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**IN THE HIGH COURT FOR ZAMBIA**

**2016/HPC/0089**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(CIVIL JURISDICTION)**



**IN THE MATTER OF : AN APPLICATION UNDER ORDER 30  
RULE 14 OF THE HIGH COURT  
RULES, CHAPTER 27 OF THE LAWS OF  
ZAMBIA.**

**IN THE MATTER OF : THE PROPERTY COMPRISED IN A  
FIRST LEGAL MORTGAGE RELATING  
TO S/D NO. 44 OF S/D "D" OF S/D NO.  
1 OF S/D "A" OF FARM NO. 687  
LUSAKA IN THE NAME OF CRESCENT  
FUTURE KIDS LIMITED.**

**IN THE MATTER OF : FORECLOSURE, POSSESSION AND  
SALE OF THE MORTGAGED PROPERTY**

**BETWEEN:**

**FIRST NATIONAL BANK ZAMBIA IMITED**

**PLAINTIFF**

**AND**

**CRESCENT FUTURE KIDS LIMITED**

**1<sup>ST</sup> RESPONDENT**

**EPHRAIM DAN SIMUKONDE**

**2<sup>ND</sup> RESPONDENT**

**MWEEMBA MUUKA**

**3<sup>RD</sup> RESPONDENT**

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# J U D G M E N T

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***Before the Honourable Mr. Justice W.S. Mweemba in Chambers at Lusaka.***

*For the Applicant : Ms. B. M. Siakumu – in House Counsel – First National Bank (Z) Limited.*

*For the Respondents : Mr. P. Songolo – Messrs Philsong & Partners.*

## **CASES REFERRED TO:**

- 1. Stanley V Wild (1899) 474.***
- 2. Reeves Malambo V Patco Agro Business Industries Limited SCZ Judgment No. 20 of 2007.***
- 3. Kasengele V Zambia National Commercial Bank – SCZ Judgment No.11 of 2011.***

## **LEGISLATION REFERRED TO:**

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 2. Halsbury's Laws of England Volume 32, paragraph 402.***
- 3. Order 88 Rule 5 (13) of the Rules of the Supreme Court, White Book (1999 Edition).***
- 4. Order 21 Rule 7 of the High Court Rules, Chapter 27 of the Laws of Zambia.***

The Applicant First National Bank Zambia Limited by way Originating Summons has applied pursuant to Order 30 Rule 14 of

the High Court Rules, Chapter 27 of the Laws of Zambia against the Respondents for the following reliefs:

1. *Payment of all monies which as at 17<sup>th</sup> February, 2016 stood at K1,580,334.85 plus contractually agreed interest, costs and all other charges due and owing to the Applicant Bank by the 1<sup>st</sup> Respondent under facilities availed to the 1<sup>st</sup> Respondent and secured by a First Legal Mortgage over Subdivision No. 44 of Subdivision "D" of Subdivision No. 1 of Subdivision "A" of Farm No. 687, Lusaka (the Mortgaged Property) property registered in the name of the 1<sup>st</sup> Respondent;*
2. *An Order to foreclose on the Mortgaged Property;*
3. *Delivery of vacant possession of the Mortgaged Property by the 1<sup>st</sup> Respondent to the Applicant;*
4. *An Order of Sale of the Mortgaged Property by the Applicant;*
5. *An Order for the enforcement of the Guarantee/Suretyship signed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents;*
6. *Costs; and*
7. *Any other relief the Court shall deem fit.*

According to the supporting Affidavit sworn by Euphrice Kombe filed into Court on 29<sup>th</sup> February, 2016 the 1<sup>st</sup> Respondent was by Facility Letter dated 22<sup>nd</sup> July, 2013 availed Credit Facilities which included an Overdraft Facility in the sum of K560,000.00. By Facility Letter dated 6<sup>th</sup> December, 2013 the 1<sup>st</sup> Respondent was availed a short term Overdraft/Letter of Credit Facility of K1,000,000.00. By Facility Letter dated 1<sup>st</sup> August, 2014 the 1<sup>st</sup>



Respondent was availed further Credit Facilities which included another Overdraft Facility of K1,000,000.00. By an Addendum dated 20<sup>th</sup> October, 2014 and duly executed by the parties, changes regarding security held under the Facilities were effected.

The interest agreed was at the Bank of Zambia Monetary Policy Rate then 9.75% plus a margin of 9% and later at the Bank of Zambia Monetary Policy Rate of 12% plus the product of a margin of 9% (and a factor then at 1.78) bringing the effective rate of interest to 28%. The interest was calculatable daily on the daily debit balances and charged monthly in arrears. It was to be calculated on a daily basis on debit balances owing under the facilities notwithstanding that such balance may have been increased by the debiting of interest to such balance. The parties further agreed that any interest not covered monthly will be compounded at the aforesaid rate.

As security for the facilities, the 1<sup>st</sup> Respondent executed a First Legal Mortgage over Subdivision No. 44 of Subdivision "D" of Subdivision No. 1 of Subdivision "A" of Farm No. 687, Lusaka. The Legal Mortgage was duly registered at the Lands and Deeds Registry. The facilities were further secured by Unlimited Suretyships/Guarantees provided by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

The Overdraft Facilities were to expire after a period of 12 months from the date of draw down.

The record will show that the Respondents Advocates did not file an Affidavit in Opposition.

The record will also show that on 30<sup>th</sup> March, 2016 the Applicant – filed a Notice of Discontinuance wherein it wholly discontinued the action against the 3<sup>rd</sup> Respondent.

The Applicant submits that the 1<sup>st</sup> Respondent has defaulted on the Credit Facilities and that the Respondents have failed to settle their indebtedness arising out of the Credit Facilities secured by a Legal Mortgage. The definition of a Mortgage as defined by Judge Lindley in the case of **SANTLEY V WILDE (1)** was cited. The said case defined a Mortgage as:

***“A mortgage is a conveyance of land or an assignment of chattels as security for the payment of a debt or the discharge of some obligation for which it is given”.***

It is further submitted that **HALSBURY’S LAWS OF ENGLAND VOLUME 32** at Paragraph 402, states that a mortgage consists of two things, namely a personal contract of a debt and a disposition or charge of the Mortgagor’s estate or interest as security for the repayment of the debt.



Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia empowers the Court to entertain the Applicants application.

The Applicant submitted that as the Respondents have failed and/or neglected to pay the money outstanding, it should be granted the reliefs as claimed. It relied on the case of **REEVES MALAMBO V PATCO AGRO INDUSTRIES LIMITED (2)** where the Supreme Court held that:

*“A mortgagee is at liberty to exercise his right to foreclosure and sell the property in the event of default and failure by the mortgagor to redeem the Mortgaged Property; and that under a legal mortgage by demise, the mortgagee becomes an absolute owner of the mortgage term at law as soon as the day fixed for redemption has past”.*

The case of **KASENGELE V ZAMBIA NATIONAL COMMERCIAL BANK (3)** was also cited. In that case the Supreme Court held as follows:

*“We wish also to comment on the Respondent’s ability or non – ability to pay. There is evidence at page 88 of the record of appeal from DW1, Edward Mutale, the Respondent’s accountant that if the*

***Board had ordered the Bank to pay it was going to be done. Moreover inability to pay has never been and is not a defence to a claim. Neither is it a bar to entering Judgment in favour of a successful litigant”.***

On 1<sup>st</sup> April, 2016 the Respondents filed a Notice to Admit Claim pursuant to Order 21 Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia. The Respondents admitted owing the Applicant K1,580,334.85 only but applied for an Order directing the Applicant to grant the Respondents additional time namely 120 days from the date of the Order and or to suspend any Orders for possession that the Applicant may obtain following these proceedings. For this submission the Respondents learned Counsel cited the discussion at Order 88/5/13 of the White Book, 1999 Edition.

The Summons for an Order for Extension of time within which to settle the Admitted Claim and or suspension of Orders for possession was supported by an Affidavit and Skeleton Arguments dated 1<sup>st</sup> April, 2016.

The Respondents having clearly admitted to owing the Applicant the sum of K1,580,334.85, I accordingly enter Judgment in favour of the Applicant Bank against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the

payment of the sum of K1,580,334.85 as at 17<sup>th</sup> February, 2016 with interest continuing to accrue as contractually agreed.

It is further Ordered that the said sum be paid within sixty (60) days from date hereof.

In the event of default, the Applicant shall foreclose, have vacant possession of the Mortgaged Property namely Subdivision No. 44 of Subdivision "D" of Subdivision No. 1 of Subdivision "A" of Farm No. 687, Lusaka and exercise its power of sale of the property.

In the event that the proceeds from the sale of the Mortgaged Property is not enough to expunge the indebtedness in full, the Applicant shall be at liberty to execute on the 2<sup>nd</sup> Respondent as guarantor.

Costs to the Applicant Bank to be taxed in default of agreement.

Leave to appeal is granted.

Dated the 30<sup>th</sup> day of June, 2016.



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**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**