**Selected Judgment No. 47 of 2017**
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**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 31/2015**
**HOLDEN AT NDOLA** **SCZ/8/214/2014**
*(Civil Jurisdiction)*


BETWEEN:

**TAP ZAMBIA LIMITED** **APPELLANT**

**AND**

**PERCY LIMBUSHA AND 8 OTHERS** **RESPONDENT**

**Coram: Hamaundu, Kaoma and Musonda, JJS**
**On 5th September, 2017 and 8th September, 2017**

For the Appellant : Messrs Nchito & Nchito (filed notice of non-appearance)

For the Respondent : Messrs Mushota & Associates(filed notice of non-appearance)

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# JUDGMENT

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**HAMAUNDU, JS, delivered the Judgment of the Court**

Cases referred to:
**Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and Allied Workers [2007] ZR 106**

Rules referred to:
**Order 47/1/8** of the **Rules of the Supreme Court** *(White Book)*

Other works referred to:
**Halsbury's Laws of England, 3rd edition, volume 16**

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Legislation referred to:
**Sheriffs Act, Chapter 37** of the **Laws of Zambia, S.14(2)**

This appeal is against the Industrial Relations Court's refusal to set aside a Writ of *fieri facias* that was issued by the respondents. The events leading to this appeal are, simply, these:

The respondents had been employees of the appellant. Following their dismissal from the appellant's employment, the respondents took the matter to the Industrial Relations Court. The respondents were successful in the Industrial Relations Court, where the court ordered that they be deemed to have gone on early retirement, with full benefits. It is apparent that the parties had differences as to what was to be computed, prompting the appellant to seek clarification from the court as to the effective date of the retirement. The court clarified that it was with effect from their date of dismissal.

The appellant then applied to the Registrar for assessment of the sums due to the respondents. The Registrar ruled that the application was improperly before him. The appellant appealed against that ruling. In the meantime, the respondents issued a writ

of *fieri facias*, endorsing thereon a sum that had been computed by themselves without assessment.

The appellant applied to the court to set aside that writ. The court rejected the application, stating that the writ of *fieri facias* could not be *"stopped"* because it had already been executed. Hence this appeal.

Before us, the appellant has advanced two grounds of appeal, 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.

At the hearing, the parties and their advocates elected not appear before us and, consequently, filed notices of

non-appearance. The appellant had filed written heads of argument, together with the record of appeal. We must state that, although the notice of non-appearance filed by the respondents advocates stated that written arguments were submitted for our consideration, we have not seen such arguments. We will, therefore, proceed to consider the arguments advanced in the heads of argument filed on behalf of the appellant.

In the first ground of appeal, the argument advanced by counsel on behalf of the appellant was that the execution of the judgment was irregular because the respondents endorsed on the writ of *fieri facias* a sum of money that had neither been agreed to by the parties nor assessed by the court. For that argument, we were, particularly, referred to the case of **Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and Allied Workers**[1] where we held:

> **"It was not open to the complainant to unilaterally compute the sum payable and levy execution of the amount: Execution can only be levied on amounts due by the court in a judgment or agreed to by the parties to an action and incorporated into a consent judgment."**

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We went on to hold in that case that:

> **"the proper course that the complainant should have taken was to have the amount assessed, instead of unilaterally computing the sum payable and proceeding to levy execution on that amount"**

In the second ground of appeal we were referred to **Order 47/1/8** of the **Rules** of the **Supreme Court** *(White Book)* which provides:

> "setting aside execution— **this may be done where execution has been improperly issued even after execution has been levied"**

We were also referred to two passages from **Halsbury's Laws of England, 3rd edition, volume 16.** The first one is to be found at paragraph 55, page 38. A portion thereof states:

> **"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."**

The second passage is to be found at paragraph 57, page 39. This provides:

> "Restitution- **when a wrongful or irregular execution has been set aside or when a judgment or order has been reversed after execution thereon has taken place restitution will be made to the 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 in 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."**

With those authorities, it was argued on this ground that the court below erred in law when it held that the writ of *fieri facias* could not be set aside because it had already been executed.

The foregoing is the gist of the arguments that were advanced on behalf of the appellant in this appeal.

We entirely agree with the submissions by learned counsel for the appellant. The reasoning by the court below that the writ of *fieri facias* could not be set aside because it had already been executed presumes that once a writ of *fieri facias* has been issued, there is nothing that can be done about it; no matter how erroneously the writ has been issued. That reasoning is not supported by law.

**Order 47/1/8** of the **Rules** of the **Supreme Court** which the appellant has cited is clearly on point and shows that an execution which has been improperly issued can be set aside at whatever stage of the execution process. An improperly issued process of

execution can give rise to liability. Hence our **Sheriff's Act, Chapter 37 of the Law of Zambia** in **section 14(2)** provides:

> **"In every case of execution, all steps which may be legally 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"**

It is clear, therefore, that a writ of execution which is improperly or irregularly issued ought to be set aside at any stage so that, in an appropriate case, liability should attach to the party on whose demand the irregular execution process has been issued.

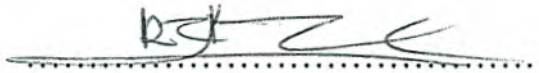
Coming to the peculiar irregularity in this particular matter, we made it very clear in the case of **Barclays Bank Plc v Zambia Union of Financial Institutions and Allied Workers**[1] that it is irregular for a judgment creditor to unilaterally make his own computation of the judgment sum due and endorse the same on a writ of *fieri facias*. In this case, it was not in dispute that that is what the respondents had done. Clearly, therefore, the writ of *fieri facias* issued in this case should have been set aside.

In the circumstances, we allow this appeal. The writ of *fieri facias* issued by the respondents in the court below is set aside. As it is stated in the passage that has been quoted from **Halsbury's Laws of England** with regard to restitution, when a wrongful or irregular execution has been set aside, restitution will be made to the successful party; and the order setting aside the execution should provide for this. In this case, the appellant's goods were levied under the irregular writ of *fieri facias*. The order of stay of sale of those goods was discharged by the court below when it refused the appellant's application to set aside the writ. In the circumstances, we order that the goods be restored, if they have not been sold. If, they have been sold, we order the respondents to pay over to the appellant the proceeds of sale. We note, however, that the record of appeal does not contain any form of return by the sheriff concerning the execution. We, consequently, order that the proceeds of sale be ascertained by way of assessment before the

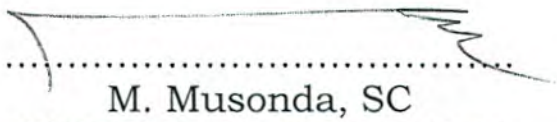
Registrar, if indeed the position is that the goods were sold.

The appellant shall have costs of this appeal.

E. M. Hamaundu
**SUPREME COURT JUDGE**



R. M. C. Kaoma
**SUPREME COURT JUDGE**



M. Musonda, SC
**SUPREME COURT JUDGE**