IN THE HIGH COURT OF ZAMBIA **2017/HP/1268**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

THEOTIS MATAKA & SAMPA LEGAL PRACTITIONERS **PLAINTIFF**
(Suing as a firm)

AND

MUMBA MUZIYA **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 26th DAY OF FEBRUARY, 2020

For the Plaintiff : *Mr S. Kaonga, Theotis Mataka & Sampa Legal Practitioners*

For the Defendant : *Mr B. Mosha, Mosha & Company*

RULING

CASES REFERRED TO:

1. ***Alexander Koda Films Production Ltd v Columbia Pictures 1946 2 ALL ER 424***
2. ***Barclays Bank Zambia Plc v Zambia Union of Financial Institutions Allied Workers 2007 ZR 106***
3. ***Zambian Breweries Plc and Lameck Sakala Appeal No. 173 of 2009***
4. ***TAP Zambia Limited v Percy Limbusha and 8 others Selected Judgment No. 47 of 2017***
5. ***Trevor Limpic v Rachel Mawere and Caroline Mawere SCZ No 3 of 2018***
6. ***BP Zambia Plc v Expendito Chipasha and 235 others Selected Judgment No. 57 of 2018***

LEGISLATION REFERRED TO:

1. ***Rules of the Supreme Court of England 1999 edition***
2. ***The Judgment Act, Chapter 81 of the Laws of Zambia***
3. ***Sheriffs Act, Chapter 37 of the Laws of Zambia***

OTHERS WORKS REFERRED TO:

1. ***Halsbury's Laws of England 3rd edition, Volume16***

This is a ruling on applications made by the defendant on 13th January, 2020, for an order to set aside execution of the judgment, and the writ of fieri facias for irregularity, and for an order for restitution and damages for wrongful execution. The applications were made pursuant to Order XXXVI Rule 10 and Order III rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, as read together with Practice Note 47/1/8 of Order 47 Rule 1 of the Rules of the Supreme Court of England, 1999 edition and Section 14 (2) of the Sheriff's Act, Chapter 37 of the Laws of Zambia.

Counsel for the defendant relied on the affidavit that was filed in support of the application, as well as the skeleton arguments filed on 13th January, 2020.In augmenting, Counsel submitted that the gist of their applications as gleaned from paragraphs 10-11 of the affidavit filed in support of the application, and the exhibits, was that the execution was premised on figures that were unilaterally arrived at.

It was further submitted that the parties had done their own computation of the interest, and the plaintiff had proceeded to issue a writ of fieri facias, which had a misleading statement, suggesting that the court had issued a certificate of taxation. It was also submitted that with regard to the interest that was awarded by the judgment, it should have been subjected to assessment before the writ of fieri facias was issued.

Counsel stated that in a recent court case, Section 2 of the ***Judgment Act, Chapter 81 of the Laws of Zambia*** was explained, and the gist of the ruling in that matter, was that interest envisaged by the Act is the monetary policy rate. Further, that it is trite law, that where there is a dispute on the computation of any figures, the appropriate course of action is assessment.

In response, Counsel for the plaintiff stated that they opposed the applications, and relied on the affidavit in opposition, and the skeleton arguments that were filed on 4th February, 2020.On the submission that the matter ought to have been referred to assessment of the interest due on the judgment sum, Counsel stated that the argument was misplaced.

That they had perused the High Court Rules, Chapter 27 of the Laws of Zambia and the Rules of the Supreme Court of England, 1999 edition, and the only assessment that they had come across in those rules was with regard to judgment sums, the value of the subject matter or goods in dispute, general damages and costs. He stated that these are things that cannot be ascertained without the intervention of a third party, such as a Deputy Registrar or a Taxing Master.

His argument was that interest can easily be ascertained by obtaining the average interest rate, and in this case, interest was awarded from the date of issue of the writ, until the date of ruling at the average short term deposit rate, and thereafter, at the Bank of Zambia lending rate. This, Counsel stated is quantifiable, and can be computed without difficulty, and the plaintiff did so, and forwarded the same to the defendant. He went on to state that upon the defendant failing to settle the same, the plaintiff issued a writ of fieri facias.

Still in submission, Counsel stated that the defendant in the skeleton arguments had cited cases, which on perusal, showed that the dispute in those cases related to either damages or judgment sums which only the court could ascertain. Counsel agreed that endorsing the judgment sum on a writ of fieri facias without assessment is irregular, but that where the interest on a judgment sum is quantifiable, this does not apply.

To buttress that argument, reliance was placed on Section 2 of the Judgments Act, Chapter 81 of the Laws of Zambia, and Counsel submitted that it empowers a successful party to levy execution for interest. Therefore, as the law provides for execution on interest, there was no need for assessment. Further in submission, Counsel stated that he had perused the case that had been referred to by Counsel for the defendant, which he had not named, and which had dealt with the Judgments Act.

It was his submission that the said case was different from this case, as there was no execution in that case. He however submitted that they accepted the Bank of Zambia lending rate, but their submission was that this was not the issue, as commercial banks add a mark up to the base rate. He went on to state that the defendant had used the Bank of Zambia lending rate of 10.2 percent at the time.

However, that was not in contention, but that the defendant had not addressed the issue of the short-term deposit rate that the plaintiff had used. Counsel also submitted that the ruling that had been relied on by the defendant came from a court of equal jurisdiction, and this court is not bound by it. On the allegation that the endorsement on the writ of fieri facias was irregular, and exhibit 'MM10' to the affidavit in support of the application, which is the bank lending rate, shows the lending rate,

Counsel said that the said exhibit was not authenticated by the Bank of Zambia.

That if this Court was inclined to accept the said exhibit, it should note that it is dated 31st March, 2018, and interest was supposed to be computed from 1st August, 2017, until the date of the ruling, and thereafter at the Bank of Zambia lending rate. It was submitted that the defendant had not shown how the K35, 000.00 arrived at as interest was irregular, but that he had just stated the discrepancy between his figure and that of the plaintiff, and this did not amount to discrepancy.

Still in submission, Counsel stated that exhibit 'MM10' did not support the defendant's computation of the interest on more than K100, 000.00, which was owed for over a year, and he had applied interest of 3.06%, which was erroneous, based on the above submissions. Therefore, the defendant had failed to prove that the endorsement of K35, 000.00 as interest was irregular.

With regard to the submission that the writ of fieri facias had a false reference to a certificate of taxation, Counsel stated that this was misleading. His submission was that the writ fieri facias dated 20th September, 2019 does not refer to costs. He stated that the defendant had referred to the praecipe for the writ of fieri facias, and his submission was that there had never been taxation of the costs, to warrant a certificate of taxation in the praecipe. It was stated that the praecipe for the writ of fieri facias, was dated 25th March, 2019.

Counsel's view was that it was a misnomer to argue that the praecipe was irregular, as it was accompanied by a properly endorsed writ of facias, and the amount endorsed there on shows that the execution was

with regard to interest, and there was no prejudice as a result of the mistaken reference.

In support of that argument, the case of ***Alexander Koda Films Production Ltd v Columbia Pictures*** [1] was relied on, stating that it speaks to a document not being set aside for mistake, where there has been no prejudice. Counsel stated that while the case did not discuss a writ of fieri facias or the praecipe, it had discussed court documents not being set aside for mistake, especially where there is no prejudice.

Counsel with regard to the stay of execution, stated that they relied on the skeleton arguments, as the defendant did not file an affidavit in support of the application, stating the facts that had been relied upon in support of the application. Counsel submitted that from the authorities that had been cited, for an application to stay execution to succeed, an applicant must show in the affidavit in support of the application, that there are prospects of success, as well as compelling and convincing reasons why a successful party should not be deprived the fruits of their judgment.

His view was that there was nothing to that effect on the court record to warrant the application being granted, as execution had already been levied, as the goods were already in the hands of the Sheriff. Counsel prayed that the application be dismissed with costs, as it was misconceived, and the application for stay of execution was irregular and lacked merit.

Counsel for the defendant, in reply to the assertion that the application to stay execution was not supported by an affidavit, stated that the summons spoke for themselves, and in this regard, the last paragraph of the summons states which part of the affidavit was relied upon.

As regards the allegation that the lending rate as per the Bank of Zambia document that the defendant had exhibited to the affidavit in support of the application not being authenticated, Counsel stated that paragraph 8 of the said the affidavit, states in detail where the Bank of Zambia document was obtained, and the link had been clearly stated.

In respect of the computation that had been done by the defendant having3% as shown on exhibit 'MM9' to the affidavit, It was Counsel's submission that paragraph 4 of the said affidavit, makes reference to the short-term deposit rate from the date of issue of the writ to the date of the ruling, and thereafter, at the Bank of Zambia lending rate until payment. Counsel further stated that exhibit'MM9', has two interest rates that correspond with the order of the court. He reiterated that where the parties are at variance, there should be assessment, to determine the amount payable.

Counsel also stated that a reading of the praecipe for the writ of fieri facias exhibited as 'MM12' to the affidavit in support of the application, shows that it refers to the writ of fieri facias. Counsel submitted that the writ of fieri facias and the praecipe, go hand in hand, and it was part of the documents that was used to move the Sheriff. The authorities cited in the skeleton arguments relating to assessment were reiterated.

As regards the recent case that the defendant had relied on, Counsel stated that Counsel for the plaintiff had understood it differently, hence the different computations by the parties. Counsel contended that the defendant would suffer prejudice if the writ of fieri facias was not set aside, as he would be made to pay monies on figures that been unilaterally arrived at by the plaintiff, which had not been assessed.

Lastly, and on the submission that there was nothing to stay, Counsel stated that this had been canvassed in the skeleton arguments. His submission was that execution starts with seizure, and ends with sale, and therefore, the process had not been concluded, and could be stayed.

I have considered the applications. They were made pursuant to the provisions of Order XXXVI Rule 10 and Order III rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, as read together with Practice Note 47/1/8 of Order 47 Rule 1 of the Rules of the Supreme Court of England, 1999 edition, and Section 14 (2) of the Sheriff's Act, Chapter 37 of the Laws of Zambia.

Order XXXVI Rule 10 of the High Court Rules, provides that;

> "***10. Except as provided for under rule 9, the Court or Judge may, on sufficient grounds, order stay of execution of judgment".***

On the other hand, Order III Rule 2 of the said High Court Rules states that;

> "***2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".***

Practice Note 47/1/8 of Order 47 Rule 1 of the Rules of the Supreme Court of England, 1999 edition, provides as follows;

> ***"This may be done where execution has been improperly issued, even after execution has been levied. Where the Court sets aside a default judgment under O.13, r.9 or O.19, r.9, it***

will also, at the same time, set aside any execution levied on such a judgment, but will ordinarily provide for the costs and charges of such abortive execution to be paid by the defendant, if the default judgment was a regular judgment".

Section 14(2) of the Sheriff's Act provides that;

"(2) In every case of execution, all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution, and such party shall be liable for any damage arising from any irregular proceeding taken at his instance".

The background leading to the applications, is that the plaintiff commenced this action on 1st August, 2017 by writ of summons and statement of claim, claiming;

i. *Payment of the sum of ZMW35, 217.26, being the outstanding balance due on misappropriated filing fees during the Defendant's tenure of employment with the Plaintiff, and in breach of his contract of employment.*
ii. *Special damages in the sum of ZMW74, 784.74, being the total cost of additional filing fees and penalty fees imposed by PACRA.*
iii. *Interests on the amount due.*
iv. *Costs of and incidental to these proceedings; and*
v. *Any other relief that the court may deem fit.*

The defendant entered appearance and filed a defence on 17th August, 2017, and on 1st December, 2017, the plaintiff applied to enter judgment on admission. The application was heard by the Deputy Registrar on 8th February, 2018, and in a ruling dated 20th February, 2018, the plaintiff's

application for entry of judgment on admission was granted. Dissatisfied with the ruling, the defendant lodged an appeal before me.

In my judgment, dated 13th June, 2019, I granted the plaintiff's application, and I entered judgment on admission for the amounts of K35, 217.26 and K74, 784.74, totalling K110, 002.00. The amount attracted interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter, at the Bank of Zambia lending rate until payment. The plaintiff was also awarded costs to be taxed in default of agreement.

On 20th June, 2019, the plaintiff filed a writ of fieri facias to levy execution for the judgment sum of ZMW110, 002.00, which was accompanied by a praecipe. An application was filed by the defendant to stay execution of the writ of fieri facias, pending determination of the appeal. That application was discontinued, and an application to pay in instalments was instead filed on 27th June, 2019.

On 3rd July, 2019, when the application came up for hearing, it was adjourned to 5th July, 2019. On that date, I declined to grant the application to stay execution, as while it was premised on an application to pay in instalments, the contents of the affidavit in support of the application revealed that the defendant had appealed against my order on judgment on admission, which application had been withdrawn. Thus, I found that insufficient grounds had been advanced to support the application.

I adjourned the matter to 19th July, 2019, to hear the application to pay the judgment sum in instalments, but the application did not take off on that date, as Counsel for the plaintiff applied for an adjournment, so that they could raise issue with the affidavit in reply, which was served on

them on 17th July, 2019. The matter was adjourned to 9th August, 2019, and on that date, I was informed that the application to pay the judgment sum in instalments had been overtaken, as the defendant had paid the principal sum in full.

The application was thus discontinued, and on 2nd September, 2019, the plaintiff filed a writ of fieri facias to levy execution for the amount of ZMW35, 008.70 as interest, which was accompanied by a praecipe. Then on 13th January, 2020, the defendant filed ex-parte summons to stay execution of judgment and the writ of fieri facias dated 2nd September, 2019 pending an application to set aside the execution for irregularity.

The affidavit in support of those applications which was deposed to by the defendant, Mumba Muziya, states that this honourable court on 13th June, 2019, rendered a ruling, wherein it entered judgment on admission in favour of the plaintiff, for the sums of K35,217.26 and K74,784.74 totalling K110,002.00. The Court also awarded interest on the judgment sum as follows;

> *"The amounts shall carry interest at the average short-term deposit rate from date of issue of the writ until judgment and thereafter at the Bank of Zambia lending rate until payment"*

The defendant deposes that he paid K30,000.00 and K80,002.00 on 26th June, 2019 and 26th July, 2019, respectively, thereby clearing the judgment sum in full. He also avers that since interest had not yet been assessed, the defendant's advocates wrote to the plaintiff requesting for their computation of the interest, in hope that the parties could agree on the interest payable, to avoid subjecting the same to the court for assessment.

It is stated that the plaintiff sent their computation of the interest, at ZMW 35,008,70, which the advocates for the defendant disputed. They sent their computation to the plaintiff, in accordance with the parameters set out in their computation schedule, along with the rates that were obtained from the Bank of Zambia website. The defendant avers that according to their computation, the amount due was K7,384.39, which was counter proposed for payment.

He deposes that on 8th January, 2020, the Bailiff executed against the writ of fieri facias which was issued by the plaintiff for the sum of ZMW 35,008.70, and that upon perusal of the said writ of fieri facias, he had noticed that in the first paragraph, at lines 2 and 3, it purported that the said sum was an amount awarded by the court as interest to the plaintiff, when in fact not.

Further, that from the praecipe of the writ of fieri facias, he noted that the plaintiff had moved the court to seal the writ of fieri facias on a falsified claim that the court had issued a certificate of taxation, bearing the date 25th March, 2019, for the sum of ZMW 35, 008.70, when in fact not.

In the skeleton arguments, the plaintiff argues that the Supreme Court had occasion to address most of the issues arising from the facts before this court, in the case of ***TAP Zambia Limited v Percy Limbusha and 8 others***[4]. That in that case, two grounds of appeal were considered namely;

> *"(i) that the court below erred in law and in fact when it refused to set aside the execution of the Writ of Fieri facias when the respondents had endorsed a sum on the writ that was neither agreed to by the parties nor assessed by the court,*

and,

(ii) that the court below erred in law and in fact when it found that a writ of fieri facias could not be set aside after the Sheriff had seized the goods, when the court had the power to do so under the rules of court".

The argument is that the court agreed with the submissions made by Counsel for the appellant, who referred to the case of ***Barclays Bank Zambia Plc v Zambia Union of Financial Institutions Allied Workers*** [2], where the court held that;

> ***"It was not open to the complainant to unilaterally compute the sum payable and levy execution on that 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.....the proper course that the complainant should have taken was to go to court to have the amount due assessed by the court".***

That with regard to the second ground of appeal, the court also agreed with the reference by Counsel for the appellant to Practice Note 47/1/8 of Order 47/1 of the ***Rules of the Supreme Court of England 1999 edition*** which provides as follows;

> ***"setting aside execution***
>
> ***This may be done where execution has been improperly issued, even after execution has been levied..."***

It is argued that the court in that matter held that a writ of execution which is improperly or irregularly issued, ought to be set aside at any stage, and it ordered that the writ be set aside. Further, in line with

Section 14(2) of the ***Sheriffs Act, Chapter 37 of the Laws of Zambia,*** liability should attach to the party on whose demand the irregular execution process has been issued.

The argument is further that the Supreme Court in that matter also agreed with the passage from ***Halsbury's Laws of England 3rd edition, Volume16***, which was relied on by the appellant at paragraph 55, page 38, and which provides that;

> ***"If the execution is irregular or ought not to have been issued, the Master will in general set it aside and, if goods or money have been levied under it, will order them to be restored."***

It is also argued that paragraph 57 of the said ***Halsbury's Laws of England,*** at page 39 states that;

> ***"Restitution – when a wrongful or irregular execution has been set aside or when a judgment or order has been reserved after execution thereon has taken place, restitution will be made to be successful party. The order setting aside the execution or reversing the judgment or order should provide this; and if it does, execution may issue upon it the ordinary course. If the order does not so provide, another order may be made or a writ called a writ of restitution may be issued, commanding the judgment creditor to restore the property or pay over the proceeds of sale."***

That on that basis, the court ordered that the goods be restored, if they had not been sold, and that if they had been sold, that the proceeds of the sale be paid to the appellants.

In line with the above authorities, the defendant argues that there are only two options when sums payable in a judgment are not quantified; that is, agreement of the sums due by the parties or assessment of the amount by the Court.

The defendant also submits that Order XXIII of the High Court Rules Chapter 27 of the Laws of Zambia, provides for the computation of unquantified sums in judgments, in the event that the court itself is unable to carry out such assessment, which is by appointment of Referees. Reference is made to the case of ***BP Zambia Plc v Expendito Chipasha and 235 others***[6], where the court held that;

> ***"5.30. In the circumstances, we will refer the computation of interest prescribed by the Pension Scheme Rules to the learned Registrar of the High Court, who should invoke Order XXIII of the HIGH COURT RULES in accordance with our directive in Paragraph 3.1 of this Judgment."***
>
> ***"6.1. In the circumstances of this case, we will refer this matter back to the learned Registrar of the High Court for assessment of the moneys due to the Respondents. In view of the complexity of the computations required to be done, we direct that the Registrar should invoke Order XXIII of the HIGH COURT RULES to appoint a Referee to do the said computations. The Referee must be a qualified Actuary. We order that both parties must share the cost of the Actuary equally."***

In the affidavit in opposition that was filed on 4th February, 2020, which is deposed to by Joy-Rachael Mutemi, it is averred therein that the computed sum of ZMW 35.008.70, is an accurate sum due and owing to

the plaintiff as interest. Her position is that the only matters that necessitate an assessment from the court, are matters where the figures are not quantifiable, or easily agreed upon, like damages and legal costs.

She also deposes that the ruling of the court explicitly stated the rate at which the interest rate on the judgment sum would be payable, and the plaintiff was thus within its rights to levy execution for its recovery. It is stated that the defendant did not take into account the fact that the debt owed was in excess of ZMW100,000.00, and it was unpaid for more than 365 days. Thus, the plaintiff was entitled to compute interest at the rate of 16% as the short-term interest rate, and that the defendant merely reproduced unauthenticated documents.

It is also deposed that the defendant has been indebted to the plaintiff since 2017, and he could have avoided execution on his assets, if he had settled the debt that he owed.

In the skeleton arguments, the plaintiff argues that the case of ***Tap Zambia Limited*** relied on by the defendant as authority, can be distinguished from the facts in casu. In that regard, the argument is that in that case, the court rightly held that the writ of fieri facias was irregular, because the monies that were due were not quantifiable. The plaintiff also argues that in the case of ***BP Zambia Plc v Expendito Chipasha*** [6] also relied on by the defendant, the amounts which were self-assessed were for the judgment debt and damages. That the court in that case held that;

> ***"As we have already held on the third ground of appeal, the learned trial Judge did not award K720,056,600.00 to the Respondents. The Respondents could not, therefore, have rightly based the issuance of the Writ of FIFA on that amount.***

> ***The judgment of the learned trial Judge did not ascertain the exact amounts that were due to the Respondents. The learned trial Judge simply ordered that the Respondents were entitled to pension benefits to be determined under Rule 1 1(ii) of the Pension Scheme Rules. This clearly meant that the Respondent could not execute on the basis of the judgment of the learned trial Judge because that judgment did not award ascertained amounts to the Respondents."***

It is the plaintiff's argument that the said case is different, as in this matter, it is the interest on an ascertained judgment debt that is in contention. The plaintiff further argues that in this case, the interest due to the plaintiff can be easily ascertained, and the plaintiff can rightfully and legally execute on the defendant for recovery of the same.

The plaintiff also relies on Section 2 of ***The Judgment Act, Chapter 81 of the Laws of Zambia*** which provides as follows;

> ***"Every judgment, order, or decree of the High Court or of a Subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest at the rate of six per centum per annum from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree".***

The argument is that there is no jurisprudence or law in Zambia that obligates that interest should be submitted for assessment by an independent Deputy Registrar. Finally, that the defendant has not

disclosed any evidence to show that the interest due to the plaintiff is irregular.

What is clear from the submissions, is that the parties are not in agreement as to the amount that is due to be paid as interest on the judgment sum by the defendant to the plaintiff. By the ruling dated 13th June, 2019, this court ordered that;

> *"The amounts shall carry interest at average short-term deposit rate from the date of issue of the writ until judgment and thereafter at the Bank of Zambia lending rate until payment"*

From the affidavits filed into court, it can be seen that both parties computed the interest, that they believed was due, with the plaintiff computing it at ZMW 35,008.70, and the defendant at ZMW 7,384.39. The defendant in his arguments states that the plaintiff levied execution for the interest due on amounts that it unilaterally computed.

In the email exhibited as 'MM8' to the affidavit in support of the application, which the defendant wrote to the advocate for the plaintiff, he attached his computation of the interest, and pointed out the variance between what he had come up with, and what the plaintiff had come up with.

The plaintiff however went ahead and executed on the amount that it had computed. This is the basis upon which the defendant has applied to set aside the writ of fieri facia, alleging that it is irregular. The defendant also argues that the amount due as interest should be assessed, because the parties are not in agreement.

The plaintiff on the other hand argues that the amount need not be assessed, because the rate at which the interest is payable was explicitly

stated by this court as quoted above. The defendant in his skeleton arguments has referred to the cases of ***TAP Zambia Limited v Percy Limbusha and 8 others*** [4] and ***Barclays Bank Zambia Plc v Zambia Union of Financial Institutions Allied Workers*** [2] arguing that a party cannot unilaterally come up with a sum and levy execution on the same, but that execution can only be levied on amounts found due by the court, in a judgment or upon agreement by the parties to an action, and incorporated into a consent judgment.

Indeed, this is the position of the law. However, it is also true that the order given by this court was very specific as to how the interest was to be arrived at, as quoted above. This is the practice when awarding interest on sums owing, as was stated in the case of ***Zambian Breweries Plc and Lameck Sakala*** [3],where the Court held that;

> ***"On the merits, we are of the view that it was wrong to calculate interest from 1st December 1979, when the Respondent was employed. We say so because his cause of action for terminal benefits did not arise from the date he was employed. It arose from the date of his retirement. As to the rate of interest and the effective date, the standard practice on debts, is to award interest on the sum owing, at the average short term bank deposit rate, from the date of issue of the writ of summons to the date of Judgment. This is pursuant to Order 36, Rule 8 of the High Court Rules. Thereafter, up to the date of settlement, interest is awarded at the current lending rate, as determined by the Bank of Zambia. This is pursuant to Section 2 of the Judgments Act, CAP 81 of the Laws of Zambia, as amended by Act No. 16 of 1997."***

However, the plaintiff was also right in pointing out that exhibit 'MM10a' to the affidavit in support of the application, was from 31st March, 2018, instead of 1st August, 2017, as was directed by this court. This court stated that the interest would run from the date of issue of the writ, which was 1st August 2017, and not 31st March 2018. This therefore, means that the computation done by the defendant may not be accurate.

I do however note that the plaintiff has also not exhibited how they computed their interest, to arrive at the figure of ZMW 35,008,70.There is therefore need to determine if indeed the computation of the interest due on the judgment sum by the plaintiff is accurate, seeing that the parties are at variance on the amount due.

Therefore, regardless of the fact that the court order was clear on how the interest was to be computed, it is also clear that the parties are in dispute over the computation. The proper course would therefore be to order that the interest due, be assessed by the Deputy Registrar.

The defendant also argued that the praecipe for the writ of fieri facias referred to a certificate of taxation that was not issued by the court. The plaintiff argued that this submission was a misnomer, as the writ of fieri facias was properly endorsed, and the defendant had not suffered prejudice, as a result. In support of that argument, Counsel for the plaintiff relied on the case of ***Alexander Koda Films Production.***

The defendant however argued that the praecipe for the writ of fieri facias is what was used to move the Sheriff. In light of the fact that the plaintiff executed for interest due on the judgment sum when there was a dispute on the same, entails that the writ of fieri facias was irregular to that extent. I say so, as while in my ruling dated13th June, 2019, i directed

the rate at which the interest due would be calculated, this amount was not ascertained.

It could only be ascertained by going to the Bank of Zambia website. The affidavit in support of the application, particularly exhibit 'MM8' shows that the parties came up with different computations. There being a dispute on the amount due, there should have been an application to have the same assessed.

The plaintiff can therefore be said to have unilaterally computed the amount due as interest, and executed for payment of the same, when the parties had not agreed on the amount stated on the writ of fieri facias. It was therefore prejudicial to the defendant. The writ of fieri facias is thus liable to be set aside, as Practice Note 47/1/8 of Order 47/1 of the ***Rules of the Supreme Court of England 1999 edition*** quoted above, provides that setting aside of an irregular fieri facias can be done even after execution has been levied.

Further, on the strength on the authority of ***Halsbury Laws of England,*** the goods seized can be restored to the defendant. As regards the writ of fieri facias, which is exhibited as 'MM11' to the affidavit in support of the application, and which was filed together with a praecipe on 2nd September, 2019, it reads in part as follows;

> ***"TO: the Sheriff of Zambia and his bailiffs***
> ***You are hereby commanded in the President's name that of the goods and chattels of MUMBA MUZIYA you cause to be made the sum of ZMW35, 008.70 on the amounts awarded by the court as interest, which sum of money was lately before the High Court for Zambia...."***

The praecipe for the writ of fieri facias, which is exhibited as 'MM12' to the affidavit in support of the application reads as follows;

> ***"Seal a writ of fieri facias directed to the Sheriff of Zambia and his bailiffs against Mumba Muziya of Eva Jhala's place Plot 2552, Flat 3, New Kasama anywhere else where the goods and chattels of the aforesaid defendant may be found upon a final certificate of taxation the court bearing the date 25th March, 2019 for the sum of ZMW35, 008.70".***

It can be seen from these two documents that the praecipe for the writ of fieri facias makes reference to ZMW35, 008.70 as being due as result of a certificate of taxation of the costs, while the writ of fieri facias refers to the amount as having been found due as interest by the court. The two documents go hand in hand, and they are not in tandem as to what the execution is for.

More importantly however, is that there is a dispute on the interest due, and the same should have been subjected to assessment. The writ of fieri facias was for execution of only the interest due, and not the costs. Counsel for the plaintiff agreed that the costs were not taxed in this matter. In the case of ***Trevor Limpic v Rachel Mawere and Caroline Mawere*** [5], the Supreme Court stated and held as follows;

> ***"In our view, the case of Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and Allied Workers cited by the appellant is instructive on the procedure to be adopted in enforcing amounts that have been agreed to by parties to an action. The holding in that case at page 117 states in part that:***

"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." (Emphasis ours)

Dr. Chongwe contended that the Barclays Bank Zambia Plc case is distinguishable from the present case because in that case no agreement had been reached between the parties but in the present case, an agreement on the quantum of costs had been reached as evidenced by the letters exchanged between the parties. In our view, this argument is legally flawed when regard is had to Order 42, rule 5A of the WhiteBook which deals generally with consent judgments and orders.

The parties having agreed to the sum of K250,000.00 as costs, a consent order to that effect should have been entered or sealed before the respondents could levy execution. This is in line with Order 42, rule 5A(3) which provides that:

"Before any judgment or order to which this rule applies maybe entered, or sealed, it must be drawn up in the terms agreed and expressed as being "By Consent" and it must be indorsed by the solicitors acting for each of the parties."

Furthermore, Order 62, rule 3(2) also states 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 court."

It is not hard to discern from the authorities discussed above that a judgment or order of the court is a sine qua non for the payment of money to a party in any proceedings.

According to State Counsel, there was no need for a formal order because the agreed costs emanated from the judgment of the Supreme Court dated 25th July 2014. There is no dispute that in the said judgment the Supreme Court awarded costs to the respondents, to be taxed in default of agreement. In her ruling at pages 19 - 20 of the record of appeal, the learned trial judge stated as follows:

"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 [Order 42/5A and 42/5A (4)] do not apply to the scenario in casu because the agreed costs emanate from the judgment of the Court. On this score, Iequally find Order 62 Rule 3 (on entitlement to costs) as cited by Mr. Chenda to be irrelevant."

We hold the view that the learned trial judge fell into serious error in finding as she did. It is clear from the authorities discussed above that execution should only have been effected by the respondents after a consent order indicating the agreed costs had been filed into court. Furthermore, the prescribed forms of a writ of fifa. and the accompanying praecipe, as aptly argued by Mr. Chenda, both make reference to a judgment or order as being the basis of execution. The said forms also require that the date of the order or judgment of the court is endorsed thereon.

Dr. Chongwe, SC submitted that there was no rule of law prohibiting inclusion of proof of an agreement in the writ of fifa and praecipe of fifa. He also argued that this was not the

first time costs have been agreed and thereafter, execution levied following the provision of satisfactory proof of the agreement at the time execution is sought. Ingenious as State Counsel's arguments may sound, we have no hesitation to state that they are legally flawed. Worse still, State Counsel has not advanced any authority to support his contention that execution can be levied upon provision of an exchange of letters showing an agreement on costs. In the absence of any such authority and for the reasons we have stated above, it is inescapable to conclude that the issuance of the writ of fifa. was irregular for want of an order of court, by consent or otherwise, specifying the costs agreed. We further posit that allowing parties to levy execution merely on the basis of agreed amounts contained in letters which are exchanged by the parties without reducing them into consent judgments or orders would be a recipe for anarchy in the administration of justice. Ground three, therefore, has merit.....

The ruling of the lower court is according set aside. Consequently, we order that the writ of fifa. dated 3rdDecember 2014 be set aside; costs of execution levied including the Sheriff's fees be paid by the respondents; and costs in the court below and here be awarded to the appellant".

This case is very clear that if there is no agreement whether on a judgment sum, damages, costs etc, there must be assessment or taxation as the case may be. Therefore, I accordingly set aside the writ of fieri facias that was issued to execute for the interest due.

Further, in line with Practice Note 47/1/8 of Order 47 Rule 1 of the Rules of the Supreme Court of England, 1999 edition, if the goods seized in execution have not been sold, they shall be returned to the defendant forthwith, and the costs of execution go to the defendant.

If the goods seized in execution have been sold by the Sheriff, the proceeds of the sale shall be paid to the defendant. The parties shall proceed to assessment of the amount due as interest, and the costs if not agreed, shall be taxed, before execution can be levied.

As regards the application to stay execution, while the affidavit in support of the application just refers to the application being in support of the application to set aside the writ of fieri facias, the summons is clear that it was issued for an application to set aside the writ of fieri facias and to stay execution. It has been shown that the writ of fieri facias was issued irregularly, and therefore the application has succeeded.

Thus the application, although it was issued to stay execution, but the writ of fieri facias having been set aside, and any goods seized in execution having been ordered to be returned to the defendant, if they have not been sold, or if they have been sold, the proceeds thereof, be paid to the defendant, has been overtaken. Costs of the application go to the defendant, which shall be taxed if not agreed. Leave to appeal is granted.

DATED AT LUSAKA THIS 26th DAY OF FEBRUARY, 2020

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE