

**IN THE HIGH COURT OF ZAMBIA  
AT THE KITWE DISTRICT REGISTRY  
HOLDEN AT KITWE  
(Civil Jurisdiction)**

**2014/HK/ ARB/02**

**BETWEEN:**

**GIVEN CHISAKULA KAWINA**

**JUDGMENT CREDITOR**

**AND**

**SATYAM SHIVAN SUNDARAM**

**1<sup>ST</sup> JUDGMENT DEBTOR**

**CLASSIC MINING & TRADING LTD**

**2<sup>ND</sup> JUDGMENT DEBTOR**

**Before the Hon. Mr. Justice E. Pengele in Chambers on 6<sup>th</sup>  
March, 2020.**

For the Judgment Creditor: Mr. Paul Kaloke of Messrs. Chilupe and  
Permanent Chambers

For the 1<sup>st</sup> Judgment Debtor: Mr. K. Mwiinga and Mr. Wiza Nyirenda of  
Messrs. William Nyirenda and Company

For the 2<sup>nd</sup> Judgment Debtor: Not in attendance

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

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**Cases referred to:**

1. Power V. Grace (1932) 2 D. L. R 793;
2. Gonyora V. Zenith Distributors (Pvt) Ltd and Others (2004) ZWHHC 44;
3. Sheriff of Zimbabwe V. Mukoko and Another, SC of Zimbabwe 805- 17;
4. Rodgers Chibwe V. Kasempa District Council, SCZ Judgment No. 13 of  
2015;
5. Construction Sales and Services Limited and Others V. Standard

- Chartered Bank Zambia Limited, SCZ Judgment No. 4 of 1991;
6. Clement Chuunya and Hilda Chuunya V. J. J Hankwenda, SCZ Judgment No. 2 of 2002;
  7. Bukumo Mining V. Luiiri Gold Mines Ltd and 6 Others, 2010/HP/448 (unreported);
  8. Barclays Bank Zambia Plc V. Zambia Union of Financial Institutions and Allied Workers; ??
  9. Salomon V. Salomon and Company Limited (1895- 1899) ACL – ER 33;
  10. Farmers Co-operative (N.R) Ltd V. Joan Margaret Drake (1963-1964) ZR 74;
  11. Hongling Xing Xing Building Company Limited V. Zamcapital Enterprises Limited 2010/HK/439; and
  12. Bank of Zambia V. Caroline Anderson and Andrew W. Anderson, SCZ Judgment No. 13 of 1993.

**Legislation referred to:**

- a. Rules of the Supreme 1999 Edition;
- b. High Court Rules, Chapter 27 of the Laws of Zambia;
- c. Constitution of Zambia, Chapter 1 of the Laws of Zambia;
- d. Companies Act No. 10 of 2017; and
- e. Judgments Act, Chapter 81 of the Laws of Zambia.

**Other works referred to:**

- (i) "Land law in Zambia- Cases and Materials" at page 69, paragraph 4.1.1; and
- (ii) Giles Francis Harwood, Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice" 20<sup>th</sup> Edition.

This Judgment follows an Appeal by the 1<sup>st</sup> Judgment Debtor against a Ruling of the learned Registrar rendered on 4<sup>th</sup> July, 2019. The Ruling of the Honourable Registrar followed an

application by the Judgment Debtors to set aside a Writ of *Fieri Facias* (Fifa), which had been issued in this matter, for irregularity.

The brief history of this matter is that on 31<sup>st</sup> July, 2014, the Judgment Creditor obtained an Interim Final Arbitral Award against the Judgment Debtors. The said Arbitral Award was subsequently registered after an unsuccessful challenge by the Judgment Debtors to set aside the Arbitral Award.

On 3<sup>rd</sup> August, 2018, the learned Registrar endorsed the issuance of a Writ of Fifa which was filed by the Judgment Creditor. It was that Writ of Fifa which the Judgment Debtors asked the learned Registrar to set aside leading to the Ruling of the Honourable Registrar that has now been appealed against.

In his Ruling, Honourable Registrar held that the money judgment could be enforced through a Writ of Fifa. That there was nothing that precluded the Judgment Creditor from enforcing the judgment against either of the Judgment Debtors using the Writ of Fifa. He, therefore, concluded that the Writ of Fifa in this case was properly issued and that there was nothing irregular about it. He, accordingly, dismissed the Judgment Debtors' application with costs.

Dissatisfied with the Ruling of the Honourable Registrar, on 11<sup>th</sup> July, 2019, the 1<sup>st</sup> Judgment Debtor filed a Notice of Appeal to a Judge at Chambers. The 1<sup>st</sup> Judgment Debtor has appealed on the ground that the Ruling of the Honourable Registrar does not

address the specific issues of concern submitted for consideration in the 1<sup>st</sup> Judgment Debtor's Affidavit, namely-

- 1. the position of the law on using the Writ of Fifa as a mode of enforcement against real property;**
- 2. the position of the law as regards enforcement against joint properties involving only one party to the proceedings;**
- 3. the position of the law as regards when one can enforce a Judgment on real property of a Judgment Debtor;**
- 4. the position of the law as regards inclusion of interest in the Writ of Fifa not awarded by the Court and still subject of arbitration before the Arbitrator with proof of such process;**
- 5. whether or not the Judgment Creditor can resort to execution on real estate belonging to the 1<sup>st</sup> Judgment Debtor before depleting the movable assets of both Judgment Debtors;**
- 6. whether or not the Judgment Creditor was not conflicted in the manner that she handled this process; and**
- 7. whether or not it was proper for these proceedings to continue without the 2<sup>nd</sup> Judgment Debtor being represented whom the Judgment Creditor manages and deliberately prejudiced.**

Both the 1<sup>st</sup> judgment Debtor and the Judgment Creditor filed Written submissions. When the matter came up before me for hearing on 31<sup>st</sup> January, 2020, Counsel for the 1<sup>st</sup> Judgment

Debtor and Counsel for Judgment Creditor indicated that they would rely on written submissions.

Counsel for the 1<sup>st</sup> Judgment Debtor filed their written submissions on 11<sup>th</sup> February, 2020. The crux of the submissions by Counsel is that the 1<sup>st</sup> Judgment Creditor is not entitled to the reliefs sought from Court through the Writ of Fifea on account of irregularity in the said Writ of Fifea and the process of its issuance. Counsel stated that in this regard the 1<sup>st</sup> Judgment Debtor would rely on the Affidavit in support of summons to set aside filed on 5<sup>th</sup> September, 2018, and the Affidavit in Reply filed on 14<sup>th</sup> December, 2018.

The Affidavit in Support of Summons for an order to set aside the Writ of Fifea was deposed to by the 1<sup>st</sup> Judgment Debtor. The gist of the contents of that Affidavit is that whilst the body of the contested Writ of Fifea purported to indicate that the execution was intended for both Judgment Debtors, the endorsement on the said Writ only targeted the 1<sup>st</sup> Judgment Debtor and ignored to either itemize and/or put the residence of the company being the 2<sup>nd</sup> Judgment Debtor.

The deponent went on to state that the Judgment Creditor is conflicted because she was both a Plaintiff and Defendant by virtue of her being the Director with the responsibility of representing the 2<sup>nd</sup> Judgment Debtor.

The 1<sup>st</sup> Judgment Debtor went on to depose that the properties earmarked for execution are jointly owned with another person who is not a party to these proceedings and who has never been heard.

The 1<sup>st</sup> Judgment Debtor further stated that the Arbitral Award deliberately gave interest only for a specified period. That, therefore, the interest of 16% from 1<sup>st</sup> August, 2014 to date of payment is illegal. Further, that the Judgment Creditor made an application to amend the interest awarded in the Arbitral Award and that the said application is pending determination before the Arbitrator.

The deponent proceeded to depose, in the alternative, that the 2<sup>nd</sup> Judgment Debtor has assets which could be executed upon since the Judgment debt is a shared one.

The 1<sup>st</sup> Judgment Debtor additionally deposed that the Judgment Creditor did not make any application for authority to represent the 2<sup>nd</sup> Judgment Debtor before Court and further that there is no law firm representing the interests of the 2<sup>nd</sup> Judgment Debtor before Court. That, therefore, there is need for the 2<sup>nd</sup> Judgment Debtor to be represented if these proceedings are not to end up being a miscarriage of justice.

Lastly, in that Affidavit the 1<sup>st</sup> Judgment Debtor stated that the address endorsed on the Writ of Fifta as No. F/7 Lubambe Centre, Parklands, Kitwe, is the tenancy of one Urmila Sundaram and not the 1<sup>st</sup> Judgment Debtor's premises.



The Affidavit in Reply dated 14<sup>th</sup> December, 2018, is also deposed to by the 1<sup>st</sup> Judgment Debtor. The crux of what is contained in that Affidavit is that the 1<sup>st</sup> Judgment Debtor does not owe any responsibility to the 2<sup>nd</sup> Judgment Debtor to pay for its debt owed to the Judgment Creditor.

The learned Counsel for the 1<sup>st</sup> Judgment Debtor filed written submissions on 11<sup>th</sup> February, 2020. Counsel presented their written submissions under the heads of the Judgment Debtors' Assets; Mode of Execution on Immovable Assets; Interest Calculation in the Writ of Fifa; and Conflict of Interest.

The kernel of the submissions of Counsel, under the heading of the Judgment Debtors' Assets, is that a Writ of Fifa issued against two Judgment Debtors ought to be executed against both Judgment Debtors' movable assets before being executed against the immovable assets of both Judgment Debtors. Counsel contended that the property which may be seized in execution of a Writ of Fifa are goods and Chattels which are movable property of the Judgment Debtor. Counsel went on to argue that in this case, where there are two Judgment Debtors, if the movable property of one Judgment Debtor is insufficient to satisfy the Judgment Debt, the movable property of the other Judgment Debtor must also be exhausted before execution can be effected on the immovable property of any of the Judgment Debtors. In support of these submissions, Counsel referred me to orders 45/1/6 and 45/1/20

of the Rules of the Supreme Court 1999 Edition<sup>a</sup> of the and Order XLII, rule 3 of the High Court Rules<sup>b</sup>.

Counsel went on to state that the Writ of Fifa issued in this case contains the following irregularities:

- 1. that only the 1<sup>st</sup> Judgment Debtor is listed in the Writ and not the 2<sup>nd</sup> Judgment Debtor when both Judgment Debtors are liable to liquidate the judgment debt;**
- 2. that the property listed as liable to seizure under the Writ of Fifa are only those that purportedly belong to the 1<sup>st</sup> Judgment Debtor and not those that belong to the 2<sup>nd</sup> Judgment Debtor; and**
- 3. that the property listed as being liable to seizure under the Writ of Fifa include immovable property purportedly belonging to the 1<sup>st</sup> Judgment Debtor, and none belonging to the 2<sup>nd</sup> Judgment Debtor, when immovable property cannot be seized under a Writ of Fifa and when movable property for both Judgment Debtors have not been exhausted.**

Counsel went on to submit that in any event, the property that has been listed in the Writ of Fifa are jointly owned with another person who is not a party to these proceedings. Counsel contended that execution can only be levied on property that belong exclusively to the Judgment Debtor and not property held jointly with a third party. For these submissions, Counsel referred me to Order 42 of



the High Court Rules<sup>b</sup> and Article 16 of the Constitution of Zambia<sup>c</sup>.

Counsel advanced the view that each co-owner of property is treated as being entitled to the whole of the subject property. To buttress the foregoing, Counsel cited an extract from a book entitled "Land law in Zambia- Cases and Materials<sup>(i)</sup>". Counsel also referred me to the cases of Power V. Grace<sup>1</sup>; Gonyora V. Zenith Distributors (Pvt) Ltd and Others<sup>2</sup>; and Sheriff of Zimbabwe V. Mukoko and Another<sup>3</sup>.

The additional argument of Counsel was that the Judgment Creditor cannot rely on Order 45, rule 1 of the Rules of the Supreme Court<sup>a</sup>, because the High Court Rules<sup>b</sup>, contains clear provisions on the subject. To augment the above, Counsel relied on the case of Rodgers Chibwe V. Kasempa District Council<sup>4</sup>. Counsel maintained that the High Court Rules<sup>b</sup> provide that in relation to property jointly owned by a Judgment Debtor and a third party, the property upon which execution is to be levied must belong to the Judgment Debtor only to the exclusion of all others.

With regard to the mode of execution, Counsel argued that the Writ of Fisa is not and has never been a mode of execution against immovable property. In the view taken by Counsel, in money Judgments, immovable property can only be executed upon by way of a Writ of Ejectment or a Writ of Possession depending on what the Judgment states.

Counsel relied on the case of **Construction Sales and Services Limited and Others V. Standard Chartered Bank Zambia Limited**<sup>5</sup> for the contention that in money judgments in Zambia the Judgment Creditor can resort to either issuing a Writ of Fifta or a Writ of Eligit where the movable property is not enough to meet the judgment sum. Counsel also referred me to the cases of **Clement Chuunya and Hilda Chuunya V. J. J Hankwenda**<sup>6</sup> and **Bukumo Mining V. Luiri Gold Mines Ltd and 6 Others**<sup>7</sup>.

Coming to interest calculation, Counsel submitted that the Arbitral Award only tied interest to the dates of 1<sup>st</sup> April, 2012 to 31<sup>st</sup> July, 2014. That, therefore, the Judgment Debtor is at a loss to understand the origin of the computation of interest by the Judgment Creditor to run up to date. According to Counsel, the Court of Appeal Judgment did not alter the period for which interest must be paid as pronounced in the Arbitral Award.

Counsel added that the interest awarded in the Arbitral Award remains a subject of proceedings brought by the Judgment Creditor before the Arbitrator and that there has not yet been a pronouncement by the Arbitrator. That, therefore, the Judgment Creditor must not make any calculation of interest in her Writ of Fifta different from what is given in the Arbitral Award. To reinforce the foregoing, Counsel cited the case of **Barclays Bank Zambia Plc V. Zambia Union of Financial Institutions and Allied Workers**<sup>8</sup> where it was held that-

**“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 Fifta issued herein should not have been issued as it was irregular.”**

Counsel submitted that the principle in the Barclays Bank Zambia Plc<sup>8</sup> case applies to the computation of interest owing on a Judgment debt. In Counsel's opinion, the correct course of action is for the Judgment Creditor to wait for a declaration of the Arbitrator on the amount of interest due to the Judgment Creditor or to levy execution based on the interest provided.

The last aspect that Counsel submitted on was the issue of conflict of interest. Counsel submitted that the Judgment Creditor is currently wearing two hats and wanting to benefit from the fruits of her Judgment while still preserving the assets of the 2<sup>nd</sup> Judgment Debtor from being diminished by execution being levied against it. That this is because the Judgment Creditor is a Director in the 2<sup>nd</sup> Judgment Debtor. Counsel maintained that the Judgment Creditor is conflicted. That, therefore, the Judgment Creditor should step aside as Managing Director of the 2<sup>nd</sup> Judgment Debtor while this case is ongoing to pave way for another person who will defend and protect the interests of the company in accordance with the law. According to Counsel, because of the conflict of interest, this matter has been made to proceed without the 2<sup>nd</sup> Judgment Debtor ever

being represented before the Court. In support of the above submissions, Counsel referred me to sections 107 and 108 (1) of the **Companies Act No. 10 of 2017<sup>d</sup>**.

Counsel went on to submit that the Writ of Fifta in dispute is oppressive because it only has the 1<sup>st</sup> Judgment Debtor's residential address and assets to the exclusion of the 2<sup>nd</sup> Judgment Debtor. In Counsel's opinion, this is more so in view of the fact that the 2<sup>nd</sup> Judgment Debtor has far more movable property than the 1<sup>st</sup> Judgment Debtor.

In conclusion, Counsel prayed that this is a proper application for this Court to set aside the Writ of Fifta for irregularity and condemn the Judgment Creditor in costs.

The lawyers for the Judgment Creditor filed their written submissions on 14<sup>th</sup> January, 2020. When the matter came up for hearing, the learned Counsel for the Judgment Creditor indicated that the Judgment Creditor would rely entirely on the filed written submissions. In the said submissions, Counsel indicated that the Judgment Creditor would adopt the contents of her Affidavit in Opposition to the 1<sup>st</sup> Judgment Debtor's Affidavit in Support of Summons to set aside the Writ of Fifta.

The gist of the contents of the Judgment Creditor's Affidavit in Opposition to Summons for an order to set aside Writ of Fifta was that she was perfectly entitled under the law to enforce the payment

of the Judgment debt against the 1<sup>st</sup> Judgment Debtor without recourse to the 2<sup>nd</sup> Judgment Debtor.

The deponent went on to point out that her personality at law was separate from, and independent of, that of the 2<sup>nd</sup> Judgment Debtor, in which both herself and the 1<sup>st</sup> Judgment Debtor are shareholders.

The Judgment Creditor further deposed that only moveable assets comprising two vehicles and household goods belonging to the 1<sup>st</sup> Judgment Debtor had so far been seized in execution and that the 1<sup>st</sup> Judgment Debtor's real property have not yet been seized for sale in execution.

The deponent proceeded to depose that she has never personally represented the 2<sup>nd</sup> Judgment Debtor in any Court of law nor made any application to Court to personally act on behalf of the 2<sup>nd</sup> Judgment Debtor in any Court of law. She stated further that by an internal memorandum under her hand dated 8<sup>th</sup> August, 2018, Messrs. Ellis and Company were engaged to act for the 2<sup>nd</sup> Judgment Debtor following termination of the services of Messrs. William Nyirenda and Company as Advocates of the 2<sup>nd</sup> Judgment Debtor.

The Judgment Creditor additionally deposed that, as a result of various debts owed by the 2<sup>nd</sup> Judgment Debtor to its employees and suppliers, the Management of the 2<sup>nd</sup> Judgment Debtor made a decision to sell one of the 2<sup>nd</sup> Judgment Debtor's motor vehicles.

Finally the deponent stated that the Writ of Fifa was properly issued.

The crux of the submissions of Counsel for the Judgment Creditor is that the judgment of the Judgment Creditor is for a specific sum or sums of money against the 1<sup>st</sup> and 2<sup>nd</sup> Judgment Debtors. Counsel contended that a Judgment for a sum of money can be enforced by an execution through a Writ of Fifa. For this argument, Counsel referred me to **Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 20<sup>th</sup> Edition**<sup>(iii)</sup>. Counsel also cited Order 45, rule 1 (25) of the **Supreme Court Practice**<sup>a</sup>, and Order 42, rule 1 of the **High Court Rules**<sup>b</sup>, among other authorities.

Counsel averred that what the Judgment Creditor has is a benefit of a Judgment for a sum or sums of money and not a judgment for possession of land. That, therefore, enforcement of such a Judgment by Writ of Fifa is the proper procedure under the laws of Zambia. Counsel, accordingly, stated that the grounds of appeal under 1 (a), (b) and (c) of the Notice of Appeal must be dismissed.

Counsel for the Judgment Creditor went on to submit that once the Arbitral Award was registered, it became a judgment of the Court and enforceable as such. In this regard, Counsel relied on section 2 of the **Judgments Act**<sup>c</sup>.



The further contention of Counsel for the Judgment Creditor was that Order 42, rule 3 of the **High Court Rules**<sup>b</sup>, provides for a clear procedure which must be followed before real property of a Judgment Debtor seized in execution can be sold. Counsel submitted that whenever property of a Judgment Debtor is seized in execution, personal property is required to be sold first and when the debt is not satisfied, real property would be resorted to satisfy the Judgment debt. Counsel, therefore, argued that ground of appeal number 1 (e) should also be dismissed.

Counsel additionally contended that it is not in dispute that the 2<sup>nd</sup> Judgment Debtor is a legal entity separate from the Judgment Creditor. That, therefore, the allegation of conflict of interest on the part of the Judgment Creditor in relation to the 2<sup>nd</sup> Judgment Debtor is a misapprehension of the law.

The further submission of Counsel is that as a separate legal entity, the 2<sup>nd</sup> Judgment Debtor was capable of deciding as to whether or not it was in its interest to continue incurring legal fees where a judgment was final. In support of this submission, Counsel referred me to the case of **Salomon V. Salomon and Company Limited**<sup>9</sup>.

I have carefully considered the appeal by the 1<sup>st</sup> Judgment Debtor, the Ruling of the Honourable Registrar, the history of the matter as revealed by the documents on the record and the submission of Counsel for both parties.

The learned Counsel for the 1<sup>st</sup> Judgment Debtor have argued their ground of appeal under the following heads:

- (i) **the Judgment Debtors' assets;**
- (ii) **mode of execution on immovable assets;**
- (iii) **interest calculation in the Writ of Fifta; and**
- (iv) **Conflict of interest.**

I will also decide on the appeal under the four heads as identified and argued by Counsel for the 1<sup>st</sup> Judgment Debtor.

I will start with the issue relating to the Judgment Debtors' assets. It is settled law that all property of a Judgment Debtor, whether real property or personal property, can be a subject of execution. Order 42, rule 1 of the **High Court Rules**<sup>b</sup>, accordingly, provides in this regard, that-

**"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 ...) is liable to attachment and sale in execution of the decree."**

The question I must resolve is with regard to how the execution should be done where, like in the present case, there are two Judgment Debtors. Counsel for the 1<sup>st</sup> Judgment Debtor have

argued that where a Writ of Fisa is issued against two Judgment Debtors, it must be executed against the movable assets of both Judgment Debtors before execution can be extended to the immovable assets. I agree entirely with the submission of Counsel for the 1<sup>st</sup> Judgment Debtor. It is settled law that in an execution on property the real property of Judgment Debtors can only be resorted to when the personal property is not sufficient to satisfy the judgment sum. This position is clearly stated in Order 42, rule 3 of the High Court Rules<sup>b</sup>, which provides as follows:

**“3. On any levy on the property of any person to satisfy an order or judgment of Court for the payment of money, the real property of such person shall only be sold if the personal property is insufficient.”**

I, therefore, hold that the execution in this case must be done first on the personal properties of either or both of the Judgment Debtors before the Judgment Creditor can execute on the real property of either or both of the Judgment Debtors. The Judgment Creditor is, however, not confined as to which of the two Judgment Debtors to start with. The Judgment Creditor is free to execute on the movable property of either of the Judgment Debtors before moving to the movable property of the other Judgment Debtor, if the Judgment sum is not satisfied by the execution on one of the Judgment Debtors. The Judgment Creditor can also choose to execute at once on the movable property of the two Judgment Debtors.

The Advocates for the 1<sup>st</sup> Judgment Debtor also raised the question of whether Order 45, rule 1 of the **Rules of the Supreme Court**<sup>a</sup>, is applicable to Zambia in view of the provisions of Order 42 of the **High Court Rules**<sup>b</sup>. The view taken by Counsel for the 1<sup>st</sup> Judgment Debtor is that Order 45, rule 1 of the **Rules of the Supreme Court**<sup>a</sup> cannot apply to Zambia because there is no gap in the law in Zambia. In Counsel's opinion, Order 42 of the **High Court Rules**<sup>b</sup> makes provision relating to execution on goods or property which is jointly owned by a Judgment Debtor and a third party. Counsel advances the contention that Order 42 of the **High Court Rules**<sup>b</sup> provides to the effect that execution can only be levied on property that is owned exclusively by the Judgment Debtor and not that which is owned by the Judgment Debtor and a third party. I have already reproduced Order 42, rule 1 of the **High Court Rules**<sup>b</sup> elsewhere in this Judgment. It appears Counsel for the 1<sup>st</sup> Judgment Debtor meant to refer to Order 45/1/25 of the **White Book**, and not Order 45, rule 1 thereof. Order 45/1/25 provides for goods owned by a debtor with a third party. It states as follows:

**"where two persons own chattels as co-owners (whether joint tenants or tenants in common) each is entitled to possession and sell without the consent of the other. Accordingly, the Sheriff acting under a Writ of Fisa upon a judgment against one co-owner is in no worse position and so can seize and sell the whole of the property.... In such a case, upon the Sheriff interpleading, the Court or a Judge would order the Sheriff to divide the proceeds of the sale**

**accordingly between the Judgment Debtor and the co-owner claimant....”**

Having carefully read Order 42, rule 1 of the **High Court Rules**<sup>b</sup>, I am unable to agree with Counsel for the 1<sup>st</sup> Judgment Debtor that the said Order addresses the situation where two persons own goods or property as co-owners. In my opinion, Order 42, rule 1 of the **High Court Rules**<sup>b</sup> only deals with a situation where there is only one owner of the property in question.

Accordingly, I am of the considered view that there is a gap in the law in Zambia. It follows, therefore, that Order 45/1/25 of the Rules of the Supreme Court is applicable to Zambia to deal with situations where a Judgment Debtor owns goods or property jointly with a third party to the proceedings.

Coming to the second issue, that is, the mode of execution on immovable assets, Counsel for the 1<sup>st</sup> Judgment Debtor have argued that the Writ of Fifta is not the correct mode of execution against immovable property. According to Counsel, immovable property in money judgments can only be executed upon by way of a Writ of Ejectment or a Writ of Possession. Conversely, Counsel for the Judgment Creditor have contended that the Writ of Fifta is the proper procedure for execution on any property whether real or personal.

I have taken time to carefully peruse the law and decided cases relating to execution and enforcement of judgment and orders

concerning real property. My navigation through the law and decided cases has established that when it comes to execution on real property, a Judgment Creditor cannot use a Writ of Fife. This is because there is more that needs to be done before a Judgment Creditor can either take possession of or sell real property. Thus, in relation to enforcement of a judgment or order concerning real property, the law provides for the Writ of Elegit and the Writ of Possession.

With regard to the Writ of Elegit, Order 42, rule 2 (4) of the High Court Rules makes provision for proceedings by way of elegit. The case of **Construction Sales and Services Limited, A.I. Bagus, D. H. Bagus and P.C Chibuyu V. Standard Chartered Bank Zambia Ltd**<sup>5</sup> seems to contain the position that a Judgment Creditor can take possession of real property under a Writ of Elegit. Of course the main issue in that case related to the appropriate procedure to be adopted when a Judgment Creditor, who has taken possession of real property under a Writ of Elegit, is alleged to have caused willful loss to the Judgment Debtor.

The case of **Clement Chuunya and Hilda Chuunya V. J.J. Hankwenda**<sup>6</sup>, also appear to settle the position that a Writ of Elegit can be used to take possession of real property. In that case the Supreme Court emphasized that the sale of real property taken under a Writ of Elegit must be closely supervised by the Court.

One of the leading cases on the Writ of Elegit is the case of **Farmers Co-operative (N.R) Ltd V. Joan Margaret Drake**<sup>10</sup>. In that case,



the Plaintiff obtained a money Judgment. A Writ of Elegit was then issued in respect of the said judgment and, following the usual investigation, the Deputy Sheriff caused to be delivered to the Plaintiff, to hold until the judgment debt was satisfied a piece of land belonging to the Judgment Debtor. Following a written offer of purchase of this land by Mrs. Drake ( the Defendant), the Plaintiff applied by Originating Summons for an order for sale of the judgment debtor's interest in the said land and for satisfaction of the moneys due in respect of the judgment debt out of the proceeds of sale. The Court said the following, *inter alia*:

**“A Judgment Creditor to whom legal possession has been delivered under a Writ of Elegit is a tenant by Elegit under the Judgment Debtors Act, 1864 .... He may apply by petition (now by Originating Summons) for an order for sale of the land to which the Writ relates. Before granting the order, the Court or Judge may direct inquires as to the title, nature and particulars of the interest of the Judgment debtor in the land, but it need not do so when those matters are clear. When an order for sale is made, it is to be carried out in accordance with the practice of the Court in respect of the sale of real estate of deceased persons for the payment of debts.”**

As for the Writ of Possession, the starting point is Order 45, rule 3 of the Rules of the Supreme Court<sup>a</sup>, which deals with enforcement

of judgment for possession of land. The relevant portions of Order 45, rule 3 is as follows:

**“ 3 (1) subject to the provisions of these rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means, that is to say-**

**(a)Writ of possession ...**

**(2) Writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 88 applies....”**

In the case of **Hongling Xing Xing Building Company Limited V. Zamcapital Enterprises Limited<sup>11</sup>**, Matibini, J, (as he then was) made some pronouncements relating to the Writ of Possession. He said-

**“I must state at once that in my opinion the grant of leave to issue a Writ of Possession presupposes in the first place the existence of a judgment or order for the giving of possession of land. Thus the enforcement of a judgment or order to grant possession of land through a Writ of possession must be preceded and complimented by leave of the Court to issue the Writ of Possession.... It is trite law that the grant of leave to issue a Writ of Possession as a means of recovering possession of the premises,**

presupposes that either a final judgment ordering the giving of possession of land has been rendered, or alternatively, an order has been issued directing that possession of land should be given.... The net result of this application is therefore that it is incompetent for a party to apply for leave to issue a Writ of Possession, in the absence of a judgment or order for the giving of such possession.”

It is clear from the foregoing that a Judgment Creditor cannot use a Writ of Fisa to execute on real property. It is evident from the decided cases I have referred to above that, depending on the nature of the execution, a Writ of Elegit or a Writ of Possession can be used when it comes to real property. The authorities I have discussed above establish that a Writ of Elegit allows the Judgment Creditor to take possession of real property. If the Judgment Creditor wants to sell the said property, the Judgment Creditor is required to make an application to the Court before the sale is done.

In the case of a Writ of Possession the decided cases clearly settle the position that it can only be issued if there is a judgment or an order for the giving of possession of land. The Writ of Possession can only be issued with leave of the Court except if that Writ relates to a judgment or order given or made in a mortgage action to which order 88 of the **Rules of Supreme Court**<sup>a</sup>, applies. I am of the firm view that in the case of a money judgment or order, the order for the giving of possession of land does not invariably have to be

contained in the main judgment or order. In my opinion, an order in that regard may be obtained, for instance, in a case where the execution of a Writ of Fife has found insufficient movable property to satisfy the judgment sum and it has become necessary to have recourse to the Judgment Debtor's real property.

Coming to the issue of the interest applicable from the date of the Arbitral Award to the date of settlement of the judgment sum, Counsel for the 1<sup>st</sup> Judgment Debtor essentially argued that the only interest that should apply is that which was awarded in the Arbitral Award.

In the case of **Bank of Zambia V. Caroline Anderson and Andrew W. Anderson**<sup>12</sup>, the Supreme Court held, in part, that-

**"The Judgment debt carries interest in accordance with the law unless otherwise ordered."**

I must be quick to mention that the Supreme Court judgment in the **Bank of Zambia**<sup>12</sup> case was rendered in 1993. It appears that at that time the Court could leave out, in its judgment or order, the issue of interest applicable after the judgment. When that happened, the interest applicable after the judgment would be as provided for by the law as it stood then. After the amendments that have since taken place to the law on interest before and after judgment, the law relating to interest has evolved. It is now primarily contained in order 36, rule 8 of the **High Court Rules**<sup>b</sup>

and section 2 of the Judgments Act<sup>e</sup>. Order 36, rule 8 provides as follows:

**“8. Where a Judgment or order is for a sum of money, interest shall be paid thereon at the average of the short- term deposit- rate per annum prevailing from the date of the cause of action or Writ as the Court or Judge may direct to the date of judgment.”**

Clearly, therefore, order 36, rule 8 of the High Court Rules<sup>b</sup> only deals with interest on a sum of money from the date of the cause of action or of the Writ, as the case may be, to the date of judgment.

Section 2 of the Judgments Act<sup>e</sup> deals with the interest rate applicable on a sum of money from the date of judgment or order to the date the judgment sum is satisfied in full. The said section 2 specifically provides as follows:

**“ 2. Every judgment, order or decree of the High Court or of a Subordinate Court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the Court which shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree.”**

Evidently, therefore, the discretion to determine the interest rate applicable, after the judgment up to the date of settlement of the judgment sum, has been given to the Court that renders the judgment, order or decree in question.

It follows, therefore, that the interest applicable after the Arbitral Award was rendered, in the case before me, can only be determined by the Arbitral Tribunal. It was, therefore, irregular for the Judgment Creditor to include interest of 16% on the judgment sum from 1<sup>st</sup> August, 2014 until payment of the sum.

On the issue of conflict of interest, Counsel for the 1<sup>st</sup> Judgment Creditor have argued that the Judgment Creditor is conflicted because she is also the Managing Director of the 2<sup>nd</sup> Judgment Debtor. I must state immediately that I do not agree with this contention. I do not think it is tenable to contend that the Judgment Creditor cannot pursue her judgment sum from the 2<sup>nd</sup> Judgment Debtor simply because the Judgment Creditor is said to be a Managing Director in the 2<sup>nd</sup> Judgment Debtor. It is trite law that the shareholders of a limited company are separate and distinct from the company. A limited company is a legal entity in its own right with ability to sue and to be sued. In this regard, section 16 of the **Companies Act**<sup>d</sup> provides to the effect that once registered, a company acquires a separate legal status. Section 22 of the **Companies Act**<sup>d</sup> goes on to provide to the effect that a company has capacity to sue and to be sued in its own corporate name. Furthermore, the frequently cited case of **Salomon V.**



Salomon and Co<sup>9</sup> also establishes the firm principle that a company has a distinct corporate personality from its subscribers and officers.

In view of the foregoing, I do not accept ~~to~~ the contention advanced on behalf of the 1<sup>st</sup> Judgment Debtor that where a Director or even a Managing Director has sued a company, the company cannot make a decision on how to defend itself in that action. I do not, therefore, see any conflict of interest in this case.

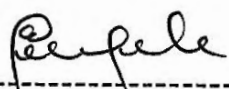
The 1<sup>st</sup> Judgment Debtor has succeeded on its contentions that the movable assets of both Judgment Debtors must be finished before execution can be extended to the immovable property of the Judgment Creditors. The 1<sup>st</sup> Judgment Debtor has also succeeded on the issue that a Writ of Fifea cannot be used to execute on real property. Lastly, the 1<sup>st</sup> Judgment Debtor has succeeded in his averment that it was wrong for the Judgment Creditor to include in the Writ of Fifea interest applicable after the judgment when that interest was not awarded by the Arbitrator. The question is whether the said irregularities warrant the setting aside of the Writ of Fifea.

With regard to the immovable property, I have noticed from the documents before me that although these were listed in the Writ of Fifea, the 1<sup>st</sup> Judgment Debtor does not dispute the contention by the Judgment Creditor that execution was only effected on movable property. As for the interest rate, it is clear that the Writ of Fifea contains interest on the Judgment sum from the date of judgment to the date of payment.

I am of the view that the irregularities stated above cannot warrant the setting aside of the Writ of Fifta. They are minor irregularities which can be rectified by amendment. I do not think the Judgment Debtors would suffer any prejudice if the said changes are made to the Writ of Fifta. Order 20/8/9 of the **Rules of the Supreme Court**<sup>a</sup> provides to the effect that an amendment may be allowed at any stage of the proceedings including after judgment. Further, that as a general rule, however late the amendment is sought to be made it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise.

I will, therefore, give the Judgment Creditor the liberty to rectify the irregularities in the Writ of Fifta as highlighted in this Judgment. I award cost to the 1<sup>st</sup> Judgment Debtor to be taxed in default of agreement.

**Delivered at Kitwe this 6<sup>th</sup> day of March, 2020.**

  
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**E. PENGELE**  
**HIGH COURT JUDGE**