IN THE HIGH COURT FOR ZAMBIA **2003/HP/0864**

AT THE PRINCIPAL REGISTRY

LUSAKA

(Civil Jurisdiction)

BETWEEN:

RACHEL MAWERE	1ST PLAINTIFF
CAROLINE MAWARE	2ND PLAINTIFF
COLLINS MAWARE	3RD PLAINTIFF
AND	
TREVOR MICHAEL LIMPIC	1ST DEFENDANT
MARTIN MAWERE	2ND DEFENDANT
COMMISSIONER OF LANDS AND DEEDS	3RD DEFENDANT

BEFORE HONOURABLE JUSTICE M. CHANDA

APPEARANCES

For the Plaintiffs	:	Dr. Roger Chongwe, SC RMA Chongwe & Company
For the 1st Defendant	:	Mr. Kazimbe Chenda Simeza Sangwa & Associates

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R U L I N G

LEGISLATION REFFERED TO:

Order 42 Rule 5A, 45 Rule 1 (1) (a), 62/B/114 and 62/3/(2) of the Rules, of the Supreme Court of England, 1999 Edition

CASES REFERRED TO

Zambia Telecommunication Company Ltd v Muyowa Liuwa SCZ Judgment No. 16 of 2002

This is an appeal filed into Court on 26th January, 2015 against the decision of the Deputy Registrar at Lusaka, wherein he held that the agreed costs by the parties herein must be considered to form part of the Judgment. The learned Deputy Registrar further held that the parties having agreed on costs, necessary implication being that the sum agreed can be recovered in the ordinary and usual manner a judgment sum is recovered by drawing of a writ of fieri facias, that there was no requirement for a formal order from the Registrar before the Plaintiff could proceed to levy execution for costs.

The facts of this case can be briefly stated. The Plaintiffs issued a writ of fieri facias on 3rd December 2014 following the judgment of the Supreme Court dated 25th July, 2014 wherein the Supreme Court held that plot number 5508 Lusiwasi Road, Kalundu, Lusaka belonged to the Plaintiffs. The Supreme Court ordered cost against the 1st Defendant to be taxed in default of agreement.

It was from this background that the 1st Defendant applied to the Deputy Registrar for an interim order setting aside the execution of the writ of fifa on the grounds of irregularity. The learned Deputy Registrar heard the application on the 12th day of December, 2014 and he declined to set aside the writ of fifa.

Dissatisfied with the decision of the learned Deputy Registrar, the 1st Defendant has appealed to the Judge in Chambers advancing two grounds of appeal as follows:-

1. **That the learned Deputy Registrar erred in law and in fact when he found that there was an agreement on costs between the Plaintiff and the 1st Defendant; and**

2. **That the learned Deputy Registrar erred in law and in fact when he held that there was no requirement for a formal order before enforcement."**

In support of the two grounds of appeal raised, the learned Counsel for the 1st Defendant, **Mr. K. Chenda**, relied on the 1st Defendant's heads of arguments filed into Court on 23rd April, 2015 which he supplemented by oral submissions.

In respect of the first ground of appeal, Counsel for the 1st Defendant contended that in the Ruling appealed against, the learned Deputy Registrar correctly observed at page R2 paragraph 2 that:-

> *"The judgment of the Court directed the costs to be agreed and in default to be taxed."*

Mr. Chenda went on to submit that the learned Deputy Registrar wrongly held that the parties had concluded an agreement on the issue of costs merely because the primary term of quantum of costs had been arrived at by the parties. It was Counsel's contention that the Deputy Registrar overlooked the fact that the secondary terms of payment mechanics for the agreed quantum had not been concluded. Counsel for the 1st Defendant emphasised that the payment terms had not been concluded by

the parties as to whether the costs would be paid in a lump sum or in instalments. It was Counsel's further assertion that the Deputy Registrar fell gravely in error in ruling that the parties had concluded an agreement on costs because according to *Order 42 Rule 5A of the Rules of the Supreme Court of England,* the terms indicated in the correspondence exchanged between the Plaintiffs and the 1st Defendant were supposed to have been drawn up and embodied in a formal document to be signed by the respective Counsel before the Deputy Registrar could conclude as he did.

The relevant parts of *Order 42 Rule 5A* were reproduced by Mr. Chenda as follows:-

5A- Consent Judgments and Orders in the Queen's Bench Division

(1) "Subject to paragraphs (2), (3) (4) and 5 where all the parties to a cause or matter in the Queen's Bench Division are agreed upon the terms in which a judgment should be given, or an order should be made, a judgment or order in such terms may be given effect as a judgment or order of the Court by the procedure provided in rule 5.

(2) This rule applies to any judgment or order which consists of one or more of the following:-

(a) Any judgement or order for:-

(i) The payment of a liquidated sum or damages to be assessed, or the value of goods to be assessed;
(ii) The delivery up of goods, with or without the option of paying the value of the goods to be assessed, or the agreed value;
(iii) The possession of land where the claim does not relate to a dwelling-house;

(b) any order for:-

(i) The dismissal, discontinuance or withdraw of any proceedings, wholly or in part;

(ii) The stay of proceedings either conditionally or upon conditions as to payment;

(iii) The stay of proceedings upon terms which are scheduled to the order but which are not otherwise part of it;

(iv) The stay of enforcement of a judgment, either unconditionally or upon condition that the money due under the judgment is paid in instalments specified in the order;

(v) The setting aside of a judgment in default;

(vi) The transfer of any proceedings to a Country Court....;

(vii) The payment out of money in Court;

(viii) The discharge from liability of any party; and

(ix) The payment, taxation or waiver of costs, or such other provision for costs as may be agreed."

Counsel for the 1st Defendant further drew the attention of the Court to the practice regulating consent procedure as provided in *Order 42/5A/4 of the White Book, 1999 edition.* He contended that *Order 42 /5A/4* recognises that although the agreed terms are contractual in nature, once drawn up in the prescribed manner (including the expression "By Consent") they acquire the same force and binding effect as an order made by the Court. The relevant provision of *Order 42/5A/4* were reproduced by Counsel as follows:-

Practice regulating consent procedure

> *"The consent judgment or order must be drawn up in the terms agreed and must be expressed as being "By consent," and it must then be presented to the Court office in accordance with the requirements of rule 5 where it will be entered or sealed like any other judgment or order, but of course it will not bear the name of any judge, master or reference as is required under r1 (3).*

It should be realised that a consent judgment or order, obtained under the consent procedure under this rule will have the same force and effect as a consent order made by a Judge, Master, or Referee. It will be a consent judgment or order made by or in the name of the Court and will have all the consequences of the Court judgment or order. (for the consequences see vol.2 Section 2) since a consent judgment or order under the procedure of this rule will not be seen, still less examined or scrutinised by any judicial officers, solicitors, have an increased burden in ensuring that it is expressed fully, clearly and with precision, and carries into effect the intention of the parties without ambiguity or possibility of a conflict of construction. Although the terms agreed are contractual in character in form and effect they will have the force and consequences of an order of the Court, and this must be borne in mind in the draft of the agreed terms.

If the consent, judgment or order, when presented to the Court officer to enter or seal, does not appear to make sense or is contradictory in its terms or is unclear or otherwise defective, the Court officer in the central office will refer the matter to the practice Master; and in a District Registry to the District Judge."

Counsel argued that before Ruling that the parties herein had concluded an agreement on the issue of costs the learned Deputy Registrar was duty bound to ensure and satisfy himself that:-

(a) The parties had settled on a quantum of costs;

(b) The parties had settled the terms of payment; and

(c) The parties had embodied the terms in a document drawn up, signed by Counsel and filed into Court in the manner prescribed by order 42 Rule 5A 1, 2 (b) (iv) and 42/5A/4.

In ground two, Counsel for the 1st Defendant contended that the learned Deputy Registrar erred in law and in fact when he held that there was no requirement for a formal order before enforcement.

It was Counsel's submission that he had perused the relevant part of the ruling of the Deputy Registrar where *Order 62/B/114 of the White Book, 1999 edition* was advanced as authority for the conclusion that no formal order was required before the Plaintiff could issue a writ of fifa and that the costs were said to form part of the judgment. In addressing this part of the Ruling appealed against, Counsel for the 1st Defendant began by reproducing the provision of *Order 62/B/114* as follows:-

> *Agreement as to costs*
>
> *"where judgment is given for £ .....with costs to be taxed," the parties may agree the costs in which case the agreed costs will (in QBD) be added to the judgment on production of the agreement, with the leave of a master indorsed in the judgment office. Where the judgment is for £.....and costs to be taxed or agreed," the leave of a master is not necessary. But in cases within r.16, the costs must be taxed, not agreed unless the order specifically states that the costs may be agreed."*

Counsel submitted that the provisions of *Order 62/B/114* were misapplied by the learned Deputy Registrar as firstly the judgment in the case before Court was not for a monetary award (and costs) as is the case with *Order 62/B/114* which is expressed as covering "where the judgment is for £.....and costs....." He went on to submit that assuming that *Order 62/B/114* applied to a non-monetary judgment (such as the one in issue before Court) then provided that the parties drew up an order on costs in the manner prescribed by *Order 42 Rule 5A*, then the agreement thereunder would become part of the judgment without need for any leave or interpretation to be attached to *Order 62/B/114*. Therefore, the learned Deputy Registrar fell gravely in error in concluding that there was no

requirement for a formal order before the Plaintiff could proceed to levy execution for costs. Mr. Chenda reiterated that a formal order was required, but not one issued by the Judge or Deputy Registrar but one drawn up by the parties and filed into Court in accordance with *Order 42 Rule 5A (1), 2 (b) (ix)* and *42/5A/4*.

Counsel further argued that there were other express provisions under the rules of Court which dictate that under the circumstances, a formal order should have been in place on the issue of costs before the Plaintiff could validly levy execution. To buttress his position he cited *Order 62 Rule 3 (2) of the White Book, 1999 edition* which provides that:

> *3(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court*
>
> *(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis.*

Counsel also referred the Court to *Order 45 Rule 1 (1) (a) of the White Book, 1999 edition* which provides that:-

> *(1) Subject to the provisions of these rules a judgment or order for the payment of money, not being a judgment or order for the payment of money into Court may be enforced by one or more of the following means, that is to say-*
>
> *a) Writ of fieri facias.*

Counsel reiterated that the writ of *fieri facias* having been issued in the absence of any order whether by the Court or by consent of the parties was incurably irregular.

In conclusion Counsel for the 1st Defendant urged the Court to allow his appeal, set aside the Ruling of the learned Deputy Registrar and substitute it with the following orders:-

(a) That the writ of fieri facias dated 3rd December 2014 be set aside;

(b) That the costs of execution levied thereby including Sherriff's fees be paid by the Plaintiff to the 1st Defendant; and

(c) That the costs of the application before the learned Deputy Registrar and of this appeal be paid by the Plaintiff to the 1st Defendant.

Counsel for the Plaintiffs **Dr Roger Chongwe, SC**, relied on the heads of arguments filed into Court on 5th February, 2015 which he augmented with *viva voce* submissions to oppose the 1st Defendant appeal.

State Counsel argued that the costs were properly agreed and to the extent of the direction of the Court, they constituted the Court's order of agreed costs. He stated that they could therefore properly be enforced by writ of fifa as envisaged by *Order 45 Rule 1(a)*. He further asserted that as the agreed costs emanated from an order of the Court, the Plaintiff was entitledto the said costs which were derived from an order of the Court and therefore not in any way in conflict with the provisions of *Order 62 Rule 3*.

State Counsel further argued that at page R4 of the learned Deputy Registrar's ruling it was stated that "where the costs are however ordered to be taxed or agreed, the leave of Master is not

necessary. Mutati's Mutandis, the effect of *Order 62 (B) 114* to the scenario in *casu* is that the agreement on the costs by the parties does not require a formal order to be endorsed by the Registrar for it to be valid and enforceable. The agreed sum must be considered to form part of the judgment, the necessary implication being that the sum agreed can be recovered by drawing up a writ of fifa." Dr. Chongwe contended that the decision of the Deputy Registrar in this matter was unassailable and reflected the position of the law as it stands in Zambia. State Counsel submitted that when an order of the Court was to be taxed in default of agreement, the agreement had never been divided into primary and secondary terms. He further stated that there was no authority in the High Court Rules or the White Book to the effect that an agreement to pay a sum of money could be categorised in primary and secondary terms.

State Counsel drew the attention of the Court to the fact that the sum of money agreed was not disputed. The dispute as he understood it from the point of view of the 1st Defendant was in the manner or the method of payment which could not be a basis of setting aside execution. Dr Chongwe further indicated that since the agreement on costs was reached, the 1st Defendant had made no effort to liquidate the owing sum.

State Counsel submitted that in their correspondence with the 1st Defendant the parties had settled on a quantum of costs; and as such there was no need to settle on the terms of payment and embody the terms in a document drawn up by Counsel, and

signed by both Counsel and file it into Court in order for the Registrar to sign.

In conclusion, Dr Chongwe implored the Court to uphold the decision of the learned Deputy Registrar and to dismiss the appeal for want of merit and order the costs of appeal against the 1st Defendant to be taxed in default of agreement.

I have very carefully considered the Ruling by the learned Deputy Registrar as well as the submissions by the parties, along with all the documents on record augmenting the same. I note that the bone of contention in ground one is that although the sum of K250, 000 was agreed as costs by the parties, there was no agreement as to whether the said costs would be liquated in a lump sum or instalments.

I have given this issue due consideration and I am quite satisfied that the determination of the learned Deputy Registrar that the parties agreed on costs in the sum of K250, 000 cannot be faulted. I have looked at the judgment of the Supreme Court dated 28th July, 2008 and I must affirm that the gist of the Court's directive was for the parties to agree on the quantum of costs or in default thereof proceed to taxation.

I must state here that if the parties had proceeded to taxation of costs in default of agreement, the process would have simply been to determine or fix the amount of litigation related expenses due to the prevailing party and not to consider the mode of

payment. Thus, Mr. Chenda's argument that the Plaintiffs should have proceeded to taxation if they were disgruntled with his client's proposed payment terms, so that they could have recovered their costs in a lump sum is in my considered view devoid of substance or merit. I entirely agree with the submission by Dr. Chongwe, SC, Counsel for the Plaintiffs that when an order of costs is to be agreed or taxed in default thereof, there is no legal requirement for the parties to agree on the "Primary" term of quantum of the costs and the "Secondary" terms of payment mechanisms.

It must be emphasised that except where it has been expressly agreed to do so or by order of the Court, the Judgment Creditor is under no obligation to accept liquidation of a debt in instalments.

In ground two, Counsel for the 1st Defendant had spiritedly argued that the learned Deputy Registrar erred in law and in fact when he held that there was no requirement for a formal order before enforcement. The Court was referred to *Orders 42/5A, 42/5A/4* and *Order 62/3 (2) of the White Book, 1999 edition* as authority for Counsel's proposition.

In the first place I wish to make an observation that *Orders 42/5A and 42/5A/4 of the White Book, 1999 edition* apply to Consent Judgments and Orders done by Litigants without such Orders and Judgments being made or given by any Judicial Officer. In the matter at hand it is common ground that the agreement on costs by the parties formed part of the judgment,

pursuant to the instruction of the Supreme Court. It is my affirmation that the afore cited provisions do not apply to the scenario in *casu* because the agreed costs emanate from the judgment of the Court. On this score, I equally find *Order 62 Rule 3* (on entitlement to costs) as cited by Mr. Chenda to be irrelevant.

I must state that it is absolutely redundant for the parties to execute a formal Consent Order for validation by the same Court for purposes of enforcement, since the agreed quantum of costs, to the extent of the direction of the Court, constitute the Court's Order of agreed Costs. The appeal on these grounds cannot therefore succeed.

This matter has dragged on since 2003. I hold that the prevailing party deserves and is entitled to obtain due and prompt satisfaction of their Judgment debt. I must add that where the Judgment sum (agreed costs) is due to be paid by a Judgment debtor and no time is fixed for payment of the agreed costs, the Judgment debtor must pay as soon as the amount is agreed. I am also fortified in my thinking by the holding of the Supreme Court in the case of **Zambia Telecommunication Company Ltd v Muyowa Liuwa SCZ Judgment No. 16 of 2002** where it was clearly elucidated that:

> **"The Courts should not make a habit of depriving a successful litigant the fruits of his judgment except in special circumstances."**

There are no special circumstances that have been shown by the 1st Defendant in this appeal. The 1st Defendant's application to stay execution of the writ of fifa is an attempt to merely deprive the Plaintiffs the fruits of their judgment as ordered by the Supreme Court.

Having found no merit in the Appeal by the Defendant, I dismiss it with cost to the Plaintiffs, to be taxed in default of agreement.

Leave to appeal to the Supreme Court is granted.

Dated at Lusaka this .....05.....day of .....JUNE..... 2015

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HONOURABLE JUSTICE M. CHANDA