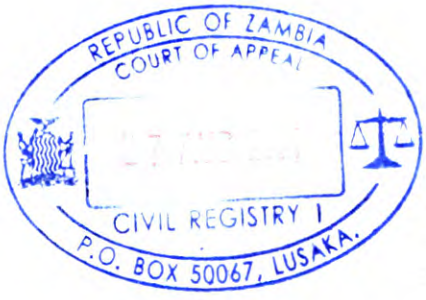
IN THE COURT OF APPEAL **CAZ APPEAL No.167/2020**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

RHINO BICYCLES LIMITED	**1st APPELLANT**
SIMANYOME AMATENDE	**2nd APPELLANT**
AND	
FELIMART INVESTMENT LIMITED	**RESPONDENT**

CORAM: CHISANGA JP, MULONGOTI and SIAVWAPA, JJA

On the 12th November 2020 and 27th August 2021

For the Appellants : *N/A*

For the Respondent: *Ms. M. Kapapula of Messrs S L M Legal Practitioners*

JUDGMENT

CHISANGA JP delivered the Judgement of the Court

Cases Referred to:

1. ***Barclays Bank Zambia PLC v. Zambia Union of Financial Institutions and Allied Workers and Others (2007) ZR 106***
2. ***Nasilele v. Nasilele (2012) ZR Vol.1***
3. ***Schofield v. Church Army (1986) 3 All ER 715 at 718***
4. ***Farmers' Co-operative (NR) Limited v. Drake (1963-64) Z and NRLR 74 HC***
5. ***Sonny Paul Mulenga and Others v. Investrust Merchant Bank Zambia Limited***
6. ***Zambia Revenue Authority v. Post Newspaper Limited (2016) 1 ZR 394***
7. ***Nyampala Safaris (Z) Limited and others v. Zambia Wildlife Authority and Others (2004) ZR 49***

1.0 INTRODUCTION

This appeal emanates from the refusal by the High Court to grant a stay of execution and to set aside an ex-parte order for leave to issue writ of execution.

2.0 BACKGROUND

2.1 In the Commercial Division of the High Court, at a scheduling conference, Mbewe J entered Judgment on Admission against the appellants upon perusal of their defence, which he found contradictory, and in breach of Order 53 Rule 6 (2) – (5).

2.2 The Respondent (Felimart) was plaintiff in the court below. It claimed damages for breach of contract allegedly arising from an oral agreement made between the parties in March 2019. It was averred that the Appellants, engaged Felimart to attend to the clearing and bonding of 95 cartons of bicycles imported from India. Felimart's role was to stand as surety for Zambia Revenue Authority (ZRA) taxes, using its bond facility in which the goods were to be moved from Nakonde to Lusaka, into Felimart's warehouse. On final clearance of the goods, the Appellants were to settle taxes due to ZRA, as well as Felimart's handling fees, whereupon the goods were to be delivered to the appellants' warehouse.

2.3 On March 14th 2019, ZRA issued a clearance order for the consignment to be transported from the border to Felimart's bonded warehouse for customs and clearance formalities. The goods could be either bonded or finally cleared. In breach of the agreement, the appellants moved the goods but failed to deliver them to Felimart's warehouse, and refused to disclose the whereabouts of the consignment. This resulted in Felimart being liable to ZRA as it holds the bond. Felimart therefore, claimed that ZRA bonding fees and taxes be remitted to ZRA to absolve it of liability with ZRA.

2.4 In their defence, the appellants admitted having engaged Felimart to attend to clearance of the cargo from Nakonde to Lusaka for a charge of US$300, Removal In Bond. They denied engaging Felimart to stand as surety for tax purposes, adding that Felimart assumed this role on its own volition. They also denied that final clearance of the consignment was to be done in Lusaka. They added that the 2nd appellant had requested Felimart to formally invoice the 1st appellant for purposes of payment, but Felimart had failed to deliver an invoice. It was also averred that the goods are at the appellants premises and that they are aware that they should pay taxes, but that the amounts were not communicated by Felimart.

2.5 On 17th January 2020, upon considering the pleadings at a scheduling conference, Mbewe J entered judgment in favour of Felimart on account of the appellants' failure to adequately traverse the assertions in the statement of claim. He opined that the appellants could not in one breath deny engaging Felimart to act as surety to ZRA and in the next admit that the terms of engagement were for RIB charged at US$300, as the Removal in Bond (RIB) is the means by which Felimart stood as surety for the release of the consignment by ZRA from Nakonde to Lusaka. He expressed the view that there were no triable issues that required determination after trial. He entered judgment on admission in favour of Felimart, giving it four weeks within which to quantify the final amounts due from the appellants to ZRA and to Felimart. He also awarded interest on the judgment sum at short term deposit rate from date of writ to date of judgment, and thereafter at the Bank of Zambia short term rate until final judgment.

2.6 On 17th April, 2020, Mbewe J, by ex-parte Order, granted Felimart leave to levy execution on the appellants for recovery of the sums of K52, 572.68 plus interest due to it, as well as K63 480.10 payable to ZRA in accordance with the Judgement of the Court. On 8th June, 2020, Felimart issued a *Writ of Fieri Facias* against the appellants for the said amounts.

2.7 Three days later, on 11th June 2020, the appellants made a combined application to stay execution, and to set aside the Order for leave to issue Writ of Fieri Facias and the Writ itself. In the affidavit in support, it was deposed that the judgement of 17th January was understood as conferring determination of the amounts due on Felimart itself. That Felimart had no power at law to make a binding determination of the amounts due to it. Moreover, whatever determination Felimart made ought to have been certified by the court. That therefore, the absence of certification of the amounts assessed by Felimart rendered the assessed amount to be not part of the judgement or an Order of the court. Mbewe J refused the application. The application to stay execution pending appeal was renewed before a single judge of this court, who stayed the execution of the Writ of Fifa pending appeal.

2.8 The appeal before this court is brought on two grounds:

1. The Court below erred in law and in fact when it granted an Ex-parte Order for leave to issue Writ of Execution when there was no judgment or order for the payment of money.

2. The Court below erred in law and in fact when it refused to grant an Order staying execution and setting aside Writ of Fieri Facias for irregularity.

3.0 APPELLANTS' HEADS OF ARGUMENTS

3.1 In their heads of argument, the Appellants begin by stating that the appeal is not against the Judgment on admission but against the ex-parte order for leave to issue *Writ of Fieri Facias* and the subsequent issue of that Writ. It is argued that while the judgment on admission is erroneous in many respects, it was only declaratory in effect and condemned the appellants in costs. They quote a statement at page 7 of the Judgment which reads as follows:

> ***"I therefore enter judgment on admission in favour of the Plaintiff. The Plaintiff is given 4 weeks from the date of this judgment to quantify the final amounts due from the Defendant to itself and the Zambia Revenue Authority"***

3.2 The appellants point out that the Ex parte Order for leave to issue a *Writ of Fieri Facias* was made pursuant to this judgement. Contrary to the disclaimer that the appeal is not against the judgement on admission, the appellants submit that the court acted in excess of its jurisdiction in authorising Felimart to assess damages. They rely on Order 37 Rule 4 of the White Book, submitting that assessment is a judicial process reserved for Masters, Registrars and Judges. Granting leave to issue a writ of execution did not cure the irregularity of assigning assessment of dues to Felimart itself.

3.3. To support the appellants' proposition, learned counsel points to **Matibini's Zambia Civil Procedure: Commentary and cases, Vol 2** where the learned author states at 1371 that the amounts endorsed on the *Writ of Fieri facias* must be both quantified and ordered by the court.

3.4 Our attention is also drawn to ***Barclays Bank Zambia PLC v. Zambia Union of Financial Institutions and Allied Workers and Others***[1] where the Supreme Court said the following:

> ***"It is quite 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. 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. The writ of fieri facias issued herein should not have been issued as it was irregular. In the circumstances, we would allow the appeal with costs and set aside the writ of fieri facias."***

3.5 Learned counsel ultimately submits that the Writ of Fieri Facias was irregular and should have been set aside by the Court below.

3.6 The contention under ground two is that the Court had power to set aside the ex-parte order by which it granted leave to issue writ of execution. The jurisdiction to do so is conferred by Order 32 Rule 6 of the

White Book. It is pointed out that because the order that granted leave to issue a Writ of Fifa was made ex parte, the appellants were not afforded an opportunity to be heard. ***Nasilele v. Nasilele***[2] *and* ***Schofield v. Church Army***[3], where dangers of ex parte orders are highlighted, are prayed in aid.

3.7 It is contended that as the leave was defective, the defect extended to the Writ of Fieri Facias. This argument is grounded on ***Farmers Co-operative (NR) Limited v. Drake***[4].

4.0 RESPONDENT'S ARGUMENTS

4.1 Learned counsel for Felimart submits that this appeal is premature, with no chance of success. He argues that if the appeal is not against the judgment on admission, and the appellants take no issue with that judgement, they should have no problems with the orders of the Court to quantify the judgement sum. Counsel submits that the appellants did not take issue with Felimart's quantification.

4.2 It is argued that although the appellants' state that the appeal is not against the judgement on admission, a careful analysis of the record of appeal reveals that the appellants are labouring under a misconceived notion that the judgment authorised Felimart to assess damages. Counsel argues that the appellants should have applied for

interpretation of the judgment if they did not clearly understand it. According to learned counsel, the judgment on admission awarded Felimart the sums claimed. Felimart, in adhering to the judgment, computed the sums due to it and to ZRA.

4.3 Referring to Order XLII Rule 5(2) of the High Court, learned counsel submits that the court below had to grant leave to levy execution against the unsuccessful party.

4.4 Under ground two, learned counsel cites Order 46 Rules 1 and 2 of the White Book 1999 Edition. Rule 2 reads as follows:-

> ***"A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:-***
>
> ***... (d) where under the judgment or order, any person is entitled to relief subject to the fulfilment of any condition which it is alleged had been fulfilled."***

4.5 He then contends that in the present case, the judgment on admission ordered the respondent to quantify the amounts that were due to it and to ZRA. The quantification was a condition under the judgement which needed to be fulfilled. Thus, in order to enforce the quantified amounts, the respondent sought the leave of the court.

4.6 It is argued that although the court has power to set aside an order made ex-parte by Order 32 Rule 6 of the White Book 1999 Edition, this power is discretionary. The appellants have not shown good cause to warrant the setting aside of the *Writ of Fieri Facias* which was issued with leave of court.

4.7 It is submitted that the appellants needed to demonstrate that the intended appeal had prospects of success. ***Sonny Paul Mulenga and Others v. Investrust Merchant Bank Zambia Limited***[5], ***Zambia Revenue Authority v. Post Newspaper Limited***[6] and ***Nyampala Safaris (Z) Limited and others v. Zambia Wildlife Authority and Others***[7] were cited as support for the argument. It is maintained that the appellants have failed to satisfy the requisites that would lead to the discharge of a stay of execution. We are urged to dismiss the appeal.

4.8 When the appeal was called for hearing, only counsel for the respondent was in attendance. He was desirous of proceeding with the appeal despite the appellants' absence. He relied on the Heads of Argument filed into court on 16th October 2020.

5.0 CONSIDERATION

5.1 We have considered the record of appeal, the grounds of appeal as well as the heads of arguments advanced in this appeal. To recap, the

appeal impugns the ex-parte order for leave to issue a *Writ of Fieri Facias* in execution of the Judgment on admission.

5.2 The record reveals that the judgment was handed down on 17th January, 2020. The learned judge directed the respondent to calculate ZRA's dues as well as its dues. In apparent pursuit of the court's Order, the respondent sent the computation to the appellants by letter dated 7th February 2020. This letter went unanswered, prompting Felimart to send a reminder dated 10th March 2020. The appellant's advocates acknowledged receipt of both letters, intimating that their client was unavailable. They could only give a response on 25th March, 2020. That date came and passed without a reaction as promised. The respondent then applied for leave to issue a *Writ of Fieri Facias.* The court granted leave on 17th April, 2020. A Writ of Fifa was accordingly issued on 8th June 2020.

5.3 Before us, the appellant has fervently argued that it was erroneous to Order the respondents to assess amounts due to them. That such a computation could not amount to an order of the court upon which execution can be levied. The application to set aside the ex parte order for leave to issue a Writ of Fifa was in fact in contention.

5.4 It is quite clear, that the appellants have belatedly taken issue with the judgment on admission, in so far as computation of the sums due to ZRA and the respondent was left to the respondent. It will be recalled that the judgment was delivered on 17th January, 2020. The appellants did not appeal against the impugned portion of the judgement nor did they contest the computation by Felimart. It was only after the latter had obtained leave to issue the Writ of Fifa that they expressed dissatisfaction with the judgment of the court. We must state that the appellant's advocates should have taken issue with the judgment the moment it was delivered. We will confine ourselves to the issue of granting leave to issue a Writ of Fifa, although it is inevitable for us to say a word about the judgement.

5.5 ***Barclays Bank Zambia PLC v. Zambia Union of Financial Institutions and Allied Workers and Others***[1] cited in support of the appeal was concerned with the Industrial Relations Court's refusal to set aside a *Writ of Fieri Facias* for irregularity.

5.6 In that case, the complainant and respondent had referred a collective dispute to the Industrial Relations Court. After receiving viva voce evidence, and considering the documentary evidence, the court reached the conclusion that aside from the aspects already agreed upon between the Bank and the Union during their negotiations in 2004, the

package on redundancy should be four months current salary for each year served. The formula for computing the redundancy dues was stated in the judgement. However, the amounts payable were not quantified, but left to the parties to quantify and reach agreement. Neither party appealed against the judgement, which was delivered on 21st April 2004.

5.7 On 26th July, 2004, the complainant issued a *Writ of Fieri Facias* for the sum of K5,845,018,214.31. The respondent sought to set aside the writ for irregularity. The application fell on hard ground. On appeal, the Supreme Court observed that the parties were unable to reach consensus on what amounts were due to the complainants under the terms of the judgment of the court. It held that in the absence of agreement on the dues, the proper course was to apply for assessment.

5.8 The court opined that it was not open to the complainants to unilaterally compute their dues and levy execution accordingly. The court explained that execution can only be levied on amounts found due by a court in a judgment or agreed to by the parties to an action and incorporated into a consent judgment. Therefore the *Writ of Fieri Facias* should not have been issued, and was irregular.

5.9 In the instant case, we can do no better than echo what fell from the mouths of their lordships in the *Barclays* case. Having found the appellant uncooperative, Felimart should have applied that the matter be

referred to assessment. In granting leave to issue a Writ of Fifa, Mbewe J misdirected himself, as he sanctioned a course of action that was irregular. He should have referred the parties to assessment, in conformity with the guidance in the Barclays case. Better still, he ought not to have ordered Felimart to calculate its own dues, but should have referred the matter to assessment. The directive that Felimart calculates the amounts owing left the quantum unresolved. This was not a satisfactory conclusion to the case.

6.0 CONCLUSION

6.1 On the foregoing discussion, we allow the appeal and set aside the *Writ of Fieri Facias*. The sums due to the respondent and Zambia Revenue Authority will be assessed by the District Registrar. In the particular circumstances of this case, each party will bear own costs.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE

.....
M. J. SIAVWAPA
COURTOF APPEAL JUDGE