CLEMENT CHUUYA AND HILDA CHUUYA *v* JJ HANKWENDA

supreme court.
ngulube, CJ, lewanika, DCJ and chibesakunda, JS.
22nd November 2001 and 20th February 2002.
(SCZ Judgment No. 3 of 2002.)

Flynote

Civil Procedure – Writ of Eligit – Willful default leading to loss for the judgment creditor – Practice followed.

Held:

Where a judgment creditor in possession of the debtors property from which an income could be derived, willfully defaults by failing to realize any income from the property, the debtor can apply to court for an inquiry of the income which would reasonably have been realized and sum found should be credited to the judgment debtor.

Work referred to:

Rules of the Supreme Court (White Book) Orders 40 and 88.

Legislation referred to:

High Court Act Cap. 27 Order 42.

Cases referred to:

1. *Construction Sales and Services Limited and Others* v *Standard Bank Zambia Limited* (1990-1992) ZR 157.

2. *Farmers Co-operative N.R. Limited* v *Drake* (1963-1964) Z.R. 74.

C.L. Mundia of C.L. Mundia and Company for the appellants.

A.M. Munyinda of Munyinda and Company for the respondent.

Judgment

NGULUBE, C.J. delivered the judgment of the Court.

For convenience, we will refer to the respondent as the plaintiff and the appellant's as the defendants, which is what they were in the action. This was to have been a simple case where the plaintiff, an estate agent, sued the defendants to recover a sum of K5 Million being agency fee or commission for finding a buyer. Judgment was entered for the plaintiff for the said K5 Million plus interest at the average Bank of Zambia lending rate from 10th April, 1996, up to date of payment, plus costs. This was after the learned trial Judge accepted the plaintiff's claim that it was through his agency that the defendants found the purchaser at K50 million for their house at Stand Number 6834 Olympia Park Extension. The defendants had tried to evade paying the commission. The case became complicated after the plaintiff had tried to execute a writ of fieri facias to which there was a nulla bona return since the defendants were abroad and only a tenant was in their other property in Makeni which strangely enough was the address endorsed for the execution.

The case followed a strange path when the plaintiff decided that he would recover his money by proceeding against the judgment debtors' Makeni property and that he would enforce some of the orders himself. Even efforts to have the judgment debt paid amicably ran into difficulties when the plaintiff, by his Counsel, calculated the indebtedness at K37,725,000 comprising the judgment debt of K5 million; interest chosen at 50 percentage p.a over four years of K10 million; bailiff's cost of K1.5 million, surveyor's fees of K900,000; an alleged property management fee of K5,325,000; and legal costs self assessed at K15 million. Counsel for the defendants counter proposed interest at 30 percentage amounting to K5,625,000; bailiff's fees at K900,000; nil for surveyor's fees; nil for property management; and K6 million for legal fees. This came to K17,525,000 less K2,981,000 paid as at that time to leave a balance of K14,544,000. These figures were apparently not agreed. Meanwhile, the plaintiff ejected the tenant the defendants had left in their Makeni property after obtaining a charging order which charged that property with the payment of the judgment debt. This led to the claim for the management fee, a claim so devoid of legal basis that we are surprised it was ever made at all. There was an argument that the plaintiff did not comply with the provisions of Order 50 RSC in the White Book under which the charging order purported to be made. But if in fact possession could be taken under the order, the plaintiff would have been in the same position as a mortgagee in possession so that Order 88 of the White Book would have had to be complied with if there was to be any sale:- See RSC Order 50/9A of the 1999 white Book. He would also have been required to use his best endeavors to liquidate the judgment debt such as by letting the property and collecting the rent. It was pointless and unacceptable to eject a tenant and instead to incur the alleged management fees. In this regard, we reaffirm our sentiments to this effect in *Construction Sales and Services Limited and Others* v *Standard Bank Zambia Limited* (1). We reaffirm also that where a judgment creditor in possession of the debtor's property from which an income could be derived willfully defaults by failing to realize any income from the property, the debtor can apply to court for an inquiry of the income which would reasonably have been realized and the sum found should be credited to the judgment debtor.

It was argued and submitted as we have previously mentioned that Order 50 RSC was not complied with. For instance, the order appears not to have been in the first instance one to show cause, specifying the time and place for further consideration of the matter and imposing the charge in any event until then. Order 50 speaks for itself. We agree with Mr Mundia that this was not complied with and that the steps actually taken fell far short of compliance with the practice and procedure outlined under Order 50. Mr Munyinda submitted that his client had substantially complied with the order. We do not agree.

In any event, the plaintiff appears to have forgotten that a charging order simply gives security and that an order for sale thereafter places the judgment creditor in the same position as a mortgagee. This is why Order 50/9A (2) provides that Order 88 – which is for mortgage actions – shall apply to proceedings to enforce a charging order by sale. It is necessary to keep repeating that the plaintiff had the responsibilities of a mortgagee when he decided to take possession of the defendant's Makeni property. Even this was done under defective elegit proceedings. Mr Munyinda very properly conceded that when the property was seized under a writ of elegit, the relevant Order 42 of our High Court Rules was not followed at all. To begin with, there was no effort whatsoever to ask the Sheriff to conduct an inquisition and to make a return. Indeed, the detailed procedure for elegit was not followed at all: See for instance the leading case in this country on this method of enforcement in *Farmers Co-operative (N.R.) Limited* v *Drake* (2). In that case Charles J, went out of his way to summarize the law and practice of this ancient remedy. We urge those wishing to proceed by way of elegit to have recourse to the very useful and very detailed outline of the practice to be followed which the Judge set out from the penultimate paragraph at page 75 to the first paragraph at page 77. The sale under elegit is supposed to be closely supervised by the court which should also approve the price which must always be fair and in the best interests of both sides, including the debtor. In the case at hand, there was not even any pretence to see through the writ of elegit issued. Instead, it was used as a device to simply gain possession of the defendant's Makeni property. This was an abuse of the process of elegit, a process of the Court.

Having got hold of the property, the plaintiff had it valued by some surveyors who put the market value at K142 million. Yet by private treaty not even submitted to the Court for approval, the plaintiff tried to sell the property to a third party for K60 million. The court cannot possibly allow what would in essence be a fraud on the judgment debtors to stand.

We heard many submissions and many arguments on both sides. It was even alleged that the K5 million debt had all but been paid – a sum of K4.9 million was mentioned. The indebtedness was inflated by figures which had neither been agreed nor sanctioned by the court. The wrongful attempts by defective elegit and charging order to realize the judgment debt only served to add to the confusion. There are many ways of enforcing a money judgment and if a judgment creditor chooses to proceed by way of elegit, this must be done properly. Similarly, if charging orders are preferred, the correct practice and procedure must be adopted. The attempt here to fashion some kind of hybrid and short cut procedures resulted in a process of enforcement which looks more like self-help.

Having examined the record and having considered all the arguments and submissions, that we are satisfied that the appeal must be allowed to the extent that we set aside the enforcement of the judgment by purported elegit and the charging orders; and order for sale; we also set aside the purported sale to the third party. While we do not disturb the original judgment, we also recognize the harmful effect of the respondent's irregular efforts to realize his judgment. In this regard, we remit the case to the High Court with the directive that, on application by either party, the Deputy Registrar should ascertain what is properly still owing if anything to the judgment creditor on the judgment plus interest and legal costs including bailiffs fees. The learned Deputy Registrar should also ascertain what the debtors have paid as well as what they should be credited as having paid in respect of the income the judgment creditor should have received from having taken possession of the judgment debtor's property in Makeni, being Farm No. F687A/16/D/IA. The side that will be found to be owing the difference will pay the same to the other.

We have not forgotten about the third party; the alleged purchaser of the property from the respondent. There was a dispute whether he had already paid or not and if he was related to the respondent or not. These are all immaterial. The sale cannot stand and it has been

quashed. If he paid, the third party should be refunded by the judgment creditor, the respondent herein. Costs follow the event and will be taxed if not agreed.

Appeal allowed.