

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

2015/HPC/0137



BETWEEN:

**METL ZAMBIA LIMITED**

**PLAINTIFF**

AND

**INTERFERT AGRO COMMODITIES LIMITED**

**DEFENDANT**

**FLOYD MALEMBEKA**  
**WILD TYRKEY FARM LIMITED**

**1<sup>ST</sup> CLAIMANT**  
**2<sup>ND</sup> CLAIMANT**

*Before: Justice B. G. Lungu on 22<sup>nd</sup> August 2016 in Chambers*

For the Plaintiff : Ms. A Chinyimba  
Messrs JB Sakala & Company

For the Defendant : Absent

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## **R U L I N G**

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**CASES REFERRED TO:**

1. *Michael Chilufya Sata vs. Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi Tv Limited, Mobi Tv International Limited, (2011) Z.R Vol. 1; 2010/Hp/1282 (H.C).*
2. *Kapiri Glass Products Limited vs. Maruti Oil Industry Limited (1993 - 1994) Z.R. 73 (H.C.).*
3. *Nyampala Safaris Limited and Others v Zambia Wildlife Authority and Others SCZ/8/179/2003 (unreported).*

**LEGISLATION REFERRED TO:**

1. *The High Court Act and Rules, Chapter 27 of the Laws of Zambia.*
2. *The Supreme Court Practice of England, 1999 Edition (The White Book)*



This is an application made by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants, for an order to stay the sale of seized goods taken in execution under a Writ and Praecipe of Fieri Facias of 2<sup>nd</sup> December 2015, pending the determination of their application to set aside the Writ of Fieri Facias for irregularity.

The application is stated to be made pursuant to Order 3 Rule 2 of the High Court Rules of the High Court, CAP 27 of the Laws of Zambia (HCR) which reads as follows:

***"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."***

The application was supported by an affidavit sworn by Floyd Malembeka, the 1<sup>st</sup> Claimant and a Director for the Defendant. The Claimants also filed Skeleton Arguments and a List of Authorities in aid of their application.

In his deposition, Mr Malembeka acknowledged that the Defendant was indebted to Plaintiff according to the Judgment rendered in 2015. He further deposed that a Writ of Fieri Facias was executed, pursuant to which goods were seized, namely, Benz S- Class Reg.



No. ABH 644 and cattle, which according to the deponent belonged to the Claimants.

The deponent further attested that the Defendant is a company limited by shares, incorporated under the Companies Act, CAP 388 of the Laws of Zambia, which company has a separate legal entity, with rights to sue and be sued in its own name. It was deposed that the Claimants had at no point been made parties to these proceedings and as such, the seizure of the motor vehicle and cattle belonging to the claimants was irregular.

In their Skeleton Arguments, the Claimants presented arguments for both the application for a stay of the seized goods as well as the application to set aside the Writ of Fifta. However, as the applications were not scheduled to be heard in concert, I will only consider the arguments relating to the application for a stay of the seized goods. In this regard, the argument that can be deciphered from the Claimants' Skeleton Arguments is that under Order 3 Rule 2 HCR, the Court has power to grant any interlocutory order that is in the interest of justice. That as the Claimants were not parties to the action, and having filed a Notice of Claim, claiming ownership to the seized goods, the Court ought to stay the sale of the seized goods, pending their application to set aside the Writ of Fifta.





When the application came up for hearing on 22<sup>nd</sup> August, 2016, the Claimants were absent, without reason. I accordingly proceeded to hear the matter in their absence, more so that Counsel was in attendance at the previous sitting when the hearing date was agreed and set. Accordingly, no further submissions were tendered on behalf of the Claimants.

The application was opposed by the Plaintiff by means of an Affidavit in Opposition filed on 18<sup>th</sup> August 2016, sworn by Cosmos Mtesigwa, the Country Manager for the Plaintiff Company. It was deposed that the 1<sup>st</sup> Claimant, being the contact person for the Defendant, provided the Plaintiff with a company profile that exhibited the company assets, which included the seized Mercedes Benz. It was further deposed that the seized animals also belonged to the Plaintiff and not the Claimants. The deponent deposed that the Claimants were attempting to circumvent execution by creating a fictitious veil between the Defendant and the Claimants. Additionally, it was deposed that the procedure adopted by the Claimants was irregular.

On 22<sup>nd</sup> August 2016 when the matter was heard, Counsel for the Plaintiff, Ms Chinyimba, in opposing the application, relied on Order 17 Rule 2 of the White Book, 1999 edition. Counsel quoted Order 17 Rule 2 as follows:

***"Any person making a claim to or in respect of any money, goods or chattels taken or intended to be***





***taken in execution under process of the Court, or to the proceeds or value of any such goods or chattels, must give notice of his claim to the sheriff charged with the execution of the process and must include in his notice a statement of his address, and that address shall be his address for service."***

It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Claimant failed to observe the quoted rule of procedure and that the application, in totality, was wrongly presented before Court. The consequence, it was submitted, was that the application should be dismissed with costs.

Having carefully considered the Affidavit evidence and submissions before me, it is clear to me that the Claimants seek stop the sale of goods taken in execution. In so doing, the Claimants entreat this Court to grant them a stay of execution by solely relying Order 3 Rule 2 HCR. I accept that Order 3 Rule 2 clothes the Court with the power to exercise its discretion to ***"make any interlocutory order that the court considers necessary for doing justice."*** However, I find it necessary to illuminate that Order 3 Rule 2, which at a perfunctory glance appears to grant a very wide discretion, in fact contains an inescapable restrictive proviso. In this regard, the proviso prologues Rule 2 of Order 3 HCR with the restriction which reads: ***"subject to any particular rules"***. I am compelled, therefore, to consider the particular rules and law that govern the grant of a stay of execution.



In so far as governing rules are concerned, there appears to be no specific rule in the High Court Rules that poignantly deals with the grant of a stay of execution generally. I acknowledge that there are rules found in Orders 36 and 47 of the High Court Rules which relate to stays of execution. However, those rules each deal with a specific concern, namely, a stay of execution as it relates to the payment of a judgment debt in instalments or a stay of execution pending an appeal, respectively. The application before me is not premised on either a pending appeal or the payment of a judgment debt in instalments. This leave me with a settled mind that there is a lacuna in our rules of procedure for the grant of a stay of execution in any other general form. Opportunely, there is guidance in Section 10 (1) of the High Court Act on how gaps in our rules of practice and procedure may be filled. Section 10 (1) reads as follows:

***"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, ..., and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England ..."***

My Learned brother, Justice Dr Patrick Matibini, SC (as he then was), had occasion to explicate the use of section 10 (1) of the High Court Act in the case of **MICHAEL CHILUFYA SATA V CHANDA CHIIMBA III ZAMBIA NATIONAL BROADCASTING CORPORATION, MUVI TV**





LIMITED, MOBI TV INTERNATIONAL LIMITED<sup>1</sup>, where he held that "***The Rules {of the White Book} are to be resorted to, only when it is necessary to fill a lacuna or gap in our own rules of procedure.***" I am persuaded by this interpretation of Section 10 (1) of the High Court.

Accordingly, on the authority of Section 10 (1) of the High Court Act, I am prompted to resort to the Supreme Court Practice of England 1999. I now move to consider the rules and procedure for the grant of a stay of execution as provided for in the White Book.

Order 47 Rule 1 (a) of the Rules of the Supreme Court (RSC) is appositely instructive. It provides as follows:

***"Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution that there are special circumstances which render it inexpedient to enforce the judgment ... then, ...the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.***





The effect of Order 47 Rule 1 RSC, as stated in the explanatory notes to the Rule, is to confer express power on the Court to stay execution by writ of fi. fa. either absolutely or for such period and subject to such conditions as the Court thinks fit. The notes further guide that ***"in considering whether to grant a stay of execution of a money judgment, ... the Court in exercise of its unfettered discretion must start with the assumption that there had to be good reason to deny the judgment creditor of the fruits of his judgment."***

The Zambian Courts have also had occasion to apply and expound on Order 47 of the White Book. In the case of **KAPIRI GLASS PRODUCTS LIMITED v MARUTI OIL INDUSTRY LIMITED<sup>2</sup>**, the Court observed that it was clear that under Order 47 Rule 1 (a) of the SCR, the application for stay of execution can be made under special circumstances and further that ***"the special circumstances are of various nature."***

Later, in the **MICHAEL CHILUFYA SATA VS CHANDA CHIMBA** case, the Court ruled that ***"It must ... be further shown either that special circumstances exist to warrant the grant of stay, or that without a stay a defendant stands to be ruined, or suffer irreparable injury. Whatever the case, some special ground, or reason should be shown to exist."*** The Court, in that case further pronounced as follows: ***"It is impossible to enumerate in***

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***advance all the matters that might be considered to constitute special circumstances.... The rationale for these stringent conditions, or criteria in exercising the discretion to grant a stay, is that a successful party should not be denied immediate enjoyment of the fruits of the judgment or ruling, unless good and sufficient grounds are advanced or shown.***

Lastly, on the scope of special circumstances in granting a stay of execution, the Supreme Court, in the case of **NYAMPALA SAFARIS ZAMBIA LIMITED AND OTHERS V ZAMBIA WILDLIFE AUTHORITY AND OTHERS**<sup>3</sup>, aptly observed that ***“A stay of execution is granted on good and convincing reasons. The rationale of this position is clear. Which is that a successful litigant should not be deprived of the fruits of litigation as a matter of course. The application must therefore clearly demonstrate the basis of which a stay should be granted.”***

In considering the aforementioned plethora of authority, I find that all of them point to my considering one pivotal question, namely: Have the parties seeking the stay of execution demonstrated any good and compelling basis to warrant this Court depriving the successful litigant of the fruits of litigation? It is my considered view that unless this question is answered in the affirmative, this application for a stay of execution must fail.





I have carefully considered the Affidavit evidence, Skeleton Arguments and submissions presented to the Court. I will first deal with the Plaintiff's argument that the application must fail because the appropriate course for the Claimants ought to have been to seek relief by way of interpleader taken out by the Sheriff.

I accept that relief by way of interpleader may be sought by the Sheriff where the Sheriff seizes goods by way of execution and a person other than the judgment debtor claims them. Such relief is appropriately provided for under Order 43 HCR and indeed under Order 17 RSC. However, that is not the application before me. The application before me is founded on Order 3 Rule 2 of the High Court Rules. Moreover, I am not persuaded that the application made by the Claimants under Order 3 Rule 2 HCR, which is of broader application, must fail on the mere basis that there is a more suitable application which the Claimants ought to have made.

With respect to Order 3 Rule 2 of the High Court Rules, I reiterate its proviso that the grant of interlocutory orders there-under is subject to prevailing rules. I find that the applicable rules and practice, as provided for under Order 47 of the White Book, are clear. That is, in order for the Court to consider the grant of a stay of execution, there must be an application for a stay made ***"by the judgment debtor or other party liable to execution that there are special circumstances which render it inexpedient to enforce the judgment..."***



In applying Order 47 Rule 1 of the White Book to this case, I find that the Claimants are neither judgment debtors nor other parties liable to execution under this cause. As such, their application falls foul of the requirement of Order 47 Rule 1.

Moreover, I briefly pause to consider whether there are special circumstances brought by the Claimants. According to the Claimants, the circumstance upon which they beseech the Court to grant the stay is their application to set aside the writ of *fifa* for irregularity. This singular premise presents a predicament for the Claimants as they themselves acknowledge that they are not parties to the action. They have not given the Court any authority upon which a third party can apply to set aside a writ of *fifa* in proceedings to which they are not a party. This circumstance is therefore not supported by law and dissipates the existence of a special circumstance for me to consider.

In view of the aforementioned, I see no compelling circumstance at this point to continue denying the judgment creditor the fruits of litigation. Accordingly, I decline the invitation to grant the stay of the sale of the goods taken in execution on the ground that it will expose the Plaintiff to an injustice. The application for stay of the seized goods is therefore dismissed.

The Ex-parte Order of 2nd August 2016 staying the Sale of the seized Goods by the Sherriff of Zambia is hereby discharged.



Costs are awarded to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

**Delivered at Lusaka this 7<sup>th</sup> Day of October, 2016**

A handwritten signature in black ink, appearing to be 'B.G. Lungu', written over a horizontal dotted line.

**B.G. LUNGU  
HIGH COURT JUDGE**



