

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

**APPEAL NO. 17/2021**

**BETWEEN:**

**INNOCENT KAHYATA & OTHERS**

**APPELLANTS**

**AND**

**LIVINGSTONE CITY COUNCIL**

**RESPONDENT**



**CORAM: MAKUNGU, NGULUBE AND BANDA-BOBO, JJA.**

**On 17<sup>th</sup> November, 2022 and 29<sup>th</sup> December, 2022.**

**For the Appellants:** Mr. J. C. Chimembe, of Messrs. JMC & Associates

**For the Respondent:** Mr. H. K. Sawanda, In-House Counsel, Livingstone City Council.

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**J U D G M E N T**

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**NGULUBE, JA,** delivered the Judgment of the Court.

**Cases referred to:**

1. *BP Zambia Plc v Expendito Chipasha and 235 Others*, Selected Judgment No. 57 of 2018.
2. *Barclays Bank Zambia Plc v Zambia Union of Financial Institutions Allied Workers* (2007) ZR 106.
3. *TAP Zambia Limited v Percy Limbusha and 8 Others*, Selected Judgment No. 47 of 2017.

**Legislation referred to:**

1. *The Constitution of Zambia as amended by Act No. 2 of 2016*

**Other works referred to:**

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

**INTRODUCTION**

1. This appeal is against a judgment of the High Court delivered by Maka-Phiri J, upholding the District Registrar's decision to set aside a writ of *fifa* issued by the appellants, for irregularity.

**BACKGROUND**

2. The appellants are former employees of the respondent whose employment was terminated by way of retrenchment. The parties had a dispute over payment of the appellants' dues. It is common cause that the appellants together with another group of retrenchees commenced an action against the respondent which resulted into a consent order which the parties entered into on 4<sup>th</sup> May, 2004. The respondent started complying with the consent order, after which the retrenchees split into two groups. Thereafter, the first group was paid in full.
3. The respondent later commenced an action against the appellants to set aside the consent order because it was laden with mistakes.
4. After hearing the parties, Salasini J refused to set it aside because that would have amounted to repudiating the agreed terms of the

consent order by one of the parties. She considered that the respondent had considerably complied with the consent order by making payments to both groups of retrenchees, which it continued to do as late as 15<sup>th</sup> September, 2015. She also refused to grant the appellants' application to enter judgment on admission in the sum of K1,473,683,446.44, on the ground this amount was due to both groups of retrenchees who were affected by the consent order. She opined that the appellants were only entitled to half of it. The learned Judge therefore referred the appellants' case to the Registrar for assessment.

5. When the matter was taken for assessment, the Registrar directed the parties to engage an independent qualified accountant to calculate all the amounts due, using the formula adopted by the parties in the consent order. The appellants issued a writ of *fifa* before the parties could engage an accountant. On the respondent's application, the Registrar set aside the writ of *fifa* for irregularity.
6. The appellants appealed to a Judge of the High Court who upheld the decision of the Registrar. Maka-Phiri J found that it was premature for the appellants to issue a writ of *fifa* when the matter was at assessment which had not been concluded. She reasoned that if a writ of *fifa* was executed without proper computation of



what was paid and what is outstanding, there would be a potential risk of the respondent overpaying the appellants, a situation which would amount to unjust enrichment and is against public policy.

### **THE APPEAL TO THIS COURT**

7. Dissatisfied with the Judgment of the lower Court, the appellants appealed to this Court advancing two grounds of appeal as follows:
  1. *That the Court below erred in both law and fact when it held that the District Registrar's ruling was on firm ground; and*
  2. *That the Court below erred in law and fact when it held that it was premature for the appellants to issue a writ of fieri facias in the circumstances.*
8. When the appeal came up for hearing, Mr. Chimembe on behalf of the appellants relied on the heads of argument filed in support of the appeal. The respondent's counsel, Mr. Sawanda, also relied on the heads of argument which were filed in opposition.

### **THE APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL**

9. In support of ground one, Mr. Chimembe alluded to the fact that Salasini J ordered that only half of K1,473,683,446.44 was due to the appellants. He argues that the amount referred to assessment is not half of K1,473,683,446.44, but the appellants' dues mentioned in Paragraph 2 of the consent order, and other benefits.

He submitted that the respondent undertook to pay half of K1,473,683,446.44 in two equal instalments of K368,421.00. However, the respondent only paid the first instalment to the appellants on 4<sup>th</sup> March, 2019, but failed to pay the second instalment which should have been paid by 31<sup>st</sup> May, 2019. It was his submission that the issuance of the writ of *fifa* was triggered by the respondent's failure to pay the balance of K368,421.00.

10. He faulted Maka-Phiri J for upholding the decision of the District Registrar, arguing that the payment of half of K1,473,683,446.44 by the respondent did not depend on the computation of all other amounts due to the appellants. He contends that the K736,842.00 is a distinct amount which did not require any computation.
11. On the second ground, Mr. Chimembe submitted that under ***Order 45/1/5 of the Rules of the Supreme Court of England***, "***The practice is clear that a writ of fieri facias may issue immediately upon payment becoming due...***" The thrust of his submission is that the K1,473,683,446.44 was due when the consent order was executed. Counsel also referred us to ***Article 160 of the Constitution of Zambia*** which permits a party who has a judgment against a local authority to enforce such judgment against the local authority after one year

from the date of judgment. We were urged to uphold the appeal with costs to the appellants.

### **THE RESPONDENT'S ARGUMENTS AGAINST THE APPEAL**

12. On behalf of the respondent, Mr. Sawanda opposed ground one. He submitted that the Judgment of Salasini J referred the matter to the Registrar for assessment of all the amounts due to the appellants. It was his contention that the dispute in this case is not about the respondent's failure to pay, but the amount to be paid, which must be ascertained through an assessment by an accountant as ordered by the Registrar. He contends that the respondent cannot continue paying the appellants considering the disagreement over the amounts due.
13. The respondent's counsel further opposed ground two. It was his contention that the writ of *fifa* was prematurely issued because the assessment has not been conducted by an independent accountant. He submits that **Article 160 of the Constitution** can only be invoked if the respondent defaults a year after the assessment. We were urged to dismiss both grounds of appeal for lack of merit.



## **DECISION OF THIS COURT ON THE APPEAL**

14. We have considered the grounds of appeal, the evidence on record, the heads of argument filed by counsel for the parties, together with the authorities to which we were referred. We shall deal with both grounds together as they are interrelated.
15. The issue to be determined is whether the appellants irregularly issued the writ *fifa* against the respondent. The writ of *fifa* was issued after Salasini J referred the matter for assessment to the Registrar, who also directed the parties to appoint an accountant to compute the sums paid so far and the outstanding amounts. There is no dispute that the writ of *fifa* was issued before assessment of the amounts due was concluded.
16. We however wish to state that a successful party is required to wait for the assessment of the amounts due before issuing a writ of *fifa*. In the case of ***BP Zambia Plc v Expendito Chipasha and 235 others***<sup>1</sup>, the respondents issued a writ of *fifa* before the amount due to them was assessed by the Deputy Registrar. The Court held that the *fifa* was issued irregularly as the amount due had not yet been assessed. In ***Barclays Bank Zambia Plc vs Zambia Union of Financial Institutions Allied Workers***<sup>2</sup>, the Court held that:

***“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 proper course that the complainant should have taken was to go to court to have the amount due assessed by the court.”***

17. We have addressed our minds to Mr. Chimembe’s argument that the amount which was subject of the writ of fifa is a liquidated sum which did not require any assessment. Although Salasini J ordered that only half of K1,473,683,446.44 was due to the appellants, counsel contends that the amount referred for assessment is not half of K1,473,683,446.44, but the appellants’ dues mentioned in Paragraph 2 of the consent order, and other benefits.
18. Counsel informed us that the amount subject of the writ of fifa is a liquidated sum of K368,421.00, which the respondent failed to pay after undertaking to pay half of K1,473,683,446.44 in two equal instalments of K368,421.00. It is counsel’s submission that the respondent only paid the first instalment of K368,421.00 on 4<sup>th</sup> March, 2019, but failed to pay the balance of K368,421.00 which it undertook to liquidate on or before the 31<sup>st</sup> of May, 2019.
19. We respectfully disagree with counsel that Salasini J referred the matter for assessment of the amounts mentioned in Paragraph 2 of the consent order, and other benefits. A careful study of Salasini J’s



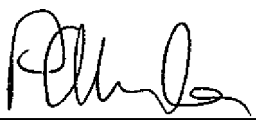
judgment shows that she referred the matter for assessment because the respondent considerably complied with the consent order by paying both groups of retrenchees, which it had continued to do as late as 15<sup>th</sup> September, 2015. The first group of retrenchees was fully paid.

20. We agree with the lower court that the writ of *fifa* was prematurely and irregularly issued as the case was still at assessment which had not been concluded. We also agree that if execution is levied on any amount without the proper computation of what was paid and what is outstanding, there is a potential risk of the respondent overpaying the appellants, a situation which would indeed amount to unjust enrichment and is against public policy.
21. In ***TAP Zambia Limited v Percy Limbusha and 8 others***<sup>2</sup>, the Court held 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. ***Practice Note 47/1/8 of Order 47/1 of the White Book*** confirms that execution can be set aside where it has been improperly issued.

## **CONCLUSION**

22. All in all we find no merit in both grounds of appeal as we support the decision of the lower court to uphold the Registrar's ruling setting aside the writ of *fifa* for irregularity. This appeal is hereby dismissed. We make no order as to costs.

  
C. K. MAKUNGU  
**COURT OF APPEAL JUDGE**

  
P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**

  
A. M. BANDA-BOBO  
**COURT OF APPEAL JUDGE**