

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA**

**2015/HP/1064**

*(Civil Jurisdiction)*

**BETWEEN:**

**BARNABAS CHIBOBOKA**



**PLAINTIFF**

**AND**

**BEATRICE CHOLA (MRS)**

**1<sup>ST</sup> DEFENDANT**

**JJOSEPH DAKA**

**2<sup>ND</sup> DEFENDANT**

**EVANS BANDA**

**3<sup>RD</sup> DEFENDANT**

**JULIET CHILENJE (MRS)**

**4<sup>TH</sup> DEFENDANT**

*(Sued in their capacity as Trustees of the  
Zambia National Aids Network)*

**GEORGE ZIMBA**

**5<sup>TH</sup> DEFENDANT**

**SAM KAPEMBWA**

**6<sup>TH</sup> DEFENDANT**

**FINGANI MHONE**

**7<sup>TH</sup> DEFENDANT**

*(Sued in their capacity as Task Team  
of the Zambia National Aids Network responsible  
For sale and disposal of ZNAN assets)*

*For the Plaintiff : Mr. W. Mwenya of Messrs Lukona Chambers*

*For the Defendants: N/A*

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**R U L I N G**

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**Legislation referred to:**

1. High Court Rules Chapter 27 of the Laws of Zambia

**Cases referred:**

1. Standard Bank Zambia Limited v Brocks (1972) ZR 306

This is an application by the Plaintiff for interim attachment of property pursuant to order 26 of the Rules of the High Court<sup>1</sup>. The application is supported by an affidavit deposed to by the Plaintiff.

The gravamen of the affidavit deposes that the defendants are indebted to the Plaintiff in the sum total of K308,827.00 being in respect salary arrears K100,452.00 salary in lieu of notice K29,997.00 gratuity on prorata basis K143,217.00 and allowable commuted leave days K34,661.00 as evidenced by a letter dated 12<sup>th</sup> September, 2011 produced as exhibit “**BC1**”.

That, it has come to the knowledge of the Plaintiff that the Defendants having been disposing off the assets of **Zambia National Aids Networks** on whose behalf they are acting as trustees and task team appointed to oversee the activities of Zambia National Aids Network during the winding up process.

That the said trustees have retrieved about 20 vehicles belonging to Zambia National Aids Network from various holders and the 5<sup>th</sup> Defendant Mr. George Zimba is aware of the said operation.

That some of the retrieved vehicles are parked at various unknown places whilst others are parked at one of the Trustees non-Governmental Organisations premises in Mtendere Site and service improved statutory area in Mtendere - in Lusaka. The identity of the said organisation is known as Africa Direction. The 3<sup>rd</sup> Defendant **Evans Banda** is associated with Africa Direction.

That the co-ordinating mechanism a Country representative body of global fund who funded the Zambia National Aids Council

(ZNAN) to procure the assets want the assets to remain with different holders for use in their programmes.

The Chairperson of ZNAN Task Term has requested the Country co-ordinating mechanism to consider paying the benefits of the remaining employees using the said assets.

It was deposed that unless an attachment order is made the remaining assets may be disposed off in which event the anticipated Judgment would be rendered nugatory for lack of assets.

The market value of each of the vehicles revealed by exhibit BC 2 is over K50,000.00. It was further deposed there is also a likelihood of dissipation of the vehicles through negligence if the same were not attached to the Court.

Some of the vehicles have been donated to other NGO whose details the Plaintiff pledged to furnish to the Court.

At the hearing of the inter-parte application, the Defendant's Advocates did not attend. Mr. Mwenya Learned Senior Counsel for the Plaintiff informed the Court that he had duly served the application and supporting affidavit on his colleagues, the Advocates for the Defendants as evidenced by an affidavit of service filed on 31<sup>st</sup> October, 2016. I therefore granted leave to the Plaintiff's Advocates to present their application.

In his brief submission Learned Counsel submitted that he was relying on the summons filed on 2<sup>nd</sup> June, 2016 together with the supporting affidavit. There being no affidavit in opposition, he prayed that the order for attachment be granted.

I should start by observing that, it is trite that if an application summons, motion or notice is launched by a litigant which is supported by an affidavit – the failure by the opponent to file in an opposing affidavit will ordinarily raise a rebuttable presumption that the facts deposed in the supporting affidavit are deemed to be admitted.

I however, do not accept the view that in every case where an application, summons, motion or notice, is not opposed by an affidavit the relief being claimed should automatically be granted.

In my view, even where an application is not opposed for one reason or another or for none at all, the Court is not prohibited to inquire into the merits or demerits of the application and to consider whether the application is well anchored on a legitimate order, Rule or any Section of the law or Judicial precedence and or practice direction to satisfy itself that in the circumstances of the case, the situation warrants the grant of any such relief or order sought by the moving litigant.

I will now proceed to deal with the substantive application.

The starting point in consideration of this application is order 26 Rule 1 of the High Court Rules which provides as follows:-

***“if the Defendant, in any suit for an amount or value of five hundred thousand kwacha (unrebased) or upward, with intent to obstruct or delay execution of any decree that may be passed against him, is about to dispose of his property from jurisdiction, the Plaintiff may apply to the***

***Court or a Judge, either at the time of the institution of the suit or at anytime thereafter until final judgment, to call upon a defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and his failing to give such security, to direct that any property, movable or immovable, belonging to the Defendant shall be attached until further order of a Judge”***

For an applicant to succeed, he has to satisfy two requirements, under order 26(1) to warrant the grant of the order. The First is that for such an order to be granted there must be a threat or intention on the part of the Defendant to dispose of his assets in order to obstruct or delay execution of any judgment.

Faced with the present application I visited the case of ***Standard Bank Limited V Brocks<sup>1</sup> (1972) ZR 306***, at page 307 where it states as follows:-

***“The remedy, which a Plaintiff has to protect chances of payment lies under order XXVI of the Rules<sup>1</sup>, namely, an interim attachment. Such attachment can of course only issue where a Defendant is about to remove or dispose of the property with intent to obstruct or delay execution of any decree, that may be passed with intent to obstruct or delay execution of any decree that may be passed against him”.***

The affidavit evidence to support this allegation is to the effect that the Defendants have donated some vehicles to various organisations.

The Plaintiff fears that if the retrieved vehicles are disposed off the anticipated judgement would be ordered nugatory.

There has been no attempt by the Plaintiff to demonstrate by physical evidence of indiscriminate disposal of the Assets of Zambia National Network Task Team, apart from the Plaintiffs unsupported assertions.

It is also worth noting that, the value of the vehicles listed in exhibit BC 2 page (ii) is put at K2,011,167,618. It is not clear as to what is the value of the vehicles which have been recovered.

The plaintiff is claiming a sum of K308,827.00. Granting a carte blanche interlocutory attachment of the vehicles in my view will not be equitable.

I find that the allegations fall short of the threats envisaged under order 26 Rule 1 of the High Court Rules<sup>1</sup> as propounded in the ***Standard Bank Limited Vs Brocks*** case<sup>1</sup>. To begin with there is no evidence that the Defendants intend to dispose of all the assets.

The evidence in paragraph 12 of the affidavit states as follows:-

***“That Mr. Zimba, the Chairperson of ZNAN Task team has requested the CCM to consider paying the benefits of the remaining employees using the said assets.”***

With this revelation and acknowledgment it is obvious the defendants, are aware of its indebtedness to the beneficiaries and there is no threat, veiled direct or indirect to dispose off all the assets of the Defendants. It has not been demonstrated that the Defendants intention is to obstruct or delay execution of any decree or judgment that the Court may give.

The second requirement is that, prior to making an application, such as the one before me, the Plaintiff should call upon the Plaintiff to provide security only where the Defendant to provide such security is the Plaintiff empowered to apply for an interim order of attachment.

Order 26(1) states in part,

***“The Plaintiff may apply to the Court, to call upon to furnish sufficient security to fulfil any decree that may be made against him in the suit, and, on his failing to give such security to direct that my property, movable or immovable belonging to the Defendant shall be attached.”***

It is clear from the foregoing portion of the order that the Plaintiff must first call upon the Plaintiff to furnish enough security to satisfy a judgment. Only upon his failing to do so, should a Court consider attaching his property. In the case in casu there is no evidence which has been fostered to show that such demand for such security was made and was refused or ignored by the Defendants.

On the foregoing reasons and by way of conclusion, the Plaintiffs application lacks merit and I accordingly dismiss it.

Ordinarily, a successful litigant must not be deprived of his well-earned costs unless good cause is shown why the successful must be deprived of such costs. The costs however, are at the discretion of Court. But in exercising the discretion the Court should act judiciously, in the case in casu the successful litigant in this application are the Defendants. The Defendants elected not to oppose the application and there was conspicuous absence of the learned Attorneys for the Defendants. It is therefore common cause that the collapse of the Plaintiffs application cannot be attributed to the industry of the Defendants nor their counsel, but at the industry of the Court.

The justice of the case is that I make no order as to costs. Differently put either party is to bear its own costs.

Leave to appeal to the Court of Appeal is hereby granted.

**Delivered at Lusaka this.....<sup>2nd</sup> November, 2016.**

**Mwila Chitabo, SC**  
**Judge**