

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2012/HPC/584**

(Civil Jurisdiction)

**IN THE MATTER OF:** ORDER XXX RULE 14 OF THE HIGH COURT  
RULES CHAPTER 27 OF THE LAWS OF ZAMBIA

**AND**

**IN THE MATTER OF:** AN APPLICATION FOR DELIVERY OF  
POSSESSION OF STAND NO. 1484 CHELSTON,  
LUSAKA TO THE APPLICANT AS LEGAL  
MORTGAGEE WITH POWER OF SALE TO  
RECOVER DEFAULT AMOUNT OF LOAN AND  
INTEREST THEREON.

BETWEEN:

BOMACH FINANCE LIMITED

**APPLICANT**

**AND**

WILLIAM KANTUMOYA

**DEFENDANT**

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN  
CHAMBERS ON THE 17<sup>TH</sup> DAY OF MARCH, 2014**

*For the Applicant: J. Chibalabala, Messrs Douglas & Partners*  
*For the Respondent: K M Simbao, Messrs Mulungushi Chamber.*

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

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**Cases referred:**

1. Philips v Copping (1935) 1 KB, 15

**Legislation referred to:**

2. The Money Lenders Act, Chapter 398 of the Laws of Zambia
3. The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia
4. The High Court Act, Chapter 27 of the Laws of Zambia

The **Applicant, Bomach Finance Limited** commenced proceedings herein by way of an Originating Summons on the 11<sup>th</sup> day of October 2012 against **William Kantumoya, the Respondent**, seeking the following reliefs:

- 1. The Respondent pays the accrued sum of K64,050.40 together with interest at the agreed rate,**
- 2. That the Respondent having defaulted on the paying of the principal and interest in respect of the loan granted, the property known as Stand No. 1484 Chelston Lusaka be delivered to the Applicant with power to sell, assign or otherwise dispose of the said property,**
- 3. Costs of the proceedings.**

According to the affidavit in support of the Originating Summons of even date deposed to by **Amisi Mwandezi** the **Credit Manager** in the employ of the Applicant, the parties did in the month of July 2012 enter into a loan agreement in which the Respondent was advanced the sum of K40,000 although no proof of the loan agreement has been exhibited. That the parties agreed that interest was to accrue at the compound rate of 18 per centum per month.

It is further asserted that the parties executed a legal mortgage over **Stand No. 1484 Chelston Lusaka** which was pledged by the Respondent as collateral. Copies of the Mortgage and the Certificate of Title have been exhibited.

Also exhibited is the Statement of Accounts indicating the accrued outstanding amount as at 13<sup>th</sup> day of July 2012 at **K64,050.40**.

According to the Applicant, the Respondent has neglected and or refused to pay the outstanding amount.

At the hearing of the application, Counsel for the Applicant relied on the affidavit in support of the Originating Summons and the exhibits therein

Although there is no affidavit in opposition, Counsel for the Respondent seemed to question whether the Applicant is a financial institution and also the interest being charged to that effect. This being a legal issue, I did indicate that I would take the same into consideration in determining the matter.

A perusal of the record shows that there is no full and proper description of the Applicant on both the Originating Summons and the Mortgage Deed. The closest description as it appears in the Mortgage Deed is that the Respondent is a Company registered in the Republic of Zambia.

It is also not known nor is it disclosed as to what is the nature of the business the Applicant carries on. Further, it is not known whether the Applicant is a Money lender, bank or financial institution.

Legislations such as **The Money Lenders Act<sup>2</sup>**, **The Banking and Financial Services Act<sup>3</sup>** and so forth are meant to capture

those who are in that respective business and to regulate them in the conduct of their business and also to protect members of the public from exploitation by so called shylocks.

However, it's not uncommon in today's world for people to lend each other money even when they are not in that business. And when that happens, indeed the Courts need to step in and look at the legislative limitations and illegality of such transactions whilst at the same time not losing sight of the equitable remedies available.

As **Scrutton LJ** said in the case of **Philips v Copping**<sup>1</sup> on page J15:

**“it is the duty of the court when asked to give a Judgment which is contrary to statute to take the point, although the litigants may not take it. Illegality once brought to the attention of the court overrides all questions of pleadings, including any admissions made therein”.**

Also by failing to exhibit the loan agreement, the Applicant has not provided the Court with the necessary legal backing or provision of the law under which the parties made the transaction.

That despite, it is not in dispute that the Respondent borrowed the sum of K40,000 from the Applicant and subsequently pledged by way of collateral the property in **Stand No. 1484 Chelston**

which was duly registered at Lands and Deeds. Therefore, to let the Respondent off the hook without any recompense to the Applicant would be undue enrichment of the Respondent.

The law to that extent empowers the Courts to administer law and equity concurrently.

**Section 13 of The High Court Rules**<sup>4</sup> states as follows:

*“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently and the Court in the exercise of the Jurisdiction vested in it shall have the power to grant and shall grant either absolutely or on such reasonable terms and conditions as shall seem just all such remedies or reliefs whatsoever interlocutory or final to which any of the parties thereto may appear to be entitled. In respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter so that as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided, and in all matters in which there is conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail”.*

In view of the aforestated, I have no alternative but to interfere on the issue of interest as it does not seem to have any legal backing

and therefore the Applicant is not entitled to it as claimed, but as shall follow in the **Order below**.

In the view that I have taken, **I hereby Order** as follows:

1. That the Respondent shall pay the Applicant the sum of K40,000 together with interest at the average short term deposit rate per annum as determined by Bank of Zambia from time to time from the 11<sup>th</sup> day of October 2012 being the date of commencement of the action to the date of this Judgment and thereafter at the current Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgment debt.
2. The Respondent is hereby granted a moratorium of Sixty (60) days within to pay the Judgment debt together with interest aforesaid failure to which the Applicant shall be at liberty to foreclose, possess and dispose off the mortgaged property namely **Stand No. 1484 Chelston, Lusaka**
3. Costs to the Applicant. Same to be taxed in default of Judgment.

**Dated at Lusaka this 17<sup>th</sup> day of March 2014.**

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Justin Chashi  
**HIGH COURT JUDGE**

