

IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE
(Commercial Division)

2018/HKC/061

Between:

KATONGO AND COMPANY (*suing as a Firm*)

Judgment Creditor

And

SUNGANI MWALE

Judgment Debtor

(*Sued as Receiver/Manager of
Kapiri Glass Manufacturing Co. (2008) Limited
(In receivership)*)

KAPIRI GLASS MANUFACTURING COMPANY (2008)
LIMITED (*IN RECEIVERSHIP*)

1st Claimant

DEVELOPMENT BANK OF ZAMBIA

2nd Claimant

Before Justice Abha N. Patel, S.C. the 19th day of April, 2021

For the Judgment Creditor: Mr. C. Magubbwwi

of Messrs Magubbwwi and Associates

For the Judgment Debtor: No Appearance

For the Claimant: Mr. S. Twumasi of Messrs Kitwe Chambers

For the 2nd Claimant: Ms. C. Mutati Legal Counsel Development Bank of Zambia

RULING

List of Authorities

1. The Rules of the Supreme Court 1999 Edition.
2. The Constitution of Zambia Act No. 2 of 2016.
3. The Rules of the High Court Chapter 27 of the Laws of Zambia
4. The Corporate Insolvency Act No. 9 of 2017

List of cases

1. Magnum (Zambia) Limited v Basif Quadri (Receiver/Manager) and Another (1981) ZR 141
2. Avalon Motors Limited (in receivership) vs Bernard Leigh Gadsden & Motor City Limited (1998) Z.R. 41 (SCZ)
3. DBZ and KPMG and Others v Sunvest Pharmaceutical and Sun Pharmaceuticals Limited. —

Complete
Citation

1 Introduction and background

- 1.1 This application comes before me by way of a Notice of Claim to goods filed by the 1st Claimant on 16th December 2020. (*Notice of Claim*).
- 1.2 The Judgment Creditor (Plaintiff) responded by filing its application to set aside the Notice of claim to goods taken in execution on the 21st day of December 2020 with its attendant skeleton arguments and supporting affidavit. (hereinafter referred to as *the Application to set aside*)
- 1.3 The 1st Claimant did file its Affidavit in Opposition to the application to set aside and skeleton arguments on 29th December 2020.
- 1.4 The 2nd Claimant equally filed its Affidavit in opposition to the application to set aside with its attendant skeleton arguments on 5th January 2021.
- 1.4 The Judgment Creditor filed its Affidavit in Reply to the 2nd claimant's affidavit in opposition on 25th January 2021.

1.5 The application was scheduled to be heard by a re-scheduled notice of hearing on the 18th day of January 2021. The Court however being indisposed on the said date, did issue Special Order for Directions dated 1st February 2021.

1.6 However, and after the issuance of the special order for directions, Parties continued to file further skeleton arguments and affidavits, without leave and or any application to enlarge time.

1.7 In the interest of justice, and in the exercise of its inherent discretion, and upon seeing a proposed Consent Order filed by the 1st claimant on 9th February 2021 by way of summons for leave to file further submissions, the Court did call the Parties for a status on 24th February 2021 and did allow the Parties to file a Consent Order to agree the substantive issues in dispute and which required the determination of the Court. The Court also ordered that the said consent order to include further order for directions should be filed by or before 3rd March 2021.

1.8 The Parties having failed to file the consent order in time, the Court did issue a notice of hearing for a further compliance conference returnable on 30th March 2021.

1.9 At the said compliance conference, the Court noted that Parties had proceeded to file their respective statement of issues to be determined by the Court, it being noted that these were again filed without leave or any application for leave, the most recent of which was filed on 29th March 2021.

1.10 In the interest of finality of matters, and with a view to determining the applications before the Court in a conclusive manner, the Court, with

consent of counsel~~s~~ present, did issue further directions, calling upon the 1st claimant to file its skeleton arguments by or before 6th April 2021, Messrs Development Bank of Zambia, by 12th April 2021 and the Judgment Creditor to file its skeleton arguments in reply by or before 19th April 2021.

1.11 For the avoidance of doubt, the Court did direct that no further documents other than those specified in **paragraph 1.10** above be filed in these proceedings.

1.12 It is in accordance with the said further directions that the Court has proceeded to deliver this Ruling the subject of the applications before the Court.

1.13 The Court remains grateful to Counsel for the Parties for the industry employed in the documents presented all of which have been considered carefully alongside the respective submissions and my decision is as set out below.

2. **Facts and relevant Evidence**

2.1 The following facts are common cause from the Record, the affidavit evidence and or the pleadings settled in *casu*:

(i) The Plaintiff, an advocate, practising under the name and style of Katongo and Company was engaged by the Defendant, acting in his capacity as receiver and manager of Kapiri Glass Manufacturing Company (2008) Limited (In receivership) to render legal services to the defendant.

(ii) The defendant, Sungani Mwale, at all material times was a natural person working and acting as the duly appointed receiver/manager of Kapiri Glass Manufacturing Company (2008) Limited (In Receivership). (hereinafter referred to as *KGMC*)

(iii) This Court, (under the hand of the then Hon. Judge seized with the matter), did enter a consent judgment on 20 February 2019 in favour of the plaintiff in the sum of USD 236,500 by way of full and final settlement of the plaintiffs claims against the defendant. (*The judgment sum*).

(iv) The record will also show that the Court subsequently ordered the change in the name of the receiver/manager to one Martin Mutondo, as the appointment of Sungani Mwale was terminated on 28 January 2018.

(v) The record will show that there were various applications made such as for joinder by Development Bank of Zambia, as intended second defendant, and on whose behalf the defendant had been appointed and who then appointed the Plaintiff to render legal services referred to in 2.i above. The court however did not allow the application for joinder of the intended 2nd defendant, noting that the consent judgment of 20 February 2019 remained intact, there being no further issues to be determined in the matter. It is worth noting that the application for joinder was made after the Consent Judgment was entered.

(vi) This court dealt with a post judgment application for leave to issue a writ of execution which it granted on 9th August 2019, and against which execution, the notice of claim is now mounted.

(vii) Further, several post judgment interlocutory applications were made on behalf of the Plaintiff (the judgement creditor) all in an effort to recover the judgment debt from the defendant.

(viii) The Record will indicate that this Court did deliver a Ruling dated the 14th day of September 2020 on an application by the Judgment Creditor for an Order for Private Sale by the Sheriff pursuant to **Order 47 rule 6** of the Rules of The Supreme Court 1965, (White Book 1999 Edition Vol.1).

(Hereinafter referred to as *the Ruling*) which application was dismissed by the Court in its Ruling.

3.1 The Notice of Claim

- (i) The 1st claimant, namely Kapiri Glass Manufacturing Company (2008) Limited (In Receivership) (*KGMC*,) made a claim to the goods taken in execution by the Sheriff of Zambia under this cause and maintained that the Claimant was not a party to the proceedings.
- (ii) The claimant also submitted that there is in force an ex parte order of interim injunction against the Receiver of the claimant, dated 2nd October 2018 and a Ruling confirming the said interim injunction delivered on 5th September 2019 in Cause Number 2018/HP/1664.
- (iii) The claimant did attach copies of the process referred to in *2ii* above to its notice of claim.

3.2 The Application

- (i). The Judgment Creditor responded on 21st December 2020 by mounting a challenge by Summons to set aside the Notice of Claim to goods taken in execution. It has relied on the Affidavit of Katongo Nsofu and skeleton arguments filed on the same day.
- (ii) The Judgment Creditor has moved this Court to impugn the Notice of Claim for irregularity on two grounds: *firstly* that the 'claimant' is one and the same judgment debtor and cannot lay claim to the goods taken in execution, and *secondly* that the 'claimant' being in receivership cannot process any court application free of the receiver.
- (iii) Counsel for the Judgement Creditor has referred the Court to a plethora of authority on the first challenge mounted by it and has referred specifically to **Order 2 rule 2 of the Rules of the Supreme Court and Order 17 rule 1(b)** of the said rules and has urged the Court to strike out the notice of claim for its failure to comply with the rules of court.
- (iv) On the second challenge, the Judgment Creditor has referred the Court to the case of **Magnum (Zambia) Limited v Basif Quadri (Receiver/Manager) and Another**, in support of its submission that a company in receivership has no locus standi independent of its receiver, and further submits that this irregularity alone, is sufficient for the Court to set aside the Notice of Claim for irregularity.

- (v) The claimant has opposed the arguments of the Judgment Creditor and through its Affidavit in Opposition has endeavoured to submit on the status of the judgment debtor in its attempt to differentiate it from the company, namely Kapiri Glass Manufacturing Company (2008) Limited (In Receivership) being the company that filed the Notice of Claim to goods.
- (vi) In as far as the deponent of the claimant's affidavit in opposition makes several averments, and has filed skeleton arguments and legal submissions, which have been anxiously considered by the Court.
- (vii) The Court has noted the submission of the claimant challenging the propriety of the Judgment Creditor's application to strike out the Notice of Claim and they have submitted that in accordance with **Order XLIII of the High Court Rules Cap 27** of the Laws of Zambia and **Order 17 of the Rules of the Supreme Court**, that the appropriate action was for the issuance of an interpleader summons and that the Judgment Creditors application being incompetent ought to be dismissed with costs.
- (viii) The application to set aside the Notice of Claim is further opposed by the 2nd Claimants affidavit in opposition and skeleton arguments filed on 5th January 2021. The Court has scrutinised the said opposing arguments and has reflected deeply on its contents and will make its

observations in the Ruling. The Court has noted specifically the exhibits produced and marked “MM1’ through to “MM12’

- (ix) The Judgment Creditor filed its Affidavit in Reply on 25th January 2021 and as has been noted in **paragraph 1.10** above, the Court did issue further directions for the orderly conduct of matters before it and has considered all documents on the record before it.

4. **The Issues**

4.1 Although I note the efforts of the Parties to lead the Court into determining the very many issues raised on the propriety of the *Notice of Claim*, versus the Judgment Creditor’s *Application* to set aside the said notice of claim as opposed to an interpleader action, the Court in the interest of justice and with a view to finality in litigation (having noted the several interlocutory post-judgment applications) that have consumed the Courts valuable time and resources, must as a natural consequence of the raging and competing dispute, look at this matter with a holistic and not myopic view.

If the law is a living institution, it must rise to the challenge and respond to the real issues that have confronted this Court without mindless adherence to technicalities. On this I am guided by **Article 118 of the Constitution of Zambia Act No. 2 of 2016**.

4.2. I am of the considered view that the real issue for determination is the status of the consent judgment and the status of the Judgment

Creditor (the Plaintiff) in *casu* viz the competing claims to the assets seized by the Sheriff in execution.

5. Analysis of the Law and the Issues

5.1 It is critical to note and the Court does take judicial notice of the fact that at the time the action in *casu* was filed, on 7th November 2018, the Judgment debtor appears to have had been restrained by an ex parte Order for preservation of property and or interim injunction pending the determination of the matter, by another Court of competent jurisdiction under cause number 2018/HP/1664, which Order was granted on 2nd October 2018. (*the ex parte order of preservation*). This appears as exhibit "MM8" to the 2nd claimants affidavit in opposition filed on 5th January 2021. The operative part of the ex parte order of preservation reads as follows:

"It is hereby ORDERED and DIRECTED that Defendants herein whether by themselves, their officers, their servants, agents or whoever be and are restrained from disposing of and dealing in whatsoever manner with the assts of the Plaintiff herein, and from enforcing the third party mortgages and or securities taken out in respect of the working capital loan and the facilities pending the determination of this matter by the Honourable Court."

5.2 It is noted that the Plaintiff in that action was Kapiri Glass Manufacturing (2008) Company Limited (In Receivership) and the 1st and 2nd Defendants were Sungani Cisanzo Mwale (sued in his capacity as Receiver and Manager of was Kapiri Glass Manufacturing

(2008) Company Limited (In Receivership) and Development Bank of Zambia respectively.

- 5.3 The record in *casu* reflects that the consent judgment was sealed by this Court on 20th February 2019 and It was a further term of the said consent judgment *that the defendant shall pay the judgement sum as soon as the restriction on him and the defendants bank account is removed and in default the Plaintiff shall be at liberty to enforce the judgement.*
- 5.4 Further the defence filed in *casu* at *paragraph 5* thereof states that the defendant has not neglected or failed to pay the reduced legal fees but that it has been prevented because of an interim injunction order issued by the Court stopping the withdrawal of any money from the bank by the defendant.
- 5.5 It may be argued that the defence refers to the ex parte order of preservation stated in 5.1 above.
- 5.6 However, and what is clear in the mind of the Court is that the Consent Judgment was granted by the Court and to date, there is no application in this Court or in any other Court, to set aside the said consent judgment. It is clear therefore that the Judgment Creditor was not privy to the proceedings referred to above and not expected to have known of the limitation of the judgement debtor (the defendant) in entering the terms of the consent judgment and who was adequately represented by Counsel.

5.7 The Court will not venture down the path of speculative conjecture save to state that the consent judgment in *casu* remains and is enforceable by the Judgment Creditor in the terms as provided by the said consent judgment.

5.8 The Court has also had occasion to reflect on the affidavit and skeleton arguments filed by the '2nd Claimant', and again, in the interest of finality, will not attempt to determine the propriety of it having proceeded in the manner it did, save to note that it has also referred this Court to a Judgment and subsequent Ruling issued by my learned brother Hon. Justice Chenda in **Cause No. 2020 /HPC/0721**. This confirms my earlier finding as stated in *paragraph 5.6* above, that the Judgment Creditor was neither privy to that matter nor concerned with the issues surrounding that action, which appear to have centred on the termination of the deed of appointment of the Receiver/Manager of KPMG and issues surrounding his remuneration during the period of his appointment. Any pronouncements made by that Court cannot be imported in *casu*.

5.9 Further, any suggestions and submissions that the consent judgment should be impugned due to the excessive amount or fees not commensurate with the level of services rendered by the Judgment Creditor, is frowned upon, as this is neither the correct forum nor prescribed manner in raising grievances of this nature.

5.10 That the record in *casu* reflects that at the point of the Joinder application made by the Judgment Creditor, and as referred to in *paragraph 2.1.v* above, the intended 2nd Defendant, namely Development Bank of Zambia DBZ, (*the 2nd Claimant herein*) filed an opposition to the said application. It is clear that DBZ was aware of the terms of the consent judgment and further referred to the ex parte order of preservation of property issued under **Cause No. 2018/HP/ 1664**. To the extent that it maintains that it was not privy to the consent judgment in *casu*, it was aware of its existence from in or about 27 March 2019 (the date of filing its Affidavit in Opposition to the Joinder application). It is obvious that the 2nd claimant did nothing to challenge or set aside the said consent judgment.

6. **Conclusions and Orders**

6.1 This Court regrets to note the multiplicity of actions that appear to have been initiated and scattered all over the various registries and recalls the principles against multiplicity as guided by the Supreme Court of Zambia in cases such as **DBZ and KPMG and Others v Sunset Pharmaceutical and Sun Pharmaceuticals Limited**.

The effect of so many actions, with different pronouncements, scattered piece meal, may have the effect of bringing the law into disrepute, while litigants continue mounting challenges and heaping application upon application before the Courts, often ending up with orders that are at best, academic, and as guided by the

pronouncements of the Supreme Court, a Court will not issue Orders whose effect will be simply academic.

6.2 I must now escalate my findings to make determinations in the matter at hand and the subject of this Ruling. As has been determined, the interest of the Judgment Creditor remains intact as its consent judgment has not been impugned or challenged.

6.3 I have also arrived at the conclusion and agree with the submissions of the Judgment Creditor that the claimant is one and the same Judgment debtor and cannot lay a claim to the goods taken in execution. I have been referred to the provisions of **Order 17 rule 1(b) of the RSC 1965** whose effect is that a Judgment debtor can not file a notice of claim to initiate inter pleader proceedings with respect to his own goods taken in execution.

6.4 On the issue of a company in receivership having no locus independent of its receiver, I have anxiously considered the arguments advanced by both parties and have noted the reliance on the well cited authority of **Magnum (Zambia) Limited v Basif Quadri (Receiver/Manager) and another**.

I have equally considered the provisions of **Section 13 of the Corporate Insolvency Act No. 9 of 2017** which has codified that a Receiver appointed under deed is an agent and officer of the company over which he is appointed.

I have also considered the argument in rebuttal of the claimant who has posited that the Judgment debtor was sued in his own capacity as a natural person and not on behalf of or as agent for KGMC. I find this argument self-defeating, as a glance at the Writ of Summons issued in *casu*, cites the Judgment debtor as *Sungani Mwale (being sued as Receiver/Manager of Kapiri Glass Manufacturing Company (2008) Limited (In Receivership)*.

6.5 I have equally considered the argument of the 1st Claimant of the application of **section 20 (6)** of the **Corporate Insolvency Act No. 9 of 2017** and I accept the submission of the Judgment Creditor that this argument lacks merit and should be disregarded. It is cardinal to note that the property of the Judgment debtor was affected by a consent Judgment in *casu*, and before the receiver was dis-appointed. I accept the submission that ipso fact, the subsequent removal of the receiver did not nullify the consent judgment and following on, **section 20 (6)** does not injunct enforcement of the judgment by the judgment creditor.

6.6 I therefore arrive at the firm conclusion that the 'claimant' as Judgment debtor, cannot lay a claim to its own goods seized in execution and find that the Notice of Claim is incompetent before this Court and is set aside for irregularity.

6.7 In my considered opinion, the matter does not end here.

I have taken note of the many submissions leading to the fact of having reached an advanced stage in the process of negotiations and sale of

