

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

2014/HPC/0357

IN THE MATTER OF: ORDER 30, RULE 14 OF THE HIGH COURT RULES AND ORDER 88 RULE 1 OF THE SUPREME COURT OF ENGLAND 1999, EDITION

IN THE MATTER OF: THE THIRD PARTY MORTGAGE AND FURTHER CHARGE OVER STAND NO. 416, KITWE.

BETWEEN:

AFRICAN BANKING CORPORATION
ZAMBIA LIMITED (T/A **BancABC**)

APPLICANT

AND

CHAT MILLING COMPANY LIMITED

1ST RESPONDENT

GOODWARD MULUBWA

2ND RESPONDENT

CHAT MILLING (KITWE) LIMITED

3RD RESPONDENT

SWIFT MILLING LIMITED

4TH RESPONDENT

SWIFT CARGO SERVICES LIMITED

5TH RESPONDENT

Before the Hon. Mr. Justice Justin Chashi in Chambers on the 3rd day of June 2015.

For the Applicant: N B Chanda (Mrs) Messrs AM Wood and Company

For the Respondents: M M Haimbe, Messrs Sikamba Legal Practitioners

R U L I N G

Cases referred to:

1. Sunday Kawaya v First Alliance Bank Zambia Limited - SCZ/8/208 of 1997(unreported)

2. The Supreme Court Practice (White Book) 1999

On the 9th day of December 2014, I delivered a Judgment in favour of the Applicant in the sum of **K6, 602,774.00** together with interest. In the said Judgment, I gave the Respondents a moratorium of 120 days within which to pay the Judgment debt.

The reason for doing so was that the outstanding indebtedness was not disputed, save that the Respondents needed more time to allow them exercise their equity of redemption.

The Respondents then did nothing during the moratorium. It is evident that they waited until the expiry of the moratorium and then filed an application for stay of execution and settlement of the Judgment debt in installments, which application was filed on the 7th day of April 2015.

It is this application which is now before this Court for consideration. The application is accompanied by an affidavit in support deposed to by Oscar Twelesi, the 1st Respondents Management Accountant and Skeleton arguments. The gist of the application is that the 1st Respondent has not been operating since October 2014 due to maintenance and repair works that were being carried out at the mill, although this assertion was not disclosed through affidavit evidence at the hearing and would in my view seem to be a complete afterthought.

The deponent has further asserted that the 1st Respondent is in the process of selling Swift Milling Company Limited at Stand No. 337/8/9 Umzilikazi road, Lusaka and that some of the proceeds will go towards settlement of the debt, although a buyer is yet to be found.

According to the 1st Respondent, operations have now resumed and the 1st Respondent being a viable business, once it stabilizes would be able to settle the Judgment debt in monthly instalment of K500, 000.00.

The Respondents application is opposed. In doing so, the Applicant filed an affidavit in opposition deposed to by **Patricia Kalaba**, the **Credit Administration Manager** and Skeleton arguments.

According to the Applicant, the Respondents application is incompetent as the Respondents have not complied with the law they are relying on.

Further that, having been given a moratorium and not having made any use of it, they cannot now be applying for a stay and settlement of the Judgment debt in installments.

It is also, the Applicants position that the Respondents application is in bad faith and is only meant to deny the Applicants the fruits of its Judgment.

In determining the application, I have taken into consideration the affidavit evidence and the parties' respective arguments as well as my Judgment of the 8th day of December 2014.

Order 47 Rule 1 Subrule 3 Rules of The Supreme Court²
under which the application has been made, states that:

“An application made by Summons must be supported by an affidavit made by or on behalf of the applicant stating the ground of the application and the evidence necessary to substantiate them and in particular, where such application is made on the ground of the applicant’s inability to pay, disclosing his income, the nature and value of any property of his and the amount of any liabilities of his”

The requisites of the aforestated provisions of the law being relied upon by the Respondents have not been met. In that respect, I am in agreement with the Applicant’s Counsel, that the application is incompetently before this Court, as this court has not been provided with the first respondent’s evidence of means

However, that notwithstanding, I am compelled to go further and address the other issues before this Court.

As earlier alluded to the Judgment of this Court gave the Respondents a moratorium, during which nothing was done in settling the debt and neither has any payment been made so far ever since despite having resumed operations in April 2015, as alleged by the respondents.

In the case of **Sunday Kawaya v First Alliance Bank Zambia Limited**¹, the Supreme Court has this to say:

“There may be cases where the harshness of an execution and its harmful consequences can be avoided without keeping the Creditor out of his money and while ensuring that the money is recovered within a reasonable period. This facility is not available as a matter of course: the debtor should make out a good case for instalments which can be considered to be a sufficient reason or special circumstances”.

It must be noted from the outset that this is not basically a money Judgment, but a Judgment debt arising out of a mortgage action.

In my view, the Respondents have not shown any seriousness in unduly redeeming the mortgage, if anything they are bent on procrastinating the same without any justifiable nor satisfactory reason. The Respondents have not advanced sufficient grounds

which amount to special circumstances which may render it inexpedient to enforce the Judgment.

This, coupled with the failure by the Respondents to meet the requisite provisions in the law being relied on, in my view makes it an improper case for granting the application for stay of execution of the Judgment and settlement of the Judgment debt in monthly installments.

The application is refused with costs to the Applicant. Same to be taxed in default of agreement.

Delivered at Lusaka on the 3rd day of June 2015.

Justin Chashi
HIGH COURT JUDGE