the First Application, where immediate protection of an injunction is sought. That, upon such application the court may grant the injunction sought *ex parte* until a receiver is appointed.

Counsel for the Judgment Creditor, further, contended that it is evident that the Judgment Creditor is on *terra firma* in its application, as demonstrated in the First Affidavit in Support. Counsel also submitted that there is a reasonable probability of the Judgment Debtor disposing of its assets to frustrate the Judgment Creditor's recovery in light of the initial execution having been

partially successful. In this regard, Counsel referred the Court to exhibit “FC2” of the Judgment Creditor’s affidavit in support of *ex parte* summons for the appointment of a receiver. In this respect, Counsel submitted that this is a proper case for the Court to grant the injunction sought as the Judgment Creditor has not only complied with the requirements of Order 30, rule 3 of the White Book, but has also demonstrated that it has sufficient interest in the Judgment Debtor’s property, having obtained successful judgments, both in this Court and the Court of Appeal.

The First Application was opposed and to this end an affidavit (hereinafter referred to as the “First Affidavit in Opposition”), was filed into court on 28th April, 2020 and the same was sworn by one Yu Wang Ping, a director in the Judgment Debtor herein. In the said affidavit, the deponent denied that the application to institute Third Party Proceedings is frivolous and that it is not for the Judgment Creditor to say whether such an application is frivolous or not, as it is for the Court to make such a finding, after hearing evidence. That, in any event, the agreement between the parties when drafting the debenture was that the fees now claimed from the Judgment Debtor were to be paid by Yangts Jiang Enterprises Limited. To support this assertion, the deponent produced exhibit “YP1”, being a copy of the said debenture.

The deponent also denied the assertion that the Judgment Debtor’s current management has never shown any real intention to pay the judgment sum, and a likelihood exists that it will stop at nothing to continue the efforts to frustrate the Judgment Creditor. In this

regard, the deponent deposed that the Judgment Creditor is being paid and that the contents of the affidavit in opposition to the summons to appoint a receiver will show the same.

The First Affidavit in Opposition is augmented by Skeleton Arguments, also filed into court on 28th April, 2020, the gist of which is that the injunction sought is unnecessary and should not be sustained as it is clear from the affidavits before court that there is nothing disclosed that warrants the grant of an injunction. Citing the learned author Patrick Matibini's Zambian Civil Procedure: Commentary and Cases, Counsel for the Judgment Debtor argued that a commentary on Order 30, rule 6 of the White Book, mentions what it entails to proceed under the said Order. That, injunctive relief under the said Order must satisfy certain requirements.

In reply, the Judgment Creditor filed into court an affidavit (hereinafter referred to as the "First Affidavit in Reply"), also sworn by Fraser Chishimba, a Senior Partner in the firm of the Judgment Creditor. It was his testimony that the Judgment Debtor has only made part payment of the judgment sum while making numerous proposals for assignment of receivables, which have not materialised.

The deponent further reiterated that the Judgment Debtor's application to institute Third Party Proceedings is frivolous on the face of it and an afterthought as the Judgment Debtor has only taken steps to issue the said Third Party Notice almost two years after leave to do so was granted by this Court.

As regards the Judgment Debtor's assertion that the agreement between the parties when drafting the debenture was that the fees now claimed from the Judgment Debtor were to be paid by Yangts Jiang Enterprises Limited, the deponent averred that the said issues being raised have been already adjudicated upon conclusively by both this Court and the Court of Appeal and as such, cannot be the subject of further argument or be re-opened in the manner being attempted by the Judgment Debtor.

The deponent further testified that the Judgment Debtor has only made a small effort towards paying the debt, but has failed to make a firm provision to ensure that the judgment sum is settled in full. That, the seizure by the Sheriff's Office shows that the Judgment Debtor does not have sufficient asset base with which to liquidate the judgment sum.

Finally, the deponent averred that in the absence of an interim injunction preventing the Judgment Debtor from disposing off of its assets pending appointment of a Receiver, it will proceed to dispose of the same.

At the hearing of the First Application, Counsel for the Judgment Creditor briefly augmented their arguments that the record will show that the Judgment Creditor has attempted to levy execution on the Judgment Debtor, but such execution has proved futile as the Judgment Debtor is either, deliberately hidden its assets or is attempting or is in the process of disposing of the same. That, while all this is going on, the Court has not yet appointed a Receiver to

ensure that the Judgment Creditor will be able to realise the fruits of its judgment dated 13th March, 2020. Counsel thus, submitted that given the circumstances and in the interest of justice, it is fit for this Court to grant the injunction sought as it is more probable than not that the Judgment Debtor would dispose of the assets, in view of its reluctance in discharging its obligations under the judgment of the Court of Appeal.

With this, Counsel for the Judgment Creditor prayed for costs as regards the First Application.

In opposition, Counsel for the Judgment Debtor, briefly augmented their arguments that the Judgment Creditor has not disclosed anything that would warrant an order of interim injunction and has not brought any evidence before this Court to show that the Judgment Debtor has deliberately hidden assets or intends to dispose of the same. That, by affidavit evidence, the Judgment Debtor is committed to liquidating the judgment sum. With this, Counsel for the Judgment Debtor prayed that this Court discharges the interim injunction that was granted to the Judgment Creditor and that costs of the First Application be for the Judgment Debtor.

In reply, Counsel for the Judgment Creditor, submitted, particularly with respect to the Judgment Debtor's Counsel's submission that the Judgment Debtor's Affidavit in Opposition to the First Application discloses that the Judgment Debtor is committed to settling the judgment sum, that a perusal of the said affidavit shows no such commitment as no proof of payment of the said

judgment sum has been exhibited. That the said affidavit, at best, only exhibits a document which allegedly transfers liability to a third party, which this Court ought not to have regard for, as this was already determined by this Court and the Court of Appeal.

Counsel for the Judgment Creditor had indicated, at the hearing, that the First Application was made, pending determination of the Second Application herein. While the order of business at the hearing was such that the Third Application was heard immediately after the First Application, I will first address the First and Second Applications, as they are interdependent, and then I will proceed to address the Third Application herein.

I should also hasten to state that by consent of the parties, indicated at the hearing of the Applications herein, the Second Application was not going to be heard orally and the Court was to proceed to deliver its ruling based on the documents filed by the parties. As the First Application herein, has been indicated to be pending the determination of the Second Application, it is only imperative for me to begin by determining the Second Application, as the success or failure of the First Application heavily depends on the success or failure of the Second application.

The Second Application herein, was filed into court on 9th April, 2020 and was made pursuant to Order 30, rule 1 of the White Book, and in the said summons, the Judgment Creditor craves an order that a Receiver be appointed over the entire undertaking of the Judgment Debtor and that the day to day management of the

Judgment Debtor, including the Board of Directors, do vest in the said Receiver until the Judgment Creditor's interest is satisfied, or on good cause shown, further order.

The Second Application is supported by an affidavit (hereinafter referred to as the "Second Affidavit in Support"), also sworn by one Fraser Chishimba, the Senior Partner in the firm of the Judgment Creditor, and also filed into court on 9th April, 2020.

It was the deponent's testimony that the Judgment Creditor has recovered judgment against the Judgment Debtor, both in this Court and in the Court of Appeal. That, following the said judgment, the sum due stands at US\$236,571.30 and US\$110,598.70 in accrued interest, bringing the total to US\$347,170.00. To support this assertion, the deponent produced exhibit "FC1", being a copy of the statement of account.

It was also averred by the deponent that execution has been levied against the Judgment Debtor and to this end, the deponent produced exhibit "FC2", being the Sheriff's interim report on walking possession. That, going by the sum involved, it is highly unlikely that the assets seized will satisfy the judgment sum.

The deponent finally deposed that it remains hazy as to what means the Judgment Debtor has at its disposal to pay the judgment sum and a Receiver, duly appointed by this Court will give a clearer picture. That, there is a likelihood that the assets of the Judgment Debtor could be dissipated by the directors of the Judgment Debtor,

who have remained quiet without any proposal as to how they intend to pay the judgment sums.

There was also an Affidavit of Fitness and Consent to act as Receiver (hereinafter referred to as the "Affidavit of Fitness") accompanying the Second Application, sworn by one Watson Lumba, a Chartered Accountant practicing under the name and style of Silwal Associates. The deponent produced exhibits "WL1" and "WL2", as proof of his credentials.

Watson Lumba deposed that the Judgment Creditor has proposed to appoint him as Receiver in this action and that he gives his consent to act, verily believing that he is qualified with sufficient work experience and practice to serve as a Receiver, once appointed. He further deposed that he has no reason to believe that he has any interest in the matters in this action.

The Second Affidavit in Support was augmented by a List of Authorities and Skeleton Arguments of even date. Counsel for the Judgment Creditor contended that there are various interests in property to which a judgment debtor may be entitled, yet which cannot be taken in execution under any of the processes specified in our court rules. That, such interests may generally be reached by the appointment of a receiver, supplemented, if necessary, by an injunction restraining the judgment debtor from dealing with the property.

It was further contended by Counsel for the Judgment Creditor that the appointment of a receiver of the interest of a judgment debtor in

real estate, though sometimes termed “equitable execution”, is not a mere form of execution, but it is relief producing the same benefit as execution properly so called, but obtainable only by means of an order of the Court in that behalf, based on the fact that execution so called cannot be had. In this regard, counsel argued that equitable execution is not like legal execution, it is equitable relief, which the court gives because execution at law cannot be fully utilised.

Citing Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia, Counsel for the Judgment Creditor submitted that this Court is uniquely gifted to administer law and equity concurrently. Further, that the general procedure governing applications for appointment of a receiver by way of equitable execution is the same as that for appointment of receivers generally and that this is governed by Order 30 of the White Book. In this regard, Counsel cited Order 30, rules 1, 2, 3 and 4 of the White Book.

Citing Practice Note 30/1/7 of the White Book, Counsel for the Judgment Creditor submitted that the evidence in support of an application of this nature should state generally the nature of the interest that is sought to have a receiver appointed for and should also include an affidavit of fitness where the appointment of a named person is sought. That, if the court is then satisfied with the evidence so adduced in support of the application, an order should ordinarily issue therefrom, though the court has the jurisdiction to make further interlocutory orders with respect to the operations of the receiver so appointed.

Counsel for the Judgment Creditor submitted finally, that in the instant case, and having regard to the Second Affidavit in Support as well as the affidavit as regards the fitness of one, Watson Lumba, the Second Application herein is meritorious, as legal execution is impracticable and as such, the Judgment Creditor will only enjoy the fruits of its judgment if the Second Application is granted.

The Second Application is opposed and to this end, an affidavit (hereinafter referred to as the "Second Affidavit in Opposition"), was filed into court on 28th April, 2020 and the same was sworn by one Yu Wang Ping, one of the directors in the Judgment Debtor Company.

It was the testimony of the deponent that the Judgment Creditor's position that the Judgment Debtor has failed to settle the judgment sum, is not true. Further, that is not true that the judgment sum stands at US\$347,170.00.

The deponent averred that soon after the judgment of the Court of Appeal, discussions were instituted on the settling of the judgment sum and that the Judgment Creditor and Judgment Debtor agreed that the sum of US\$50,000.00 was to be paid and a debt was to be assigned to the Judgment Creditor. To support this assertion, the deponent produced exhibit "YP1", being a copy of the certificate of payment to be assigned to the Judgment Creditor.

The deponent further averred that after the discussion, a proposal was made to have a consent order in place. As proof of this assertion, the deponent produced exhibit "YP2", being a copy of a

letter that was sent to the Judgment Creditor following the discussions. That, following the letter, there was a response from the Judgment Creditor, u-turning on the agreed position. To buttress this assertion, the deponent produced exhibit "YP3", being a copy of the said letter.

It was deposed by the deponent that there was then a standoff as the Judgment Debtor insisted on the consent order to be executed in that regard. As proof of this assertion, the deponent pointed the Court to exhibit "YP4".

It was also deposed by the deponent that after the discussion, a meeting was convened between Mr. Chishimba and Mr. Zimba, in the presence of the Bailiff and a discussion was had, where it was agreed that the sum of US\$50,000.00 cash be paid and the same was paid, and that the certificate for payment also be left and an entity to discount the said invoice be found. To support this averment, the deponent produced exhibit "YP5", being a copy of the letter speaking to the said meeting.

The deponent testified that to the best of his knowledge, adequate effort has been made to settle the judgment sum and adequate resources have been dedicated to the said settlement, save for the Judgment Creditor's refusal to take the same.

It was the deponent's testimony that he had been advised by his advocates that under the circumstances, it would not be just to appoint a receiver as the judgment sum would be collected by the Judgment Creditor without a receiver. Further, that the source of

the information to the effect that the Judgment Debtor has no intention to pay, has not been disclosed.

The Second Affidavit in Opposition is augmented by a List of Authorities and Skeleton Arguments of even date, and it was contended by Counsel for the Judgment Debtor that in matters relating to appointment of a receiver by way of equitable execution, there are rules set out at law that ought to be followed. Referring the Court to a journal article authored by one E.R. Edinger on appointment of equitable receivers, Counsel thus, submitted that it must be shown that the property in issue is exigible. That, the first rule applicable in an application of this nature is the most crucial and it is such that failure to show the court that the property is exigible is ground to stop the application in *limine*.

Counsel contended that the Judgment Creditor has been paid US\$50,000.00 in cash and a certificate from the Ministry of Education with a value of K4,940,153.39, which is due for payment has been given to the Judgment Creditor and that the latter amount is well in excess of what is owed to the Judgment Creditor. That, all this was done in good faith and in a bid to resolve this matter.

Citing the case of *Vancouver A & W Drive-Ins Ltd v. United Food Services Limited*¹, Counsel submitted that there has been no full utilisation of all the avenues available at law and that, in fact, there is a certificate that has been offered for the debt plus an amount of US\$50,000.00 paid against the debt. Further, citing Patrick Matibini's Zambian Civil Procedure: Commentary and Cases (2017),

Counsel contended that when deciding whether or not to appoint a receiver, the court will decide whether it is just or convenient that the appointment should be made. In this regard, counsel submitted that the circumstances in *casu* are such that the Judgment Debtor has indicated to the Judgment Creditor through their application before court, that third party proceedings have been instituted against a third party that owes them money which money ought to be paid to the Judgment Creditor once collected.

Counsel for the Judgment Debtor also submitted that a receiver is appointed to collect income and, in this case, there is already income that has been set aside for the Judgment Creditor. To fortify this, Counsel relied on the case of *Edwards v. Picard*². It was thus, Counsel's final submission that if a receiver, in *casu*, is appointed, this Court would be departing from doing a just or convenient thing. Counsel prayed that the Court should not appoint a receiver and further, should discharge the injunction.

The Judgment Creditor replied to the affidavit in opposition and to this end, Counsel for the Judgment Creditor filed into court, on 5th May, 2020, an affidavit (hereinafter referred to as the "Second Affidavit in Reply"), also sworn by one Fraser Chishimba, the Senior Partner in the Judgment Creditor firm.

The deponent deposed that contrary to the Judgment Debtor's position, the Judgment Debtor has failed to settle the judgment sum, despite being aware of the same and has not adduced proof that the sum has been settled.

Responding to the Judgment Debtor's assertion that is not true that the judgment sum stands at US\$347,170.00, the deponent averred that the judgment sum was arrived at taking into account interest as awarded by this Court and as confirmed by the Court of Appeal.

The deponent confirmed that indeed the Judgment Debtor through its advocates approached the Judgment Creditor with a view to liquidate the judgment sum, but the discussions proved to be futile as payment of the judgment sum was not made in full. Further, that the Judgment Creditor did not agree to any assignment of debts from a third party to itself and this is confirmed by the letter exhibited as "YP5" in the Second Affidavit in Opposition.

It was also the deponent's testimony that there is, and there was, no consent judgment for settlement of the judgment sum, as the Judgment Creditor did not, and has not, agreed to the proposal as suggested therein, and further, the same was a mere proposal which the Judgment Creditor was at liberty to either agree to or reject and the Judgment Debtor cannot force the Judgment Creditor to accept its terms.

The deponent further averred that the Judgment Debtor made a surprise visit at the deponent's residence on a Saturday afternoon, with a purported cash payment towards the judgment sum and a photocopy of an unverified contractor's payment certificate from the Ministry of Education. That, despite the cash advance, there has never been agreement as to how the balance is to be paid and the Judgment Debtor has not made any effort whatsoever, to follow

procedures on how a state debt is to be assigned or contracted out to a third party, as there are other ramifications on matters relating to the state treasury. That, not even the Attorney General has been engaged to this effect, to the best of the deponent's knowledge.

The deponent finally deposed that the Judgment Debtor has not made any efforts to ensure that the judgment sum is settled in full and that he has been advised by the Judgment Creditor's advocates that this is a proper case for the appointment of a receiver, as it is evident that the Judgment Debtor does not intend on making good its liability unless compelled do so by this Court through the Second Application.

The Second Affidavit in Reply is augmented by Skeleton Arguments, filed into court on 5th May, 2020, in which it was contended that, indeed there are requirements that ought to be met before a receiver can be appointed by way of equitable execution, as aptly put by the Judgment Debtor and that the record will show that there is a judgment in favour of the Judgment Creditor which has yet to be satisfied.

Citing Order 51, rule 1, as read with Order 30 of the White Book, Counsel for the Judgment Creditor submitted that a party need not exhaust all other avenues of execution before using the means being sought by the Judgment Creditor herein. That, in any case a party is at will to use the most appropriate means available at law, taking into account, the facts of their particular case. In this regard, Counsel contended that the Judgment Debtor is not on *terra firma*

in alleging that the Judgment Creditor ought first to resort to other means of execution before proceeding to seek enforcement by way of having a receiver appointed.

Counsel for the Creditor, further contended that Practice Note 51/1/3 of the White Book defines and explains the rationale behind this remedy; that there are various interests in property to which a Judgment Debtor may be entitled, yet which cannot be taken in execution under any of the processes specified under any execution rules or execution proper, and such interests may be reached by the appointment of a receiver. In this respect, Counsel submitted that as the Judgment Debtor is a corporate body, the said judgment can only be satisfied from its property.

Citing paragraph 330 of Volume 7 of the Halsbury's Laws of England (5th Edition), Counsel for the Judgment Creditor submitted that the general ground on which the court appoints a receiver is ultimately in every case the protection and preservation of property for the benefit of persons with an interest in it. With this, Counsel further, submitted that it has been demonstrated that the Judgment Creditor has an interest in the property of the Judgment Debtor, which interest lies in having the said property used to discharge the judgment sum.

Counsel for the Judgment Creditor also submitted that equitable execution is not a mere form of execution, but it is a relief producing the same benefit as execution properly so called, but obtainable only by means of an order of the court in that behalf,

based on the facts that execution so called cannot be had. That, it is not execution, but a substitute for execution. For this argument, Counsel relied on the case of *Re Shepherd*. In this regard, Counsel stated that the record shows that execution has been attempted, but the same has proved futile as the Judgment Debtor appears not to have any property worth seizing. Counsel thus, invited the Court to consider exhibit "FC2" in the Second Affidavit in Support. That, in the absence of any tangible property, it follows that the judgment sum can only be fully recovered from other interests that the Judgment Debtor is entitled to once placed in the hands of a receiver.

Citing the case of *Maclaine Watson and Co. Ltd v. International Tin Council*⁴, Counsel for the Judgment Creditor submitted that enforcement of judgment by way of appointment of a receiver as means of equitable execution is a means of overcoming a hindrance faced in the normal means of execution. That, in *casu*, the hindrance that has been faced in enforcement of the judgment is the Judgment Debtor's inability to settle the judgment sum in the normal course.

Counsel indicated that the Judgment Creditor is not disputing the allegation that part payment has been made, but that what is in issue is the satisfaction of the judgment sum in full. That, while making undertakings to settle the same in full, the Judgment Debtor has not taken any steps in addition to part payment, to ensure that the same is paid, but is merely seeking to escape liability by purporting to transfer the same to its alleged debtor, the

Ministry of Education, which is not a party to these proceedings. Further, that even the purported proposed assignment of receivables will not absolve the Judgment Debtor from liability and will still leave it indebted to the Judgment Creditor.

Finally, Counsel for the Judgment Creditor submitted that all the relevant requirements as set out in Order 51, rule 1 and Order 30 of the White Book have been met. That, the said rules provide for the test that the court should follow in determining whether it is just or convenient to appoint a receiver by way of equitable execution. In this regard, Counsel contended that owing to the circumstances of the matter herein, it is just and convenient to grant the Second Application as it is evident from the affidavits on the record that the Judgment Debtor does not intend on settling the judgment sum until compelled do so by this Court. That, the third-party proceedings which have been instituted by the Judgment Debtor are an afterthought and involve a third party which was not and is not a party to these proceedings, and thus, the Judgment Creditor's rights under the judgment ought not to be affected by any such third party proceedings.

I have carefully considered the parties' affidavits and arguments in support of their respective positions as regards the Second Application, and I am indebted to Counsel for the legal resource provided. In a nutshell, the Judgment Creditor is seeking an order appointing a receiver of the Judgment Debtor as the firm alleges that the conduct of the Judgment Debtor, thus far, is such that it has shown no intentions of settling the judgment sum owed to the

Judgment Creditor and it does not have sufficient seizable assets. In the process, therefore, the Judgment Creditor is seeking an injunction restraining the Judgment Debtor from assigning, charging or otherwise dealing with all of its property, or assets wheresoever found both within and outside Zambia, until the appointment of a receiver or further order of court.

From the above, it appears to me that the issue for determination under the Second Application is whether this is an appropriate case in which an order of appointment of a receiver by way of equitable execution over the Judgment Debtor, may be granted.

The Judgment Creditor has relied on Order 30, rule 1 of the White Book, in making the Second application and the said Order provides as follows:

"1) An application for the appointment of a receiver may be made by summons or motion.

(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.

(3) Where the applicant wishes to apply for the immediate grant of such an injunction, he may do so ex parte on affidavit.

(4) The Court hearing an application under paragraph (3) may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons returnable on such date as the Court may direct, to be issued."

The Judgment Creditor has contended that they are making the Second Application because they once effected execution through seizure by the Sheriff's Office, which revealed that the Judgment Debtor does not have sufficient asset base with which to liquidate the judgment sum. That, in the premises, they seek the appointment of a receiver to take over the entire undertaking of the Judgment Debtor and that the day to day management of the Judgment Debtor, including the board of directors, should vest in the said receiver until the Judgment Creditor's interest is satisfied.

I have perused exhibit "FC2" in the Second Affidavit in Support and I am satisfied that execution through seizure of movable goods was levied.

It has, further, been alleged by the Judgment Creditor that after their attempt at execution, the assets that were seized were not sufficient to cover the total judgment sum the Judgment Debtor owes to the Judgment Creditor. This allegation has not been rebutted by the Judgment Debtor.

In rebuttal to the Judgment Creditor's general contention, the Judgment Debtor has argued that the Second Application is not sustainable because the Judgment Creditor has not exhausted all other avenues of execution before resorting to appointment of a receiver by way of equitable execution. In reply to this, Counsel for the Judgment Creditor has argued that a reading of Order 30 together with Order 51, rule 1 of the White Book reveals that a party need not exhaust all other avenues of execution before using the means being sought by the Judgment Creditor herein.

Oxford Dictionary of Law defines equitable execution as:

“Means of enforcing the judgment of a court when the judgment creditor cannot obtain satisfaction from the normal methods of execution. For example, the creditor may appoint a receiver to manage the defendant's property or he may obtain an injunction to prevent the defendant from dealing with the property. These remedies are often regarded as relief granted by the court, rather than as execution.”

The learned authors of Halsbury's laws of England give a clear background to equitable execution in paragraph 1497, as follows:

“Equitable execution originated in the old practice of the Court of Chancery to assist in enforcing a judgment for the recovery of money of a court of ordinary jurisdiction by entertaining an application for the appointment of a receiver of such of the interests in the judgment debtor's property as could not, owing to their nature, be taken under a common law writ of execution.”

Further, Practice Note 51/1/3 of the White Book provides an elaborate explanation of the nature of appointments of receivers by way of equitable execution, as follows:

“There are various interests in property to which a judgment debtor may be entitled, yet which cannot be taken in execution under any of the processes specified in these rules. Such interests may generally be reached by the appointment of a receiver; supplemented, if necessary, by an injunction restraining the judgment debtor from dealing with the property...”

“Equitable execution is a process which the Court allows for the purpose of enabling a judgment creditor to obtain payment of his debt, when the position of the real estate is such that ordinary execution will not reach it”...

The appointment of a receiver of the interest of a judgment debtor in real estate, though sometimes termed "equitable execution," is not a mere form of execution, but it is relief producing the same

benefit as execution properly so called, but obtainable only by means of an order of the Court in that behalf, based on the fact that execution so called cannot be had...; "Equitable execution is not like legal execution: it is equitable relief, which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution"... though it has been held to come within the term "execution by process of law"...

A receiver ought not to be appointed where there are no impediments to legal execution, and no special circumstances making the appointment "just or convenient"..., nor where it is shown that there is property which can be taken in legal execution...; It is "just and convenient" to enforce a plaintiff's judgment by giving him equitable execution where he cannot get legal execution... And so, where impediments exist to ordinary execution, as e.g. where the judgment debtor is out of the jurisdiction, and the judgment creditor is unable to take the necessary steps to found garnishee proceedings...; but not where legal execution is only impeded by a mixture of chattels with those of other persons... The Court has no jurisdiction to appoint a receiver merely because under the circumstances of the case it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution..." (Emphasis supplied by the Court)

Reading the definition of equitable execution together with the nature of the same, it appears to me that there is nowhere in the law suggesting that the remedy of appointing a receiver by way of equitable execution can only be resorted to after all avenues of execution proper have been exhausted. As a matter of fact, the learned authors of Halsbury's Laws of England categorically state as follows, under paragraph 1499:

"The former practice was that equitable execution would only issue where there was no remedy by execution at law or such remedy was likely to be ineffective. There therefore had to be

some impediment to the issue of execution in the ordinary course of law, whether by writ of fieri facias or warrant of execution, or by means of a third party debt order or charging order; but, subject to this, the remedy was available in the case of a judgment or order for the payment of a sum of money, or, in lieu of sequestration, to enforce an order for payment of money into court, and was not necessarily confined to the equitable interests of the judgment debtor. In a proper case the court might appoint a receiver even though the legal remedy against the judgment debtor's legal property had not been exhausted, but as a general rule a receiver would not be appointed if a method of legal execution was available.

A receiver may now be appointed in all cases in which it appears to the court to be just and convenient to do so. (Emphasis the Court's)

It seems that what would qualify an appointment of a receiver by way of equitable execution is not that all means of execution proper have been exhausted, but that it appears just and convenient to the court that it should order such appointment. In this regard, the learned authors of Halsbury's Laws of England state as follows, in paragraph 1501:

"The High Court or a county court may by order appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

I have also perused exhibits "YP1" to "YP5", in the Second Affidavit in Opposition and my deduction from the same is that the Judgment Debtor made an offer to settle the judgment sum to the Judgment Creditor by making an initial deposit of US\$50,000.00, which would then be followed by the parties executing a consent

order to cover the remaining balance plus costs to be paid by way of an assignment of monies to the Judgment Debtor by the Ministry of Education. From the correspondence, the Judgment Creditor did not agree to these terms and no consent order has been exhibited as proof of any agreement. The Judgment Creditor did, however, receive and acknowledge receipt of the sum of US\$50,000.00 as part payment of the judgment sum.

In my view, therefore, the facts in *casu* are such that there is an impediment to legal execution as the Judgment Creditor has attempted to levy execution against the Judgment Debtor, which said execution did not sufficiently cover the entire judgment sum, and which fact has not been denied by the Judgment Debtor. Thus, there is simply no more property that can be taken in legal execution, while the Judgment Debtor still remains indebted to the Judgment Creditor. This, in my view, creates special circumstances making the appointment of a receiver by way of equitable execution, just and convenient.

For the aforesaid reasons, the Second Application herein succeeds as prayed in the Summons.

I had indicated earlier that the success or failure of the First Application was dependent on the success or failure of the Second application.

Citing the cases of *Archer v Archer*⁶ and *Bullus v Bullus*⁷, both in which an injunction was granted to restrain payment of a legacy to a husband, the learned authors of Halsbury's Laws of England

state, in paragraph 338, that an injunction may be granted in aid of or in lieu of equitable execution.

Thus, proceeding on the strength of the two cases above and Order 30 of the White Book, it follows that the First Application herein, also succeeds and the *ex parte* order of injunction granted on 17th April, 2020 is hereby confirmed.

I now move on to the Third Application.

The Third Application was made pursuant to Order 36, rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia (hereinafter referred to as the “High Court Rules”), and was filed into court on 26th May, 2020. The Third Application was accompanied by an affidavit (hereinafter referred to as the “Affidavit of Means”), sworn by one Yu Wang Ping, a director in the Judgment Debtor Company. It was his testimony that the Judgment Debtor has so far paid a deposit of US\$66,181.23 to the Judgment Creditor and as proof of this assertion, the deponent produced exhibit “YWP1”, being copies of the receipts from the Judgment Creditor confirming receipt of the said sums.

It was the deponent’s further testimony that owing to the financial constraints ascribed to COVID-19 and the delay by the Government of Zambia and other debtors to settle their debts due to the Judgment Debtor herein, the Judgment Debtor desired to pay the balance of the judgment sum payable to the Judgment Creditor herein, in instalments. To support this assertion, the deponent produced exhibit “YWP2”, being a copy of payment certificate

exhibiting the money owed by the Government of Zambia to the Judgment Debtor.

It was also the deponent's testimony that he believes that the Judgment Debtor makes approximately K500,000.00 per month before wages and other day to day running expenses of the company are paid, which amounts to a net of approximately K300,000.00, and as such, is unable to liquidated the judgment sum in a lump sum. To fortify this assertion, the deponent produced exhibit "YWP3", being a copy of a Bank Statement. That, the Judgment Debtor is able to pay monthly instalments of US\$10,000.00 beginning 30th June, 2020, until the balance of the judgment sum and costs payable to the Judgment Creditor are settled.

The Affidavit of Means is augmented by Skeleton Arguments, also filed into court on 26th May, 2020, the gist of which is that the Judgment Debtor has demonstrated sufficient reasons to be awarded an order for payment of the balance of the judgment sum in monthly instalments and bring this matter to finality.

Referring to the case of *Southern Cross Company Limited v. Nonc Systems Technology Limited*⁸ and Order 36, rule 9 of the High Court Rules, Counsel for the Judgment Debtor submitted that the said provision is instructive on the requirement that an applicant ought to demonstrate some sufficient reasons in applying for a stay. Further, citing the case of *Zambia Export and Import Bank v. Mkuuyu Farms Limited and Others*⁹, Counsel submitted that a court may

order a judgment debt to be satisfied by instalments upon sufficient cause being shown by the judgment debtor.

The Third Application is opposed, and to that end, the Judgment Creditor filed into court an Affidavit in Opposition to Affidavit of Means (hereinafter referred to as the "Third Affidavit in Opposition"), sworn by one Oga Sitimela, a Partner in the firm of the Judgment Creditor, and filed into court on 23rd June, 2020.

The deponent deposed that while the Judgment Debtor has stated that it has more debtors, other than the Government of the Republic of Zambia, it has not disclosed who the said other debtors are and how much they owe the Judgment Debtor.

The deponent has further averred that the bank statement exhibited in the Affidavit of Means is not a proper financial document to show the financial position of the Judgment Debtor as required. That, the Judgment Debtor, at the very least, ought to have produced an income statement. In addition, the deponent deposed that the Judgment Debtor has not tabulated how the alleged K300,000.00 on wages and other day to day running expenses has been determined.

It was the deponent's testimony that the Judgment Debtor has not adduced sufficient evidence upon which this Court could assess the proposed US\$10,000.00 monthly instalment. That, in addition, the costs herein have neither been agreed nor taxed, therefore, the Third Application cannot be extended to costs.

The Second Affidavit in Opposition is augmented by Skeleton Arguments, also filed into court on 23rd June, 2020, the gist of which is that the Judgment Debtor has failed to demonstrate sufficient reason why the judgment sum should be paid in instalments. That, this is so because in order for an order to liquidate a judgment sum in instalments to be made the following *must* be produced:

- (i) Details of all the debtors owing the judgment debtor. That, in this regard, the Judgment Debtor has only produced details of one debtor;
- (ii) The judgment debtor must produce details of its liabilities. That, in this regard, the Judgment Debtor has not produced any such documentation except a bank statement which is not a sufficient document to demonstrate the Judgment Debtor's position in terms of liabilities and financial standing in general; and
- (iii) The judgment debtor must produce details of all its assets, which in the case at hand, the Judgment Debtor has failed to do so.

Also citing Order 36, rule 9 of the High Court Rules and the case of *Zambia Export and Import Bank v. Mkuyu Farms Limited and Others*⁹, Counsel for the Judgment Creditor submitted that it is trite that before an order for payment in instalments may be made, there is need to show sufficient reason why the court should make an

order which has the effect of delaying the judgment creditor's enjoyment of the fruits of its judgment.

Further, citing Order 47, rule 1 (3) of the White Book, Counsel for the Judgment Creditor submitted that there is need for the judgment debtor to disclose its income, the nature and value of all properties it owns, and the amount of any liabilities. In a similar vein, Counsel also cited the case of *Southern Cross Company Limited v. Nonc Systems Technology Limited*⁸. It was contended that the burden placed on a judgment debtor is not limited to revealing names of some of the debtors, but to produce before court all details of the other debtors, including the amounts owed to the judgment debtor, the particulars of the debt and the terms upon which the debts will be furnished.

Further, Counsel submitted that the law also places a burden on the judgment debtor to furnish the court with details of its liabilities and other expenses, and not merely producing a bank statement.

Counsel for the Judgment Creditor, further, prayed that if this Court will be of the view that the Judgment Debtor has satisfied the requirements under Order 36, rule 9 of the High Court Rules, the Court should adjust the proposed monetary payment of US\$10,000.00, upwards. That, this is because the proposed US\$10,000.00 per month will entail that the Judgment Debtor will only be able to liquidate the judgment debt over a period of 25 months plus, and yet the services upon which the debt arose were rendered in 2015 and 2016.

Counsel for the Judgment Creditor argued that to allow the US\$10,000.00 monthly instalments would mean that not only has the Judgment Creditor had to wait for four and a half years to get to the current position, but will have to wait another two years to receive full settlement of the judgment sum. That, this would be an imbalance tilting in favour of the Judgment Debtor, thereby causing prejudice to the Judgment Creditor.

In the premises, Counsel for the Judgment Creditor prayed that the Court dismisses the Third Application, with costs to the Judgment Creditor.

I have carefully considered the parties' affidavits and Skeleton Arguments in support of and in opposition to the Third Application herein. I am indebted to Counsel for the authorities cited.

A perusal of the record reveals that the Judgment Debtor is not disputing the judgment debt owed to the Judgment Creditor. Therefore, what remains is for the Judgment Debtor to liquidate the said judgment debt, which debt the Judgment Debtor seeks to settle in instalments. It is also not in dispute that the Judgment Debtor has paid about US\$66,181.23 towards the liquidation of the judgment sum, and as at the time of delivering the Ruling herein, a further K183,036.00 was paid into court on 2nd July, 2020 and another K180,180.00 on 12th August, 2020, also in pursuance of liquidating the judgment sum.

The issue for determination under this application is whether the Judgment Debtor has advanced cogent reasons to justify a grant of

an order to liquidate the judgment sum owed to the Judgment Creditor in instalments.

Order 36, rule 9 of the High Court Rules, the Order pursuant to which the Third Application herein has been made, provides as follows:

“Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance.”

The pronouncement of the Supreme Court, over the requirements in applications for payment in instalments, in the case of *Zambia Export and Import Bank Limited v. Mkuyu Farms Limited and Others*⁹, cited by both parties herein, cannot be over emphasised. The Supreme Court in the said case had the following to say:

“In the event that we found for the appellant, Mr. Shamwana asked for fourteen (14) days within which the respondents would have to apply to Court for a fresh order of payment by instalments. This would involve examination on oath of the respondents as to their means or liability to liquidate the debt in one lump payment.” (Emphasis supplied).

This clearly entails that there should be facts and evidence presented by an applicant, sufficient enough to stir a court to

exercise its discretion in favour of such applicant; and this would involve examination on oath of the applicant as to their means or inability to liquidate the debt in one lump payment.

Sufficient grounds must precede an order to settle a judgment debt in instalments and this requires evidence to be adduced such as the applicant's income, nature and value of his property, as well as details of the indebtedness to other persons other than the judgment creditor. This is fortified by Order 47, rule 1 (3) of the White Book.

In an ideal situation, therefore, the Judgment Debtor would have to provide the Court with full and comprehensive financial statements. This would typically include a comprehensive list of assets and liabilities, with documentary proof, as far as possible for the Court to determine the Judgment Debtor's financial position.

Counsel for the Judgment Debtor submitted that a perusal of the Affidavit of Means shows that the Judgment Debtor makes approximately K500,000.00 per month before wages and other expenses are paid for, and referring the Court to exhibit "YWP3", Counsel submitted that she believed that the Judgment Debtor has disclosed sufficient cause to warrant the grant of an order to pay the judgment sum in instalments.

Having perused exhibit "YWP3" in the Affidavit of Means, I find that the Judgment Debtor has failed to show this Court its assets and liabilities for purposes of assisting the Court in making a determination on whether to grant the Third Application or not. The

said exhibit "YWP3" is simply a bank statement narrated from the perspective of the bank regarding an account held by the Judgment Debtor at that bank. A more accurate and true reflection of the Judgment Debtor's financial standing would, in my view, be given by an income and liability statement generated from the books of accounts of the Judgment Debtor. Thus, the Judgment Debtor ought to have produced more than just exhibit "YWP3" in order for it to satisfy this Court that the order sought is warranted.

I do take note that the Judgment Debtor has made efforts to make partial payments towards the judgment sum, by directly advancing sum funds to the Judgment Creditor as well as making payments into Court. While this is commendable, the Judgment Debtor still has not demonstrated to this Court that it is unable to liquidate the judgment sum in a lump sum. Therefore, I see no basis upon which I can proceed to even grant its proposed monthly instalment payments of US\$10,000.00. The said proposal is simply unsubstantiated. Further, the proposed instalments will only stretch the waiting period for the Judgment Creditor to enjoy the fruits of its judgment and will defeat the principle that an order for instalment payments must be on reasonable terms and not at the comfort of any of the parties.

It is trite that litigation must come to an end and that successful parties must enjoy the fruits of their judgment and only good and sufficient cause should break this norm. Therefore, to grant the Judgment Debtor's Third Application as prayed, would in my view,

be prejudicial to the Judgment Creditor whose fruits of the Judgment have already been delayed enough.

Also, contrary to the Judgment Debtor's assertion that it has other debtors owing it sums of money, it has not provided any evidence to support this assertion.

In view of the foregoing, the Third Application fails and is accordingly dismissed.

Costs of and incidental to the First, Second and Third Applications herein are awarded to the Judgment Creditor, to be agreed or taxed in default thereof.

Leave to appeal is denied.

Dated at Lusaka the 20th day of August, 2020.



W.S. MWENDA (DR)
JUDGE