

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2021/HP/1011

BETWEEN:

**TEHILAH BWALI
JANET THOLE**

AND

**ELIZABETH CHUMBO
REGINA NONDE**



**1ST PLAINTIFF
2ND PLAINTIFF**

**1ST DEFENDANT
2ND DEFENDANT**

Before: The Hon. Mr. Justice Charles Zulu.

The Plaintiffs: In Person

The 1st Defendant: No appearance

R U L I N G

Legislation & other materials referred to:

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

1.0 INTRODUCTION

1.1 This ruling is in respect of an application by the plaintiffs/judgment creditors dated August 29, 2023, for the arrest of the defendants/judgment debtors. The title of the

summons was dubbed: “Ex-Parte Summons for an Order of arrest of absconding judgment debtor”.

- 1.2 The application was made pursuant to Order XXV rule 1 of the **High Court Rules Chapter 27 of the Laws of Zambia** read together with sections 4 and 10 of the **Debtors Act Chapter 77 of the Laws of Zambia**.

2.0 BACKGROUND

- 2.1 A brief background to this application is that, on August 27, 2021, the plaintiffs took out a writ of summons accompanied by a statement of claim, essentially seeking payment of the sum of K121,000.00; being monies borrowed by the Defendants from the Plaintiffs.
- 2.2 The originating process was served on the defendants via substituted service. The defendants did not enter appearance and defence. A final default judgment was entered on March 31, 2022. Consequently, the plaintiffs took out a writ of fieri facias dated June 30, 2023, and attempted to execute the same on July 14, 2023. However, a return of *nulla bona* was entered, indicating that execution failed because the second defendant did not possess goods worth seizing.

3.0 THE HEARING

- 3.1 The application was initially set for hearing on September 28, 2023, the plaintiffs/judgment creditors and the second defendant were in attendance. However, the second defendant indicated that she was not ready to proceed because she was not served with the affidavit in support of the application, and was desirous to engage legal representation. I allowed an

adjournment. However, on the return date, January 26, 2024, only the plaintiffs were in attendance. The second defendant was inexcusably absent.

4.0 THE PLAINTIFFS' AFFIDAVIT EVIDENCE IN SUPPORT

4.1 An affidavit in support of the application was deposed to by the second Plaintiff, Tehilah Bwali. Basically the affidavit contains facts already summarised in the paragraphs dealing with the background of the case, I will not labour to regurgitate the same.

5.0 DETERMINATION

- 5.1 This application is bound to fail due to lack of certainty and procedural impropriety. It is appreciable the lack of certainty and non-compliance with the rules of procedure is on account that the plaintiffs are lay persons, with scanty knowledge on the matter in issue.
- 5.2 The plaintiffs/judgment creditors relied on section 10 of the Debtors Act, which provides:

10. Where the plaintiff in any action before the High Court or any subordinate court proves at any time before final judgment by evidence on oath to the satisfaction of the court that he has good cause of action against the defendant to the amount of twenty kwacha or upwards, and that there is probable cause for believing that the defendant is about to quit Zambia unless he be apprehended, and that-

(a) the absence of the defendant from Zambia will materially prejudice the plaintiff in the

prosecution of his action or in his obtaining satisfaction therein; or

(b) the defendant has disposed of or removed out of Zambia his property or any part thereof and the execution of any judgment or order will be thereby obstructed or delayed;

such court may, in the prescribed manner, order such defendant to be arrested and imprisoned for a period not exceeding six months ...

5.3 They also relied on Order XXV rule 1 of the HCR which provides:

1. An order to arrest under section ten of the Debtors Act shall be made upon affidavit and ex parte; but the defendant may at any time apply to the Court or a Judge to rescind or vary the order or to be discharged from custody, or for such other relief as may be just.

5.4 Clearly, the above provisions are inapplicable here, because they relate to arrest of an absconding defendant prior to entry of final judgment. The provision that relates to arrest of an absconding judgment debtor is section 11 of the **Debtors Act**. But the plaintiffs did not cite this section.

5.5 The plaintiffs/judgment creditors also relied on section 4 of the Debtors Act. The same provides:

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.

5.7 Section 4 above relates to committal to prison of a person or judgment debtor who defaults on the payment of the judgment debt. Clearly, the plaintiffs co-jointly relied on sections 4 and 10 of the Debtors Act, albeit the two relate to two different circumstances. And that is where the uncertainty lies with the plaintiffs' application making it irregular; as to whether the application be heard and determined under section 4 or 10 of the Debtors Act, when the two sections are respectively sui generis.

5.8 Even supposing that the application is certain, on mere account of its title, that the defendants be arrested as absconding judgement debtors, the same is still untenable. For the reason that, the plaintiffs/judgment debtors have not demonstrated that the judgment debtors are about to leave Zambia, or have disposed of, or removed out of Zambia their property, or any part thereof, or that there is probable cause for believing that they are about to do so, to the detriment of the plaintiffs.

5.9 Again, even assuming that the uncertainty is curable to the extent that section 4 of the Debtors Act could be enforced, the application remains untenable. In the absence of an inquiry through judgment summons, as to the means of the judgment debtors, the application to automatically invoke section 4 of the Debtors Act is premature and irregular.

6.0 CONCLUSION

6.1 In the light of the foregoing, the application is dismissed for procedural impropriety.

6.2 I make no order as to costs.

DATED THE 9TH DAY OF FEBRUARY, 2024.


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THE HON. MR. JUSTICE CHARLES ZULU