

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ APPEAL NO. 248/2020
CAZ/08/280/2020

BETWEEN:

CLA COMMERCIAL VEHICLES LIMITED

APPELLANT

AND

AUTO GUARD ENGINEERING SERVICES LIMITED

RESPONDENT

CORAM: KONDOLO SC, CHISHIMBA AND NGULUBE, JJA

On 25th August, 2021 and on 3rd August, 2022

For the Appellant. : Ms. N. Mbuyi of Messrs Paul Nora Advocates

For the Respondent : Mr. A. Kokowe of Messrs Milimo Chooka & Associates

J U D G E M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Barclays Bank v Zambia Union of Financial Institutions & Allied Workers (2007) ZR 106**

LEGISLATION REFERRED TO:

1. **The Rules of the Supreme Court 1965, 1999 Edition (White Book)**

OTHER WORKS REFERRED

1. Halsbury's Laws of England, 3rd Edition, Volume 16.

1. INTRODUCTION

1.1 This is an appeal against the order of Mwikisa J dated 15 July, 2020, wherein she refused the Appellant's application for a stay of execution of sale pending an application to set aside a Writ of Fieri facias (Writ of Fifa).

2. BACKGROUND

2.1 The Appellant owed the Respondent the sum of US\$35,000 for some engineering work done on its behalf. The Court initially entered Judgment in default in the sum of US\$35,000 but later entered Judgment on admission on the whole debt owed in the sum of K350,000.

2.2 The Appellant paid into Court the sum of K175,000 but delayed paying the balance. Consequently, the Respondent proceeded to issue a fifa in the sum of US\$30,000.

2.3 The Appellant applied to stay execution of sale of goods in execution pending an application to set aside the fifa for irregularity on the grounds that an incorrect amount had been endorsed on it.

3. DECISION OF THE HIGH COURT

3.1 The lower Court denied the application stating that the Appellant had been given several opportunities to pay the debt in instalments but had continuously defaulted.

3.2 The learned trial Judge also referred to her Rulings dated 21st May, 2020 and 18th June, 2020 in which she had earlier refused Appellant's applications to pay the Judgment debt in instalments and for a stay of execution pending appeal.

4. APPEAL

4.1 Dissatisfied with the decision, the Appellant has filed two grounds of appeal;

1.The learned Judge erred and misdirected herself in law and in fact when she denied granting the order for Stay of sale of goods in execution pending the hearing of the application to set aside Writ of Fiere Facias.

2.The learned Judge erred and misdirected herself in law when she denied granting the Appellant a Stay of sale of goods in execution when the Appellant

showed evidence by way of documentary that the Respondent had over executed.

5. APPELLANT'S ARGUMENTS

- 5.1 The long and short of the Appellant's grounds of appeal and heads of argument is that the sum of money endorsed for execution on the Writ of Fieri Facias issued by the Respondent exceeded the judgement debt. It was on that basis argued that the *fifa* was irregular and the execution was thus wrongful.
- 5.2 The Appellant cited several authorities including the case of **Barclays Bank v Zambia Union of Financial Institutions & Allied Workers** ⁽¹⁾ in which it was held that execution can only be levied on amounts due in a judgment or agreed by the parties.
- 5.3 It was therefore argued that the court had the power to set aside an irregular *fifa* and to that effect cited **Order 47 Rule 1 (8) of the Rules of the Supreme Court (White Book)** and **Halsbury's Laws of England, 3rd Edition, Volume 16, paragraph 55, p. 38** which states that where execution is irregular the Master may set it aside and restore goods or money levied under it.

5.4 The Appellant submitted that liability should attach to a party on whose demand an irregular writ has been executed by the sheriff of Zambia. **Section 14 (2) of the Sheriffs Act, Chapter 37** was cited as follows;

“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 proceedings taken at its instance.”

5.5 The Appellant reiterated its prayer that the Appeal be allowed because the trial judge ought to have allowed the application for a stay of execution pending an application to set aside the *fifa*.

6. THE RESPONDENTS ARGUMENTS

6.1 At the hearing, Mr. Kokowe on behalf of the Respondent applied to file their heads of argument out of time. We denied the application on the basis that the Respondent had not shown sufficient cause. For that reason, there are no arguments in response on the record.

7. DECISION OF THE COURT

- 7.1 We have considered the record of appeal and the Appellant's arguments and as we earlier alluded, the main issue for determination is whether the writ of *feri facias* issued by the Respondent was irregular, as claimed by the Appellant.
- 7.2 Page 10 of the record of appeal shows that a default Judgment was entered against the Appellant on 16th May, 2019 in the sum of US\$35,000 together with damages for breach of the contracts entered into by the parties, interest on the judgment and costs.
- 7.3 The record shows that the Appellant proceeded to apply to set aside the default Judgment and instead of filing an affidavit in opposition, the Respondent reacted by filing a motion for judgment on admission supported by an affidavit and skeleton arguments which stated that Appellant had admitted to being indebted to the Respondent in the sum of K350,000 and implored the trial Judge to enter judgement on admission.
- 7.4 The Order or Ruling on Judgment on admission is not on the Record but the Ruling dated 21st May 2019 refers to the Judgment on admission and a judgment debt in the sum of K350,000 (at R2 and R8).

7.5 The record also shows that the Appellant paid a total sum of K175,000 into Court in partial satisfaction of the judgment debt which the Respondent drew out of court on 10th September, 2019.

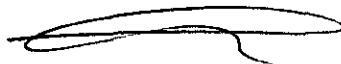
7.6 As stated in the case of **Barclays Bank v Zambia Union of Financial Institutions & Allied Workers (supra)** cited by the Appellant, a party can only issue execution against sums ordered by the Court or agreed by the parties. It is therefore quite evident that the writ of *feri facias* issued by the Respondent in the sum of US\$30,270.27 was irregular because it did not reflect the balance of the judgment sum following the Respondent's withdrawal of the sum of K175,000.

7.7 We therefore find that the pending application before the trial Judge to set aside the *fifa* has good prospects of success and the trial Judge ought to have stayed execution of the *fifa* until she had heard the application to set it aside for irregularity.

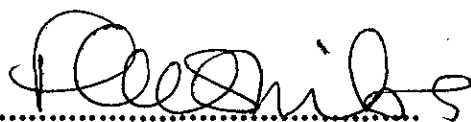
8. CONCLUSION

8.1 We consequently order that the sale of the goods in execution be stayed until the trial Judge hears and determines the

pending application to set aside the fifa. The appeal therefore succeeds with costs to the Appellant to be taxed in default of agreement.



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M.M. KONDOLO SC
COURT OF APPEAL JUDGE



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F.M. CHISHIMBA
COURT OF APPEAL JUDGE



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P.C.M. NGULUBE
COURT OF APPEAL JUDGE