

**CONSTRUCTION SALES AND SERVICES LTD, A.I. BAGUS, D.H. BAGUS
AND P.C. CHIBUYE v STANDARD BANK (Z) LTD (1990 - 1992) Z.R. 157
(S.C.)**

SUPREME COURT
GARDNER, AG. C.J., SAKALA, AG. D.C.J., AND CHIRWA, J.S.
10TH JUNE, 1992 AND 9TH SEPTEMBER, 1992
(S.C.Z. JUDGMENT NO.1991)

Flynote

Civil procedure - *Elegit* - Writ of - Wilful default leading to loss for the judgment debtor - Appropriate procedure.

Headnote

The appellants' action is against an order of the High Court setting aside an order of a district registrar giving judgment against the respondent - in the sum of K9 623 935.05. In the initial proceedings, the respondent obtained judgment against the appellants in the sum of K22 351.64 with interest. Ultimately a writ of *elegit* was issued in execution of the judgment.

Various proceedings followed culminating in the district registrars order. The appeal basically concerned the appropriate procedure to be adopted when a judgment creditor who has taken possession of real property under a writ of *elegit* is alleged to have caused wilful default loss to the judgment debtor.

Held:

A judgment creditor as in possession under a writ of *elegit* has to use his best endeavours to liquidate the judgment debt as quickly as possible or through wilful default loss occur the creditor is liable and an account must be taken. If the prior account is unsatisfactory a further account may be applied for.

Works referred to:

Supreme Court Practice (White Book), order 43 of England, (2nd ed.) vol.14 paras. 133, 140.

For the appellants: H. Chama, Mwanawasa and Co.

For the respondent: B. C. Mutuale, Ellis and Co.

Judgment

GARDNER, AG. C.J.: delivered the judgment of the Court.

This is an appeal against an order of the High Court setting aside an order of a district registrar giving judgment against the respondent in the sum of K9 623 935.05.

The history of the case is that in an action, 1977/HK/27, the respondent obtained judgment against the defendant in the sum of K22 351.64 and interest at the rate of 11 per annum with costs of K74.40. Ultimately a writ of *elegit* was issued in execution of the judgment and the respondent took possession of the appellants' farm.

Various proceedings followed, including the issue of further writs which are irrelevant to this

appeal. On 21st May, 1990 the district registrar made an order on a summons to account as follows:

'It is hereby ordered that:

- (i) the plaintiff render an account of monies it has received on farm number 2355 Kitwe from rentals and/or any other means;
- (ii) the plaintiff render an account of the state and condition of the property the

p158

- defendants left at the aforesaid farm immediately before they were evicted by the plaintiff;
- (iii) the plaintiff show by how much the debt owed by the defendants has been liquidated; and
- (iv) the plaintiff deliver to the second defendant the Toyota Crown vehicle and the Ford truck bodies or their value AND that the costs of an incidental to this application be for the defendants and paid by the plaintiff.'

In pursuance of the order the respondent's manager filed an affidavit dated 17th July, 1990 in which he said that an attempted sale of the property had fallen through and that the respondent had not been able to let the property. The deponent said further that there was a trespasser on the farm and that the appellant still owed the sum of K29 000 on the judgment.

In reply the third appellant filed an affidavit dated 25th July, 1990 in which she deposed that as a result of the respondent's continued possession of the farm the appellants had suffered damages consisting of loss of income, damage to buildings and damage to movable assets.

On 16th May, 1991 the district registrar gave a ruling to the effect that the respondent had not prudently managed the farm and that the third appellant was entitled to the sum set out in her affidavit. The respondent appealed to the High Court and the learned judge, having held that it was wrong for the appellant to have relied on order 43 of the Supreme Court Practice (The White Book), set aside the district registrar's order. The appellants appeal against that finding.

This appeal basically concerns the appropriate procedure to be adopted when a judgment creditor, who has taken possession of real property under a writ of *elegit*, is alleged to have caused by wilful default loss to the judgment debtor. We agree with Mr *Chama* that under order 43(2) an application for an account to be taken may be made in any cause or matter. In particular, when a judgment creditor is in possession under a writ of *elegit* he is in the same position as a mortgagee, in possession (see *Halsbury's Laws of England*, 2nd ed. vol. 14 para. 133). In this case the first application for the taking of an account was properly made and the appellants were clearly entitled to an order. When the respondent purported to comply with the order by the manager's affidavit of 17th July, 1990, in which it was stated that there had been no letting of the property and therefore presumably no money to be accounted for, the appellants were entitled under order 43(5) to give notice that the account was unsatisfactory.

In order to make the taking of an account under order 43 effective it is obviously not enough for a judgment creditor in possession to say boldly that the property has not been let. The judgment creditor has a duty to use its best endeavours to liquidate the judgment debt as soon as possible. If through its wilful default any loss occurs it is responsible for such loss. (See *Halsbury's Laws of England* 2nd ed. vol. 14 para. 140.)

In this case the appellants alleged, *inter alia*, that they had lost income from the property; this claim should have been investigated by the district registrar. This was a case where there was obviously a dispute as to whether the facts disclosed any liability on the part of the respondent and it was quite

p159

inappropriate that it should have been dealt with on affidavit evidence. It is necessary for oral evidence to be heard to ascertain whether there has been wilful default by the respondent in failing to realise any income from the property and, if so, what amount of income would reasonably have been expected to be realised. Thereafter any such sum should be credited to the appellants until the judgment debt is satisfied so that an order can be made for the return of the property to the appellants.

As to the claims relating to the movable assets of the appellants, these were outside the scope of the writ of *elegit*, and had no connection with the account ordered to be taken. In so far as the ruling of the district registrar purported to deal with a claim for damages it should not have been made. Order 43 relates only to taking of accounts and consequent orders. In any event the writ of *elegit* did not extend to movable assets. The claim for damages, if any, would have to be the subject of other proceedings.

For the response we have given the appeal is dismissed. We confirm that the order of the district registrar dated 16th May, 1991 is set aside and we order that the case be remitted to the district registrar to hear oral evidence to decide whether the respondent should be held liable for failing to obtain any income from the property and, if so, to make an appropriate order.

Costs to abide the event in the Court below.
Appeal dismissed.
