IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 120/2020**
HOLDEN AT KABWE
(Civil Jurisdiction)

BETWEEN:

FINANCE BANK ZAMBIA LIMITED **APPELLANT**

AND

DIMITRIOS MONOKANDILOS **1st RESPONDENT**
FILANDRIA KOURI **2nd RESPONDENT**

CORAM: ***CHASHI, LENGALENGA AND NGULUBE, JJA.***
On 14th October, 2020 and 23rd October, 2020

For the Appellant: *F. Mudenda, Messrs Chonta, Musaila & Pindani Advocates*

For the Respondents: *C. Mambwe, Messrs Mambwe Siwila & Lisimba Advocates*

J U D G M E N T

NGULUBE, JA, delivered the judgment of the Court

Cases referred to:

1. *Zulu vs Avondale Housing Project Limited (1982) Z.R.172*
2. *Barclays Bank Zambia Plc vs Zambia Union of Financial Institutions and Allied Workers (2007) Z.R.106*
3. *Attorney General vs Marcus Kampumba Achiume (1993) Z.R.1*
4. *Kelvin Hang'andu and Company vs Webster Mulubisha (2008) Z.R.82,*
5. *Paddy P. Kaunda and others vs Zambia Railways Limited SCZ Appeal No. 13 of 2001*
6. *Caltex Oil Zambia vs Teresa Transport Limited (2002) Z.R.97*

Rules referred to:

1. The Court of Appeal Rules, Statutory Instrument No. 65 of 2016
2. The Supreme Court Practice, (White Book) 1999 Edition

INTRODUCTION

1. This is an appeal against a Ruling of Musona, J. of the Commercial Division of the High Court that was delivered on 13th May, 2020, dismissing the appellant's application for an order for stay of execution of a Writ of Fieri Facias.

BACKGROUND

2. The parties to this matter have been in courts of law since 1996, with various claims against each other and this has continued to date. On 20th March, 2018, the Court below delivered a judgment under cause 2012/HPC/0577 involving the parties herein and being dissatisfied with the same, the appellant appealed to this court. On 17th September, 2019 before the hearing of the appeal in this court, the respondents issued a *Writ of Fieri Facias* and on 18th September, 2019, the appellant sought and was granted an ex parté order of stay of execution by the court below.
3. In our Judgment dated 29th November, 2019 we upheld the lower court's Judgment and granted the respondents cost. However, before the parties could agree on the sum of interest due to the respondents

and prior to assessment, the respondents issued another *Writ of Fieri Facias* on 5th December, 2019 in which the sum of United States Dollars $1,512,769.66 was endorsed, being 7% interest on United States Dollars $949,933.87 from 17th January,1997, the date of the writ to 16th October, 2019 being the date of payment of the principal sum into court.

4. Based on the conduct of the respondents, the appellant, on 13th December, 2019 filed in the court below an application for stay of execution pending application to set aside *Writ of Fieri Facias*. On the same day, the court below granted the said application ex parté and later set it aside on 13th May, 2020 after an inter parté hearing, on the ground that the said application was an abuse of the court process.

5. At the same time, the appellant applied for leave to appeal to the Supreme Court which we denied and unsuccessfully renewed the same before a single judge of the Supreme Court. The appellant was however granted a stay of execution of the judgment of this Court pending determination of the motion for leave to appeal to Supreme Court by the full Court. At the time we heard this appeal there was another ex parté order for stay of execution granted by a single judge of this court, pending hearing of this appeal, which was heard inter partés and is pending ruling.

CONSIDERATION OF THE DISPUTE BY THE COURT BELOW

6. The Ruling dated 13th May, 2020 shows that in determining the application before him, the Judge in the Court below considered the affidavit in opposition to ex parté summons for stay of execution and setting aside of the *Writ of Fieri Facias*, and made the following observations-

   (a) That on 13th December, 2019 when he granted a stay of execution in this case, on the same day the appellant obtained an ex parté order for stay of execution pending hearing for their motion for leave to appeal to the Supreme Court signed by Lady Justice Kabuka.

   (b) That while all this was going on, the appellant commenced a fresh action and obtained an injunction in the High Court at Lusaka before Justice G. Chawatama and

   (c) Arising inter alia, from the above he noted that he had no jurisdiction to stay execution of a Writ of Fieri Facias of the Court of Appeal.

7. Based on these observations, the Judge of the Court below opined that on 13th December, 2019 the appellant obtained an ex parté order for stay of execution pending hearing of its notice of motion for leave to appeal to Supreme Court. The Judge stated that the outcome has not

been disclosed, and that there is a fresh action in which an injunction was granted by Lady Justice Chawatama whose outcome he was not aware of. The court went on to state that the stay of the *Writ of Fieri Facias* being sought was granted by this Court which is superior to the court below, and dismissed the appellant's application for being an abuse of court process. The court then granted the respondents costs while granting the appellant leave to appeal.

THE GROUNDS OF APPEAL

8. The appellant has advanced five grounds of appeal framed as follows:

   i. **The court below erred both in law and fact in abdicating is duty to adjudicate upon the issue in controversy between the parties brought out in the appellant's application to set aside the Writ of Fieri Facias.**
   ii. **The court below erred both in law and fact when it found at page R2 of the Ruling that in 2015 an action was commenced by the same plaintiff against the same defendants herein.**
   iii. **The court below erred both in law and fact when it found at page R2, of the Ruling that the same application which it heard on 24th September, 2019 had again come down to it with reference to a separate and distinct application that was made to set aside an earlier Writ of Fieri Facias issued on 17th September, 2019.**
   iv. **The court below erred both in law and fact when it found at page R3 of the Ruling that it had no jurisdiction to stay execution of a Writ of Fieri Facias from the Court of Appeal.**
   v. **The court below erred both in law and fact at page R4 of the Ruling by dismissing the appellant's application for stay of**

execution of Writ of Fieri Facias pending application to set aside Writ of Fieri Facias for being an abuse of court process.

APPELLANT'S ARGUMENTS

9. In support of ground one, it was submitted that from the contents of the appellant's affidavit in support of summons for stay of execution pending application to set aside *Writ of Fieri Facias* for irregularity, the issues in controversy between the parties were-

   i. Whether it is proper to issue a *Writ of Fieri Facias* for recovery of interest without the interest being agreed upon or being assessed by a Court of competent jurisdiction, and

   ii. Whether it is proper to issue a *Writ of Fieri Facias* for the recovery of interest from a date which is contrary to the High Court and Court of Appeal Judgments.

10. It was contended that these were the issues in controversy which the court below was called upon to resolve but unfortunately, it abdicated its duty to adjudicate. It is contended that it is trite that trial courts have a duty to adjudicate upon every aspect of the dispute between the parties. In support of this, the Court was referred to the case of ***Zulu vs Avondale Housing Project Limited***[1] where the Supreme Court held, *inter alia*, that –

> ***"The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."***

11. It was contended that had the court below considered and adjudicated upon the issues in controversy between the parties and had the court properly directed itself to the law surrounding the issues in controversy or dispute, it should have found in the appellant's favour and set aside the irregular *Writ of Fieri Facias*. It was submitted that an execution can only be levied on amounts found due by the court in a judgment or agreed to by the parties to an action and incorporated into a consent judgment. The court was referred to the case of ***Barclays Bank Zambia Plc vs Zambia Union of Financial Institutions and Allied Workers[2]***, where the Supreme Court held that-

> ***"It was not open to the complainant to unilaterally compute the sum payable and levy execution of the amount. Execution can only be levied on amounts found due by the court in a judgment or agreed to by the parties to an action and incorporated into a consent judgment."***

12. That the rationale behind agreement or assessment before any amount is endorsed on a *Writ of Fieri Facias* is to ensure that the correct amounts are executed. That in *casu*, the parties did not agree

on the period for which interest was to be payable despite the court below and this Court having decided the actual date the action was commenced. We were urged to find that the *Writ of Fieri Facias* issued by the respondents on 5th December, 2019 for recovery of interest without agreement by the parties or assessment of the same by the court is irregular and excessive and liable to be set aside.

13. On ground two, we were referred to the case of ***Attorney General vs Marcus Kampumba Achiume***[3] in which the Supreme Court held that-

> ***"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court can reasonably make."***

It was contended that, the court below misapprehended the facts before it and came to a conclusion which cannot be supported by the evidence on record and one which cannot reasonably be entertained. We were urged to reverse the finding of fact made by the Judge of the court below as it is perverse or was made in the absence of evidence or upon a misapprehension of facts.

14. In support of ground three, it was contended that, the court below erred by interpreting the application made before it, leading to this

appeal as being the same as the application made before it on 24th September, 2019. The initial application made on 24th September, 2019 was to set aside the *Writ of Fieri Facias* issued on 17th September, 2019 for irregularity while the application before the court below leading up to this appeal, the *Writ of Fieri Facias* was issued on 5th December, 2019 following our Judgment dated 29th November, 2019.

15. It is contended that, the execution amount endorsed on the second *Writ of Fieri Facias* as interest was also irregular, as the computation of interest is at variance with the Order and findings of the Court in relation to the date of commencement of the action and was not agreed upon by the parties or assessed. Given the foregoing, it was submitted that the court below misapprehended the facts before it and came to a conclusion which cannot be supported by the evidence on record. We were urged to reverse the finding of fact made by the court below.

16. On ground four of the appeal, it was contended that there is no *Fieri Facias* of a superior court on record as the *Writ of Fieri Facias* in question was filed before the High Court. It was submitted that the lower court's finding of fact on this score is perverse and made in the absence of evidence or on misapprehension of fact and ought to be reversed. According to the rules of court, a *Writ of Fieri Facias* can only

be issued in the High Court and that it is the correct forum to apply to set aside the same.

17. In support of ground five, it was contended that, the court below erred by noting that the same application on the same subject matter had been escalated to the Court of Appeal when, there was no such application escalated to the Court of Appeal. The application made before this Court after this Court's Judgment of 29th November, 2019 was for a stay of execution pending appeal, and not pending setting aside of the *Writ of Fieri Facias.*

18. It is contended that the court below further erred by observing that the bank obtained two stays from two different courts on the same day. It is the appellant's contention that the law surrounding these applications is distinct and relate to completely different remedies. It is submitted that the stay from the High Court was against the irregular *Writ of Fieri Facias* while a stay in the Supreme Court was pending leave to appeal. That the two stays of execution cannot be said to be interrelated, and therefore do not relate to the same subject matter and that the stay from the High Court could not have been obtained from the Supreme Court, and the reverse is also true.

19. Further, it is contended that the court below erred by interpreting the stay of execution from this Court as an application to stay execution

of the *Writ of Fieri Facias* when these were two separate applications directed to the appropriate fora and seeking different reliefs. It is submitted that the cases surrounding abuse of court process clearly shows that it is only an abuse of court process if a party seeks the same relief over the same subject matter, from different courts. The court was referred to the provisions of Order 18/19/18 of the White Book which provides as follows-

> ***"The term abuse of the process of court connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material."***

20. It is contended that the test for multiplicity of actions or forum shopping is that the subject matter must be the same, or indeed, the same parties being involved in various issues which are the subject of a new action. This is not the case *in casu* as an application for stay of execution of a *Writ of Fieri Facias* is distinct and separate from the application to stay of execution before the Supreme Court. We were

urged to find in favour of the appellant as there was no abuse of court process on their part.

RESPONDENTS' ARGUMENTS

21. In opposing ground one of the appeal, the respondents contended that it is clear that the court below dismissed the appellant's application for want of jurisdiction and abuse of court process for the following reasons:

    i. That there was already a stay of execution of the same judgment granted in the Supreme Court;
    ii. That there was already an injunction granted by Judge Chawatama in another matter between the parties; and
    iii. That the fifa was enforcing a judgment of the Court of Appeal which was a superior court to the High Court.

22. We were referred to the case of ***Kelvin Hang'andu and Company vs. Webster Mulubisha***[4] where the Supreme Court held that:

> ***"Once a matter is before Court in whatever place, if the process is properly before it, the Court should be the sole Court to adjudicate all issues involved. All interested parties have an obligation to bring all issues in that matter before that particular Court. Forum shopping is abuse of process which is unacceptable."***

In light of this case, it was submitted that it was abuse of Court process for the appellant to go back to the High Court regarding enforcement of the judgment of the Court of Appeal when execution of the said judgment had already been granted by a single Judge of the Supreme Court.

23. It was submitted that one cannot conceive of a more blatant abuse of Court process than the prevailing situation where one party obtains a stay of execution in a lower Court when there is already a stay of execution of the same judgment granted by a superior Court. Further, it is contended that if the Court below had gone ahead to consider the application, it would have assumed powers which it did not have.

24. On whether or not it was proper to issue the *writ of fieri facias* for recovery of interest without the interest being agreed upon or assessed by a court of competent jurisdiction, the respondent contended that in our Judgment at page 102 of the Record of Appeal we guided that interest should accordingly be calculated on the principal of USD949, 933.81 at 7% per annum from the date of writ until full settlement. That where judgment is for a specific sum at a specific rate of interest for a specific period of time, there is no need for assessment.

25. The formula for calculating the interest is known. We were referred to the case of ***Paddy P. Kaunda and others vs Zambia Railways Limited***[5] where the Supreme Court held that where there is a known formula for calculating dues, that formula must be used. It was submitted that the appellant's argument has no merit and is a mere stratagem to frustrate the execution of a properly obtained judgment.

26. On what was the date of Writ of Summons from which to calculate the interest, it was submitted that page 133 of the record of appeal the Writ clearly shows that it was filed on 17th January, 1997 and that the appellant wants to mislead the court to ignore the correct record of the date of writ and seize upon the wrong date of 30th March, 2010 which was a clear misstatement of the record by the Court. It is contended that the appellant's idea is to misrepresent the date of the writ so that the Respondents lose out on interest from 1997 to 2010, a period of 13 years.

27. In response to ground two of the appeal, the respondent disagreed with the statement by the court below as appears in paragraph 1 of the Ruling appealed against, that no action was commenced in 2015 by the Respondents as no evidence was adduced by either party to this effect. However, submitted that the statement made by the Court cannot be classified as a finding of fact as it was a mere statement. It

was submitted that a finding of fact can only be termed as such if a question of fact was presented before the court. that it is clear from the narration leading to that statement, that the Court was not resolving a question of fact that was reciting what the court assumed was the history of the matter leading to the point of decision.

28. In responding to ground three of the appeal, the respondents agreed that the two applications for stay of execution and setting aside *fifa* related to Writs of *Fieri Facias* issued on two different dates. The respondents also agreed with the Court below that the two applications were in fact the same as demonstrated below:

    i. Both were attempting to restrain enforcement of the same judgment.

    ii. Both raised the same jurisdictional issues of whether or not the High Court could stay execution of a Judgment issued by a Supreme Court.

    iii. In both of them there was stay of execution already granted by a Superior Court. In the initial application, the appellant had obtained a stay of execution of the judgment in the Court of Appeal, while in the subsequent application there was a stay of execution of the same judgment granted by a Single Judge of the Supreme Court.

29. It was further submitted that when the High Court Judge delivered his first ruling of 24th September, 2019, he made it clear that he had no jurisdiction to grant a stay in the obtaining circumstances. Instead of appealing that decision, the appellant went back to the same court under the same circumstances in which the same Judge had refused to entertain the initial application. The Court below had to be consistent in its decision and rightly considered the second application as having been the same as the first one. We were urged to dismiss this ground of appeal for being superfluous.

30. In opposing ground four of the appeal, it was contended by the respondents that while they agree with the appellant that there is no provision for conducting running litigation in superior courts, they do not agree that this Court which issued the judgment is excluded from considering applications relating to enforcement of its judgment merely because a *fifa* is filed in the High Court. It was submitted that the case of ***Caltex Oil Zambia vs Teresa Transport Limited***[6] does not vest the High Court with the jurisdiction to stay execution of superior courts judgments. We were also urged to dismiss this ground of appeal.

31. In response to ground five of the appeal, the respondents submitted that the appellant's arguments under this ground attempt to convince

this court that there is a difference when a stay is obtained pending setting aside a *writ of fieri facias*, and when a stay is concurrently obtained pending appeal or leave to appeal relating to the same judgment. The appellant wants to convince us that it is perfectly in order to stay execution of a *writ of fieri facias* pending an application to set aside the fifa when a stay of execution of the same judgment has already been granted pending leave to appeal in two different courts ranking differently in superiority. It was contended that the case of ***Hang'andu and Company vs Webster Mulubisha***[4] classifies the appellant's conduct as abuse of court process as the same enjoins parties to bring all issues in controversy in a matter before one court which should be the sole court to adjudicate on them. In conclusion, it was submitted that the question may well be asked: Since execution of the Judgment had been stayed by the Single Judge of the Supreme Court, what was there to stay by the High Court? We were urged to dismiss the appellant's appeal with costs to the respondents.

THE HEARING

32. At the hearing of the appeal, both Counsel reiterated the arguments advanced in the heads of argument which we have already considered above and we need not reproduce.

DECISION OF THE COURT

33. Having considered the record of appeal and the written and oral submissions by counsel we shall deal with all the grounds of appeal separately.

34. On ground one, the evidence on record is that the appellant made an application before the court below to stay execution pending application to set aside writ of fieri facias. In considering this application, it came to the attention of the court below that another stay of execution had been sought and granted to the appellant by another Judge of the High Court and that another stay of execution had been granted by a single judge of the Supreme Court. The appellant has argued that the stays obtained before the court below and the Supreme Court are different and that they relate to two different subject matters. On the other hand, the respondents' Counsel while conceding that the two stays relate to two different applications, argued that the stays obtained relate to the same judgment and that the resulting effect is the same.

35. We do agree with counsel for the respondents that the resulting effect of the two stays are the same. It is this Court's view that the stay of execution granted by the Supreme Court is sufficient to temporarily revert the parties to the status quo prevailing prior to the decisions

set to be sailed. In holding this view, we find comfort in the case of ***Kelvin Hang'andu and Company vs. Webster Mulubisha*** cited above and we cannot fault the lower Court's reasoning given the precarious situation it found itself in. We find no merit in this ground of appeal.

36. On ground two of appeal, we note that this ground raises the issue of the powers of an appellate court to set aside the findings of fact made by the trial court. We were referred to various authorities which explain the circumstances under which an appellate court can reverse a finding of fact made by the trial court. On the other hand, while agreeing with the appellant that the statement made by the court below is not supported by evidence on record, they stated that the same does not amount to a finding of fact as it was a mere statement. We agree with the respondents that a finding of act is made when there is a question of fact presented to the court. *In casu*, no question of fact was presented before the court below. The Judge merely made the said statement when he was trying to illustrate the background to this matter.

37. On ground three of the appeal, the appellant submitted that the finding fact made by the court below, that the application for stay of execution leading to this appeal and the application which was before it dated 24th September, 2019 was similar. On the other hand, the

respondent submitted that while the two applications are different, the resulting effect is the same. It is the view of this Court that the two applications were set to set aside two *Writs of Fieri Facias* issued on different dates to enforce the same judgment.

38. We say so because, the first fifa was issued pending determination of the appeal which was before this court, while the second fifa was issued to enforce the judgment of this Court which upheld the Judgment of the Court below. We note that what informed the lower court's decision was the fact that there was already a stay of execution of the judgment of this Court granted by a single Judge of the Supreme Court which we have stated above that it was sufficient to maintain the status quo. We do not find merit in this ground of appeal.

39. Turning to ground four, the appellant contends that the Court below erred in holding that it had no jurisdiction to stay execution of a *writ of fieri facias* enforcing judgment of this court. It is trite that there is no provision to conduct running litigation in appellate courts. It follows therefore that the judges in the high court have jurisdiction to attend to any matter arising from the applications regarding enforcement orders. We find merit in this ground of appeal

40. On ground five of the appeal, as we have already stated above that the stay of execution granted by the Supreme Court pending the

determination of an application for leave to appeal temporarily revert the parties herein to the status quo prevailing prior to our Judgment. The interpretation of the stay granted by the Supreme Court is that nothing can be done about the judgment of this court or the High Court until the Supreme Court determines the application before it. It is therefore inconceivable for the appellant to move the High Court on an application for stay of execution of writ of fifa which was effectively stayed by the Supreme Court.

41. In the circumstances, we cannot fault the Court below for dismissing the application for being an abuse of Court process. Further, we do not find merit in this ground of appeal. Having found merit in ground four, the same has no bearing on the outcome of this appeal. Accordingly we dismiss the appeal with costs to the respondents. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F.M LENGALENGA
COURT OF APPEAL JUDGE

P.C.M NGULUBE
COURT OF APPEAL JUDGE