

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2013/HPC/0310

In the matter of: An application for an Order of Foreclosure, Possession and Sale of properties known as Lot No. 37725/M, Ndola and Subdivision B of Lot No. 16609/M Chibombo which were subject of Legal Mortgages between the Applicant and Respondent as security for a repayment of Loans

In the matter of: Order 30, Rule 14 of the High Court Rules

BETWEEN:

INTERMARKET BANKING CORPORATION ZAMBIA LIMITED

APPLICANT

AND

COURTYARD HOTEL LIMITED

RESPONDENT

BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC AT LUSAKA IN CHAMBERS

For the Applicant:

Mr. R Ngulube
Tembo Ngulube Associates

For the Respondent:

Mr. J Zimba
Makebi Zulu Advocates

JUDGMENT

List of authorities referred to:

1. Order 30 Rule 14 of the High Court Rules Cap 27 of the Laws of Zambia
2. Statutory Instrument No. 142/1996
3. Ecobank Zambia Limited Vs ZCON Construction Company & 4 Others

This is the Applicant's application for an Order of Foreclosure, Possession and Sale of Properties known as Lot No. 37725/M, Ndola and Subdivision B of Lot No. 16609/M, Chibombo which were subject of a Legal Mortgage between the Applicant and Respondent as security for repayment of loans availed to the Respondent by the Applicant.

The Application was brought Pursuant to **Order 30 Rule 14 of the High Court Rules Cap 27 of the Laws of Zambia**, claiming the following reliefs:-

1. An Order for payment of the Outstanding Loan of ZMW6,272,799.36 by the Respondent.
2. An Order that should the Respondent fail, neglect or refuse to pay the aforementioned monies, the Legal Mortgages created by the Respondent in favour of the Applicant in respect of Lot No. 37725/M, Ndola, Copperbelt Province, and Subdivision B of Lot No. 16609/M, Chibombo, Central Province, be enforced by an Order of Foreclosure, vacant possession and sale thereof.
3. An Order for the enforcement of the Second Debenture over all the Respondent's assets and appointment of a Receiver for the purposes of enforcing the said Debenture which has priority over all other debentures save a debenture in favour of First Alliance Bank for ZMW3,000,000.00 and US \$600,000.00.

4. Payment of interest rate at the agreed rate of 30% compounded per annum on the monies stated in one (01) above.
5. Further or other relief that the Court shall deem fit.
6. Costs.

On 5th September, 2013 the Respondent filed an affidavit in opposition to the Originating Summons.

In the said affidavit in opposition deposed to by one **Ayub Mulla** the Respondent does not dispute owing the Applicant some monies; save that the amount of ZMW 6,000.00 alluded to in the affidavit in support of the Originating Summons had been reduced to ZMW 5,654.062.01 by the payment of ZMW 2,705,500.00 and that the interest rate applicable on the remainder was now 24%. The Respondent further stated that the amount claimed by the Applicant needed to be reconciled to ascertain the correct amount outstanding. The Respondent requested the Court to Order that the loan account be reconciled and a statement given to the Respondent, as well as all transfer copies indicated on the statement.

On 20th September, 2013 the Applicant was granted Judgment on Admission in the sum of K2,948,562.10.

Therefore this Judgment relates to the disputed amount.

In support of the application the Applicant relied on the affidavit in support to the Originating Summons, and affidavit in reply to the affidavit in opposition to the Originating Summons filed on 26th November, 2013.

The Applicant further relied on the affidavit verifying an account filed on 31st October, 2014.

Mr. Ngulube for the Applicant submitted that the Statement of Accounts which is Exhibit “BM1” shows that the Respondent’s accounts had a total debit of K27,996,660.08 against the Credit sum of K20,317,005.00, leaving an outstanding balance of K7,679,654.62 which is the amount the Applicant seeks to recover from the Applicant, less the admitted sum, by way of the Judgment on Admission in the sum of K2,948,582.00.

With regard to the argument raised by the Respondent in the affidavit deposed to by one **Sandisiwe Njovu**, to the effect that the Applicant was not supposed to charge interest over 18.25% in view of the **Bank of Zambia Circular No. 25/2012**, **Mr. Ngulube**, argued that the interest cap of 18.25% as contained in the said Circular did not affect loans that were contracted before 21st December, 2012, and that this Circular affected loans after the date of the Circular.

In reference to the Respondent's argument that after the loan became none performing on or about 2012, the Applicant should have stopped charging interest, **Mr. Ngulube** stated that, that is not the Law.

He referred the Court to that **Statutory Instrument No. 142/1996** relating to none accrual loans, and that the effect of the Statutory Instrument is not to freeze the interest but to merely separate interest from the principal sum. He referred the Court to Cause No. 2011/HPC/0611, a Judgment of my Learned brother Judge A. M. Wood on the interpretation of **Statutory Instrument No. 142/1996**.

At the hearing of the Originating Summons the Respondent did not appear either by itself or Counsel. I proceeded to hear and determine the matter on the basis of documents filed herein.

I have considered the affidavits, and list of authorities filed herein. The Respondent has not denied that it was availed a loan facility by the Applicant, on or about December 2010, and that the said loan facility was secured by a Mortgage over the Respondent's property namely Lot No. 37725/M, Ndola, as evidence by Exhibit "BB7-15", a copy of the Legal Mortgage.

The Respondent's loan facility was further refinanced by the Applicant by provision of further finance in the sum of ZMW 6,000,000.00, and interest rate agreed at 30% compounded per annum. Further security for the refinancing was provided by a Second Debenture over all the Respondents assets and a

Legal Mortgage over the Respondent's property being Subdivision B of Lot No. 16609/M, Chibombo as evidenced by Exhibit "BB16-24", copies of the said second debenture and Legal Mortgage.

According to **Mr. Ngulube** for the Applicant, the outstanding balance on the Respondent's account according to Exhibit "BM1" is K7,679,654.62 and this is the amount which the Applicant now seeks to recover from the Respondent, less the admitted sum as indicated in the Judgment on Admission herein.

The record shows that the Respondent does not dispute that it owes the Applicant some monies. The Respondent's only contention as indicated in its affidavit in opposition to the affidavit in support of Originating Summons is that (paragraph 9) the loan account could not balance and as at the date of filing the affidavit the bank had failed to provide copies of the original instructions of the electronic transfers that were done over the period 2010 to 2011 and that there is need to properly consolidate the loan account so as to determine the balance as at the date of the originating process.

As the Respondent does not dispute owing the monies and is clearly in default of its repayment obligations, the Applicant is entitled to Judgment on the outstanding balance being K7,679,654.62, less the admitted sum as indicted in the Judgment on Admission.

With regard to the Respondent's argument that the Applicant was not supposed to charge interest above 18.25% in view of the Bank of Zambia **Circular No. 25/2012**, I have noted that the said Circular provided that:-

“These conditions will apply to new Loans while existing loans will be allowed to run their course on the current terms unless refinanced”.

The loan the subject of these proceedings was granted in December 2010 and refinanced on 13th June, 2012. The Circular was issued on 21st December 2012. Therefore the interest of 18.25% does not apply to the subject loan.

With regard to Respondent’s proposition that the Applicant should have stopped charging interest after the loan became none performing in 2012, **Mr. Ngulube** referred the Court to **Statutory Instrument No. 142/1996**, stating that the effect of the Statutory Instrument was not to freeze the interest rate but merely to separate interest from the principal sum. He also referred the Court to Cause No. 2011/HPC/0611, a case before my brother Judge A. M. Wood, **ECOBANK ZAMBIA LIMITED VS ZCON CONSTRUCTION COMPANY & 4 OTHERS** in which Judge Wood had occasion to interpret the effect and meaning of **Statutory Instrument No. 142/1996**. I agree with **Mr. Ngulube’s** submission that part of the effect of the Statutory Instrument is to separate interest from the principal; in so far as an account has acquired a non-accrual status. I take particular note of Part III of Statutory Instrument No. 142 of 1996. It is without doubt that the loan under consideration ought to have been transferred to non-accrual status when the collectability of principal and interest became doubtful. Thereafter Regulations 8, 9 and 10 became applicable to the loan. That is to say all previously accrued and uncollected interest taken into income shall be reversed at the latest by the end of the quarter in which the loan was placed in non-accrual status interest. The

sum total of the above regulations is to freeze the interest on the loan until it is restored to accrual status; otherwise the provisions of Regulations 7, 8, and 9 would be superfluous and serve no purpose. I therefore agree with the Respondent, the Respondent was not entitled to charge interest after the loan became a none-performing loan.

Having found that this is a loan that should have been placed in a non-accrual status, it follows that thereafter the loan should be treated in accordance with Regulations 8, 9 and 10.

With the above in view, I am not persuaded by **Mr. Ngulube's** submission that Statutory Instrument No. 142/1996 does not freeze interest. In my view the process in **Regulations 7, 8, 9 and 10** by necessary implication results in a moratorium on interest until the loan is restored to accrual status as envisaged by Regulations 10 and 11.

On the evidence on record and in view of my findings above, I consider that the interest of justice would be served to determine exactly what is currently owed by the Respondent, taking into account the fact that Part III of Statutory Instrument No. 142 of 1996 especially Regulations 7, 8 and 9 apply to this loan.

ORDER:-

1. I order that the loan account as claimed by the Applicant be reconciled to reflect the non-accrual status of the loan and a statement be provided to the Respondent; together with the original instructions of electronic transfers that were done over the period 2010 to 2011, and consolidate the loan account so as to determine the balance as at the date of the originating process, clearly indicating the balance after taking into account the period the loan was in non-accrual status.
2. I enter Judgment in favour of the Applicant on the amount outstanding after the reconciliation consolidation as above.
3. The Respondent shall pay the Judgment sum with interest as above within six (06) months from the date of this Judgment. In default the Applicant shall be at liberty to exercise its power to Foreclose and Sale the Mortgaged Property(s) in satisfaction of the amount remaining outstanding. Should the sale proceeds of one property fail to pay the full Judgment Debt then, only shall the Applicant exercise its power of Sale on the second property. The Respondent shall determine which property shall be availed for sale first. The second Mortgaged Property shall only be sold if the 1st property shall prove insufficient to pay the Judgment Debt in full.
4. Should the sale proceeds of both properties fail to extinguish the Judgment Debt, after sale of the two (02) properties, the Applicant shall be at liberty to enforce the Debenture herein.

5. Costs shall be in the Cause.

Right to Appeal granted.

Dated this...^{24th}.....day of^{April}.....2015.



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Prisca M. Nyambe, SC
JUDGE