

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2021/HP/1501

BETWEEN:

KAINAAT INVESTMENTS LIMITED

PLAINTIFF

AND

MUTEMWA MUTEMWA

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 7th DAY
OF FEBRUARY, 2024**

For the Plaintiff : Mr. M. Mulele, Messrs GM Legal Practitioners

For the Defendant : Mr. W Siyumbano, Messrs Mutemwa Chambers

R U L I N G

CASES REFERRED TO:

- 1. Hakainde Hichilema and Five others v the Government of the Republic of Zambia Appeal No 28 of 2017***

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia***
- 2. The Debtors Act, Chapter 77 of the Laws of Zambia***

OTHER WORKS REFERRED TO:

- 1. Black's Law Dictionary, by Bryan A. Garner, 9th Edition, Thomas Reuters, West Publishers, 2009***

1. INTRODUCTION

1.1 In this application, the Plaintiff, Kainaat Investments Limited, seeks an Order of this Court to commit the

Kainaat Investments Limited to file the necessary application having observed that Mutemwa Mutemwa was an absconding Judgment Debtor.

- 2.3 That was how the application that is subject of this Ruling was filed.

3. AFFIDAVIT IN SUPPORT

- 3.1 Aamir Muhammad, as affiant of the affidavit, stated that he is a Director in Kainaat Investments Limited. He averred that Judgment was entered in favour of Kainaat Investments Limited against Mutemwa Mutemwa for the amounts of USD\$40, 000.00 and K30, 000.00, as shown on the default Judgment which was exhibited as 'AM1'.
- 3.2 It was also stated that after the Judgment was entered, Mutemwa Mutemwa pleaded to be given time to pay as evidenced on one of the letters, dated 5th May, 2022, which was exhibited as 'AM2'.
- 3.3 He further deposed that on 7th June, 2022, Mutemwa Mutemwa dishonestly availed the advocates for Kainaat Investments Limited, a fake instruction to his bank, to transfer the Judgment sum to the advocates for Kainaat Investments Limited, which instruction was exhibited as 'AM3'.
- 3.4 Aamir Muhammad deposed that on 19th April, 2022, Kainaat Investments Limited caused to be issued a Writ of Fieri Facias, which was exhibited as 'AM4' against Mutemwa Mutemwa. He stated that execution of the same was

attempted in November, 2022 by the Sheriff of Zambia, but it was suspended after Mutemwa Mutemwa pleaded to settle the debt in few days.

- 3.5 The averment was further that from that time, Mutemwa Mutemwa had made several unfulfilled promises to pay the Judgment sum, and he had relocated to another residence, and had been reluctant to avail Aamir Muhammed his current residential address.
- 3.6 It was also stated that as shown by exhibits 'AM3' and 'AM4', Mutemwa Mutemwa had demonstrated that he had more than sufficient income to cover the debt that is due to Kainaat Investments Limited.

4. LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN SUPPORT

- 4.1 The List of Authorities and Skeleton Arguments cited the law that had been relied on, in making the application. Further reliance was placed on ***Order 3 Rule 2 of the High Court Rules*** in making the application. The argument was that all efforts to recover the Judgment sum had proved futile, and committing Mutemwa Mutemwa to prison was the only way of compelling him to pay the Judgment debt.
- 4.2 It was also argued that Kainaat Investments Limited undertook to meet the costs of Mutemwa Mutemwa's subsistence during his stay in prison.

5. AFFIDAVIT IN OPPOSITION

- 5.1 State Counsel, Mutemwa Mutemwa in the affidavit in opposition that was filed on 23rd August, 2023, agreed to the averments in the affidavit filed in support of the application, that he had pleaded to be given time to pay on the default Judgment being entered, to the extent that he had reasoned with Kainaat Investments Limited to exercise patience because he was expecting funds from various debtors, who have unfortunately not paid.
- 5.2 It was denied that State Counsel, on 7th June, 2022, availed the advocates for Kainaat Investments Limited a fake letter of instruction, which was exhibited as 'AM3' to the affidavit filed in support of the application, to his bankers to transfer the Judgment sum to the advocates for Kainaat Investments Limited.
- 5.3 The averment was that the said instruction was genuinely issued, as State Counsel had an expectation regarding incoming payments from debtors which, unfortunately, did not come through.
- 5.4 It was agreed, that as deposed to in the affidavit filed in support of the application, Kainaat Investments Limited caused to be filed a Writ of Fieri Facias, in Order to levy execution against State Counsel, which execution was suspended after State Counsel pleaded to settle the amount owed in a few days.

- 5.5 Further agreement was made to assertion that however, State Counsel did not fulfil the plea, and he relocated to a different address and had been reluctant to avail his current residential address, to the extent that State Counsel did in fact reason with Kainaat Investments Limited that he would settle his indebtedness, once what he was owed, was paid.
- 5.6 It was denied that State Counsel had had the means of paying the debt as shown on the WhatsApp messages that were exhibited as 'AM3' and 'AM5', as the said documents demonstrated that State Counsel had more than sufficient funds to cover the debt. The basis of the denial, was that Kainaat Investments Limited wanted to paint a picture that State Counsel had received funds but he did not intend to pay the debt.
- 5.7 However, the contention was that State Counsel was owed funds by several debtors, but those funds were yet to be paid. It was also deposed that State Counsel was owed USD\$2,500, 000 in legal fees, which was expected to be credited into his account at any time, from when the affidavit was deposed to. He added that Aamir Muhammad of Kainaat Investments Limited had occasion to confirm this, when he spoke with an agent of State Counsel's client. The letter of engagement for legal services was exhibited as 'MM1'.
- 5.8 State Counsel deposed that he had been advised by his advocates on record, and he verily believed the same to be true, that Kainaat Investments Limited had not satisfied the

evidence of Mutemwa Mutemwa's efforts to create a false impression that he was expecting funds.

- 6.4 That in any event, there was no logic in investing K180,000.00 in such a venture, when Mutemwa Mutemwa could have reduced his indebtedness to Kainaat Investments Limited. Thus, it was reiterated that Mutemwa Mutemwa had had the means to pay, but had created the impression that he was yet to receive the funds.

7. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR KAINAAT INVESTMENTS LIMITED

- 7.1 In submitting, Counsel for Kainaat Investments Limited, stated that they relied on the affidavit that was filed in support of the application, as well as the Skeleton Arguments in support. Counsel's prayer was that should the application be granted, a grace period of up to One (1) week should be given to pay. Then if the payment was not made, Mutemwa Mutemwa should be committed to prison as he had given the assurance that he would pay the Judgment sum within Forty-Eight (48) hours.

RESPONSE BY COUNSEL FOR MUTEMWA MUTEMWA

- 7.2 In response, Counsel submitted that they relied on the affidavit in opposition, which was filed on 23rd August, 2023. In augmenting, Counsel stated that the proviso to **Section 4 of the Debtors Act, Chapter 77 of the Laws of Zambia**, places an obligation on a Judgment Creditor to prove to the

Court's satisfaction, that the Judgment Debtor has or has had the means to settle the Judgment sum, but has refused to settle the same.

- 7.3 Counsel took the view that this had not been done, and therefore the Court could not exercise its' jurisdiction under the Section. He also stated that secondly, with regard to ***Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia***, it is meant to cover matters that have not yet reached Judgment stage. However, in this case, there is a Judgment that is in place, and an interlocutory Order could not be made pursuant to that provision.
- 7.4 It was further Counsel's submission, that Mutemwa Mutemwa had given Kainaat Investments Limited continuous appraisal on the funds that were intended to be used to settle the Judgment debt. Thus, the application was a desperate attempt to humiliate Mutemwa Mutemwa who was ready to liquidate the Judgment sum.

REPLY BY COUNSEL FOR KAINAAT INVESTMENTS LIMITED

- 7.5 It was stated in reply, that as evidenced by the affidavit in reply, which was filed on 1st September, 2023, Mutemwa Mutemwa had had the means to settle the Judgment debt but he had neglected to do so. Counsel also submitted that exhibit 'AM3' to the affidavit filed in support of the application, was an instruction to ZANACO to pay Eight

Hundred Thousand Kwacha (K800, 000.00) as the Judgment sum on 7th July, 2023.

- 7.6 However, no explanation had been satisfactorily given by Mutemwa Mutemwa, as to why Kainaat Investments Limited did not receive the funds. Thus, it could only be concluded that the instruction was made with the full knowledge that there were no funds in the account, or that a stop Order was issued to stop the payment.
- 7.7 Counsel added that either way, that was evidence of intention to deliberately deprive Kainaat Investments Limited of the funds.
- 7.8 Counsel left the reliance on **Order 3 Rule 2 of the High Court Rules**, in the hands of the Court, but stated that **Section 4 of the Debtors Act** clothed the Court with jurisdiction to grant the Order prayed for.

8. DECISION OF THIS COURT

- 8.1 I have considered the application. It is made pursuant to **Section 4 of the Debtors Act, Chapter 77 of the Laws of Zambia** which is as follows in provision:

“4. Subject to the provisions hereinafter mentioned and to prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or Judgment of that or any other competent court:

Provided that-

- (i) *the jurisdiction by this section given shall, in the case of any Court other than the High Court, be exercised only by a subordinate court of the first or second class, and by an order made in open Court and showing on its face the ground on which it is issued;*
- (ii) *such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had, since the date of the order or Judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.*

8.2 Further reliance has been placed on **Order 3 Rule 2 of the High Court Rules** in making the application. That Order provides that:

“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

8.3 In respect of the use of **Order 3 Rule 2** in making the application, that has been objected to, on the basis that it is only applicable to applications that are made prior to Judgment being passed in a matter, and not after Judgment has been delivered.

8.4 In the case of **Hakainde Hichilema and Five others v the Government of the Republic of Zambia** ⁽¹⁾ the Court held that:

“From its’ wording Order 3 Rule 2 gives wide discretionary power to a Court to make interlocutory orders even if the said orders are not expressly asked for in order to meet the ends of justice. The question is; does this discretion extend to final orders? Looking at the provisions of Order 3 Rule 2 of the HCR, it is clear that the Order only applies to interlocutory Orders...”

8.5 **Black’s Law Dictionary, 9th Edition by Bryan A. Garner, Thomas Reuters West Publishing, 2009** at page 889, defines interlocutory as:

“A motion for equitable or legal relief sought before a final decision.”

8.6 In this matter, the application was made pursuant to both **Section 4 of the Debtors Act, Chapter 77 of the Laws of Zambia**, and **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**. While, **Order 3 Rule 2 of the High Court Rules**, is inapplicable, there already

being a Judgment in this matter, **Section 4 of the Debtors Act** applies. The application is therefore properly before me.

8.7 Coming to the merits of the application, the requirements of the proviso to **Section 4 of the Debtors Act** that have to be satisfied are:

- i. the person making default either has or has had, since the date of the Order or Judgment, the means to pay the sum in respect of which he has made default,
- ii. and has refused or neglected, or refuses or neglects, to pay the same

8.8 In terms of proof of means to pay the debt, **Section 5 of the said Act** provides that:

“5. Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules.”

8.9 In this matter, the only evidence of Mutemwa Mutemwa’s means to pay the Judgment sum are the correspondences that are exhibited as ‘AM2’ to the affidavit filed in support of the application, which is a letter dated 5th May, 2022, that Mutemwa Chambers wrote to G.M Legal Practitioners giving assurance that payment of the Judgment sum would commence the following week and would be completed within a month.

consequences of issuing such a letter, if he did not have the money in the account at the time. The letter even has a date stamp for Zambia National Commercial Bank, entailing that it was received.

- 8.16 Mutemwa Mutemwa did not, in the affidavit in opposition explain what if any, he did after the funds that he was expecting to come through, did not hit the account. This could have been done by exhibiting the promises that were made to pay him by the so-called debtors, and what action he took on not being paid. Further, there is no evidence to show that he advised G.M. Legal Practitioners of his predicament.
- 8.17 Had he had done so, then this Court would have been satisfied that he indeed acted in good faith, and did not intend to mislead Kainaat Investments Limited and its' advocates G.M. Legal Practitioners, that he had the means to pay, when in fact not.
- 8.18 In the absence of any plausible explanation as to why Mutemwa Mutemwa issued a letter, instructing the Bank to pay G.M. Legal Practitioners, the sum of Eight Hundred Thousand Kwacha (K800, 000.00), the only reasonable inference that I can draw, is that he had the means to pay such sum, but he thereafter for reasons only known to himself, ensured that the payment did not go through.

8.19 Having so found, and the money not having been paid, the proviso to **Section 4 of the Debtors Act, Chapter 77 of the Laws of Zambia**, has been satisfied.

9. CONCLUSION

- 9.1 The proviso to **Section 4 of the Debtor's Act** having been satisfied, I Order that Mutemwa Mutemwa shall forthwith be imprisoned for Thirty (30) days. Kainaat Investments Limited shall meet the costs of Mutemwa Mutemwa's stay in prison. I do however suspend the Order of imprisonment for a period of Thirty (30) days to enable Mutemwa Mutemwa to settle the Judgment sum in full.
- 9.2 If he fails to settle the Judgment sum in full at the end of Thirty (30) days from today, being by 11th March, 2024, the Order of imprisonment shall become effective, and a warrant for his arrest will issue.
- 9.3 Costs of the application go to Kainaat Investments Limited, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 7th DAY OF FEBRUARY, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

