IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0495**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

LEASING FINANCE COMPANY LIMITED **PLAINTIFF**

AND

FOVEROS MINING LIMITED **1ST DEFENDANT**
OMG HOLDINGS LIMITED **2ND DEFENDANT**
SAMARAS BROTHERS HOLDINGS LIMITED **3RD DEFENDANT**

Before: Honourable Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the 15th day of April, 2020

For the Plaintiff: *Mr. A. Roberts of Messrs. Alfred Roberts and Company*
For the Defendants: *Mr. T. Chibeleka of Messrs. ECB Legal Practitioners*

RULING

Cases referred to:

1) *Clement Chuuya and Hilda Chuuya v. JJ Hankwenda, SCZ Judgment No. 3 of 2002.*
2) *Gladys Mahlangu Nasilele v. Mundia Nasilele (2012) 1 Z.R.455*
3) *Roberts Petroleum Limited v. Bernard Kenny Limited (1982) 1 All E. R. 685.*

Legislation referred to:

1) *Order 42 (1) and Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2) *Order 50, rules 1 and 9A (2) of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*

This is the Plaintiff's application for the Charging Order Nisi granted by this Court on 4th February, 2019 to be made absolute. The application is made pursuant to Order 42 (1) and Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia as read together with Order 50, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book). The application is supported by an Affidavit in Support and Skeleton Arguments both filed in Court on 31st January, 2019.

The Affidavit in Support was sworn by one Arulanandam Ramesh, the Plaintiff's Managing Director. He deposed that on 22nd January, 2018, the parties hereto concluded a Consent Judgment by virtue of which Judgment was entered in favour of the Plaintiff for ZMW15,038,338.00 and interest as per Consent Judgment. A copy of the said Judgment is produced as exhibit "AR1". Since the Consent Judgment was entered, the Plaintiff has only received payment of the sum of USD150,000.00 leaving an outstanding amount of ZMW18,038,929.00 as at 31st December, 2018, inclusive of accrued interest, which remains unpaid. According to the deponent, the Defendants have failed to abide by the terms of the Consent Judgment and are in default thereof. A copy of the computation of the outstanding Judgment sum and interest as at 31st December, 2018, is exhibited as "AR2". The deponent averred that the Plaintiff remains an unsecured creditor and stands to lose the monies it is owed by the Defendants.

The deponent asserted further, that a search conducted at the Ministry of Lands revealed that:

a. The 1st Defendant is the registered owner of property located on F/1884/K410; Copperbelt Province as evidenced by a copy of the Lands Register exhibited to the Affidavit as "AR3";
b. The 3rd Defendant is the registered owner of properties in the Copperbelt Province known as CHAMB/49, CHAMB/50, CHAMB/51, and L/3962/M, as per the copies of the Lands Register exhibited as "AR4" to "AR7".

It was further deposed that a search conducted at the Patents and Companies Registration Agency (PACRA) revealed that:

i. The 2nd Defendant holds 675,000 and 449,840,000 ordinary shares in Olympic Milling (Copperbelt) Limited and Olympic Milling Company Limited, respectively. Copies of the PACRA printouts are exhibited as "AR8a" to "AR8h".
ii. The 3rd Defendant holds 75,000 and 1,000,000 ordinary shares in Olympic Milling (Copperbelt) Limited and Olympic Milling Company Limited, respectively, as evidenced by exhibits "AR8a" to "AR8h".

The deponent avowed that as things stand, the Defendants are not in a position to pay the Judgment debt in their ordinary course of business and nearly one year had already passed as at the time of swearing the affidavit, since the Consent Judgment was entered into and the Defendants had failed to settle the Judgment sum and interest and it was clear that the Plaintiff had little or nothing to

recover from the Defendants as long as it remained an unsecured creditor. That, unless the Defendant's beneficial interest in the aforementioned securities are charged, the Plaintiff will not be able to realise the full benefits of the fruits of the Consent Judgment of this Court.

It was submitted in the Plaintiff's Skeleton Arguments that Order 42, rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia, provides that personal property of a person against whom execution may be enforced is liable to attachment and sale in the execution of the decree; securities in a company being one such property. Further, that Order 50 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book), provides the procedure and empowers this Court to make a charging order against the interest of a judgment debtor charging it with the payment of the Judgment sum.

Counsel for the Plaintiff cited the case of *Clement Chuuya and Hilda Chuuya v. JJ Hankwenda*[1], where the Supreme Court held that a charging order simply gives security and an order for sale thereafter places the judgment creditor in the same position as a mortgagee. The Court said that this is why Order 50, rule 9A (2) provides that Order 88 - which is for mortgage actions – shall apply to proceedings to enforce a charging order by sale.

It was also submitted that the High Court in *Glady's Mahlangu Nasilele v. Mundia Nasilele*[2], recognised charging orders as a means

under Order 45, rule 1 of the White Book of enforcement of a judgment. That Matibini, J., stated as follows:

> *"The question of enforcement of judgments, and orders is dealt with in general terms by Order 45 of the Rules of the Supreme Court (White Book), which states by rule 1, that a judgment, or order for the payment of money, other than payment into Court, may be enforced by one or more of the following:*
> *a) Writ of fieri facias;*
> *b) Garnishee proceedings;*
> *c) A charging order;*
> *d) The appointment of a receiver;*
> *e) In appropriate circumstances, an order of committal; and*
> *f) In appropriate circumstances, a writ of sequestration."* (Emphasis by the Plaintiff)

Counsel for the Plaintiff submitted that in the present case, there is a Consent Judgment which remains unsatisfied amounting to ZMW18,038,929.00 as at 31st December, 2018 as per exhibit "AR2" in the Affidavit in Support, together with the cost of this application. That, unless the Defendants' interests in the real properties listed in the Charging Order Nisi as well as the shares in the Olympic Milling (Copperbelt) Limited and Olympic Milling Company Limited are charged, the Plaintiff will not be able to realise the fruits of its Judgment. Thus, the Defendants' interests should be charged with the payment of the Judgment sum and interest, together with the cost of this application. That, this Court has the power under Order 3, rule 2 of the High Court Rules to make any order that it considers necessary for doing justice. In the premises, it is the Plaintiff's prayer that a Charging Order be made and the Defendants show cause as to why the securities should not remain so charged.

The Defendants did not file any Affidavit in Opposition or Skeleton Arguments in Opposition. However, the application came up for hearing on 21st may, 2019 and Counsel on both sides made oral submissions. Mr. Roberts, learned Counsel for the Plaintiff submitted that his client was relying on the Affidavit in Support and Skeleton Arguments in Support filed in Court on 31st January, 2019. He further stated that there was no Affidavit in Opposition and it was the Plaintiff's prayer that the properties mentioned in the Charging Order and Notice to Show Cause be charged with payment of ZMW18,038,929 as at 31st December, 2018 plus interest and costs.

In opposing the application, Mr. Chibeleka, learned Counsel for the Defendants, submitted that the Defendants were relying on the case of *Roberts Petroleum Limited v. Bernard Kenny Limited*[3], where the Court held that there is no difference between making a charging order nisi absolute and a garnishee order nisi absolute. Further, that the Court should exercise its discretion so as to do equity so far as is possible to all the parties involved, namely, the judgment creditor, judgment debtor and all other unsecured creditors. Counsel submitted that the Plaintiff already had a Garnishee Order Absolute in its possession and there was no difference between that order and the charging order being sought by the Plaintiff. He contended that it is improper for the Court to issue two concurrent executory orders both seeking to achieve the same purpose. That, in light of the authority cited, in an endeavour to do equity to all parties involved, the Court's discretion should be exercised to allow the recovery of

monies through the garnishee proceedings and only if such recovery fails, should the Court entertain any further applications for execution.

In reply, Mr. Roberts submitted that he appreciated the unfortunate predicament that his learned friend found himself in of defending a defaulting borrower that simply had no effects. He contended that the case of *Roberts Petroleum Limited v. Bernard Kenny Limited* (supra) had been quoted out of context because the case did not in any way suggest that at law a garnishee order is the same as a charging order.

With regard to Mr. Chibeleka's submission that the Court should exercise its discretion so as to do equity so far as is possible to the various parties involved, Mr. Roberts submitted that the equitable principle of 'he who comes to equity must come with clean hands' applied in this case and he did not see how a defaulting borrower could use equity to evade paying his debts. That, the purpose of the charging proceedings is to charge those properties identified in the Charging Order Nisi as belonging to the Defendants. He submitted, further, that there is nothing wrong with this Court granting a charging order because a creditor is at liberty to enforce any measures available to recover its money provided these measures are in the same court action. Counsel submitted that Mr. Chibeleka had referred to the garnishee proceedings and placed heavy reliance on them. However, Counsel urged this Court to take judicial notice of matters that were in the public domain, especially that the Garnishee

was being placed in liquidation. That, that was all the more reason why the charging order should be made absolute, so that the Plaintiff can be more secure.

I have considered the application by the Plaintiff for this Court to make the Charging Order Nisi granted on 4th February, 2019 absolute; the documents filed by the Plaintiff in support of the application; and oral submissions by counsel on both sides. The question for determination is, in my opinion, whether or not sufficient cause has been shown by the Defendants as to why the Charging Order Nisi obtained by the Plaintiff herein should not be made absolute.

The background to the application before this Court has been outlined in the Affidavit in Support. It is not in dispute that there is a Consent Judgment which remains unsatisfied by the Defendants amounting to ZMW18,038,929.00 as at 31st December, 2018 as per exhibit "AR2" in the Affidavit in Support. I have also satisfied myself that the Defendants are the registered owners of the properties exhibited as "AR4" to "AR7" in the Affidavit in Support and the shares exhibited as "AR8a" to "AR8h" in the Affidavit in Support.

The Defendants did not file an Affidavit in Opposition. However, Counsel for the Defendants submitted that it is improper for this Court to issue two concurrent executory orders both seeking the same purpose; that there is no difference between the Garnishee Order Absolute granted to the Plaintiff and a charging order absolute

which the Plaintiff seeks from this Court. For his argument, Counsel relied on the English case of *Roberts Petroleum Limited v. Bernard Kenny Limited,* cited above. I am of the considered view that contrary to the submission by Mr. Chibeleka, there is nothing improper for this Court to issue two concurrent executory orders as the same is allowed by Order 45, rule 1 of the White Book, which permits the enforcement of a judgment or order for the payment of money by one or more of the following:

a) Writ of fieri facias;
b) Garnishee proceedings;
c) A charging order;
d) ..."

(Emphasis by the Court)

Editorial Note 45/1/3 under Order 45 of the White Book states as follows:

> *"A judgment or order for the payment of money to a person may be enforced by any of the six methods listed in para. (1) which are not alternative, but cumulative remedies..."* (Emphasis by the Court)

It is clear from the aforesaid that it is permissible for a money judgment to be enforced by garnishee order and charging order simultaneously if the Court in exercise of its discretion, is of the view that it is in the interest of justice to grant the said orders concurrently. I had occasion to study the case of Roberts Petroleum Limited v. Bernard Kenny Limited, cited by Counsel for the Defendants, which I found persuasive. My understanding, contrary to Mr. Chibeleka's submission, is that the said case states that there is no difference between making a charging order nisi absolute and a

garnishee order nisi absolute. What the said case did was to *inter alia,* bring out the principles of law that apply in cases where a charging order being made absolute is not precluded by a winding up order. One such principle was said to be that for the purpose of the exercise of the court's discretion, there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other. In my view, that is not the same thing as alleging that there is no difference between a charging order nisi and a garnishee order nisi.

Briefly the facts of the Roberts Petroleum Limited v. Bernard Kenny Limited case were that Roberts Petroleum Limited ("Robert") entered judgment in default of appearance against Bernard Kenny Limited ("Kenny") and on the same day obtained from a District Registrar a charging order nisi under which Kenny's two filling stations were charged with payment of the judgment debt. When the matter came up for hearing of the question whether or not good cause had been shown why the charging order nisi obtained by Roberts should not be made absolute, the District Registrar came to the conclusion that the charging order nisi should be made absolute and made an order to that effect. Kenny appealed against the District Registrar's decision and the High Court set aside the order of the District Registrar. On further appeal the decision of the High Court was reversed and the District Registrar's decision reinstated.

The Court observed that cases such as the one before it involved a conflict between two well-established principles of law; the first

principle being that a judgment creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of Court. Such rules provide, among other things, for the enforcement of a judgment debt by means of a charging order on the judgment debtor's lands or interests in land and the appointment of a receiver. The second principle is that, when a judgment debtor, whether a natural person or a corporate body, has become insolvent, all unsecured creditors should be treated equally, each receiving the same proportionate share of the inadequate funds available as all the others.

The Court went on to state that in cases where a charging order being made absolute is not precluded by a winding up order, the following principles of law apply:

1. The question whether a charging order nisi should be made absolute is one for the discretion of the court;
2. The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor;
3. For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other;
4. In exercising its discretion, the court has both the right and the duty to take into account all the circumstances of any particular

case, whether such circumstances arose before or after the making of the order nisi;

5. The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is, the judgment creditor, the judgment debtor and all other unsecured creditors;
6. The following combination of circumstances, if proved, justify the court in exercising its discretion by refusing to make the order absolute: -
   i. the fact that the judgment debtor is insolvent; and
   ii. the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.
7. In the absence of the combination of circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute.

Taking into account the principles articulated in the Roberts Petroleum Limited v. Bernard Kenny Limited case above, the question of whether the charging order nisi herein should be made absolute is in the discretion of this Court, while the burden of showing cause why a charging order nisi should not be made absolute is on the Defendants who are the judgment debtors herein. This Court is called upon to take into account all the circumstances of the case and to do equity to all the various parties involved.

I have taken into account all the circumstances of the case and while being mindful of my obligation to ensure that equity prevails over all the parties involved, I am aware that there are no other unsecured creditors before this Court. While the Defendants have failed to settle the judgment debt in accordance with the terms of the Consent Judgment, there are no insolvency proceedings that this Court is aware of against them or scheme of arrangement set up by creditors.

I am of the view that the Defendants have failed to discharge their burden of showing sufficient cause as to why the Charging Order Nisi should not be made absolute as no evidence has been tendered to that effect. In the circumstances, I am inclined to exercise my discretion in favour of making the Charging Order Nisi granted on 4th February, 2019 charging the property described in the schedule thereto with payment of ZMW18,038,929.00 as at 31st December, 2018 plus interest, absolute and I so order.

I award costs of the application to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is denied

Dated at Lusaka this 15th day of April, 2020.

DR. W. S. MWENDA
JUDGE