



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

2016/HPC/0218

(Civil Jurisdiction)

BETWEEN:

C & B ENTERPRISES LIMITED

PLAINTIFF

AND

LIEGE ZAMBIA LIMITED

DEFENDANT

**Before: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at
Lusaka the 16th day of March, 2020.**

For the Plaintiff: Ms. C. Chimanse of Messrs. Isaac and Partners

*For the Defendant: Ms. I. Nambule of Messrs. Howard and Marietta Legal
Practitioners*

RULING

Cases cited:

- 1) *Becker v. Noel (Practice Note) (1971) 1 W.L.R. 803.*
- 2) *Bloomfield v. Serenyi (1945) 2 All E.R. 646 (CA).*

Legislation cited:

- 1) *Order 32, rule 6 of the Rules of the Supreme Court of England and Wales, 1999 Edition ("the White Book").*
- 2) *Order 49 of the White Book.*
- 3) *Explanatory Notes in Order 32/6/30 of the White Book.*

This is the Defendant's application for an order to discharge a Garnishee Order Nisi granted *ex parte* on 30th December, 2019.

The application is by way of Summons with supporting Affidavit, augmented by Skeleton Arguments, all filed into court on 22nd

January, 2020. The Affidavit in Support was deposed to by one Shannon Joynt, a director in the Defendant Company.

The Affidavit of Shannon Joynt discloses that on 11th December, 2019, the Court of Appeal granted the Defendant an *Ex parte* Order for Stay of Execution of Judgment pending Determination of the Application for Leave to Appeal to the Supreme Court. As evidence of this averment, a copy of the *Ex parte* Order and letter of acknowledgment of service of the same was produced collectively marked as exhibit "SJ1(a) and (b)". That, on 30th December, 2019, the Plaintiff herein commenced garnishee proceedings and obtained a Garnishee Order Nisi, exhibited as "SJ2". It is contended that a perusal of the Affidavit in Support of *Ex parte* Summons for a Garnishee Order Nisi reveals that the Plaintiff did not disclose to this Court that there was a stay of execution in place dated 11th December, 2019. That, the deponent was informed by the Defendant's advocates, which advice he verily believed to be true and correct, that the grant of the Garnishee Order Nisi dated 30th December, 2019, was erroneous for failure by the Plaintiff to disclose the existence of a stay of execution, thus this application.

The Affidavit in Support discloses further, that the Garnishee Order Nisi has caused disruption of the Defendant's business activities as it is not able to remit statutory obligations. As evidence of this assertion, copies of correspondence between the Defendant and the Garnishee were produced and marked "JS3". That, despite being informed of the existence of the stay of execution dated 11th

December, 2019, granted by the Court of Appeal, the Garnishee has stated that it will not unblock the Defendant's account unless this Court so orders. Copies of the correspondence between the Garnishee and the Defendant's advocates were collectively produced as exhibit "SJ 4 (a) and (b)".

The Plaintiff did not file an affidavit or skeleton arguments in opposition to the application. However, the application came up for hearing on 11th March, 2020, at which both parties were represented by Counsel. Submitting on behalf of the Defendant, Ms. Nambule stated that her client would rely on the Affidavit in Support filed on 22nd January, 2020 and deposed to by Shannon Joynt. It was Ms. Nambule's contention that as argued in their Skeleton Arguments, Order 32, rule 6 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book), clothes this Court with jurisdiction to discharge an *ex parte* order if it is found that the applicant did not make a full and frank disclosure of facts at the time of making the *ex parte* application. She drew the Court's attention to the evidence adduced by the Defendant in the Affidavit in Support which, according to Counsel, demonstrated that on 30th December, 2019, when the Plaintiff applied for and was granted a Garnishee Order Nisi, there was in existence an order staying execution of judgment granted by a full bench of the Court of Appeal dated 11th December, 2019 and which order was served on the Plaintiff's advocates, Messrs. Alberto Ngoyi Advocates. That, the Defendant would rely on the said Affidavit in Support and Skeleton Arguments

in Support and prayed that the Garnishee Order Nisi dated 30th December, 2019 be discharged with costs to the Defendant.

In response Ms. Chimanse, learned Counsel for the Plaintiff submitted that the Plaintiff would rely on Order 49 of the White Book, which was the Order the Plaintiff had relied on when making the application for a Garnishee Order Nisi. That, according to the said Order, the condition that ought to be satisfied for such an order to be made is that there must be some other person that owes the judgment debtor an amount due. It was Counsels' contention that this condition was met by the Plaintiff when the application was made and for that reason, she did not see why the Garnishee Order Nisi should be set aside. She prayed that this Court dismisses the application sought by the Defendant and that costs be in the cause. Counsel submitted that she also wanted to put it on record that there was a pending ruling in the Court of Appeal which the Plaintiff believed would have a bearing on the application before Court.

In reply, Ms. Nambule submitted that the issue for determination by the Court was whether or not the Plaintiff should have obtained a Garnishee Order Nisi without disclosing the existence of the *ex parte* order for stay of execution dated 11th December, 2019. According to Counsel, Order 49 of the White Book allows a litigant to execute a monetary judgment by way of having a third party who is owing a judgment debtor pay that money directly to the judgment creditor, like the Plaintiff in this matter. That, as such, Order 49 is one of the many provisions of the law that facilitates the execution of monetary

judgments. Further, that exhibit "SJ1(a)" in the Affidavit in Support demonstrates that any step to execute the judgment of the Court of Appeal was prohibited. It was also submitted that exhibit "SJ3" in the Affidavit in Support exhibited the Plaintiff's Affidavit in Support of the application for a Garnishee Order Nisi which showed that the said affidavit did not disclose the existence of the order of stay of execution. That in view of the foregoing, Order 49 of the White Book does not apply to the current application.

Ms. Nambule reiterated that in accordance with the powers conferred on this Court by Order 32 of the White Book, the Garnishee Order Nisi dated 30th December, 2019 should be set aside, because at the time the Plaintiff made the application for the said order, it misled the Court by failing to disclose the existence of the order staying execution of judgment issued by the Court of Appeal. On the issue of the pending Court of Appeal Ruling, Counsel conceded that there was indeed a ruling pending in the Court of Appeal, but that the said ruling is on an application for leave to appeal to the Supreme Court and Counsel did not see how an application for leave to appeal to the Supreme Court would have a bearing on the failure by the Plaintiff to make a full and frank disclosure of the existence of an order of stay of execution as at 30th December, 2019. She prayed that the Defendant's application be granted with costs.

As alluded to earlier, the Defendant filed Skeleton Arguments in support of its application. It was submitted in the said Skeleton Arguments that Order 32, rule 6 of the White Book clothes this Court

with the discretionary power to discharge or set aside an order made *ex parte*. Order 32, rule 6 states as follows:

“The court may set aside an order made ex parte.”

That, the explanatory notes in Order 32/6/30 provide guidelines on how this discretionary power to set aside or discharge an order made *ex parte* should be exercised. That, where a party to the proceedings has neglected to make a full and frank disclosure of the relevant facts, the court ought to set aside or discharge the order made *ex parte*.

It was submitted that on the strength of *Becker v. Noel*¹, the duty to make a full and frank disclosure of the fact that the Court of Appeal had granted the order staying execution of the judgment dated 28th November, 2019 lay with the Plaintiff who evidently failed to do so. It was contended that the order staying execution of the judgment dated 28th November, 2019 was served on the Plaintiff’s advocates Messrs. Alberto Ngoyi Advocates on 11th December, 2019 as shown by exhibit “SJ 1 (b)” in the Affidavit in Support. Therefore, the Plaintiff cannot claim that it was not aware of the existence of the order staying execution of the judgment.

The Defendant submitted further, that the evidence before this Court confirms that on 11th December, 2019, a full bench of the Court of Appeal granted a stay of execution of the judgment of 28th November, 2019, which Order is shown as exhibit “SJ1 (a)” in the Affidavit in Support. That, the evidence further shows that the said Order was served on the Plaintiff’s advocates, but that notwithstanding, the

Plaintiff proceeded to commence garnishee proceedings in which it failed to make a full and frank disclosure of the existence of the stay. That, the Defendant has further demonstrated that owing to the garnishee order, it has been unable to make statutory remittances to the Government of the Republic of Zambia. That, it is the Defendant's argument that this is a fit case for this Court to discharge or set aside the Garnishee Order Nisi forthwith as not doing so will assist the Plaintiff in disobeying an order of the full bench of the Court of Appeal. It was submitted that costs be awarded to the Defendant.

I have considered the Defendant's application to set aside or discharge the Garnishee Order Nisi obtained *ex parte* by the Plaintiff herein. I have also considered the Affidavit in Support and Skeleton Arguments filed by the Defendant and the oral arguments by Counsel on both sides.

The application before me was filed pursuant to Order 32, rule 6 of the White Book which, as concisely put in the said Order, gives this Court the power to set aside an order made *ex parte*. Counsel for the Defendant referred this Court to the explanatory notes in Order 32/6/30 for guidance on the exercise of the discretionary power mentioned above. I have perused the said Order and have noted that the said explanatory notes state that when applying for an *ex parte* order, it is the duty of the applicant to make a full and fair disclosure to the court of all the relevant facts of which he knows and failure to

do so may itself be a ground for setting aside such order (see the case of *Bloomfield v. Serenyi*²).

In considering the application before me, the questions to be asked are:

- 1) *Whether or not there was an order staying execution of the judgment of the Court of Appeal dated 28th November, 2019 at the time when the application for a Garnishee Order Nisi was made;*
- 2) *If there was such an order, whether or not it had been brought to the attention of the Plaintiff at the time it applied for and was granted the Garnishee Order Nisi;*
- 3) *Whether or not the Plaintiff made a full and frank disclosure of the existence of an order of stay of execution of judgment when it applied for the Garnishee Order Nisi.*

Exhibit “SJ1 (a)” of the Affidavit in Support is a copy of the *Ex parte* Order of Stay of Execution of the Judgment of the Court of Appeal. The Order is dated 11th December, 2019. Exhibit “SJ1 (b)” is a copy of the letter of acknowledgment of service of the *Ex parte* Order for Stay of Execution which was duly signed for by Counsel for the Plaintiff on 11th December, 2019. Therefore, at the time the Plaintiff was applying for a Garnishee Order Nisi on 30th December, 2019, it had already been served with the *Ex parte* Order of Stay of Execution granted by a full bench of the Court of Appeal on 11th December, 2019 and was thus fully aware of its existence.

With regard to whether or not the Plaintiff made a frank and full disclosure of the existence of the order of stay, the Affidavit in Support of *Ex parte* Summons for Garnishee Order Nisi exhibited in the Defendant’s Affidavit in Support of the current application as

“SJ1”, clearly shows that no mention of the stay was made in the said affidavit. Therefore, I am of the view that the Plaintiff did not make a full and frank disclosure of the existence of the order of stay of execution granted by the Court of Appeal. Clearly the Plaintiff failed in its duty to disclose that relevant fact, and as was stated in the case of *Bloomfield v. Serenyi*, the failure could as well be a ground for setting aside of the Garnishee Order Nisi. I opine that the failure by the Plaintiff to disclose the fact that there was an order of stay of execution of the judgment of the Court of Appeal at the time it made the application for a Garnishee Order Nisi, which fact would without doubt have constrained this Court from granting the Garnishee Order Nisi, is a ground for setting aside the said order.

At this stage, I wish to express my displeasure at the improper conduct by Counsel for the Plaintiff of failing and/or neglecting to disclose to this Court the fact that there was an order of stay of execution of the judgment of the Court of Appeal and by so doing, mislead the Court. As officers of court, counsel must at all times desist from the inappropriate conduct of misleading the court.

Counsel for the Plaintiff put it on record that there is a ruling on an application for leave to appeal to the Supreme Court pending before the Court of Appeal which she believed would have a bearing on the application before Court. I am in agreement with the submission by learned Counsel for the Plaintiff that she did not see how an application for leave to appeal to the Supreme Court could have a bearing on the application before this Court brought about by the

failure by the Plaintiff to make a full and frank disclosure of the existence of an order of stay of execution as at 30th December, 2019. I am also at pains to see how the pending ruling of the Court of Appeal would have a bearing on the application before this Court for an order to discharge an *ex parte* order obtained by means of suppression of a material fact.

In view of the aforesaid considerations, I am of the view that this is a proper case in which to set aside the *Ex parte* Order. Consequently, the *Ex parte* Order of 22nd February, 2020 discharging the Garnishee Order Nisi granted to the Plaintiff on 30th December, 2019, is hereby confirmed. Costs of and incidental to the application herein are awarded to the Defendant, to be agreed or taxed in default thereof.

Leave to appeal is denied.

Delivered at Lusaka the 16th day of March, 2020.



**W. S. MWENDA (DR.)
HIGH COURT JUDGE**