

IN THE HIGH COURT FOR ZAMBIA

2015/HPC/0214

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

*(Civil Jurisdiction)*



IN THE MATTER OF :

**An application for delivery of possession of the property known as Lot 25567/M Central Province to the Applicant as legal Mortgagee pursuant to a power of sale comprised in the 3<sup>rd</sup> Party Mortgage Deed dated 7<sup>th</sup> February 2014 made between the Applicant and the Respondents.**

**BETWEEN:**

**INDO-ZAMBIA BANK LIMITED**

**APPLICANT**

AND

**FUSCHO TRANSPORT LIMITED**

**1<sup>ST</sup> RESPONDENT**

**CHOLA MATAKA**

**2<sup>ND</sup> RESPONDENT**

**Before The Hon Lady Justice Irene Zeko Mbewe**

*For the Applicant*

:

*Mr. M Ndhlovu of Messrs MLN Legal Practitioners*

*For the 1<sup>st</sup> and 2<sup>nd</sup> Respondent:*

*In Person*

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## RULING

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**Legislation Referred To:**

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

**Other Works Referred To:**

1. *Bryan A Garner "Black's Law Dictionary, 5th Pocket Edition, Thomson Reuters*

This is a Ruling on the 1<sup>st</sup> Respondent's application for an order to set aside the Writ of Delivery for irregularity made pursuant to

**Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia.**

The background to the application is that the Applicant commenced an action by way of Originating Summons claiming for the payment of ZMW941,065.76 being principal and interest due to the Applicant in respect to a loan facility. The loan facility was secured by a legal mortgage over Lot Number 25567/M Central Province and upon the 1<sup>st</sup> Respondent's failure to settle the Judgment debt, the Respondent delivers up possession of the trucks and trailers given as additional security by the 1<sup>st</sup> Respondent as described in the

facility agreement. On 7<sup>th</sup> December 2015, Judgment was entered in favour of the Applicant in the sum of ZMW83,000 and in default the Applicant was at liberty to foreclose/sell the mortgaged property being Stand No 25567/M Chibombo, Central Province. On the 4<sup>th</sup> May 2016 an application was made to amend the Judgment, and consequently the Judgment sum was amended from ZMW83,000 to ZMW618,200.

On 19<sup>th</sup> September 2016 an *ex parte* summons to amend Judgment was filed into Court as the Judgment excluded the claim for the delivery up of possession of the trucks and trailers as additional security by the 1<sup>st</sup> Respondent. The application was declined by the trial Judge on the basis that there was no omission in her Judgment to occasion such an amendment. The Applicant on 9<sup>th</sup> February 2017 in the absence of a Court Order directing the seizure of the trucks and trailers, proceeded to issue a Writ of Delivery which was executed by the Sheriff of Zambia. The 1<sup>st</sup> Respondent then filed an application for an Order to set aside the Writ of

Delivery for irregularity and to stay further execution of the Writ of Delivery and sell of the seized goods.

In the affidavit in support of summons to set aside Writ of Delivery, deposed to by Chola Mataka a Director in the 1<sup>st</sup> Respondent Company. The gist of the evidence is that the Judgment was entered in favour of the Applicant in the sum of ZMW618,200 and for foreclosure, possession and sale of the mortgaged property but categorically made no order for delivery up and possession of the trucks and trailers.

An opposing affidavit was deposed to by Martin Kunda a Branch Manager in the Industrial Branch of the Applicant Bank. The gist of the evidence is essentially that Judgment was awarded for possession of the mortgaged property, in default of the 1<sup>st</sup> Respondent's payment of the Judgment sum. According to the deponent, the mortgaged property does not compromise only of Lot 25561/M Central Province but also trucks and trailers. That the Applicant is the absolute owner of the truck and trailers **(Exhibit**

**PCM5 to 13")**. According to the Applicant, though the Judgment does not itemise the moveable property, but merely refers to mortgaged property in general, and following the refusal of the Judge to amend the Judgment, the Applicant is justified in issuing a Writ of Delivery for recovery of possession of the mortgaged trucks and trailers which it absolutely owns as per documents of title.

The Applicant and 1<sup>st</sup> Respondent filed skeleton arguments and list of authorities.

I have considered the affidavit evidence and arguments advanced by the parties herein. The gist of the Respondent's application is that the Applicant issued a Writ of Delivery which is irregular as it includes moveable property which was not in the Judgment of this Court. The 1<sup>st</sup> Respondent referred to **Order 45 Rule 4 of the Rules of the Supreme Court, 1999 Edition** which states that:

**"Subject to the provisions of these rules, a judgment or order for the delivery of any goods which does not give a person against whom the judgment is given or order made**

**the alternative of paying the assessed value of the goods may be enforced by one or more of the following means, that is to say -**

**(a) Writ of delivery to recover the goods without alternative provision for recovery of the assessed value thereof (hereinafter in this rule referred to as a "writ of specific delivery")**

The effect of the said Order is that a Judgment should state which goods are to be delivered to the successful party. The 1<sup>st</sup> Respondent contends that the Judgment dated 7<sup>th</sup> December 2015 or subsequent amendment of 5<sup>th</sup> May 2016 does not include the trucks and trailers which the Applicant seized by way of execution. Conversely, the Applicant alleges that the term "*mortgaged property*" as it appears in the said Judgment includes the moveable property as well as the land, and therefore there is no irregularity in the issuance of the Writ of Delivery.

A perusal of the record shows that from the Judgment dated 7<sup>th</sup> December 2015, it is clearly stated that the mortgaged property

relates to Stand No 25567/M Chibombo, Central Province and does not include the trucks and trailers as the Court expressly indicated that the Order need not be made as requested under paragraph (iii) of the Originating Summons. Paragraph (iii) of the Originating Summons states as follows:

**" (iii) That in addition to the mortgaged property, upon failure by the 1st Respondent to settle the debt referred in paragraph (i) the Respondent delivers up possession of the trucks and trailers given as additional security by the 1st Respondent particularly described in the facility agreement dated 1st February 2014 referred to in (i)."**

In its Ruling dated 5<sup>th</sup> May 2016 correcting the earlier Judgment, it states inter alia that :

**"In default, the Applicant shall be at liberty to exercise its power of sale of the Mortgaged Property."**

The question then is what is the meaning of "mortgaged property". Counsel for the Applicant contends that it includes the trucks and trailers. According to Black's law Dictionary, "mortgage" means

**"A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms."**

In its wider meaning, property means the rights in a resource such as land, chattel or an intangible. In this instance, I opine that the mortgaged property contemplated in the corrected Judgment relates to land or real property supported by the creation of a legal mortgage, and not the trucks and trailers. After all, the Applicant itself in the aforesaid paragraph (iii) of the Originating Summons qualified this by stating that in addition to the mortgaged property, the 1<sup>st</sup> Respondent delivers up possession of the trucks and trailers as additional security by the 1<sup>st</sup> Respondent. Counsel for the Applicant seeks to stretch the definition of "mortgaged property" beyond that envisaged in the Judgment of this Court.



Counsel for the Applicant argues that the Applicants are the absolute owners of the said trucks and trailers. Be that it may, that does not warrant the issuance of a Writ of Delivery outside the scope of the Judgment of this Court.

A perusal of the Writ of Delivery issued by the Applicant makes reference to this Court's Judgment of the 7<sup>th</sup> December 2015 and 5<sup>th</sup> May 2016 as having ordered for the delivery of the trucks and trailers to the Applicant. As stated aforesaid, this is not the correct position.

In my considered view, what the Applicant seeks to do is change the Judgment of 5<sup>th</sup> May 2016 using the back door since the front door is shut. The general rule is that once Judgment has been entered, the trial Court loses its unrestricted power to change that judgment. The Court however does retain power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially


alter the rights of the parties under its authority to correct clerical errors.

Based on the foregoing, the 1<sup>st</sup> Respondent's application succeeds and the Writ of Delivery is set aside for irregularity. The ex parte Order for stay pending determination of the application to set aside the Writ of Delivery granted on 22 February 2017 is discharged.

Costs to the 1<sup>st</sup> Respondent to be taxed in default of agreement.

Leave to appeal granted.

Dated at Lusaka this 24<sup>th</sup> day of July 2017.



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**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**