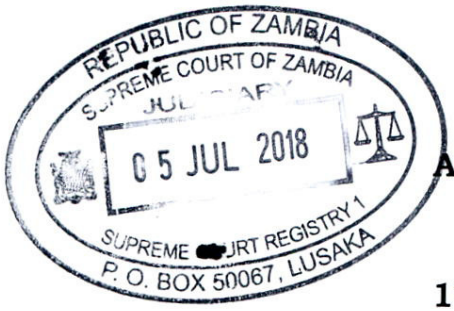
**Selected Judgment No. 30 of 2018**
**P1077**

**IN THE SUPREME COURT OF ZAMBIA** **Appeal No.121/2015**
**HOLDEN AT LUSAKA**
**(Civil Jurisdiction)**




**BETWEEN:**

**TREVOR LIMPIC** **APPELLANT**

**AND**

**RACHAEL MAWERE** **1ST RESPONDENT**

**CAROLINE MAWERE** **2ND RESPONDENT**

**COLLINS MAWERE** **3RD RESPONDENT**

**CORAM: Mwanamwambwa, DCJ, Kajimanga and Musonda, JJS**
**On 8th May 2018 and 5th July 2018**

**FOR THE APPELLANT** : Mr. K. Chenda, Messrs Simeza Sangwa & Associates

**FOR THE RESPONDENT** : Dr R. M. A. Chongwe, Messrs RMA Chongwe & Company

---

## J U D G M E N T

---

**Kajimanga, JS delivered the judgment of the court**

**Case referred to:**

**Barclays Bank Zambia PLC v Zambia Union of Financial Institutions and Allied Workers (2007) ZR 106**

**Legislation and other works referred to:**

1. **Orders 42, rule 5A; 45, rule 1; and 62, rule 3(2) of the White Book**
2. **Order 40 of the High Court Rules, Chapter 27 of the Laws of Zambia**

**P.1078**

**Introduction**

1. This is an appeal against a ruling of the High Court dated 5th June 2015, declining to set aside a writ of *fierri facias* (fi.fa.) issued by the respondents against the appellant on 3rd December 2014.

**Background to the dispute in the High Court**

2. The brief facts of this case are that the respondents took out an action against the appellant in the court below sometime in 2003. The matter was later concluded in their favour following a judgment of the Supreme Court delivered on 28th July 2014, which ordered costs against the appellant and directed that the same be taxed in default of agreement. The parties then exchanged correspondence in which costs were agreed at the sum of K250,000.00 and the appellant proposed to settle the same in instalments.

3. The proposal was, however, rejected by the respondents who then caused a writ of fi.fa. to be executed against the appellant

to recover the said agreed costs. Subsequently, the appellant applied to the deputy registrar for an order to set aside the writ of fi.fa. for irregularity on grounds that there was no judgment or order of the Court for payment of any quantified sum of money by the appellant to the respondents as costs.

4. By a ruling dated 19th January 2015, the deputy registrar found that the respondents had the right to recover the agreed costs from the appellant as the agreement on the quantum of costs was pursuant to the direction of the Supreme Court. He also found that there was no requirement for a formal order from the registrar before the respondents could proceed to levy execution for costs. Further, the deputy registrar held that the sum agreed by the parties must be considered to form part of the judgment and could be recovered in the ordinary and usual manner a judgment sum is recovered, that is, by issuing of a writ of fi.fa. The application was therefore dismissed with costs.

5. The appellant then appealed to a judge of the High Court, contending that the deputy registrar erred in law and fact when

he found that there was an agreement on costs between the respondents and the appellant. Further, that the learned deputy registrar erred in law and fact when he held that there was no requirement for a formal order before enforcement.

**Consideration of the matter by the Learned High Court Judge and decision**

6. After considering the submissions of the parties and affidavit evidence on record, the learned trial judge found that the deputy registrar's determination that the parties agreed on costs in the sum of K250,000.00 could not be faulted as the gist of the Supreme Court's directive was for the parties to agree on the quantum of costs or in default, proceed to taxation. She held 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 successful party and not to consider the mode of payment.

7. She concluded that when an order of costs is to be agreed or taxed in default thereof, there is no requirement for the parties

to agree on the primary term of quantum of the costs and the secondary terms of payment mechanisms. Further, 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.

8. The learned trial judge also found that it was redundant for the parties to execute a formal consent order for validation by the court for purposes of enforcement as the agreed quantum of costs, to the extent of the direction of the Supreme Court, constituted the Court's order of agreed costs. She opined that where the agreed costs are due to be paid by a judgment debtor and no time is fixed for their payment, the judgment debtor must pay as soon as the amount is agreed.

9. She noted that the matter had dragged on since 2003 and concluded that the respondents deserved, and were entitled, to obtain due and prompt satisfaction of their judgment debt. She, therefore, found no merit in the appeal and it was accordingly

dismissed with costs to the respondents. It is this ruling that has triggered the appeal before us.

**The grounds of appeal to this Court**

10. Four grounds have been advanced by the appellant in support of the appeal as follows:

1. **That the Court below erred both in law and fact by holding that it was quite satisfied that the deputy registrar's determination that the parties had reached an agreement on costs cannot be faulted.**
2. **That the Court below erred both in law and fact by holding that there was no requirement for the parties to agree on the primary term of quantum of costs and on the secondary term of payment mechanisms.**
3. **That the Court below erred both in law and fact by holding that it was absolutely redundant for the parties to execute a formal consent order for purposes of enforcement.**
4. **The Court below erred in fact and in law by holding that the appeal against the decision of the Deputy Registrar had no merit.**

11. Both parties filed written heads of argument in respect of this appeal which they augmented briefly at the hearing. In arguing the first and second grounds of appeal, Mr. Chenda, the learned counsel for the appellant referred us to the ruling of the lower

court specifically at page R11 lines 11-15, where the learned trial judge observed that:

> **"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 liquidated in a lump sum or instalments."**

12. He also referred us to the letter exhibited as "RMAC1" in the respondents' affidavit in opposition to the summons to set aside writ of fi.fa. which, in his contention, showed that whilst the primary term of quantum of costs had been arrived at, the secondary issue of payment terms was still under discussion. Our attention was drawn to the portion of the said letter which reads as follows:

> **"Since the proposed sum of K250,000 has now been accepted, our client advises that he is not in a position to settle the same in one lump sum due to a number of financial constraints, but proposes to settle the same in monthly instalments. We will revert shortly with [a] proposal on the quantum of the instalments. Our client needs to review his cash flow now that the proposal has been accepted."**

**P.1084**

13. Counsel therefore, submitted that the deputy registrar and the learned trial judge fell gravely in error in concluding that the parties had concluded an agreement on costs when only the primary term of quantum had been settled whilst the secondary issue of payment terms or mechanics had not been settled. He added that if the respondents were disgruntled with the failure to conclude the agreement on costs on account of the proposed payment terms, then the regular step would have been to proceed to taxation so that their costs could have been recovered as a lump sum. He contended that the respondents opted instead to levy execution on the misleading pretext that all aspects on the issue of costs had been conclusively agreed. This, counsel argued, is an irregularity which should not have been upheld by the deputy registrar and the learned trial judge.

14. Counsel went on to submit that the other reason the deputy registrar and learned trial judge fell gravely in error in ruling that the parties had concluded an agreement on costs is that according to order 42, rule 5A of the White Book, the terms

indicated in the correspondence exchanged were supposed to have been drawn up and embodied in a formal document to be signed by the respective counsel before the deputy registrar and the learned trial judge could conclude as they did. Further, he contended that order 42, rule 5A (4) of the White Book recognizes 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.

15. Counsel accordingly argued that before ruling that the parties had concluded an agreement on the issue of costs, the deputy registrar and learned trial judge were duty bound to ensure and satisfy themselves 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)(ix) and order 42, rule 5A(4) of the White Book. That since the deputy registrar and

the learned trial judge did not do so it made it unsafe and unsound to rule that the parties had concluded an agreement on costs. This, he submitted, was a ground for this Court to set aside the ruling appealed against.

16. As regards grounds three and four, Mr. Chenda submitted that in addition to the procedure under order 42, rule 5A of the White Book, there are express provisions under the rules which dictate that a formal order should have been in place on the issue of costs before the respondents could validly levy execution. He relied on order 62, rule 3(2) and (4) of the White Book 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 court.**
>
> **(3) ...**
>
> **(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where-..."**

17. He also cited order 45, rule 1(1)(a) of the White Book 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 fierri facias"**

18. Further, he referred us to the case of **Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and Allied Workers**, where this court held as follows:

> **"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."**

19. Counsel submitted, therefore, that the writ of fi.fa. having been issued in the absence of any order, whether by the court or by consent of the parties, rendered the writ incurably irregular. He argued that it would be unsafe and unsound for the execution arm of the Court system to be reduced to a state where it can be set in motion simply through letters from any one of the multitudes of law firms in the country.

20. It was Mr Chenda's contention that even the prescribed forms of a praecipe and writ of fi.fa. listed as forms 40 and 41 respectively in the First Schedule to the High Court Rules Chapter 27 of the Laws of Zambia, make reference to a judgment or order of the Court as the backbone of the execution. He also submitted that there is no mention in the said prescribed forms of an exchange of letters between advocates' as an alternative basis for execution which is what the respondents' advocates illegally opted to do in this case. He added that such illegality and the injustice inflicted on the appellant who was expecting further discussion on the payment terms cannot go without redress before this Court as the final arbiter in the land.

21. In conclusion, counsel urged us to allow the appeal, set aside the ruling of the court below and substitute it with the following orders: -

a) That the writ of fi.fa. dated 3rd December 2014 be set aside;

b) That the costs of execution levied including the Sheriff's

fees be paid by the respondents to the appellant; and

c) That the costs of the application before the deputy registrar, the appeal to a judge at chambers and of this appeal be paid by the respondents to the appellant.

22. In the respondents' heads of argument, Dr Chongwe SC, submitted generally in response to all the four grounds of appeal that this appeal was rooted on the order for costs made by the Supreme Court in its judgment of 25th July 2014 and it was this order that triggered the correspondence between the parties, leading to the agreement regarding costs as opposed to proceeding to taxation. He referred us to page R13, lines 7 – 11 of the ruling of the trial court and pages R3 – R4 of the ruling of the deputy registrar which, he contended, clearly buttressed the argument that the agreed costs emanated from the judgment of the Supreme Court dated 25th July 2014.

23. According to State Counsel, the writ of fi.fa. was regularly and

properly drawn, issued and enforced against the judgment debtor. To support this argument, he referred us to the correspondence between the parties' advocates in the record of appeal showing that the figure of K250,000.00 was agreed as costs. He argued that the learned deputy registrar's ruling disclosed that he had looked at the law which the appellant claimed, provided for leave of the registrar of the court to be obtained before the issuance of a writ of fi.fa., following an agreement as to the costs by the parties. That however, the deputy registrar found no such provision in our rules or the White Book to that effect.

24. On the question of the primary and secondary terms of the agreement on costs, it was contended that the learned deputy registrar did not address this issue as it was only raised at the hearing of the appeal before the learned trial judge who rejected the argument for being perverse and without any precedent in our law. State Counsel, therefore, urged us to dismiss the appellant's argument.

**P. 1091**

25. As regards the prescribed forms for the writ of fi.fa. and praecipe of fi.fa. not mentioning an exchange of letters between advocates as an alternative basis of execution, Dr. Chongwe, submitted that there was no rule of law prohibiting inclusion of proof of an agreement in the writ of fi.fa. and praecipe of fi.fa.. State Counsel contended 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.

26. He added that the fact that the appellant was not aware of such practice did not mean that it did not exist so as to vitiate execution based on the strength and authority of a court of law. He argued that the dates of the letters were indicated in both the praecipe of fi.fa. and writ of fi.fa. and that the actual copies of the letters were produced to the registry as proof of the agreement at the time the praecipe and writ of fi.fa. were issued and that without their production to the High Court registry, the writ of fi.fa. would not have been issued.

27. Dr. Chongwe, SC went on to submit that the appellant did not request that the costs be taxed although this option was given to him by the respondents in a letter addressed to the appellant's advocates dated 5th September 2014. On the contrary, the appellant instead made a counter offer to settle the costs at K250,000.00 which figure was subsequently accepted by the respondents' advocates. He contended that the appellant did not state that he did not agree to pay the costs of K250,000.00 but rather that he should have been given time to pay. Further, that there is no evidence of any request from the appellant nor his advocates that the costs should be taxed. State Counsel therefore, agreed with the finding in the ruling of the trial judge in the court below, that the application to set aside the writ of fi.fa. was merely an attempt to deprive the respondents the fruits of their judgment as ordered by the Supreme Court.

28. State Counsel further submitted that the **Barclays Bank Zambia Plc** case cited by the appellants should be

distinguished from the present case in that in the former, no agreement had been reached between the parties leading the court to find as follows:

> **"It is obvious to us that the parties were not able to agree on what amount was due to the Complainant's members under the terms of the judgment of the Court. In the absence of an agreement as to the amount due, the proper course that the Complainant should have taken was to go to Court to have the amount due assessed by the Court. It was not open to the Complainant to unilaterally compute the sum payable and levy execution on that amount."**

29. He pointed out that in the present case however, the exchange of letters reveals that the respondents did not unilaterally compute anything but that an agreement was reached after a considerable compromise. It was State Counsel's contention that the appellant personally, without any compulsion from the respondents, proposed and agreed to the costs of K250,000.00 in the letter dated 12th September 2012. In conclusion, State Counsel implored this court to dismiss the appeal with costs for lack of merit.

**P. 1094**

**Decision by the Court**

30. We have considered the affidavit evidence deployed in the Court below, the judgment appealed against and the arguments advanced by the parties.

31. Grounds one and two will be considered together as they are interrelated. In sum, the appellant in these grounds contends that the court below misdirected itself in ruling that an agreement on costs had been concluded by the parties when only the quantum of costs had been arrived at whilst the mode of payment remained to be determined.

32. It should be noted that in its judgment of 28th July 2014, the Supreme Court directed that the costs awarded to the respondent be taxed in default of agreement by the parties. The learned trial judge therefore, rightly observed that the gist of the Supreme Court's directive was for the parties to agree on the quantum of costs or in default thereof, proceed to taxation.

33. The issue of costs is covered under order 40 of the High Court Rules Chapter 27 of the Laws of Zambia and Order 62 of the White Book. We have perused these orders and note that there are no provisions to the effect that parties must agree on the quantum along with the terms of payment in order to constitute an agreement on costs. The learned trial judge was, therefore, on firm ground when she found that there was no requirement for the parties to agree on the primary term of quantum of the costs and the secondary issue of payment terms when an order for costs is to be agreed. Furthermore, the learned trial Judge also rightly observed that had the parties proceeded to taxation, the end result would have been to fix the amount due to the respondents as costs and not to consider the mode of payment.

34. Accordingly, the argument by the appellant that the agreement on costs had not been concluded due to the terms of payment not having been settled is without substance as it is clear from the foregoing that an order for costs to be agreed is merely

intended to ascertain the quantum to be paid by the unsuccessful party to an action and not how that amount will be paid. In any event, the learned Counsel for the appellant did not provide any authority for the proposition he advanced. In the premises, we find no merit in grounds one and two.

35. Ground three attacks the lower court's finding that the execution of a formal consent order as regards costs is redundant for purposes of enforcement. The appellant placed reliance on orders 42 rule 5A, 45 rule 1 (1) (a) and 62 rule 3 (2) of the White Book. The question for our determination, therefore, is whether there was a requirement for a formal consent order to be in place before the respondents could validly levy execution in respect of the costs awarded by the Supreme Court.

36. In our view, the case of **Barclays Bank Zambia Plc** 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)

37. 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 White Book which deals generally with consent judgments and orders.

38. 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 may be 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.

39. 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, I equally find Order 62 Rule 3 (on entitlement to costs) as cited by Mr. Chenda to be irrelevant."**

40. 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 fi.fa. 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.

41. Dr. Chongwe, SC submitted that there was no rule of law prohibiting inclusion of proof of an agreement in the writ of fi.fa. and praecipe of fi.fa. 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 fi.fa. 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.

**Conclusion**

42. Having found merit in the third ground of appeal, it follows that

ground four must also succeed. It is therefore, otiose that we should exert our energies discussing the fourth ground of appeal beyond this. As grounds three and four are at the core of this appeal, we hold that overall, the appeal has merit and it must be allowed. The ruling of the lower court is according set aside. Consequently, we order that the writ of fi.fa. dated 3rd December 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.

**M. S. MWANAMWAMBWA**
**DEPUTY CHIEF JUSTICE**

**C. KAJIMANGA**
**SUPREME COURT JUDGE**

**M. MUSONDA**
**SUPREME COURT JUDGE**