

IN THE HIGH COURT  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2014/HP/546



BETWEEN:

CHIBOTE BREWERIES LIMITED

PLAINTIFF

AND

BLUE GUM ESTATE LIMITED

DEFENDANT

Before Honourable Mr. Justice C.F.R. Mchenga SC

For the Plaintiff: K.M. Simbao, Mulungushi Chambers  
For the Defendant: N. Yalenga, Nganga Yalenga & Associates

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## J U D G M E N T

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Cases referred to:

1. Attorney General v E.B. Jones Machinist Limited, SCZ Judgment No. 26 of 2000
2. Nkongolo Farms Limited v Zambia National Commercial Bank and Others SCZ 19 of 2007
3. Khalid Mohamed v The Attorney General [1982] Z.R. 49

Legislation referred to:

1. The Sheriffs Act, Chapter 37 of the Laws of Zambia
2. The High court Act, Chapter 27 of the Laws of Zambia
3. Law of Distress Amendment Act 1888

Works referred to:

1. The Supreme Court Practice 1999 Rules
2. Halsburys Laws of England, Volume 13, 4<sup>th</sup> Edition
3. Odgers Principles of Pleading and Practice, 22<sup>nd</sup> Edition

By writ of summons, the plaintiff seeks the following reliefs:

*"A statement of account on the goods seized under warrant of distress and a refund of any money that shall be in excess of the debt plus interest and costs."*

The plaintiff's only witness was Tommy Lukas Ntele; he is one of its directors. His evidence was that the plaintiff entered into a verbal agreement to rent the defendant's premises. The tenancy was supposed to run from August 2012, with a monthly rental of K10,000.00. In 2013, they vacated the premises and at the time they were in rental arrears of K67,000.00. In October 2013, they agreed with the defendant that some other persons take up the tenancy and that those persons would pay their rentals directly to the defendant. The new tenants also defaulted thus the defendant closed the plant in February 2014. At the time they vacated, they were told that their arrears had accumulated to K87,000.00.

In March 2014, a bailiff went to the plant and they discussed their debt. He collected K5,000.00 which was a percentage of the rentals that were due. On 5<sup>th</sup> April 2014, the bailiff auctioned the equipment

from the plant and they later received a report which indicated that the equipment was sold at K190,000.00. The equipment that the bailiff took was brewing equipment, three motor vehicles being a Hino truck-ALD 9322, Fuso Fighter truck-ABM 5067 and a Canter-ALF 996. He also collected four vessels for the distribution of beer, two scrap metals and a metal stand.

He was not satisfied with the report because he came across receipts that were not included in the report. They showed the values for the vehicles sold, the vessels and the stand. Investigations revealed that the vessels were sold but the money was not accounted for. The buyers gave them the receipts. In addition, there were no receipts for the iron bars, the canter, the vessels and scrap metal. They did not dispute owing the K67,000.00. However, K20,000.00 was owed by Chipembele Brewery which was paying their rentals directly to the defendant. He said K190,000.00 was realised from the sale of the equipment and the K67,000.00 rentals and K20,000.00 for the bailiff was supposed to be deducted from it. Further, the K5,000.00 deposit was supposed to be deducted from the bailiffs K20,000.00.

The brewery equipment was sold at K190,000.00, the Hino truck at K14,000.00 and the Fuso truck at K4,500.00. This being the case, the



bailiff collected K206,000.00. According to their estimation, the value of the Canter was K20,000.00 because it had a minor fault. The value of each beer distribution vessel was K2,000.00 and they were valued at K8,000.00. The two scrap metals were valued at K2,000.00 and the stand was at K1,000.00. The total value of all the property was K237,800.00.

Since they owed the Landlord K67,000.00, after deducting that amount they were supposed to be paid K169,000.00 less K20,000.00 for the bailiff. The lawyer's fees were unknown because they did not receive a bill. He said that after adding the K5,000.00 they were entitled to K155,000.00 and that is the amount they were claiming.

When he was cross-examined, Mr. Ntele said they commenced this action before the auction of their property in June 2014. The rent was K10,000.00 per month and they were issued with receipts each time they paid. They fell into arrears in the last 6 months of the 13 months tenancy and therefore owed K67,000.00 when they moved out. He admitted that they were told that they owed K87,000.00. Their advocates were given a payment proposal and at the time they were getting prepared, the bailiffs seized their property. He had evidence that other items were not sold together with the brewery equipment.

The bailiff's records indicate that K190,000.00 was realised from the sale, the total for the expenses was K52,400.00 and the balance was K37,000.00. Their lawyer advised them that the money was kept because they concluded the auction. In addition, he admitted that he had no proof of how they arrived at the values he is claiming for the unsold property.

The defendant's first witness was Andrew Mushibwe, a certified bailiff. His evidence was that he was instructed by the defendant to execute a warrant of distress for rental arrears. He executed the warrant and seized property. After some engagements with the tenant's lawyers, he proceeded to advertise and auction the seized property. Thereafter, he rendered two reports to the landlord's advocates. The two reports had two different balances because in the first one he forgot to include security, advertising, police officer's fees and fees for his assistant who helped with the auction.

When he was cross-examined, Mr. Mushibwe said he seized seven items which included the brewery equipment, scrap stand, iron bars and other items indicated in both reports. The correct report was the one exhibited in the Supplementary Bundle of Documents. He carried out one auction and realized K205,000.00. In the first report, he indicated

K190,000.00 because that is the money that he received. He received the difference of about K10,000.00 later on.

He could not tell how much he received for each item without referring to the receipt book. He admitted that according to the defence, in paragraph 7, K108,000.00 was paid to the defendant and there remained a balance of K78,000.00. When the two amounts are added together, the amount comes to K186,800.00. It also shows that the expenses were K44,000.00 and when that amount is added it comes to K231,900.00. He maintained that figures were different because he forgot to include other expenses.

He admitted that the amount for the lawyers in both reports is different. The amount for the lawyer was arrived at after a bill was rendered. He admitted that according to the defence, the total for the lawyer's fees and his fees was K44,300.00 but according to the supplementary report it was K61,900.00. The report was rendered in 2014 and the Defence was prepared in 2015. He denied the suggestion that the report was fabricated.

The brewery equipment was sold for K190,000.00 but he could only tell how much the scrap iron bars, Fuso truck, Hino and two scrap metals



were sold for after checking his books. The two reports were prepared on the same day. The seizure was pursuant to the **Law of Distress Amendment Act** and there were no court proceedings.

When he was re-examination, he said he did not remember being contacted before the Defence was prepared. The K44,300.00 was to discharge the costs incurred by the bailiff and the advocates.

Frank Danny Ndlovu was the defendant's second witness. His evidence was that they went into an agreement with Kondwani Brewery and the plaintiff. Both companies had rental arrears and plaintiff failed to pay. After they accumulated a huge debt, they made an arrangement in which two gentlemen were tasked to run the brewery for them. They failed to pay and the rentals accumulated to K108,000.00. He engaged Mr. Mushibwe to help him recover the money.

Under cross examination, he confirmed engaging Mr. Mushibwe to recover the arrears.

Both parties filed in written submissions. It was submitted on behalf of the plaintiff that it is not in dispute that they had rental arrears and a warrant of distress was issued and executed. An auction

was subsequently held and the seized goods were sold. The equipment seized and sold were brewing equipment, iron bars, a Hino truck, a Fuso truck, a Canter truck, 4 white plastic tanks. In paragraph 7 of their defence, the defendant has laid out an account of the earnings and how they were applied.

According to paragraph 7 of their defence, the bailiff collected K186,800.00 and gave the defendant K108,100.00, leaving a balance of K78,700.00. From that amount, K44,300.00 was used to meet the bailiffs and lawyers costs while the balance was paid to the Lawyer. However, in the second report, the amount realised increased to K205,200 and the amount paid to the lawyers increased to K41,900.00.

Counsel submitted that both the defence and the reports were not credible. Both reports are dated 9<sup>th</sup> April 2014 and the defence was filed on 20<sup>th</sup> May 2015. The reports should have been available at the time the defence was filed and their contents should have been reflected in the defence. Further, both reports appear to indicate that all the goods were sold for K190,000.00. He indicated that the receipts from the auction are from different firms and don't bear the same date.



Counsel also submitted that there is no explanation why the lawyers where paid K24,300.00 in the first report or K41,900.00 in the second report given that the job to collect rentals was given to the bailiff. He referred to the case of **Frazer Associates v Armtrack Investments (Z) Limited (1)** and **Order 50 of the High Court Rules of the High Court Act** and submitted that if the lawyers had done any work, they should have rendered a bill. In the absence of a taxed bill, the lawyers were not entitled to any payment.

Counsel submitted that the claim, as has been outlined in the Statement of Claim, has been proved on a balance of probability and the plaintiff must be paid K53,700.00 which is the K48,700.00 (plus the K5,000.00 initially paid to the bailiff) which remained after the plaintiff's entitlement was deducted from the K190,000.00 earned from the sale.

He also submitted that the defendant has failed to account for the Hino truck, Fuso truck, Canter truck, 4 plastic tanks and 2 scrap metals. Going by the values of these properties, as they have been set out in the Statement of Claim, and added to the amount the K53,700.00 balance from the sale of equipment, the plaintiff is entitled to K203,700.00. He submitted that although the defendant does not appear

to be blameworthy, going by Section 14 of Sheriffs Act and the decision in the case of Attorney General v E.B. Jones Machinist Limited (2), they are liable because they are the ones who issued the warrant of distress. He prayed for interest at the bank lending rate from 5<sup>th</sup> April, 2014.

Submitting on behalf of the defendant, counsel referred to Order 6 rule 4 of the High Court Rules of the High Court Act and Odgers: Principles of Pleading and Practice and pointed out that the plaintiff, contrary to the established principles of pleading, has filed in a Statement of Claim with claims that are unrelated to the claim in the writ of summons. His Statement of Claim has a cause of action totally unrelated to the claim in the writ. Counsel also referred to Order 18 rule 15 (2) of the Rules of the Supreme Court and submitted that the only remedies available to the plaintiff are those in the writ.

As regards the allegation that the reports were prepared in the furtherance of a fraud, counsel referred to the case of Nkongolo Farms Limited v Zambia National Commercial Bank and Others (3) and submitted that fraud was not pleaded nor proved. He submitted that even if the bailiff's report was not detailed and had arithmetical errors, there

is no evidence of theft by the bailiff or anyone else. He urged the court to accept Mr. Mushibwe's testimony that the second report was to correct errors in the first one and that he had the receipts to support his claims but just forgot to bring them to court.

Counsel also submitted that even though the Statement of Claim has various claims, this action arose out of the execution of a warrant of distress issued pursuant to the Law of Distress Amendment Act 1888. He referred to Halsburys Law of England, Volume 13, 4<sup>th</sup> Edition at paragraph 368 and submitted that the plaintiff has failed to prove that the seizure was irregular. He also submitted that since the action is for the defendant to account, the claims in the statement of claim for damages are not competent. The plaintiff cannot base his claim on the market value of the items because a bailiff is not under an obligation to sell at the market price.

Finally, he referred to the case of Khalid Mohamed v Attorney General (4) and submitted that the plaintiff has not proved his case and his claim should not succeed merely because of some alleged inconsistencies in the defence evidence. He prayed that the action be dismissed with costs.



In reply, counsel for the plaintiff referred to **Order 18 Rule 15 (2)** of the Rules of the Supreme Court and submitted that the court is entitled to draw inferences from the evidence before it. It can therefore draw the correct inferences from the inconsistencies in the reports.

I am indebted to both counsels for their submissions and I have taken them into account in arriving at my decision.

The undisputed facts of this case are that on or about 6<sup>th</sup> August 2012, the plaintiff entered into a verbal lease agreement with the defendant. It was agreed that the plaintiff would rent the defendant's premises for a term of one year at K10,000.00 per month. The plaintiff fell into rental arrears and eventually vacated the premises. To recover the rental arrears, the defendant engaged a bailiff who seized the plaintiff's properties, advertised and auctioned them.

What is disputed is how much the rental arrears were and how much was realised after the auction sale. There is also a dispute on whether the plaintiff's lawyer was supposed to be paid legal costs by the bailiff after the auction sale.

The first issue I will deal with is the question whether the bailiff had any basis for paying the plaintiff's lawyer "legal costs" after selling the distrained property. **Section 7 of the Law of Distress Amendment Act**, provides as follows:

*"From and after the commencement of this Act no person shall act as a bailiff to levy any distress for rent unless he shall be authorised to act as a bailiff ....."*

It follows, that a certified bailiff can only seize property for the purposes of recovering rentals that are in arrears. He has no power to distrain property for the purpose of recovering money owing for any other reason. Neither can he use earnings after distrained goods have been sold to settle any other liabilities that the defaulting tenant may have. It is my finding that it was illegal for Mr. Mushibwe to have used the earnings from the auction to settle the plaintiff's "legal costs".

Coming to how much was owing as rental arrears, according to Mr. Ntele, the defendant was owed K67,000.00 at the time their property was seized. In paragraph 4 of the Defence, it was pleaded that the amount of rentals owing was K87,500.00. However, in paragraph 7 of the same Defence, the defendant's position is that K108,100.00 was the sum owing.

The defendant did not lead any evidence of how the K87,500.00 increased to K108,100.00. In fact, in cross-examination, it was suggested to Mr. Ntele, the plaintiff's witness, that the amount owing was K87,500.00 and he admitted that that is what the defendant claimed. The disparity between K67,000.00 Mr. Ntele referred to and the K87,500.00 in the writ is explained by Mr. Ndlovu, the defendant's witness. He said after the plaintiff failed to pay the rentals, some people were engaged to run the brewery for 2 months. The rentals for that period was K20,000.00 and they were not paid. Mr. Ntele's claim that they entered into an agreement with a different brewery that run it for two months is farfetched and I don't believe it. Consequently, it is my finding that the amount owing in rental arrears at time the plaintiff's property was seized was K87,500.00.

Further, on the basis of Mr. Mushibwe's evidence, I find that the brewery equipment was sold for K190,000.00. His evidence is however not clear on how much the other property was sold for. He said he could not tell unless he checked his books. I find this claim to be rather strange because this witness who came to court to shed light on how much was realised after he sold the distrained property and yet he came to court without the receipts. There is no basis for giving him



another opportunity to bring receipts that he has failed to bring, assuming they exist at all.

Notwithstanding, Mr. Ntele's evidence was that they carried out investigations and they came across evidence that the Hino truck was sold at K12,000.00 while the Fuso truck was sold at K4,800.00. This being the case, I find that the sale of the brewery, Hino truck and Fuso truck has been accounted for. What has not been accounted for is the sale of the iron stand, the Canter, the 4 plastic vessels and 2 scrap metals.

Coming to the two reports, I agree with the defence submission that where fraud is being alleged it must be pleaded. In this case, the plaintiff did not plead any fraud and cannot therefore rely on the allegations of fraud as where set out in the submissions. Even if this is the case, I am not precluded from considering the veracity of the report tendered into evidence through the Defendant's Supplementary Bundle of Documents.

I find that the main differences in the reports are the total amount realised after the sell and the expenses incurred by the bailiff from the time he seized the property up to when he sold it.

According to the first report, K190,000.00 was realised after the sale but the second one indicates that it was K205,200.00. I find that what is accounted for is the K190,000.00 earned from the sale of the brewery equipment, the K12,000.00 from the sale of the Hino truck and K4,500.00 from the sale of the Fuso truck. The sum total of these three amounts is K206,500.00. I find that this is the amount that was realised from the sale of the three properties and the second report is close to that amount.

As regards the expenses, I have already found that the lawyer was not entitled to any payment from the money realised from the sale. It is therefore not necessary to consider which one of the figures could be the correct one. The K20,000.00, bailiffs fees are the same in both reports and I find that they are not contested. I also find that the K7,100.00 security cost, the K3,800.00 advertisement costs and K4,300.00 miscellaneous expenditure, could have been reasonably been incurred and I accept them as being genuine. Consequently, it is my finding that a total of K35,200.00 was genuinely expended by the bailiff.

Before dealing with the plaintiff's claims as they have been set out in the pleadings, I will consider the submission on behalf of the

defendant that the only claims that can be considered are those that were in line with the claim endorsed on the writ of summons. The endorsement on the writ is for:

*"A statement of account on the goods seized under warrant of distress and a refund of any money that shall be in excess of the debt plus interest and costs."*

In the Statement of Claim, the reliefs sought by the plaintiff are:

*"By reason of the defendant's actions, the plaintiff has suffered loss and claim as follows:*

- (i) The sum of K78,700.00 balance owed to them from the sale of machinery equipment*
- (ii) The sum of K5,000.00 paid as execution fees to the Bailiffs.*
- (iii) The sum of K11,000.00 of the 4 white plastic vessel tank, 2 scrap metals and scrap stand (iron bars).*
- (iv) The sum of K140,000.00 the value of vehicles.*
- (v) Damages*
- (vi) Interest and costs*
- (vii) Further or other relief as the court may deem just and expedient."*

Other than the first and last claims, all the other claims in the Statement of Claim, are not in line with what was claimed in the writ. This being the case, I agree with the submission on behalf of the defendant, that it is not competent for me to adjudicate them.

Coming to the endorsement on the writ, I find that the bailiff has failed to account for the earnings realised from the sale of the iron stand, the Canter, the 4 plastic vessels and 2 scrap metals. I refer



the determination or assessment of their value to the Registrar. The amount assessed shall attract interest at the bank lending rate from 5<sup>th</sup> April 2014, to the date of judgment. Thereafter, it shall attract interest at the short term bank deposit rate.

I have also found that K206,500.00 was realised from the sale of the brewery equipment and 2 motor vehicles. Out of that amount, the defendant was entitled to be paid K87,000.00 as rental areas. Further, the bailiff correctly spent K35,200.00 as bailiffs fees and expenses, this leaves an excess of K84,300.00. This amount and the K5,000.00 deposit he collected from the plaintiff should have been paid back to the plaintiff.

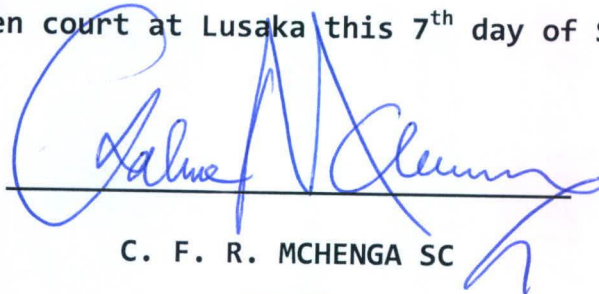
I order that K89,300.00 be paid to the plaintiff forthwith. It shall attract interest at the bank lending rate from 5<sup>th</sup> April 2014 to the date of judgment. Thereafter, it shall attract interest at the bank short term bank deposit rate.

I agree with the submission on behalf of the plaintiff that by virtue of **Section 14(2) of Sheriffs Act** and going by the interpretation of the provision in the case **Attorney General v E.B. Jones Machinist Limited (2)**, the defendant is vicariously liable for the bailiff's

action of failing to return the excess K84,300.00 to the plaintiff and failing to account for the iron stand, the Canter, the 4 plastic vessels and 2 scrap metals that he seized. In any case, most of the unpaid money ended up with them.

I also award the plaintiff Costs, to be agreed and in default to be taxed.

Delivered in open court at Lusaka this 7<sup>th</sup> day of September, 2016

A handwritten signature in blue ink, appearing to read 'C. F. R. MCHENGA', is written over a horizontal line. The signature is stylized and cursive.

C. F. R. MCHENGA SC

JUDGE