



**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2019/HPC/0471**

**BETWEEN:**

**MTN (ZAMBIA) LIMITED**

**PLAINTIFF**

**AND**

**SCIROCCO ENTERPRISES LIMITED**

**DEFENDANT**

*Before Lady Justice B.G. Shonga this 10<sup>th</sup> day of March, 2021*

*For the Plaintiff, Messrs. Gill & Seph Advocates  
For the Defendant, Messrs. Sondashi & Co. Advocates*

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## **RULING**

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### **Cases referred to**

1. *Cubit v Gamble* (1919) 35 T.L.3. 223.
2. *Zambia Revenue Authority v Post Newspaper Limited* (2016) 1 Z.R. 394 S.C.

### **Legislation and Other Material Referred To:**

1. *Order III, Rule 2, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.*
2. *Order 45, Rule 1, Sub Rule 5, Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 edition (White Book).*

## 1.0 APPLICATION

This Ruling speaks to an application by the defendant to set aside the *writ of fieri facias* for irregularity.

The application was made pursuant to **Order III, Rule 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia** and is supported by an affidavit in support and skeleton arguments filed on 2<sup>nd</sup> April, 2020.

The application attracted opposition from the plaintiff who in turn filed an affidavit in opposition and skeleton arguments on 14<sup>th</sup> April, 2020.

## 2.0 BACKGROUND

On 10<sup>th</sup> October, 2019, the plaintiff took out a writ of summons against the defendant. The defendant did not enter appearance, nor did it file a defence within the prescribed time. On 5<sup>th</sup> December, 2019, the plaintiff entered judgment in default of appearance and defence. Judgment was entered for the payment of ZMW 803,083 plus interest. On 23<sup>rd</sup> December, 2019, the defendant applied to pay the judgment

debt in installments. The application was determined in favour of the defendant on 29<sup>th</sup> January, 2020. The Ruling read, in part, as follows:

*"I will allow payment in installments, specifically six equal monthly installments and upon failure of any one installment, the whole amount remaining unpaid shall become due. The first payment shall be paid on or before 21<sup>st</sup> February, 2020..."*

On 31<sup>st</sup> March, 2020, the plaintiff issued a *writ of fi. fa.* for the sum of 583, 083.00 plus interest.

### **3.0 THE FACTS**

The agreed facts that are germane to this application, discerned from the affidavit evidence before Court, are that the defendant failed to make full and timely installment payments in accordance with the Ruling of 29<sup>th</sup> January, 2020. Particularly, that the defendant did not make full timely payments in respect of the February and March 2020 installment payments.

In terms of the Ruling, as of 23<sup>rd</sup> March, 2020, the defendant ought to have paid a total sum of K267,694.40 to the plaintiff ~~as of 23<sup>rd</sup> March, 2020~~. By that time, however, the defendant had only paid the sum of K220, 000.00. This left an outstanding amount of K583, 083.30.

Following the defendant's failure to strictly comply with the Ruling, the plaintiff issued a *writ of fi. fa.* on 31<sup>st</sup> March, 2021. The writ was issued for payment of K583, 083.00. On the same date, the defendant paid the sum of K70,000.00 to cover the amount outstanding on the March installment.

#### **4.0 LEGAL ARGUMENTS**

##### **4.1 Defendant's Arguments**

In its skeleton arguments, the defendant relies on **Order 45, Rule 1, Sub Rule 5 of the Rules of the Supreme Court, 1965, Supreme Court Practice, 1999 edition (White Book)** for its contention that the *writ of fi. fa.* must accurately reflect the sum owed by the defendant. According to the defendant, **Order 45/1/5** demands that a *writ of fi. fa.* must match the judgment in every respect by accurately stating the parties

and the sum sought to be recovered. Consequently, the defendant deduced and submitted that a *writ of fi. fa.* which contains a sum that exceeds the sum due is irregular. The case of **Cubit v Gamble (1919) 35 T.L.3. 223<sup>1</sup>** was cited to give credence to the defendant's submission.

Standing on the shoulders of the cited authorities, the defendant submitted that the *writ of fi. fa.* in this case expressed a sum more than what was due and is therefore irregular. Thus, the Court was invited to order that the writ be stayed or set aside pending determination of the matter.

#### 4.2 *Plaintiff's Arguments*

In opposing the application, the plaintiff argued that a review of the White Book reveals that **Order 45, Rule 1, Subrule 5** does not exist. It was contended, therefore, that the defendant failed to refer to the order pursuant to which the relief is sought. Furthermore, the plaintiff took the view that the defendant sought to mislead the Court. In that regard, the plaintiff illuminated the case of **Zambia Revenue Authority v**

***Post Newspaper Limited (2016) 1 Z.R. 394 S.C.<sup>2</sup> Judgment Number 18 of 2016*** where the Supreme Court stated that authorities must be quoted in full and truthfully.

As regards its substantive argument, the plaintiff countered that the *writ of fi. fa.* was issued after the defendant breached the relevant Ruling by not paying the full monthly installment that was due. The plaintiff pointed out that the sum on the *writ of fi. fa.* was arrived at after deducting the total amount that had been paid, being K220,000.00, from the judgment debt. Resultantly, the plaintiff averred that the defendant's application lacked merit and ought to be dismissed.

## **5.0 DETERMINATION**

I have carefully read and scrutinized the affidavit evidence, legal arguments, and submissions before Court.

I will begin by considering ***Order 45/1/5*** of the White Book, which forms the core of the legal basis of the defendant's application. Paragraph 5 of Order 45, Rule 1 of the White Book encompasses editorial notes which address the time for

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issue of a writ of fi. fa. It edifies that a writ of fi. fa. may issue to enforce a judgment or order for the payment to, or for the recovery by, any person, of money or costs.

These explanatory notes expound that a writ of fi. fa. may issue immediately upon payment becoming due. Moreover, that the writ may issue as a matter of course without leave and without the necessity for prior notice to the debtor. In addition, the guidance given is that where the judgment or order directs payment within a specified time, the writ will issue immediately after, but not before, such time has expired. What is more is that **Order 45/5/1** enlightens that where the judgment or order is conditional, the writ will issue immediately after, but not before, there has been default in complying with the condition.

I note that, *in casu*, the Ruling of 29<sup>th</sup> January, 2020 carried a condition to the effect that failure of any one installment payment would yield the automatic activation of the entire outstanding amount becoming due. The affidavit evidence before me demonstrates that the defendant was in default of paying the installment that was due on 23<sup>rd</sup> March, 2020.

Since the amount paid as of that date was K220,000.00, the balance then outstanding was K583, 083.30. In terms of the Ruling, this amount automatically became due and payable. Considering the above, I am satisfied of the accuracy of the ~~that the~~ amount expressed in the writ of fi, fa.

I have also cogitated upon the case of **Cubitt v. Gamble**. The case is an authority cited in the White Book for the principle that a person who issues execution after payment or after a valid tender is liable to trespass. This is so because it is considered reprehensible to issue a writ of fi. fa. after payment. In this case, there is a dearth of evidence which reveals that the *writ of fi. fa.* was issued after payment. At best, it was issued concomitantly with payment. In any event, even if the writ had been issued after payment, the remedy according to the cited case would have been an action in trespass.

Having scrutinized **Order 45, Rule 1 of the White Book**, I must agree that the defendant cited and articulated the import of **Order 45/1/5 of the White Book** in a manner that was intended



to mislead the Court. I must caution the defendant from such conduct as it tends to turn justice sour.

In view of the foregoing, I am not satisfied that this is an appropriate case in which to order that the *writ of fi. fa.* be set aside or stayed. Consequently, the application fails and is dismissed, with costs. Attendant to this, the *ex parte* stay of execution granted herein is discharged. Costs are to be taxed in default of agreement.

Dated this 10<sup>th</sup> day of March, 2021.

  
**G.B. Shonga**  
**HIGH COURT JUDGE**