

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**2017/HP/0873**

IN THE MATTER OF:

**THE LANDLORD AND TENANT  
(BUSINESS PREMISES) ACT CHAPTER  
193 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF:

**THE LEASE AGREEMENT IN RESPECT  
OF PLOT NO. 6083/CL 2 (STREET NO.  
9A) CHITULI ROAD, NORTHMEAD,  
LUSAKA**

IN THE MATTER OF:

**THE LAW OF DISTRESS AMENDMENT  
ACT 1888**

**B E T W E E N :**

BEN NGONGA FUMBELO  
(T/A Big Ben's Auto Link Services)

**APPLICANT**

**AND**

BEAUTY NDOVI PHIRI

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

REMMY LEMEKANI PHIRI

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

**Before Honourable Mrs. Justice M. Mapani-Kawimbe in Chambers on the  
4<sup>th</sup> day of December, 2017**

*For the Applicant* : *Mr. W. Mwenya, Messrs Lukona Chambers*  
*For the Defendant* : *Ms. N. Nambao, Messrs Mulungushi Chambers*

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**J U D G M E N T**

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**Cases Referred To:**

1. *Zarold Limited v Leasing Finance Company Limited and Rasford Kunda* (2010) ZR Volume 2 71
2. *Paperex v Deluk High Scholl Limited* SCZ Appeal No. 141 of 1996
3. *In the matter of the Law of Distress Amendment Act 1888 and In the matter of an application for General Certificate as a Certified Bailiff and In the matter of Patrick Kamanga (Re Kamaya)* (1987) ZR 7 (H.C.) 1

**Legislation Referred To:**

1. *The Landlord and Tenant (Business Premises) Act, Chapter 193*
2. *Sheriff's Act, Chapter 37*
3. *The Law of Distress Amendment Act 1888*

**Other Works Referred To:**

1. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Reissne Volume 13*
2. *Fredrick S. Mudenda, Land Law in Zambia: Cases and Materials, UNZA Press School of Law, 2007*

By Originating Notice of Motion, the Applicant seeks the following reliefs:

- (i) *An order that the seizure of his goods by the Sheriff of Zambia under a purported Warrant of Distress issued by the Respondents herein is irregular and defective at law and should be declared null and void by the Court.*
- (ii) *The Sheriff of Zambia must immediately release motor vehicle registration number ABX 4661 belonging to Ms. Muleya Machaili which was seized together with the goods of the Applicant as this is third party property not subject to seizure if any.*
- (iii) *An account by the Sheriff of Zambia and the Respondents on the seized goods as the value of goods seized far exceed the amount being claimed by the Respondents on outstanding rent. The said account to be rendered before the High Court for Zambia.*

- (iv) Damages to be assigned by the Learned Deputy Registrar of the High Court for wrongful and unlawful execution of goods belonging to the Applicant.*
- (v) Any order the Court may deem appropriate.*
- (vi) Interest*
- (vii) The costs of this application be for the Applicant in any event.*

In the supporting Affidavit, the deponent **Ben Ngonga Fumbelo** states that on 18<sup>th</sup> July, 2014, he and 1<sup>st</sup> Respondent executed a lease agreement on the rental of Plot No. 6083/CL 2 Street No. 9a, Chituli Road, Northmead, Lusaka, which was to be used as business premises. This is shown in the exhibit marked “**BNF2.**” That at the end of June, 2017, he owed the 1<sup>st</sup> Respondent the sum of K16,500.00 as shown in the exhibit marked “**BNF3.**”

It is deposed that on 29<sup>th</sup> June, 2017, the Respondents issued a notice to terminate the lease agreement through a social media message shown in the exhibit marked “**BNF3.**” That on 3<sup>rd</sup> August, 2017, the deponent’s Advocates wrote a letter to the Respondents advising them to terminate the lease agreement in accordance with the Landlord and Tenant (Business Premises) Act. This is shown in the exhibit marked “**BNF4.**”

The deponent states that on 11<sup>th</sup> August, 2017, the Respondents caused the Sheriff of Zambia to execute the Applicant's goods, which were in stock on the business premises by a Warrant of Distress shown in the exhibit marked "**BNF5.**" That under the Warrant of Distress, the Sheriff distrained goods on Seizure Notice No. 06709 dated 11<sup>th</sup> August, 2017 in exhibit "**BNF6.**" That the status of stock was K683,732.50 as shown in the exhibit marked "**BNF7.**"

The deponent avers that the goods seized by the Sheriff and acknowledged receipt thereof are in the custody of the Sheriff but the Debit and Advice Note No. 09039 dated 11<sup>th</sup> August, 2017 shows that they were handed to the Landlord. The Debt and Advice Note is marked "**BNF8.**"

The deponent contends that the executed goods should be kept by the Sheriff's office until payment. He avers that the outstanding rentals are K16,500 and not K30,000 as shown in the exhibit marked "**BNF3.**" The deponent states that the Respondents

are aware of the actual amount owed and there are copies of receipts to prove the balance contained in exhibit "**BNF9**."

The deponent also contends that the Respondents' action of levying execution on the Applicant's goods is not supported by a Court order and there is a dispute on the balance outstanding on the balance of unpaid rent. He states that the seized motor vehicle Registration No. ABX 4661 does not belong to him but to his customer Ms. Muleya Muchaili and its registration certificate was seized together with the goods.

The Respondents filed a consolidated Affidavit in Opposition, where they concede that they executed a lease agreement with the Applicant on 18<sup>th</sup> July, 2014. That the Applicant breached clause 2 (c), (d) and (g) of the lease agreement by damaging and altering the property as shown in the exhibits marked "**BNP1**" to "**BNP3**". That the Respondents entered the demised premises on the strength of clause 4 of the lease agreement.

The deponents aver that the Applicant owes the 1<sup>st</sup> Respondent rentals from March to August, 2017 as follows: March, – K1,500, April, K5,000, May, K5,000, June, K5,000, July, K5,000, August, K2,500. These rental arrears are shown in the exhibit marked "**BNP4**." That the K8,500 paid by the Applicant in rentals was for the months of February 2017 (K5,000) and March 2017 (K3,500), which the Respondents acknowledged through the chat messages. Further, that the Applicant's receipt shows that the transactions were made on 3<sup>rd</sup> May, 2017, which caters the stated months.

The deponents also state that Mr. Chola, the Applicant's agent was present when the Sheriff's office seized the goods under seizure form No. 06709. That the Sheriff's notice provides that if there are some representations or negotiations of some sort, the seized goods will remain in the custody of the Sheriff at the judgment debtor's risk. The deponents also state that the seized goods are still in the Sheriff's custody. They aver that the K15,000 payment referred to in paragraph 18 of the Applicant's Affidavit was transferred in August, 2016 as shown in the exhibit marked "**BNP5**." The

deponents further state that they have been verily advised by their Advocates that Ms. Muleya Machaili is entitled to make a claim for her vehicle in Court.

In the Affidavit in Reply, the deponent insists that the money due to the Respondents is K24,000 out of which he has already paid K8,500. That the debt accrued from March, 2017 and he paid rentals for the months of March to mid-August 2017, the day of execution of the warrant of distress. He avers that the Respondents have not disclosed who distrained the goods except to state that a witness was present.

The deponent contends that the Respondents did not deny that they executed a warrant of distress in excess of the amount owed. Further, that the Respondents do not deny executing other items shown in exhibit marked "**BNF7**." He avers that paragraph 18 of the Affidavit in Support does not refer to the paid sum of K15,000, but to the unpaid balance of K16,500, which is owed to the Respondents.

Learned Counsel for the Applicant filed Skeleton Arguments, where he submitted that the execution of the warrant of distress was wrongful and not supported by law. Further, it was in excess of what should have been executed. As such, the Applicant was entitled to damages. On wrongful execution, Counsel submitted that the Sheriff's office executed a warrant of distress, when that office is only allowed to levy execution on matters arising out of Court process as provided in Part III of the Sheriffs Act. Counsel also relied on section 7 of the Sheriffs Act.

Counsel contended that the result was that the Sheriff's acts were wrongful, unlawful and rendered the whole process null and void. He fortified his submissions by citing the case of **Zarold Limited v Leasing Finance Company Limited and Rasford Kunda**<sup>1</sup>, where Honourable Justice R Kaoma (HC), as she then was, at page 72 and 73 held *inter alia* that:

- “3. If goods are distained in circumstances which makes the distress in some manner wrongful, an action for damages will lie against the distrainer in respect of wrongful distress.
6. Distress for rent may be wrongful in three ways, it may be illegal, irregular, or excessive.
7. An illegal distress is one which is wrongful from the very start either because no right to distrain existed or because a wrongful act was committed at the commencement of the levy which invalidated all subsequent proceedings.”



Counsel submitted that according to exhibit “**BNF3**”, the Respondents terminated the lease on 6<sup>th</sup> May, 2017 and the Applicant should have vacated the demised premises on 30<sup>th</sup> June, 2017. It was his contention that at the time of execution of the warrant of distress on 11<sup>th</sup> August, 2017, the relationship between the Applicant and 1<sup>st</sup> Respondent as landlord and tenant had ceased. As a result, the Respondents had no right to distrain his goods under the Law of Distress Amendment Act. He once again cited the **Zarold Limited**<sup>1</sup> case, where at page 89 it was stated that:

**“Further as submitted by Mr. Pendwe, according to Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 13 paras 207 and 209, in order that the right to distrain for rent upon a demise may arise the relationship of landlord and tenant must exist, both when the rent becomes due and when the distress is levied and the rent must be in arrears. It is clear that the landlord’s right to distrain is founded on the principles that the rent reserved by his demise issues out of the land and that in distraining the landlord looks to the land demised and to the goods and chattels found on it, and therefore, rent for which distress may be made cannot be reserved out of any incorporeal hereditaments. The learned authors also make it clear that sums reserved for the use of chattel confer no right of distress.”**

On excessive execution, Counsel submitted that the Respondents did not dispute that the Applicant owed them K16,500 as unpaid rent. They also executed a vehicle ABX4661, which did not belong to the Applicant. It was Counsel’s contention that the

value of goods executed was in excess of K560,832.50 and it far exceeded the debt of K16,500. It was his submission that the action was unjustified in law and the Applicant was entitled to damages for the wrongful execution. In addition, the execution was done in a manner meant to cripple his business operations. Counsel further called in aid the **Zarold Limited**<sup>1</sup> case, where at page 73 the Court stated:

**“The damages for illegal distress are computed on the basis of the full value of the goods which have been lost to the Plaintiff, without any deduction of the rent, is recoverable as damages unless there are circumstances of mitigation which the Court ought to take into consideration.”**

It was Counsel’s submission that in the event the Respondents failed to account for the goods distrained, the Court should order payment of damages to the Applicant. He prayed to the Court to grant the Applicant the reliefs sought with costs.

In response, Learned Counsel for the Respondents filed written submissions. She cited the Learned Authors of Halsbury’s Laws of England, 4<sup>th</sup> Edition, Reissue Volume 13 at paragraph 207, who state that:

**“In order that the right to distrain for rent upon a demise may arise the relationship of landlord and tenant must exist, both when the rent becomes due and when the distress is levied, and the rent must be in arrears...”**

Counsel adverted to section 4 and 5 of the Landlord and Tenant (Business Premises) Act, which provide for the security of a lease agreement and termination of a lease by a landlord respectively. Counsel contended that the notice given by the Respondents was one prescribed by the law and thereby effective. Further, that the Respondents satisfied the first requirement of the right to distrain under the provisions of the Landlord and Tenant (Business Premises) Act. She also contended that the relationship of landlord and tenant existed and rent was due when the distress was levied.

Counsel drew my attention to a Tenancy at Sufferance, elucidated by the learned author Fredrick Mudenda in his book Land Law in Zambia at page 65, who states that:

**“A tenancy at sufferance arises where a tenant holds over after his lease has expired and remains in possession without the landlord’s assent or dissent. The tenant is liable to pay compensation for occupying and using the land. A tenant at sufferance differs from a trespasser in that his original entry was lawful and from a tenant at will in that his tenancy exists without the landlord’s assent. A**

**tenancy at sufferance will be converted into a tenancy at will if the landlord subsequently assents to the tenant's occupation."**

Counsel argued that the Applicant continued to occupy the Respondents' premises and did not vacate the premises even after they terminated the lease. The Respondents had no intention of assenting the Applicant's continued stay due to his breach of the lease agreement. She asserted that a relationship between the parties thus existed when distress was levied on the Applicant. Counsel went on to state that the Applicant was in rental arrears and he conceded the fact in his Affidavits.

On whether the distress was illegal and improper, Counsel cited the case of **Paperex v Deluk High Scholl Limited<sup>2</sup>**, where she submitted that the right to distrain was availed to the Respondents as a common law remedy.

Counsel further submitted that section 7 of the Law of Distress Amendment Act 1888, requires a distress to be levied by a certified bailiff otherwise such distress would amount to trespass. She cited section 12 of the Sheriff's Acts, which reads:

**“The Sheriff and every Deputy Assistant Sheriff, Under-Sheriff and bailiff shall in the performance of his duties in connection with any writ or process be an officer of the Court by which such writ or process was issued.”**

Counsel also cited the case of **Re Kamaya**<sup>3</sup>, where the Court laid out the qualifications of a certified bailiff as follows:

**“What appears to be difficult however is for him to satisfy the Court that he is a fit and proper person to hold a certificate. I say so because and in my view the words ‘fit and proper’ do not only mean without a criminal record or just respectable, of high integrity or of good credit but also mean fully conversant with the Law of Distress and the procedure to be adopted in levying a distress. The applicant must therefore satisfy the Court that he knows that he cannot levy distress for rent in respect of a dwelling house without leave of the Court, that in executing a warrant of distress issued by a landlord he is required by the law, upon being on the tenant’s premises, to produce his certificate when requested by the tenant to do so and to prepare a notice for distress showing the amount of rent due and give the tenant the statutory period of five days within which to meet the demand and also to prepare an inventory of the goods and chattels of the tenant distrained, that if he removes the goods from the tenant’s premises they should be stored, at his own peril, at a safe place and that the tenant may reclaim the goods within the statutory period given and that the goods so distrained may not be auctioned until the time given to pay the rent due has elapsed.”**

Counsel stated that the warrant of distress executed by the Assistant Sheriff exhibited by the Applicant as **“BNF6”** and **“BNF8”** of his Affidavit was competently and properly levied on him because it was not executed by a private bailiff.

On excessive execution, Counsel stated that exhibit "**BNF6**", showed the inventory of the goods in the Sheriff's custody and the sum executed was not above K30,000. She added that the goods were still in the Sheriff's custody and the Applicant was free to collect them upon settlement of the unpaid rent.

On damages, Counsel submitted that the Applicant was not entitled to any because his claim had no merit. The Respondents had not been paid the outstanding rental balance of K30,500, which forced them to take the action of distress. Counsel prayed to Court to order the Applicant to pay the sum of K30,500 owed to the Respondents. She also prayed for damages and interest on the outstanding amount as well as costs.

I am indebted to both Counsels for their submissions. I have paid the closest attention to the affidavits and written submissions filed herein. It is common cause that the Applicant and 1<sup>st</sup> Respondent executed a lease agreement on 18<sup>th</sup> July, 2014 for the rental of Plot No. 6083/CL 2 Street No. 9a, Chituli Road, Northmead, Lusaka. The property was to be used as business

premises by the Applicant. The Applicant defaulted on the rentals between March and August, 2017. The rentals due are not agreed by the parties. The Applicant alleges that he owes the Respondents K16,500 while their demand is for K30,000.

It is not in dispute that the Sheriff's office acting on the Respondents instructions distrained goods worth K30,000, although the Applicant claims that the goods distrained were in excess of K560,832.50. Further, a motor vehicle belonging to a Ms. Muleya Muchaili, which is not the Applicant's property was distrained.

The Applicant contends that the Sheriff's office wrongfully distrained his goods in excess of what he owed the Respondents and at the time, there was no subsisting lease between the parties. He also contends that the Sheriff's office had no authority to execute his goods. The Respondents on the other hand, argue that there was a subsisting lease between the parties when the Applicant's goods were distrained. Further, the goods distrained

were only in satisfaction of the outstanding rental arrears and the Sheriff's costs.

After analyzing the contested positions of the parties, I find that the issue to be determined is whether there was an existing lease agreement between the parties upon which the Sheriff levied execution?

To begin with, exhibit "**BNF3**" of the Affidavit in Support contains numerous messages between the Applicant and Respondents, which chronicle the events leading to the termination of the lease agreement. The messages can be summarized thus:

- (i) On 29<sup>th</sup> June, 2017, the Respondents wrote a message to the Applicant following up on their verbal notice of termination given on 6<sup>th</sup> May, 2017, to ask the Applicant to vacate their premises by 30<sup>th</sup> June, 2017. At instant, the Applicant acknowledged the message admitting rental arrears.
- (ii) On 4<sup>th</sup> July, 2017, the Applicant reminded the Respondents of the 6 months notice period required by



law on termination of a lease. Further, that he needed time to inform his clients about his relocation.

- (iii) On 25<sup>th</sup> July, 2017, the 2<sup>nd</sup> Respondent arrived in Zambia to attend to and ensure that the Applicant vacated his premises. In a return message on 26<sup>th</sup> July, 2017, the Applicant promised to avail himself but never showed up. He alleged that he was out of the country. The Applicant sent a similar message on 2<sup>nd</sup> August, 2017.
- (iv) There were several messages exchanged between 3<sup>rd</sup> August, 2017 and 17<sup>th</sup> August, 2017, by the parties in which the Respondents asked the Applicant to vacate their premises. The Applicant failed to turn up.
- (v) On 10<sup>th</sup> August, 2017, the 2<sup>nd</sup> Respondent removed the Applicant's property from his premises by a warrant of distress executed by the Sheriff's office. The Applicant was told to deal with the Sheriff's office.

In their submissions, the Respondents contended that they terminated the lease agreement on the basis of clause 4, which reads:

**“If the rent hereby reserved or any part thereof shall be unpaid for twenty-one days after becoming payable (whether formally demanded or not)...it shall be lawful for the Landlord at any time thereof to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to the right of action of the Landlord in respect of any breach of the Tenant covenants herein contained.”**

Section 4 of the Landlord and Business Premises Act secures the tenancy of a lease as follows:

**“(1) A tenancy to which this Act applies shall not come to an end unless terminated in accordance with the provisions of this Act, and subject to the provisions of section 10, the tenant under such a tenancy may apply to the Court for a new tenancy-**  
**(a) If the Landlord has given notice under section 5 to terminate the tenancy or**  
**(b) If the tenant has made a request for a new tenancy in accordance with section 6.”**

Section 5 of the Act provides for termination of a tenancy by a landlord. It reads in part:

**“(1) The Landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as “the date of termination”).**  
**(2) Subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect, unless it is given not less than six months and not more than twelve months before the date of termination specified therein.**

- (5) **A notice under this section shall not have effect unless it requires the tenant, within two months after the giving of the notice, to notify the landlord in writing whether or not, at the date of termination, the tenant will be willing to give up possession of the property comprised in the tenancy.**
- (6) **A notice under this section shall not have effect unless it states whether the landlord would oppose an application to the Court under this Act for the grant of a new tenancy and, it so, also states on which of the grounds mentioned in section 11 he would do so."**

After taking into account the cited provisions of the Act, I find that the parties modified the notice period on termination in the lease agreement. They reduced it from the statutory period of 6 months to 21 days. The Landlord was granted a right to re-enter the premises in the event that the Applicant defaulted on the payment of rent after 21 days.

Be that as it may, I am not convinced that the lease agreement actually terminated as there was unwillingness by the Applicant to vacate the premises. His conduct revealed that he purposefully kept himself away from meeting the Respondents. He still wanted to occupy the premises even after he was in default of rent. Therefore, I find that at the time of the distraint, the lease agreement was still in existence by the conduct of both parties.

Further, the Applicant was still in occupation as at 10<sup>th</sup> August, 2017, and had accumulated rental arrears on the tenancy.

The Learned Author Fredrick Mudenda in Land Law in Zambia at page 558, defines distress:

**“as mainly connoting a summary remedy by which a person is entitled without legal process to take into his possession the personal chattels of another person to be held as a pledge to compel the performance duty, the satisfaction of a debt or demand or the payment of damages for trespass by cattle.”**

The Author also states that:

**“ the common law right of distress for rent in arrears is a right for the landlord to seize whatever movables he finds on the demised premises of which rent or service issues and to hold them until the rent is paid or the service performed. The right of the landlord to distrain for arrears of rent arises at common law need not be expressly reserved.”**

He further states that:

**“ in order to envoke a right to distrain for rent upon a demise, the relationship of landlord and tenant must exist, both when the rent becomes due and when the distress is levied, and the rent must be in arrears. Distress cannot be levied until the rent is in arrears, that is, there can be no distress until the day after the rent becomes due. If days of grace are given, distress cannot be levied until they have expired.”**

The Author also states that:

**“Rent payable in advance may be distrained for on the day following that fixed for payment. Under common law, a landlord can prima facie seize and distrain for rent in arrears all goods and chattles found on the premises out of which the rent issues.”**

As I have pointed out, the Applicant owed the Respondents rental arrears on 10<sup>th</sup> August, 2017, the date on which his goods were distrained. As such, the Respondents were entitled to distrain his goods for the payment of rental arrears.

I am fortified by the **Paparex<sup>2</sup>** case, where the Supreme Court stated that:

**“On behalf of the Appellant the landlord, Mr. Mwanawasa submitted that the Rent Act does not apply to the business premises, only to dwelling houses. The Rent Act says so (section 3) and Dr. Soko who appeared for the Respondent quite properly informed us that he did not agree with the learned trial Judge on this point. Dr. Soko also very properly conceded that the learned trial Judge was wrong to hold that because the Rent Act allegedly applied to these business premises (which it did not in fact) the law of Distress Amendment Act 1888 of the UK did not apply under which a landlord can distrain for rent. It is the Rent Act in section 14, which imposes a restriction on the levying of distress for rent of dwelling houses which can only be done within leave of the Court. On the other hand, there is no similar restriction under the Landlord Tenant (Business Premises) Act. There was nothing illegal or unlawful in the Applicant’s issuing of warrant of distress to distrain for arrears if rent and the British Statue which applies by virtue of our own English law (Extent of Application Act).”**

The next issue to consider is whether the warrant of distress executed by the Sheriff's office was wrongful and not supported by law. Counsel for the Applicant submitted that the Sheriff's office executed goods outside its jurisdiction. He also submitted that the Sheriff's office is only empowered to execute warrants of distress on matters arising out of Court process. Counsel contended that the execution of the Applicant's goods at the instance of the Sheriff's office was wrongful and it rendered the execution null and void. On the other hand, the Respondents argued that the distress was properly executed and availed to them at common law.

Section 2 of the Sheriffs Act interprets "process" to mean:

**"A formal written authority issued by a court for the enforcement of a judgment and includes a writ of attachment and sale, a writ of delivery, a writ of possession, a writ of elegit and any warrant or order of arrest, commitment or imprisonment."**

Section 7 of the Sheriff's Act reads:

**"7. (1) The Sheriff shall receive all writs and process and be charged with making returns thereto as may be prescribed by rules of Court.  
(2) The Sheriff shall at the request of any person delivering a writ to him for execution, give a receipt for such writ stating the hour and the day of such delivery.  
(3) The Sheriff shall perform such other duty or duties as may be imposed upon him by any written law or any general or specific discretions of the Registrar."**

Section 12 of the Sheriffs Act states:

**“The Sheriff and every Deputy Assistant Sheriff, Under-Sheriff and bailiff shall in the performance of his duties in connection with any writ or process be an officer of the Court by which such writ or process was issued.”**

It is clear from the cited provisions that the Sheriff and subordinates are only mandated to act on writs or process issued out of Court. They are officers of the Court and not authorised to conduct private execution. In the present case, I find that there was no process issued out of Court upon which the Sheriff's office distrained the Applicant's goods. I therefore, have no hesitation in holding that the distraint was wrongful. The Applicant's goods must be returned to him forthwith together with the vehicle BMW Registration No. ABX 4661 at the Respondents' cost.

From the evidence adduced, exhibits **“BNF5”** and **“BNF6”** show that the Sheriff's office executed goods worth K30,000 and a BMW Registration No. ABX 4661. The exhibit **“BNF6”** particularly shows that the goods seized from the Applicant's stock were mostly office furniture and tyres. The Applicant on the other hand, contends

that the goods executed were in excess of K560,832.50. From my perfunctory examination of the exhibit, I find that the value of the goods distrained could have been the value of the rental arrears and not K560,832.50 claimed by the Applicant. I find no merit in this claim and accordingly dismiss it.

I further find no merit in the Applicant's claim for damages because he still owes the Respondents rental arrears. He has unjustifiably kept them out of their money. His goods are with the Sheriff's office and accounted for by the Seizure Notice. Once they are returned to him, the Applicant will not suffer any loss.

The rental arrears due on the lease agreement are disputed by the parties. I therefore refer the question of their settlement to the Learned Deputy Registrar for assessment.

Let me state that the Applicant is not blameless in this cause and he owes the Respondents money. For that reason, I order each party to bear their own costs.



Leave to appeal is granted.

Dated this 4<sup>th</sup> day of December, 2017.

*M. Mapani*

M. Mapani-Kawimbe  
**HIGH COURT JUDGE**