IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0069**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: **An Application under Order 30 Rule 14 of the High Court Act Chapter 27 of the Laws of Zambia**

IN THE MATTER OF: **The property comprised in a Credit Facility relating to Plot No.1192, Kitwe in the Copperbelt Province of Zambia in the name of Justine Lombe**

IN THE MATTER OF FORECLOSURE POSSESSION AND SALE OF MORTGAGED PROPERTY

BETWEEN:

FIRST NATIONAL BANK ZAMBIA LIMITED **APPLICANT**

AND

NEUTRON SYSTEMS LIMITED **1ST RESPONDENT**

JUSTINE LOMBE **2ND RESPONDENT**

Before Hon. Mr. Justice Nigel K. Mutuna this 11th day of June, 2015

For the Applicant: **Mr. Moono, In House Counsel for the Applicant**

For the Respondent: **N/A**

J U D G E M E N T

Cases referred to:

1) *Stanely vs. Wilde (1899) C.A. 474*
2) *Reeves Malambo vs. Patco Agro Industries Limited SCZ No.20 of 2007*
3) *Kasengele vs. ZANACO*
4) *Burnett vs. Westminster Bank (1966) 1QB 742*

Other authorities:

High Court Act, Cap 27

The Applicant, First National Bank Zambia Limited, commenced this action on 18th February 2015, by way of originating summons in support whereof is an affidavit.

The relief as endorsed on the originating summons is for:

(a) payment of all moneys due to the Applicant from the First Respondent in the sum of K362,863.02 as at 6th January, 2015;

(b) order of foreclosure, possession and sale of property known as plot number 1192, Kitwe mortgaged to the Applicant by the Second Respondent by way of a third party mortgage to secure the loan advanced to the First Respondent by the Applicant;

(c) an order for enforcement of the guarantee/suretyship signed by the Second Respondent;

(d) and costs and interest.

In response to the originating process, the First and Second Respondents caused to be filed an affidavit in opposition. The Applicant responded to this affidavit by way of an affidavit in reply.

The evidence in support of the application was led by one Euphrice Kombe. It revealed that he is employed by the Applicant as manager, ongoing risk management in the credit department. That the Applicant on 6th May 2010 extended to the First Respondent a credit facility by way of an overdraft in the sum of K650,000,000.00 (K650,000.00 rebased). The said loan was restructured into a term loan facility in a like sum by agreement of the parties by way of facility letter dated 15th March, 2012 (see exhibits EK1 and EK2).

The evidence revealed further that it was a term of the facility that interest would be charged at the Applicant's base rate prevailing from time to time (which at the material time was at 16%), plus a 2% margin. It was also agreed that interest would be calculated: on the basis of a 365 day year irrespective of whether or not the year in question was a leap year; on a daily balance owing under the facility notwithstanding that such balance may have been increased by the debiting of interest to such balance; on accrual on a day to

day basis; by debiting the First Respondent's account held with the Applicant monthly in arrears; on the basis of compounding on a monthly basis.

As regards the security, the evidence revealed that the facility was secured by a third party legal mortgage over plot number 1112 Kitwe and made between the Applicant and the two Respondents. See exhibits EK3 and EK4. A further security by way of an unlimited suretyship guarantee was also provided by the Second Respondent by which he bound himself unequivocally to settle all debts owing by the First Respondent to the Applicant. See exhibit EK5.

As regards settlement of the loan, the evidence revealed that the First Respondent undertook to make equal monthly instalments over a period of thirty six months from the draw down date. The said monthly instalments were to be made with interest and capital repayments being serviced monthly from the draw down date. Further that, the First Respondent has defaulted in that it has not abided by its undertaking to service the loan on a monthly basis and its account is in arrears. This is notwithstanding the fact that the Applicant has sent several reminders to the First Respondent requesting it to service the loan. See exhibits EK6 and EK7, the latter being a copy of the First Respondent's statement of account.

The evidence in opposition was deposed by the Second Respondent the managing director of the First Respondent. It revealed the following facts: that he did not agree with the Applicant on the details of the loan facility in the third party mortgage; that the third party mortgage was based on the terms agreed upon by the parties in the credit facility dated 6th May 2010 and not the loan agreement dated 15 March 2012 marked EK2; that the suretyship and guarantee did not extend to the credit facility dated 15th May 2012 but only applied to the one dated 6th May 2010; consequent upon the foregoing, the Applicant has been applying the wrong calculations on interest and therefore the Respondents do not owe the sum of K362,863.02 as alleged; that the Applicant defaulted on the facility letter of 6th May 2010 as it did not advise or consult the Respondent on the fees and charges levied on a monthly basis; as a consequence of these fees the Respondents' indebtedness has

increased without legal justification; and that the Applicant has been charging compound interest contrary to the facility letter dated 6th May 2010.

The evidence in the affidavit in reply restated the contents of the affidavit in support. It also averred that the fees and charges levied were explained to the First Respondent as per exhibit EK2. Further that, prior to restructuring, no compound interest was chargeable and that the same was only chargeable after the restructure.

When this matter came up for hearing on 19th May 2015, counsel for the Applicant was in attendance but counsel for the Respondents was not in attendance. I proceeded to hear the matter nonetheless because the record revealed that counsel for the Respondents had been in attendance at the last sitting and no reasons were given for his absence.

In advancing arguments in favour of the application counsel for the Applicant, Mr. Moono, relied on the affidavit evidence and skeleton arguments. His arguments in the skeleton argument defined the word mortgage as per Lindley J. in the case of ***Stanley vs. Wilde (1).*** He also drew the court's attention to order 30 rule 14 of the ***High Court Act***, which he argued gives this court jurisdiction to hear this matter. Counsel also drew my attention to the case of ***Reeves Malambo vs. Patco Industries Limited (2)*** and argued that the said case recognizes the mortgagee's right to repossess and sell mortgaged property in the event of default by the mortgagor. He concluded by referring to the case of ***Kasengele vs. ZANACO (3)*** and argued that the principle in that case is that inability to pay has never been and is not a defence to a claim.

I have considered the affidavit evidence and arguments by counsel for the Applicant. A careful perusal of the affidavit in opposition reveals that the Respondents are not denying that they are in default. I make this finding because there is no statement or contention whatsoever made in the said affidavit which is to the effect that the First Respondent has been servicing the loan promptly on the agreed dates. The bone of contention appears to be as follows:

1) *Whether the third party mortgage was premised on the facility letter of 6th May 2010 and not the one dated 15th March 2012;*
2) *Whether or not the suretyship and guarantee executed only related to the facility letter of 6th May 2010 and not the one of 15th March 2012*
3) *Whether or not the Applicant complied with the provisions of the facility letter and advised and or consulted the First Respondent before charging various monthly charges and fees:*
4) *Whether or not the parties agreed on the charging of compound interest;*

The answer to the foregoing issues lies in the genesis of the loan account which has been explained partly in the affidavit in support of this application. The evidence as I have stated in the earlier part of this judgment shows that the Applicant extended an overdraft to the Respondent on 6th May 2010 in the sum of K650,000.00. This is evident from exhibit EK1 to the affidavit in support. Clause 1.1 of the said exhibit confirms that the amount of the overdraft facility was K650,000,000.00 (now rebased to K650,000.00) and its purpose was to finance working capital. Further, the Second Defendant accepted the facility by signing on it as managing director of the First Respondent. The facility letter at clause 5.2 provided for interest to be at the Applicant's prime rate which on 6th May 2010 stood at 18% per annum plus 1%. As regards the fees, the facility letter provided thus:

> *"Fees such as commissions, interest and any other charges may be introduced under advice to yourselves are not linked to the term of the facility and remain subject to change at any time under written advice (such as statement message) or after consultation."*

(See clause 5.2)

Soon after the facility letter was signed and on 20th May 2010 the parties entered into a third party mortgage deed which effectively secured the loan by way of a mortgage over stand number 1192 Kitwe. The third party mortgage is exhibits EK3 to the affidavit in support. A perusal of the third party mortgage indicates that there is no clause on interest. However the parties having executed a facility letter on 6th May 2010, which formed the basis of

their relationship, I find that the interest ruling was that reflected in the facility letter dated 6th May 2010. The parties relationship as regards interest and other provisions which were not contained in the mortgage deed was governed by the facility letter of 6th May 2010. This is the case with the suretyship, which was executed on 7th June 2010, a month after the facility letter of 6th May 2010. See exhibit EK5 to the affidavit in support.

Subsequently on 15th March 2012, the parties entered into an agreement they termed a *"restructure to facility"*. This is EK2 to the affidavit in support. The preamble to the said agreement and clauses 1 and 2 state as follows:

> *"First National Bank Zambia Limited Registration Number 2008/72041/(hereinafter called "the Bank") has agreed to restructure facilities previously granted to Neutron Systems Limited Registration Number 51195 (hereinafter called "the borrower") as follows:*

1. *The facility*

Type of facility	***Limit***
Term Loan	*ZMK 650,000,000 (Zambian Kwacha six hundred and fifty Million only)*

2. *Purpose*

   Restructuring of overdraft facility into a Term loan".

In my considered view, it is clear from the foregoing that the intention and indeed the effect of this agreement was that it restructured the loan given to the First Respondent pursuant to the facility letter dated 6th May 2010. It therefore, replaced the facility letter dated 6th May 2010 by consent of the parties and extinguished it. Further all the terms and conditions included in the this new agreement termed, restructure to facility, became applicable to the loan in terms of the interest rate (see clause 4.1), arrangement and legal fees clause 4.2 and 4.3. There is an abundance of authorities that the parties can vary or replace terms of a contract or a contract as a whole as long as they agree to do so and evidence their agreement in writing. This is what happened in this case as is demonstrated by the background I have recounted

in the earlier part of this judgment. Therefore, the interest rate agreed upon and to be applied on 15th March 2012 and post is that as alleged by the deponent to the affidavit in support. This rate of interest was to be: the Applicant's base rate, (which at the time was 16%) plus an additional 2%; calculated on the basis of 365 day year; on the daily balance owing notwithstanding that such balance was increased by the debiting of interest to such balance; on a day to day basis; debited from the First Respondent's account; and compounded. Prior to 15th March 2012 it was as reflected in clause 5.2 of the facility letter of 6th May 2010.

As for the securities, these were already concluded and put in effect soon after the facility letter dated 6th May 2010 was signed. In answer, therefore to the issues (1) and (2) raised at page J5 hereof, the third party mortgage was premised on the facility letter of 6th May 2010. However, this changed on 15th March 20112 with respect to the prevailing interest rate and mode of charging interest by virtue of the restructure to facility.

I have perused the statement produced by the Applicant as exhibit EK7 to the affidavit in support. The statement reveals that interest charged varied from 28% to 17 to 25% between May 2010 and March 2012. This is the period when interest was pegged at the Applicant's prime rate plus additional 1% as per the facility letter of 6th May 2010. There is no correspondence showing that at the time the rate went up to 28% the Applicant's prime rate was 27%. Further, the statement also shows that during the same time, the Applicant charged honouring fees, monthly account fees, service fees and cash handling fees. There is no correspondence to show that prior to charging the said fees the Applicant advised the Respondents as per clause 5.2. of the facility letter of 6th May 2010. As regard the period 15th March 2013 and post, the statement indicates that the interest charged ranged from the rates of 18% (which was 16% plus 2%) to 19%, 20.75%, 21.75%, 22.25% and back to 18% and at one point lower than 18%. This was in accordance with the discretion that the Applicant held to vary interest rates and method of calculation of the interest rate in accordance with the rider to clause 4, of EK2 which states as follows:

> *"The Bank reserves the right to amend the interest and the method of calculating it at any time in line with market conditions. If it does so, written advice of the amendment and its effective date will be sent to the Borrower within a reasonable time".*

In my considered view, the various fluctuations in the interest rate I have alluded to above are a consequence of the Applicant adjusting its prime rate only. This it was entitled to do. However, there is no evidence to show that in accordance with clause 5.2 of the facility letter of 6th May 2010 and the rider to clause 4.1 of the restructure of facility it informed the Respondents of the adjustment to the rate of interest by way of written notice. The Applicant having failed to do so, the net result is that all adjustments are of no effect for being in contravention of clause 5.2 and the rider to clause 4.1. Parties to a contract are held strictly to the terms and conditions of their contract and must strictly abide by the four corners of their contract. In clauses 5.2 and 4 the parties agreed on the manner of charging interest, its rate and when and how the rate would fluctuate. The Applicant was therefore required to strictly adhere to the said agreement.

As regards fees and other charges, the only fees that were agreed upon are those in clause 5.2 of the facility letter of 6th May 2010 and clauses 4.2 and 4.3 of the restructure to facility agreement "EK2". These are commission, a one off arrangement fee and legal fees. The one off arrangement fees are fees commonly charged by banks and are incidental to offering and disbursing any loan. It is at this stage that they are charged and not throughout the life of a loan. The latter fees being, legal fees are as defined in clause 4.3 incidental to *"the preparation, registration and or discharge of security ..."*. They are therefore charged at the beginning and at the point of discharging the mortgage. They are also not charged in perpetuity. I have perused the statement of the First Respondent's account exhibited as EK7. From 21st April 2012 to 15th December 2012 a monthly admin fee of K20,000 was debited from the First Respondent's account (see pages 1 to 7 of EK7). This charge was rebased to K20.00 from 15 March 2012 onwards. In view of what I have said about the charges that were agreed upon by the parties I see no basis for

the charging of the said fee and accordingly find that the charge is not permissible. This is the same with the honouring fees, monthly account fees, service fees and cash handing fees charge prior to 15th March 2012, because the charging did not comply with clause 5.2. The need to inform the Respondents before the alteration of interest and charging of fees is reinforced by the decision in the case of ***Burnett vs. Westminster Bank Ltd (4)*** in which it was held at page 749 as follows"

"The question which arises is: how may that relationship of banker and customer be changed? First, by express agreement, e.g. by superimposition of a special agreement, as when the issue of a documentary credit is applied for by the customer; it is normal in such circumstances to get the customer's signature to the form of application.

When there is such a new arrangement and the customer has signed the application, then obviously he is bound, but when the bank wishes for its own reasons to impose a new term on the banker-customer contract, it must do so in such a way as to leave no possible doubt, and it cannot do so unilaterally. The bank's duty in this regard is fourfold: (i) to advise the customer of the new term; (ii) to ensure that that advice is received by the customer; (iii) to ensure that the customer understands the consequences of failure to comply with whatever he is asked to do and that the bank will not be responsible if he fails to comply. The variation of the contract thus requires knowledge and consent on the part of the customer, and possibly also consideration. It is doubtful wither the mere continuance of the banker-customer relationship constitutes such consideration."

In the instant case the Applicant and Respondents had an agreement as to how interest would be charged and its basis. Also what rates would be acceptable. Any departure from such agreement had to have the agreement of all the parties. This is the case with the fees.

In answer therefore to issue (3) raised at page J5 I find that the Applicant did not comply with the provisions of the facility letter of 6th May 2010 and restructure of facility of 13th March 2012, because it neglected to inform the

First Respondent when it adjusted the interest rates and charged fees that were not agreed upon.

As regard issue (4) in terms of clause 5.2 of the facility letter dated 6th May 2010, the Applicant was not entitled to charge compound interest between 6th May 2010 and 15th March 2012. However, the Applicant is entitled to charge compound interest in accordance with clause 4.1 (e), of the restructure of facility dated 15th March 2012 from 15th March 2012 onwards.

Arising from the findings I have made in the preceding paragraphs I order and direct as follows:

1) *The Applicant should recomputed the amount owing by the First Respondent by charging interest at its prime rate ruling at the time of 18% plus 1% and from 6th May 2010 to 15th March 2012. Any fluctuations in the rate must only be allowed and included if evidence is available that the First Respondent was notified in writing of the fluctuations. For the period 15th March 2012 to date, the Applicant must charge interest at the fixed rate of 16% plus 2% (unless it can show that the First Respondent was notified of the change in the interest rate) additionally interest should be calculated in accordance with clauses 4.1(a), (b), (c), (d) and (e) of the restructure to facility. This must be done within 10 days of the date of this judgment.*
2) *In both periods i.e. 6th May 2010 to 15th March 2012, and post 15th March 2012 to date, all charges and fees that were not agreed upon or notified in writing to the First Respondent should be excluded in the computation.*
3) *After recomputing the amounts as in 1 and 2 above, the same should be presented to the Respondents for their comments, if any, which should be made within 10 day of receipt of the recomputed amounts from the Applicant.*
4) *After the Respondents have had sight of the recomputed figures and on expiry of the 10 days in 3 above, I direct that the Respondents should settle the amount found to be due plus interest within 60 day of the expiry of the 10 days failing which the Applicant will be at liberty to apply to*

this court for entry of judgment and enforcement of its rights under the third party mortgage and suretyship.

5) *As regards costs, in view of the fact that the Applicant has substantially succeeded in this application, I award it costs, the same are to be agreed, in default taxed.*

Dated this 11th day of June, 2015.

NIGEL K. MUTUNA
HIGH COURT JUDGE