IN THE HIGH COURT FOR ZAMBIA **2021/HP/1298**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

LUSENFWA HYDRO POWER COMPANY LIMITED **PLAINTIFF**

AND

DAVID MPOLA **1ST DEFENDANT**

SAN HE MANUFACTURING LIMITED **2ND DEFENDANT**

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 11TH MARCH, 2024 - IN CHAMBERS

For the Plaintiff	:	*Mr. R. Peterson and Mr. V. Mwanza both of Messrs. Chibesakunda & Company.*
For the 1st Defendant	:	*No Appearance.*
For the 2nd Defendant	:	*Mr. D. Musonda from Messrs. Mulilansolo Chambers*

RULING

CASES REFERRED TO:

1. *Sonny Paul Mulenga & Vismer Mulenga (both personally and practicing as SP Mulenga International) Chainama Hotels Limited and Elephants Head Hotel Limited v Investrust Merchant Bank Limited (1999) Z.R 101*
2. *Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and others*
3. *Barclays Bank Zambia PLC v Zambia Union of Financial Institutions and others (2007) Z.R 106[3]*
4. *Isaac Lungu v Mbewe Kalikeka (Appeal No. 114/2013)*
5. *Afritec Asset Management Company Limited & CPD Properties Limited, The Gynae Antenatal Clinic Limited & Another (Appeal 64 of 2015)*
6. *Leopold Walford (Z) Ltd v Unifreight (1985) Z.R. 203*
7. *Standard Chartered Bank Zambia PLC v John M.C Banda (Appeal No. 94 of 2015)*
8. *Access Bank (Z) Limited v Group Five/Zcon*
9. *Zambia Revenue Authority v Post Newspapers Limited (SCZ Judgment No. 18 of 2016)*

LEGISLATION AND OTHER WORK REFERRED TO:

1. *The Rules of the Supreme Court (1999) Edition*
2. *High Court Act Rules Chapter 27 of the Laws of Zambia*
3. *Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is a Ruling on the 2nd Defendant's application for an order to stay execution and to set aside the writ of *fieri facias* dated 19th January, 2023 for irregularity. The application was made pursuant to ***Order 47 rule 1 of the Rules of the Supreme Court (1999) Edition.*** The said Order provides that:

> ***47/1 1. (1)*** *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—*
>
> *(a) That there are special circumstances which render it inexpedient to enforce the judgment or order, or*
>
> *(b) That the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, 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.*
>
> *(2) An application under this rule, if not made at the time the judgment is given or order made, must be made by summons and may be so made notwithstanding that*

the party liable to execution did not acknowledge service of the writ or originating summons in the action or did not state in his acknowledgment of service that he intended to apply for a stay of execution under this rule pursuant to Order 13, rule 8.

(3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his.

(4) The summons and a copy of the supporting affidavit must, not less than 4 clear days before the return day, be served on the party entitled to enforce the judgment or order.

(5) An order staying execution under this rule may be varied or revoked by a subsequent order.

2.0 BACKGROUND

2.1 The brief facts leading to the 2nd Defendant's application, relevant to this ruling is that the Plaintiff by writ of summons dated 22nd October, 2021 commenced proceedings against the Defendant's claiming among others, damages for negligence.

2.2 On the 30th September, 2022 judgement was passed in favour of the Plaintiff. The 2nd Defendant applied for stay of execution of the judgment pending determination of the

appeal, which stay was declined on the 19th January, 2023. The Plaintiff took out a writ of *fieri facias* hence this application by the 2nd Defendant to set aside the writ of *fieri facias* for irregularity.

2.3 On the 5th April, 2023, I granted the ex parte order to stay the execution of the writ of *fieri facias* dated 19th January, 2023 pending determination of the application to set aside the writ of *fieri facias* inter parte.

3.0 THE 2ND DEFENDANT'S AFFIDAVIT EVIDENCE

3.1 The application was supported by an affidavit deposed by Lily Tan, the General Manager in the 2nd Defendant's company.

3.2 It was deposed that on the 30th September, 2022 Madam Justice, M. Mapani Kawimbe delivered judgment in favour of the 2nd Defendant. That dissatisfied with the judgment, the Plaintiff lodged an application to amend the judgment dated 30th September, 2022.

3.3 It was averred that on the 21st December, 2022 the Court amended the judgement and awarded the Plaintiff USD 218,274. 99 and ZMW 49,590 as damages. A copy of the order was exhibited and marked **"LT1".** That on the 19th January, 2023 the Plaintiff proceeded to file a writ of *fieri facias* claiming the sum of USD 218, 274.99 and K49,590.

A copy of the writ of *fieri facias* was exhibited and marked **"LT2".**

3.4 It was further averred that the said writ of *fieri facias* is irregular and ought to be set aside. That where the Plaintiff seeks to enforce a judgment expressed in foreign currency by the issuance of a writ of *fifa*, the praecipe for the issuance of the writ must be accompanied by a certificate and that the amount so certified be entered on the *fifa*. Furthermore, that exhibit **"LT1"** which is the writ of *fieri facias* indicates that it was filed in the principal division of the High Court which does not exist at law.

4.0 AFFIDAVIT IN OPPOSITION

4.1 In opposing the Defendant's application, the Plaintiff filed an affidavit in opposition which he termed as "combined affidavit in opposition to summons for an order to set aside writ of *fieri facias* for irregularity and in opposition to ex parte summons for a stay of execution of writ of *fieri facias* pending determination of application to set aside writ of *fieri facias* for irregularity".

4.2 The gist of the Plaintiff's affidavit was that the current application for a stay of execution of the judgment filed by the 2nd Defendant is the fourth time the 2nd Defendant has sought to stay execution of the judgment and the ruling. That on the 20th December, 2022 the 2nd Defendant applied for a stay of execution of the Ruling in the Court of

Appeal and was dismissed by the ruling of Lady Justice N.A Sharpe Phiri. A copy of the Ruling was exhibited and marked **"AGA1".** Further that on the 11th January, 2023 the 2nd Defendant filed an application before this Court for an order for stay of execution of the Judgement/Ruling and was dismissed by the Ruling of Justice M. Mapani Kawimbe dated 19th January, 2023. A copy of the Ruling was exhibited and marked **"AGA2".** That on the 20th January, 2023 the 2nd Defendant filed a further application for stay of execution of the judgement/Ruling in the Court of Appeal and was dismissed by a Ruling of lady Justice F.M Chishimba dated 24th March 2023. A copy of the ruling was exhibited and marked **"AGA3".**

5.0 SKELETON ARGUMENTS

5.1 The sum total of the 2nd Defendant's skeleton argument in support was that ***Order 36 Rule 10 of the High Court Rules*** provides that *"except as provided for under rule 9, the court or judge may on sufficient grounds, order stay of execution of judgment".* The case of ***Sonny Paul Mulenga & Vismer Mulenga (both personally and practicing as SP Mulenga International) Chainama Hotels Limited and Elephants Head Hotel Limited v Investrust Merchant Bank Limited***[1] was cited where the court held that: ***"The successful litigation should not be denied immediately enjoyment of a judgment unless there are good and sufficient grounds".*** Furthermore, that the Supreme Court in the ***Nyampala Safaris Zambia Limited and Others v Zambia Wildlife Authority and others***[2] the court held 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 the litigation as a matter of course. The application must therefore clearly demonstrate the basis of which a stay should be granted".

5.2 It was then submitted that although the above authorities deal with a stay of execution of a final judgment, the principle is the same and the cases also apply to the stay of execution of the writ of *fifa*.

5.3 In opposing, counsel for the Plaintiff began his argument by stating that 2nd Defendant's affidavit in support of summons for an order to set aside writ of *fieri facias* paragraphs 9, 12, 13 and 14 contains extraneous matter that must not be contained in an affidavit. That order 41 rule 6 of the Rules of the Supreme Court (Whitebook) provides that the court may strike out any affidavit that is scandalous, irrelevant or otherwise oppressive. Also, that the explanatory notes at Order 41 Rule 6 sub rule 1 states that the court will strike out any facts and materials deposed to in an affidavit which is inadmissible in evidence. Counsel then argued that it is well established law that an affidavit is only meant to include factual material and any matter that does not meet this requirement is deemed to be extraneous matter. That Order 5 rule 16 of the High Court rules provide for this well-established principle. That paragraphs 9, 12, 13 and 14 of the Affidavit contain legal arguments, opinion and prayer in making statements regarding the irregularity of the writ of *fifa*, statements regarding the 2nd Defendant's right to be heard and statements regarding what the

interests of justice dictate. Counsel urged the court to struck out the paragraphs.

5.4 As regards the argument that a certificate must be attached to the praecipe of a writ of fifa. Counsel for the Plaintiff argued that the starting point that this court must consider when exercising its power or jurisdiction is the High Court Act Chapter 27 of the Laws of Zambia. That the High Court Rules at Order XLII provide for the execution by way of writ of *fieri facias*. That the said provisions do not require that a party when filing a writ of execution is mandated to follow any other procedure other than that prescribed in the High Court Rules. That the said order provides that a writ of execution may be enforced three days after judgment unless with leave of court. That order XLII Rule 1 directs the form of the writ of *fifa* is contained in schedule 1 form 44. Counsel argued that there is no distinction made between a judgment or decree made in foreign currency that an alternative procedure should be affected and that the procedure governing does not require the attachment of a certificate to the praecipe of a writ of *fifa*. The case of ***Barclays Bank Zambia PLC v Zambia Union of Financial Institutions and others (2007) Z.R 106***[3] was cited where the Court held that: ***"a writ must contain only a sum that has been quantified and ordered by the court in a judgment"***. That the court in the aforementioned case, went on to set aside a writ for irregularity based on the fact that the sum endorsed upon it has not been ordered by the court or assessed. Counsel argued that in the current case, the sum endorsed on the writ of *fifa* was

merely done in accordance with an order of this court and this alone makes it properly before the court.

5.5 Referring to the case of ***Isaac Lungu v Mbewe Kalikeka (Appeal No. 114/2013)***[4] it was argued that the whitebook is only resorted to in instances when laws or rules are silent or not comprehensive. That in the ***Isaac Lungu*** it was held that:

> ***"English practice and procedure rules will only apply in so far as there is a lacuna in our rules or practice and procedure. We do not resort to English practice and procedure when our own rules and procedures are clear and comprehensive"***

5.6 Counsel argued that a writ of *fifa* was issued in accordance with an order of the Court and in the form provided under the High Court Rules, as such the writ of *fifa* is in the proper form and not irregular. Further that there is no lacuna that exists with respect to the enforcement of judgments. Also, that there is no requirement to resort to the provisions of Rules of the Supreme Court when it comes to the practice and procedure of filing the writ of *fifa*.

5.7 As regards ***Order 47 Rule 1 (7) of the Rules of the Supreme Court*** which the 2nd Defendant has relied upon in bringing this application. Counsel for the Plaintiff argued that ***Order 47 Rule 1 (7) goes on to make refence to paragraph 11 (a) of the Practice Direction (Judgment in Foreign Currency) (1976)1 W.L.R 83.*** The Practice Direction (Judgement in Foreign Currency) forms

part of the practice directions issued pursuant to the Queens Bench Masters Practice Directions and are contained in Volume 2 of the Whitebook at Page 155. That a perusal of the Practice Direction (Judgment in Foreign Currency) will show that it is made clear from the outset that they are not mandatory. That ***Direction No. 2A-1*** states that:

> ***"These directions "have no statutory authority and cannot be treated as directions of the court" or as rules of the Court under the Supreme Court Act 1981."***

5.8 Counsel then argued that the practice direction is inapplicable to the facts of this matter based on two limbs. First that the Practice Direction (Judgment in Foreign Currency) is premised pursuant to the Rules of the Supreme Court Act 1981. Secondly that the Practice Direction (Judgment in Foreign Currency) has no statutory power and not a direction of the court or forms part of the Rules of Court. The case of ***Afritec Asset Management Company Limited & CPD Properties Limited, The Gynae Antenatal Clinic Limited & Another (Appeal 64 of 2015)***[5] was cited wherein it was held that:

> ***"The provisions of the Whitebook which are based on the English Supreme Court Act 1981 do not apply in Zambia. Counsel argued that this court has unfettered discretion whether to order that a party must file a certificate to accompany a praecipe where a judgment has been issued in foreign currency".***

5.9 It was further argued that in the case of ***Carnegie v Giessen (2005) EWCA Civ 191*** the court interpreted the effect of Practice Direction (Judgment in Foreign Currency) that there was nothing in S. 1 (1) or S.3 (4) of the Charging Orders Act 1974 which assists the argument that a charging order may not be expressed in a foreign currency. That the court in that case explained that before the CPR came into effect, it was clear that the practice was that, where a judgment creditor applied for a charging order to enforce a judgment expressed in a foreign currency, the affidavit in support of the application should include a certificate stating the sterling equivalent of the judgment and that, if granting the application, the court would make an order for the sterling equivalent of the judgment as so verified by the applicant. That the Court of Appeal determined that the practice was not mandatory and dismissed the appeal and held that the practice for the requirement of a certificate under the Practice Direction itself provides that it is subject to any subject order or direction which the court may give or make in a particular case.

5.10 Counsel for the Plaintiff submitted that, in advancing the arguments, the 2nd Defendant has placed reliance on the case of ***Millangos v George Frank (Textiles) Ltd (1976) A.C 443*** in which the House of Lords held that the English Court has power to give judgment for a sum of money expressed in a foreign currency but also stating that Rules of the Supreme Court 1965 required claims and judgments, and

writs and orders for their enforcement, to be expressed in sterling. It was then argued that the interpretation under **Miliangoes case** has been overtaken by that of ***Carnegie v Giessen***.

5.11 In relation to the argument of the 2nd Defendant that the relevance of the requirement to convert the amounts due is based on the fact that there is a risk that the conversion rate from the time of breach to the time of payment may change and thus the Plaintiff may be unjustly enriched. It was submitted that this argument is self-contradictory and in fact supports the fact that there should be no conversion of the judgment amount. That the liability suffered by the Plaintiff was in USD, the Court order was therefore in USD and therefore it would only be sensible that the writ of *fifa* be endorsed with the sum in USD.

5.12 As regards the 2nd Defendant's argument that the Writ of *fifa* is irregular because it should have indicated "Principal Registry" and not "Principal Division". Furthermore, that the name of the 2nd Defendant is cited as "San-He Manufacturing Limited" whereas it should be cited as "San He Manufacturing Limited". Counsel argued that ***Order 2 Rule 1 of the Whitebook*** provides with respect to non-compliance with the rules that:

> **"2/1 1.—(1)** *Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in*

respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) *Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."*

5.13 It was then argued that the above provisions make it very clear that any non-compliance with regard to form or place or manner must be treated as an irregularity and must not nullify any proceedings. That the 2nd Defendant is misled in its arguments that the writ of *fifa* is null and *void ab initio*.

5.14 Counsel made concession that the Plaintiff acknowledge that the errors were made on the Writ with respect to the description of the registry and the description of the 2nd Defendant. It was argued that these errors are "minute" irregularities which are curable and that the court through the exercise of its discretion at Order 2 Rule 1 (2) may order the Plaintiff to amend the document. The case ***Leopold Walford (Z) Ltd v Unifreight (1985) Z.R. 203***[6] was cited where the Supreme Court held that:

"As a general rule, breach of a regulatory rule is curable and not fatal depending upon the nature of the breach and the stage reached in the proceedings". That the Supreme Court noted that the Plaintiff had made an application for the rectification of the anomaly but that the application had not been heard by the time that the appeal was being heard".

5.15 The case of ***Standard Chartered Bank Zambia PLC v John M.C Banda (Appeal No. 94 of 2015)***[7] was cited where the Supreme Court held that:

"We think that rules of court should indeed serve a definitive purpose and we are not to apply them using a rigid approach without regard whatsoever to the consequences of any delayed rectification of their breach. In case of breach of rules that do not result in any real or serious prejudice or negative consequences to any party, the court does surely retain the discretion always as to what order would best meet the justice of the situation".

5.16 This court was also referred to the case of ***Access Bank (Z) Limited v Group Five/Zcon***[8] where the Supreme Court stated that when ...

"A party that may have fallen foul of the rules of court may be allowed to proceed as if no breach had occurred and or be directed to effect appropriate amendments. The court yet, are also firmly alive to the fact that rules should generally not be used as a minefield for parties who make fairly inadvertent mistakes that translate into tangible prejudice to the other party. If an irregularity can be cured without undue prejudice, then it is desirable that such irregularity be put right, subject to an order as to costs against the erring party".

5.17 Counsel argued that the 2nd Defendant has not and will not suffer any prejudice from the alleged irregularities that would warrant this court to exercise its discretion and set aside the writ of *fifa*.

5.18 As regards the threshold for granting a stay of execution, counsel argued that the primary consideration is whether the applicant has discharged the onus of demonstrating that there is a proper basis for the stay and that the situation qualifies for the court to use its discretion to grant an order staying the execution of the writ of *fieri facias*. The Supreme Court in the case of ***Zambia Revenue Authority v Post Newspapers Limited (SCZ Judgment No. 18 of 2016)***[9] held that:

> ***"The principles concerning the grant of a stay of execution dictate that the same is a discretionary remedy and that a party applying for the same is not entitled to the grant of a stay as of right. That a party to an action should not be denied the immediate enjoyment of the decree of the court unless there are good and sufficient grounds for doing so".***

Counsel also referred to the case of ***Nyampala Safaris (Z) Limited and 4 Others v Zambia Wildlife Authority and 6 Others*** where the Supreme Court held 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 litigation as a matter of course. The application must therefore clearly demonstrate the basis of which a stay should be granted".***

5.19 Counsel submitted that the application to set aside the writ of *fifa* has no merit and therefore it does not constitute good and sufficient reason for the grant of a stay of execution.

6.0 ANALYSIS AND DECISION OF THIS COURT

6.1 I have carefully considered the affidavit and skeleton arguments in support of the parties' respective positions filed in this matter. Before, I consider the application before me, I wish to start by considering the peripheral issues raised by the Plaintiff in this application which I consider profound in the determination of this application.

6.2 The Plaintiff have argued that the current application by the 2nd Defendant is the fourth time the 2nd Defendant has sought to stay execution of the judgment and the Ruling of the Court in this matter. Counsel went on to submit that on the 20th December, 2022 the 2nd Defendant applied for a stay of execution of the Ruling in the Court of Appeal and was dismissed by the ruling of Lady Justice N.A Sharpe Phiri. Further that on the 11th January, 2023 the 2nd Defendant filed an application before this Court for an order for stay of execution of the Judgement/Ruling and was dismissed by the Ruling of Justice M. Mapani Kawimbe dated 19th January, 2023. That on the 20th January, 2023 the 2nd Defendant filed a further application for stay of execution of the judgement/Ruling in the Court

of Appeal and was dismissed by a Ruling of lady Justice F.M Chishimba dated 24th March 2023.

6.3 My firm position is that the application before me by the 2nd Defendant relates to the stay of execution of the writ of *fieri facias* and setting aside the writ of fieri facias for irregularity and not stay of execution of the judgment of this Court in this matter. The Plaintiff's affidavit evidence and arguments in so far as they relate to the application for a stay of execution of the judgment is misplaced. As such the application by the 2nd Defendant for a stay of execution and setting aside of the writ of *fieri facias* for irregularity is properly before me.

6.4 Secondly, the Plaintiff in opposing this application, had taken issues with paragraphs 9, 12, 13 and 14 of the 2nd Defendant's Affidavit in support of summons for an order to set aside writ of *fieri facias*. The crux of the Plaintiff submission was that the said paragraphs contains extraneous matter that must not be contained in an affidavit. I have examined the 2nd Defendant's affidavit in support in issue, reproduced hereunder.

> ***Paragraphs 9.*** *That further to paragraph 7 above, I have further been advised by the 2nd Defendant's advocates on record that where a Plaintiff seeks to enforce a judgment expressed in foreign currency by the issue of a writ of fifa, the praecipe for the issue of the writ must be accompanied by a certificate and the amount so certified be entered on the fifa.*

12. *That it is in the interest of justice that the stay of execution of the writ of fieri facias be granted pending determination of the application to set aside the writ of fieri facias.*

13. *That if a stay of execution is not granted, the Plaintiff will proceed to levy execution on an irregular writ of fifa and the entire application to set aside the writ of fieri facias will be rendered a mere academic exercise*

14. *That further to the above paragraph, if the execution is done and the application to set aside the writ of fieri facias is rendered nugatory, the 2nd Defendant will be greatly prejudiced as it has a right to a fair hearing and has the right to its application to be determined on its merit and further, if the application to set aside the writ of fieri facias is successful, the 2nd Defendant may be granted costs.*

It is apparent that paragraphs 12, 13 and 14 contain extraneous issues and it would not be in the interest of justice for this court being aware of the same to turn a blind eye and proceed to consider the same in the determination of this matter. I am thus guided by the provisions of Order 5 Rule 15 of the High Court Rules, which provides that ***"An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusions"***. It is my firm view that what is suppose to be stated in an affidavit are facts relating to why this court should grant the stay of execution of the writ of *fifa* and set aside the writ of *fieri facias* for irregularity. This is in line with ***Order 5 Rule 16 of the High Court Rules,*** which provides that ***"every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own***

personal knowledge or from information which he believes to be true".

I therefore agree with counsel for the Plaintiff in so far as it relates to paragraphs 12,13 and 14 of the affidavits in support to stay execution of the writ of *fifa* contains extraneous matters. As a general rule of practice and procedure on affidavit for use in court being a substitute for oral evidence, the affidavit should only contain statement to which the witness disposes his own knowledge and should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.

6.5 Since Order 5 of the High Court Rules does not provide for the expunging of affidavits or any parts thereof, I have resorted to ***Order 41 Rule 6 of the Rules of the Supreme Court, 1999 Edition*** which states that: ***"The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive"***. I accordingly expunge paragraphs 12 to 14 from the affidavit. I must, however, state that expunging of paragraphs 12,13 and 14 of the 2nd Defendant's affidavit in support would not dispose off the application for a stay and setting aside the writ of *fifa* as this court will still consider the merits of the application for the setting aside the writ of fifa on the rest of the affidavit evidence, apart from the expunged paragraphs. In short, the application before me would not be disposed of by expunging paragraphs 12 to 14.

6.6 I shall now consider the central issue for determination in this application, which is whether or not the writ of *fieri facias* is irregular and ought to be set aside on the ground that, first, the writ of *fieri facias* is enforcing a judgment expressed in foreign currency and as such the praecipe for the issuance of the writ of *fieri facias* must be accompanied by a certificate and that the amount so certified must be entered on the *fieri facias*. Secondly that the writ of *fieri facias* was filed in the "principal division of the High Court" which does not exist at law. Thirdly that the name of the 2nd Defendant is cited as "San-He Manufacturing Limited" whereas it should be cited as "San He Manufacturing Limited".

6.7 As regard the first question, the 2nd Defendant vehemently argued that writ of *fieri facias* was irregular and ought to be set aside on the ground that, first, the writ of *fieri facias* is enforcing a judgment expressed in foreign currency and as such the praecipe for the issuance of the writ of *fieri facias* must be accompanied by a certificate. The Plaintiff have strongly opposed the application on ground that there is no distinction made between a judgment or decree made in foreign currency that an alternative procedure should be affected and that the procedure governing does not require the attachment of a certificate to the praecipe of a writ of *fifa*.

6.8 I have considered the 2nd Defendant's and the Plaintiff's arguments and as earlier alluded, the first issue for

determination is whether the writ of *fieri facias* issued by the Plaintiff was irregular as claimed by the 2nd Defendant. Counsel for the 2nd Defendant in his submission merely made reference to the Whitebook and English authorities which are of persuasive value on this Court.

6.9 The record in this matter, reveals that judgment was handed down on 30th September, 2022 which was amended by the Ruling of 16th November, 2022. The Court awarded damages for replacement of energy loss at USD 218,274.99. The Record further shows that the 2nd Defendant were dissatisfied with the judgement in this matter, nonetheless, the 2nd Defendant were not successful in lodging their appeal before the Court of Appeal as evident by various Rulings on record.

6.10 In apparent pursuit of the Courts' judgment, Plaintiff applied for leave to issue a writ of *Fieri facias*, which was granted and a writ of *fieri facias* was accordingly issued on the 19th January, 2023.

6.11 It is quite clear that the 2nd Defendant did not appeal against the final judgment in this matter awarding the Plaintiff energy loss in dollars but has fervently argued that it was erroneous to grant the writ of *fieri facias* as the same is expressed in foreign currency and as such the praecipe for the issuance of the writ of *fieri facias* must be accompanied by a certificate.

6.12 It is only after the grant of the writ of *fieri facias* that the 2nd Defendant has taken issue with the writ of *fieri facias*. I will therefore confine myself to the issue of the granting of the writ of *fieri facias* expressed in foreign currency.

6.13 The law providing for procedure as regards the granting of a writ of *fieri facias* is laid out in ***Order XLII of the High Court Rule,*** which provides in parts as follows:

> ***"1. All property whatsoever, real or personal, belonging to a party against whom execution is to be enforced, and whether held in his own name or by another party in trust for him or on his behalf (except the wearing apparel and bedding of himself or his family and the tools and implements of his trade, if any, to the value of five hundred Kwacha or, in the case of a farmer, one million Kwacha) is liable to attachment and sale in execution of the decree.***
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> ***5. (2) In every case, the writ of execution shall not be issued, except by express leave of the Court or a Judge, until three days after the day of the date of the order or judgment, but if the Court or a Judge sees it fit, it or he may order immediate execution.***
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> ***6. No sale of goods taken in execution shall be made until the end of five days next after such goods were seized, unless such goods are perishable, or on the request of the party whose goods are seized. Where the property seized is of a value estimated to exceed fifty thousand kwacha, the sale shall be advertised at least once in a newspaper circulating in the district where the sale is to take place.***

6.13 I have further examined form 41 of the first schedule which provides for the writ of *fieri facias* reproduced hereunder.

H.C. Civ. 41 Sch. 1

REPUBLIC OF ZAMBIA

WRIT OF FIERI FACIAS

(General Title)

To the Sheriff of Zambia and his Bailiffs

You are hereby commanded in the President's name that of the goods and chattels of you cause to be made the sum of K and also interest thereon at the rate of K per annum from the * day of 19 , which said sum of money and interest were lately before the High Court for Zambia in a certain action wherein is plaintiff and defendant by a judgment (or order) of the said Court bearing date the day of 19 , adjudged (or ordered) to be paid by the said to the said together with certain costs in the said judgment (or order) mentioned and which costs have been taxed and allowed by the Taxing Master of the said Court at the sum of K as appears by the certificate of the said Taxing Master dated the day of 19

AND THAT of the goods and chattels of the said you further cause to be made the said sum of K (costs) together with interest thereon at the rate of K per centum per annum from the* day of 19 , and that you have that money before the said Court

immediately after the execution hereof to be paid to the said in pursuance of the said judgment (or order). And in what manner you shall have executed this writ make appear to the said Court immediately after the execution thereof. And have there then this writ.

WITNESS The Honourable
Chief Justice of Zambia

Dated the day of
in the year of Our Lord
One Thousand Nine Hundred and

** Day of decree or order, or day on which money is directed to be paid, or day from which interest is directed by the order to run, as the case may be.*

ENDORSEMENT

Levy K and K for costs of execution, etc., and also interest on K at K per centum per annum from the day of 19 until payment; besides Sheriff's commission, officer's costs of levying and all other legal incidental expenses.

This writ was issued by of , Advocate for who resides at The is a and resides at in the District of .

6.14 ***Section 9 of the Interpretation and General Provisions Act Chapter 2 of the laws of Zambia*** provides that:

> ***"Every Schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law".***

It is my firm view that court forms contained in the first schedule in the subsidiary legislation form part and parcel of the High Court Rules. Therefore, the reading of the provisions of Order XLII as read together with form 41 of the first schedule reproduced above clearly outline the general and basic scope of procedure relating to issuance and enforcement of the writ of *fieri facias* which from the wording in form 41 must be expressed in Kwacha currency.

6.15 I therefore do not accept the argument by Counsel for the Plaintiff that Order XLII does not lay down any procedure in enforcing judgment expressed in foreign currency or that there is no legal basis upon which the Plaintiff ought to have filed a praecipe for the issuance of the writ of *fifa* accompanied by a certificate. It is a misapprehension on the part of counsel for the Plaintiff to completely ignore the holistic reading of Order XLII together with form 40 and 41 contained in the first schedule in the Subsidiary legislation.

6.16 What is key is that the forms which are part of the High Court Rules provides for kwacha currency to be endorsed on the praeipe and the writ of f*ieri facias*. In my view,

forms 40 and 41 enjoins applicant to endorse kwacha currency on the writ of *fifa* or the kwacha currency equivalent at the current Bank of Zambia exchange rate of the foreign currency at the time of delivery of the judgment seems to be the most feasible.

6.11 I therefore hold a strong view that the writ of *fieri facias* in this matter is irregular as the same is expressed in a foreign currency and is thereby set aside.

6.12 In view of the position taken above, the second and third question posed for determination becomes *otiose* and the same shall not be considered.

6.13 I am mindful that in considering this application this court is not and should not sit as an appellant Court interrogating the judgment on record of Justice M. Mapani-Kawimbe who at the time of delivery of this judgement was of equal footing with this Court. However, it is good practice for the Court when rendering judgment of reliefs endorsed in foreign currency, to state the kwacha equivalent at the current Bank of Zambia foreign currency exchange rate pertaining at the date of the delivery of the judgment.

6.14 Since merely setting aside the writ of *fifa* for irregularity will not shut down the door for the Plaintiff to commence fresh application for execution of judgment in this matter. This court is of the considered view that since the judgment on record was expressed in foreign currency, I

have invoked my discretionary powers under ***Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia*** which provides 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."*

In doing justice in this matter, I have taken judicial notice of the Bank of Zambia foreign exchange rate of 30th September, 2022 when judgment in this matter was delivered. One US dollar was equivalent to K15.77. Therefore, USD218,274.99 damages for energy loss granted to the plaintiff in the judgment was equivalent to K3,442,196.59 as at 30th September, 2022.

6.15 I make no orders as regards costs.

6.16 Leave to appeal to the Court of Appeal is hereby granted.

DELIVERED AT LUSAKA THIS 11TH DAY OF MARCH, 2024.

G.C. CHAWATAMA
HIGH COURT JUDGE