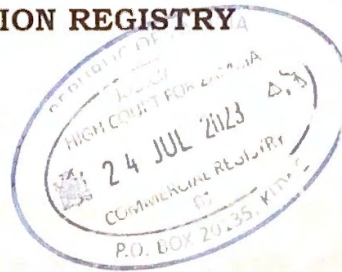


IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL DIVISION REGISTRY  
HOLDEN AT KITWE  
(Civil Jurisdiction)

2023/HKC/06



**BETWEEN:**

**TOM SAYER**

**PLAINTIFF**

**AND**

**MADISON ASSET MANAGEMENT COMPANY 1<sup>ST</sup> DEFENDANT**

**TRUSTEES OF THE MADISON UNIT TRUSTS 2<sup>ND</sup> DEFENDANT**

Before the Hon. Mr. Justice E. Pengele on 24<sup>th</sup> July, 2023.

**For the Plaintiff: Mr. C. Tafeni of Messrs. Suba, Tafeni  
and Associates.**

**For the 2<sup>nd</sup> Defendant: Mr. D.S Libati of Messrs. D.S. Libati  
Legal Practitioners**

---

**R U L I N G**

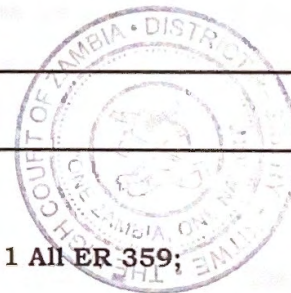
---

**Cases referred to:**

1. Pritchard V. Westminster Bank Limited (1969) 1 All ER 359;
2. Bloomfield V. Serenyi (1945) All ER 646;
3. WEA Records Limited V. Visions Channel 4 Limited (1983) 1 WLR 721;
4. Harrods Limited V. Tester (1937) 2 All ER 236; and
5. American Cyanamid Company V. Ethicon Limited (1975) AC 396.

**Legislation referred:**

- a. Rules of the Supreme Court of England, 1999 Edition (White Book).



## **1. INTRODUCTION AND BACKGROUND**

- 1.1 This Ruling follows an application by the 2<sup>nd</sup> Defendant for an order to set aside garnishee order to show cause dated 14<sup>th</sup> June, 2023. The application was filed on 23<sup>rd</sup> June, 2023, by summons and affidavit in support pursuant to Order 32, rule 6(30) of the **Rules of the Supreme Court of England**<sup>a</sup>. In addition, the learned Counsel for the 2<sup>nd</sup> Defendant filed a list of authorities and skeleton arguments.
- 1.2 On 27<sup>th</sup> June, 2023, the Plaintiff filed an affidavit in opposition to the 2<sup>nd</sup> Defendant's application. In addition, the learned Counsel for the Plaintiff filed skeleton arguments in opposition of even date.
- 1.3 The relevant background to this application is that on 14<sup>th</sup> June, 2023, this Court granted the Plaintiff a garnishee order to show cause. The garnishee order to show cause ordered to the effect that all debts due from the Garnishee, Stanbic Bank Zambia, to the 1<sup>st</sup> Defendant be attached to these proceedings.

## **2 AFFIDAVIT IN SUPPORT**

- 2.1 The affidavit in support is deposed to by Pfumai Nyambe. The crux of his depositions is that AMG Global Trustees are the Trustees of Madison Unit Trust (MUT), which is a separate legal entity that is managed by Madison Asset Management Company Limited, the 1<sup>st</sup> Defendant.

- 2.2 The deponent has stated that both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant hold bank accounts with Stanbic Bank Zambia Limited on behalf of Madison Unit Trust. On account of the 1<sup>st</sup> Defendant being under supervisory possession of the Securities and Exchange Commission (SEC), SEC has issued instructions to Stanbic Bank to the effect that the Bank should only act on instructions that have been authorized in writing by either one or both of the Joint Interim Managers of the Trustees of MUT, which is AMG Global Trustees Limited (the 2<sup>nd</sup> Defendant).
- 2.3 The deponent went on to say that on the basis of the instructions from SEC to Stanbic Bank, the Bank wrote to the 1<sup>st</sup> Defendant's Joint Interim Managers on 21<sup>st</sup> June, 2023. The Bank informed the Joint Interim Managers that, pursuant to an order of this Court, the Bank has proceeded to garnishee some listed bank accounts held in favour of various account holders.
- 2.4 The deponent went on to depose that the affected accounts belong not only to the 1<sup>st</sup> Defendant but also to the 2<sup>nd</sup> Defendant. For this reason, the garnishee has negatively affected the MUT and investors under the MUT whose redemptions cannot be processed due to the garnishee order.
- 2.5 It was Pfumai Nyambe's further deposition that the garnishee order has affected third party funds received and held on trust by the 1<sup>st</sup> Defendant for various clients and investors. The

order has also affected funds of the 2<sup>nd</sup> Defendant with regard to MUT. The 1<sup>st</sup> Defendant's Joint Interim Managers are now failing to make certain distributions that they are mandate to do on behalf of investors under the 1<sup>st</sup> Defendant.

- 2.6 Nyambe went on to say that the MUT is further failing to pay statutory and non-statutory obligations such as ground rates, taxes and utility bills. MUT runs the risk of defaulting on those obligations.
- 2.7 He added that the garnishee order has affected other third party funds such as those in the stockbroking account.
- 2.8 He proceeded to say that the garnishee order was issued despite the fact that the 2<sup>nd</sup> Defendant had earlier obtained a stay of execution of the judgment in default.
- 2.9 Nyambe went on to depose that there are proceedings in the Lusaka High Court under Cause No. 2019/HPC/376 to convene a creditor's meeting and agree on a scheme of arrangements between the 1<sup>st</sup> Defendant and its creditors. Since the proceedings are still subsisting, the present action amounts to a multiplicity of actions and an abuse of court process.
- 2.10 He further stated that the Plaintiff cannot be granted the equitable relief of a garnishee order because he is on a list of creditors who ought to be treated equally.

### **3 2<sup>ND</sup> DEFENDANT'S SKELETON ARGUMENTS**

- 3.1 The kernel of the skeleton arguments filed by Counsel for the 2<sup>nd</sup> Defendant is that, since the Plaintiff is on the list of creditors, he ought to be treated equally with the other creditors. He cannot, therefore, be entitled to the equitable remedy of specific performance. To reinforce the foregoing, Counsel relied on the decision of the Court of Appeal in the case of **Pritchard V. Westminster Bank Limited**<sup>1</sup> for the holding that all creditors should be treated equally. Further that a garnishee order which has the effect of giving a Plaintiff preference over other creditors ought not to have been made absolute.
- 3.2 Counsel further argued that the Plaintiff is not entitled to a garnishee order because he did not make a full disclosure that there are proceedings at Lusaka High Court. To reinforce his submissions, Counsel cited the cases of **Bloomfield V. Serenyi**<sup>2</sup> and **WEA Records Limited V. Visions Channel 4 Limited**<sup>3</sup>.
- 3.3 It was Counsel's further argument that the garnishee order would operate as a tool of injustice against the third parties who are beneficiary interested in the garnisheed funds. To support the foregoing, Counsel relied on the case of **Harrods Limited V. Tester**<sup>4</sup>.

3.4 Counsel invited me to apply the principle of balance of convenience enunciated in, *inter alia*, the case of **American Cyanamid Company V. Ethicon Limited**<sup>5</sup>.

#### **4 AFFIDAVIT IN OPPOSITION**

4.1 In his affidavit in opposition, the Plaintiff wondered why the 2<sup>nd</sup> Defendant is making efforts to intervene on behalf of the 1<sup>st</sup> Defendant. He stated that, in its affidavit dated 3<sup>rd</sup> May, 2023, in support of an application to stay execution of the default judgment, the 2<sup>nd</sup> Defendant argued that it was not involved in the management and assets of the 1<sup>st</sup> Defendant.

4.2 The deponent went on to state that the letter written by Stanbic Bank was not written to the 2<sup>nd</sup> Defendant. Instead, the letter was written to the 1<sup>st</sup> Defendant and copied to the Securities and Exchange Commission. Therefore, the 2<sup>nd</sup> Defendant is a stranger to that communication. For that reason, the 2<sup>nd</sup> Defendant should not respond on behalf of the 1<sup>st</sup> Defendant, which is the owner of the bank accounts.

4.3 The Plaintiff added that, with regard to the stay of execution granted by this Court, the 1<sup>st</sup> Defendant never applied for a stay. There is no stay of execution in favour of the 1<sup>st</sup> Defendant.

4.4 He proceeded to depose that the proceedings under Cause No. 2019/HPC/376 in the Lusaka High Court were for the specific

purpose of convening a creditors' meeting. The proceedings already served the intended purpose.

- 4.5 He further deposed that there is no list of creditors or agreement for payment of creditors. The 1<sup>st</sup> Judgment debtor has continued to operate without any scheme of arrangement. The 1<sup>st</sup> Defendant is not undergoing winding up proceedings or receivership. On 24<sup>th</sup> December, 2020, Madison Financial Services Plc, the main shareholder of the 1<sup>st</sup> Defendant issued a further cautionary update and market announcement where it stated that there would be capital injection into the 1<sup>st</sup> Defendant and that there were no plans to liquidate the 1<sup>st</sup> Defendant.

## **5 PLAINTIFF'S SKELETON ARGUMENTS**

- 5.1 In their skeleton arguments, Counsel for the Plaintiff has submitted that the Plaintiff has shown that the 1<sup>st</sup> Defendant is a going concern. There are no insolvency proceedings going on in relation to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant has not opposed the garnishee order nisi.
- 5.2 Counsel argued that, by bringing garnishee proceedings, the Plaintiff has shown diligent steps to recover the money due to him. Counsel referred me to the case of **Pritchard V. Westminster Bank Limited**<sup>1</sup>, where Lord Denning said at page 4 that **"The general principle, when there is no insolvency, is that the person who gets in first gets the fruits of his diligence...."** Counsel pointed out that Lord

Denning clarified that the exception is when there are insolvency proceedings or when there is an agreement of creditors.

- 5.3 Counsel submitted that in this case the Plaintiff has shown that there are no insolvency proceedings and there is no agreement by creditors.

## **6 AFFIDAVIT IN REPLY**

- 6.1 The affidavit in reply is deposed to by Pfumai Nyambe. The depositions in that affidavit are essentially a repetition of what he deposed to in the affidavit in support.

## **7 CONSIDERATION AND DECISION**

- 7.1 I have carefully considered the 2<sup>nd</sup> Defendant's application and the opposition by the Plaintiff. I have also considered the skeleton arguments filed by Counsel for the parties.
- 7.2 In his affidavit in opposition, the Plaintiff has wondered why the 2<sup>nd</sup> Defendant has intervened on behalf of the 1<sup>st</sup> Defendant in the garnishee proceedings. According to the Plaintiff, the garnishee proceedings do not concern the 2<sup>nd</sup> Defendant because the 2<sup>nd</sup> Defendant has consistently disassociated itself from the management and assets of the 1<sup>st</sup> Defendant. Counsel for the Plaintiff has argued that, in fact, the 1<sup>st</sup> Defendant has not even opposed the garnishee order nisi.



- 7.3 Conversely, in the affidavit in support of this application, Pfumai Nyambe has deposed that both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant hold bank accounts with Stanbic Bank on behalf of MUT. The deponent has gone on to swear that the accounts affected by the garnishee order belong not only to the 1<sup>st</sup> Defendant but also to the 2<sup>nd</sup> Defendant.
- 7.4 I have taken time to carefully review the above contending positions of the parties. The question that I must resolve at this point is whether or not the 2<sup>nd</sup> Defendant has *locus standi* to challenge the garnishee proceedings.
- 7.5 A cursory review of the record of this case establishes that this Court entered a judgment in default of appearance and defence on 26<sup>th</sup> April, 2023. On 3<sup>rd</sup> May, 2023, the 2<sup>nd</sup> Defendant applied for an order to stay execution of the default judgment. The ex-parte summons clearly stated in part that it was for the-

**“... hearing of an application on the part of the 2<sup>nd</sup> Defendant for an Order to Stay Execution of Judgment in Default of Appearance and Defence dated 26<sup>th</sup> April, 2023 pending the determination of an application to set aside the judgment Obtained in Default of Appearance and Defence dated 26<sup>th</sup> April, 2023.”** [Underlined for emphasis only]

- 7.6 It is clear from the above extract that the application for stay of execution was made by only the 2<sup>nd</sup> Defendant. Pursuant to

that application by the 2<sup>nd</sup> Defendant, this Court granted the 2<sup>nd</sup> Defendant an ex-parte order of stay of execution couched, in the relevant part, as follows:

**“UPON hearing Counsel for the 2<sup>nd</sup> Defendant and UPON reading the affidavit in support filed herewith.**

**IT IS hereby ORDERED that the Judgment in Default of Appearance and Defence against the 2<sup>nd</sup> Defendant dated 26<sup>th</sup> April, 2023 BE and IS HEREBY stayed pending the determination of the 2<sup>nd</sup> Defendant’s application to set aside the said Judgment in Default of Appearance and Defence.”** [Underlined for emphasis only]

7.7 The above order unmistakably shows that the stay of execution related exclusively to the 2<sup>nd</sup> Defendant. The order did not stay the default judgment in so far as it relates to the 1<sup>st</sup> Defendant. In fact, in my Ruling dated 28<sup>th</sup> June, 2023, on the 2<sup>nd</sup> Defendant’s application to set aside the default judgment, I held specifically that the judgment in default of appearance and defence was set aside only in so far as it related to the 2<sup>nd</sup> Defendant. I stated that the default judgment still remains valid and subsisting in relation to 1<sup>st</sup> Defendant.

7.8 In view of the foregoing, it is untenable for the 2<sup>nd</sup> Defendant to contend that the Plaintiff was not entitled to apply for a garnishee order nisi against the 1<sup>st</sup> Defendant in light of the

stay of execution. As rightly submitted by Counsel for the Plaintiff, the garnishee order to show cause related only to the 1<sup>st</sup> Defendant. There is nowhere in that order where the 2<sup>nd</sup> Defendant is mentioned. For the avoidance of doubt, the relevant portions of the garnishee order to show cause are couched as follows:

**“IT IS ORDERED that all debts due or accruing due from the above-mentioned Garnishee to the above-mentioned 1<sup>st</sup> Judgment Debtor in the sum of USD1,035,427.78 be attached to answer a judgment recovered against the said 1<sup>st</sup> Judgment Debtor by the above-named Judgment Creditor in the High Court on the 26<sup>th</sup> April 2023 and interest and costs together with the costs of the garnishee proceedings on which judgment the sum of USD1,035,427.78 remains due and unpaid.**

**IT IS ORDERED that the said Garnishee attend the Judge in chambers on the 28<sup>th</sup> day of July 2023 at 08:30 hours, on an application by the said Judgment Creditor that the said Garnishee do pay to the said Judgment Creditor the debt due from the said Garnishee to the said 1<sup>st</sup> Judgment Debtor, or so much thereof as may be sufficient to satisfy the said judgment, together**

**with costs of the garnishee proceedings.”**

[Underlined for emphasis only]

- 7.9 It is manifestly clear from the above portions of the garnishee order to show cause that the order relates only to the 1<sup>st</sup> Defendant and the bank accounts held by the 1<sup>st</sup> Defendant with Stanbic Bank. The order does attach any debt accruing from Stanbic Bank to the 2<sup>nd</sup> Defendant. In other words, the order does not garnishee any account held by the 2<sup>nd</sup> Defendant with Stanbic Bank.
- 7.10 In light of the above- mentioned, the deposition by Pfumai Nyambe, that the garnishee order to show cause should be set aside because it has affected accounts held by the 2<sup>nd</sup> Defendant with Stanbic Bank, is devoid of merit. If Stanbic Bank has garnisheed the 2<sup>nd</sup> Defendant's accounts as alleged, the action by Stanbic Bank is clearly not pursuant to the garnishee order issued in this case.
- 7.11 It is clear from the foregoing that the garnishee order to show cause has only affected accounts held by the 1<sup>st</sup> Defendant with Stanbic Bank and not accounts held by the 2<sup>nd</sup> Defendant with Stanbic. Order 32/6/30 of the Rules of the Supreme Court, 1999 Edition, which the 2<sup>nd</sup> Defendant has referred me to, provides that-

**“Rule 6 embodies the fundamental rule of practice that a party affected by an ex parte order may apply to the Court to discharge it,**

**inasmuch as he has not had an opportunity of being heard.”** [Underlined for emphasis only]

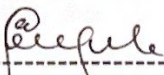
7.12 It is evident from the above Order that it is only a party affected by an ex-parte order who can apply to the Court to have the order discharged. The 1<sup>st</sup> Defendant, who has been affected by the subject ex-parte order, has not made any application to this Court for the discharge of the garnishee order to show cause.

## **8 CONCLUSION**

8.1 On the totality of the foregoing, I find absolutely no merit in the 2<sup>nd</sup> Defendant's application to set aside garnishee order to show cause. I dismiss the 2<sup>nd</sup> Defendant's application with costs to be taxed in default of agreement.

8.2 Leave to appeal is granted.

**Delivered at Kitwe this 24<sup>th</sup> day of July, 2023.**

  
-----  
**E. PENGELE**  
**HIGH COURT JUDGE**