

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

**(Commercial Jurisdiction)**

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK

APPLICANT

PLC

**AND**

WILLIAM MAZABA

RESPONDENT

**Before the Hon Lady Justice Irene Zeko Mbewe**

*For the Applicant* : *Mrs. N.N Mbao of Messrs Nkusuwila  
Nachalwe*  
*For the Respondent* : *Ms A Matantila of Messrs Ellis and  
Co*

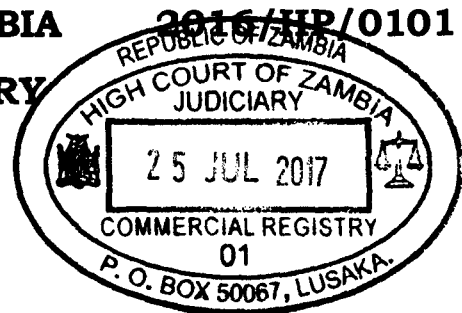
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**JUDGMENT**

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**Cases Referred To:**

1. *Swain v The Law Society* [1981] 3 ALL E R 797
2. *Re Sigsworth (Bedford v Bedford)* [1935] Ch 89
3. *Beresford v Royal Insurance Company Limited* [1938] 2 ALL E R 602
4. *Savenda Management Services Limited v Stanbic Bank Zambia*  
2014/HPC/0076.
5. *Somerset Trust Co Stemberg* 238 N J SUPER 279



6. *Carnegie Bank v Shalleck 256 NJ SUPER 23*
7. *Reeves Malambo v Patco Agro Industries Limited SCZ Judgment No 20 of 2007*
8. *S Brian (Receiver of First Merchant Bank Zambia Limited (In Receivership) v Hyper Food Products*
9. *Farrell v Secretary of Defence 91980] 1 ALL E R 166*
10. *Zambia National Building Society v Ernest Mukwamataba Nayunda SCZ Judgment No 11 of 1998*

The Applicant commenced legal proceedings by way of Originating Summons on 4<sup>th</sup> March 2016 claiming for the following reliefs:

1. Payment of all monies which as at 31<sup>st</sup> January 2016 stood at ZMW549,506.68 plus interest costs and other charges due and owing to the Applicant Bank by the Respondent under a facility-loan agreements dated 7<sup>th</sup> August 2012 and a Mortgage Deed of 2012 over Plot/Stand 834 of 8538 Kamwala/Kabwata in Lusaka owned by the 2<sup>nd</sup> Respondent.
2. Foreclosure
3. Delivery up by the Respondent to the Applicant of the Mortgaged property
4. Sale of the Mortgaged property

5. Any further or other relief the Court may deem fit.

6. Costs.

By way of consent, the parties through their respective Counsels agreed and it was ordered that the matter be deemed to have been commenced by way of writ of summons and a statement of claim.

In the Applicant's statement of claim, it is averred that the Applicant approved a loan facility dated 7<sup>th</sup> August 2012 to the Respondent at the Respondent's instance for the sum of ZMW417,300,000 together with interest (**Exhibit AC1**). That as security the Respondent executed a legal mortgage pledging Stand 843 of 8538 Kamwala/Kabwata, Lusaka to secure the ZMW417,300. and it was duly registered (**Exhibit "AC2"**). It is averred that as at 31<sup>st</sup> January 2016, the Respondent was indebted to the Applicant in the sum of ZMW549,509.68 as per account No 1525324000391 in respect of the said loan facility (**Exhibit "AC-5"**). It is averred that the Respondent has defaulted in his payment obligations and a demand has been made but no payment has been made (**Exhibit "AC-6"**). That the Court grants the reliefs prayed.

The Respondent filed into Court a defence and counterclaim. It is averred that the Respondent denies executing a legal mortgage for the mortgaged property herein and that he only signed a loan application form. It is averred that no legal mortgage has been registered at the Lands and Deeds Registry or any Registry since he did not sign any mortgage deed. It is averred that the Respondent is not indebted in the sum of ZMW549,509.68 as no statement of account was availed to him before any demand was made contrary to law. It is averred that the Applicant through its employees and agents occasioned the alleged default through fraud. According to the Respondent, in respect to the fraud, that on 3<sup>rd</sup> April 2014 the Respondent was deceptively suspended for the second time on the allegation of irregularities not provided in the Applicant's Disciplinary Code and that on 18<sup>th</sup> August 2014 the Respondent was eventually charged with the offence of negligence resulting in loss which charge he had been earlier exonerated by the Applicant's Disciplinary Committee. It is averred that the Respondent was dismissed and lost income from which to repay the loan.

The Respondent made a counterclaim that he has suffered and continues to suffer emotional stress occasioned by the imminent loss of his house and potential payment of rentals. On that basis the Respondent counterclaims an order that the unpaid principal and interest be borne by the Respondent as it occasioned the separation by unlawfully and fraudulently suspending him on a charge that is not in the Applicant's Disciplinary Code and eventually dismissing him on a different charge from the one he had been suspended and exonerated. In the alternative, an order that the Applicant compensates the Respondent by paying him the market value of the mortgaged property due to the inability to repay the loan which inability is caused by the Applicant. The Respondent counterclaims for damages for emotional stress, punitive and exemplary damages, interest on the said sums and damages, any other relief and costs.

In its reply and defence to counterclaim, the Applicant averred that the Respondent executed a mortgage deed with the Applicant and denies having unlawfully determined the Respondent's employment.

At the trial, the Applicant called one witness Edward Nshinga an Assistant Officer in retail recovery under the Department of Special Assets Management Unit in the Applicant Bank. He testified that the Respondent was an employee in the Applicant Bank and served in the capacity of Assistant Manager in the IT Department where he served from 2<sup>nd</sup> January 2007 to January 2015. During his employment, the Respondent obtained three loan facilities namely a house loan for the amount of ZMW417,300, a personal development loan of ZMW74,900 approved on 5<sup>th</sup> August 2010 and car loan of ZMW95,000 approved on 20<sup>th</sup> February 2012. The evidence revealed that the Respondent applied for the house loan on 25<sup>th</sup> July 2012 and approved on 7<sup>th</sup> August, 2012 as shown on page 3-5 of the Applicant's bundle of documents.

PW1 testified that the Respondent's monthly instalment payment was ZMW3,491 for a period of two hundred and forty (240) months. That the house loan was secured by a legal mortgage executed by the Respondent over Stand 843 of 8538 Kamwala/Kabwata, Lusaka. The mortgage was duly registered at Lands and Deeds Registry on the 7<sup>th</sup> September 2012. According to PW1, at

separation with the bank, the Respondent's indebtedness was ZMW499,196.99 out of which the Respondent paid ZMW56,367.55 to offset his motor vehicle loan.

PW1 testified that on 26<sup>th</sup> February, 2015 the Respondent requested the Applicant that he be given a grace period of six (6) months in which to pay the outstanding balance as it was immediately payable on termination of employment, and that the Applicant rejected this request and notified the Respondent accordingly. That the Respondent has failed to make any payments towards the two outstanding loan facilities, and resulting from this failure, the Applicant's Advocates made a demand for payment. PW1 testified that the Respondent's certificate of title is in the Applicant's custody pending full payment of the outstanding loans.

In cross-examination, PW1 in response to how the Respondent was expected to pay back the Applicant since he is not in gainful employment, testified that there are many avenues for available to the Respondent including the sell of the mortgaged property.

The Respondent testified that he applied for a house loan and failed to meet the instalment payment after his employment was terminated at the Applicant Bank. The Respondent is not disputing that he owes the amount and contends that once he is in a position to pay, he will do so.

In cross-examination, the Respondent testified that once a payment plan is agreed to, he can commence payments. The Respondent avers that though he is aware of interest rates changing on termination of employment, he argues that having his employment wrongly terminated, there should be a favourable applicable interest rate.

In the Respondent's written submission, the gist of the submissions is that he has sued the Applicant for wrongful dismissal. Counsel for the Respondent argues that the default in payment of the loan was occasioned by the Applicant, and that the Applicant only took action on 10<sup>th</sup> March 2016 after a period of two years and 8 months had elapsed from the date of the Respondent's suspension. Counsel for the Respondent relied on the defence of acquiescence and laches



and the Court's attention was drawn to the case of **Swain v The Law Society**<sup>1</sup>. Counsel for the Respondent submits that the Applicant slept on its rights to foreclose and made the Respondent believe that it would not enforce its right more so that the Applicant occasioned the Respondent's loss of income resulting in his failure to liquidate the loan. Counsel for the Respondent relied on the case of **Re Sigsworth v Bedford**)<sup>2</sup>, **Beresford v Royal Insurance Company Limited**<sup>3</sup>, **Savenda Management Services Limited v Stanbic Bank Zambia**<sup>4</sup>. Counsel for the Respondent submits that the Respondent is entitled to an order that the unpaid principal and interest be borne by the Applicant as it occasioned the separation by unlawfully and fraudulently suspending him on a fictitious charge. In the alternative, an order that the Applicant compensates the Respondent by paying him the market value for loss of property due to the Respondent's inability to pay. The Respondent argues that the Court defers payment, if any, on the loan pending outcome of the matter in the Industrial and Labour Relations Division.

In response, Counsel for the Applicant contends that it is misleading for the Respondent to allege that there is evidence

relating to the termination of the Respondent's employment by the Applicant in this cause. That the demand by the Applicant has nothing to do with the termination procedure but arises from a mortgage, and the issues of termination of employment is meant to circumvent payment of the loan facility. Counsel for the Applicant argues that the Respondent has the duty and responsibility to repay the loan in the manner convenient to him and in accordance with the mortgage deed, and the remedy of foreclosure has not been challenged. The Court's attention was drawn to the case of **Somerset Trust Co Stemberg** <sup>5</sup>, **Carnegie Bank v Shalleck** <sup>6</sup>, **Reeves Malambo v Patco Agro Industries Limited** <sup>7</sup>.

It is common cause that the Respondent was an employee of the Applicant Bank and during the tenure of his employment applied for a car, house and personal loan. It is common cause that a mortgage was duly created and registered at Lands and Deeds Registry relating to Stand 843 of 8526, Kamwala/Kabwata, Lusaka.

In principle, the Respondent admits owing the Applicant the sum of ZMW549,506.68. The main bone of contention is that the Applicant

caused the Respondent to default in his mortgage repayments due to the wrongful dismissal by the Applicant hence the Applicant is liable to pay the principal and accrued interest. The Respondent has failed to adduce evidence showing that his services were wrongfully terminated.

Counsel for the Defendant in her submissions relies on the equitable defence of laches and acquiescence. On a perusal of the defence and affidavit in opposition to the originating summons and witness statement, I find that there is nowhere in the pleadings where the Defendant pleaded the defence of laches and acquiescence. It is trite that the two must be specifically pleaded and that a Respondent is not entitled to rely upon a defence which is based upon facts not stated in his defence. The Respondent's defence is bereft of concise and sufficient statement on facts on which the defence of laches and acquiescence can be supported. The arguments advanced by Counsel for the Respondent are clearly a departure from the pleadings on record as parties are bound by their pleadings. I hasten to remind Counsel for the Defendant, that Courts have repeatedly emphasised that parties shall strictly

adhere to the rules of pleadings in the conduct of their cases. Pleadings must be sufficient, comprehensive and accurate. (**Farrell v Secretary of State for Defence**)<sup>8</sup>. For purposes of the matter at hand, the authorities cited in relation to the defence of laches and acquiescence are inapplicable and irrelevant.

It is not in dispute that a legal mortgage was created to secure the loan facility. The Respondent in his defence denies executing a legal mortgage. During the trial, the Respondent conceded that a legal mortgage was executed by him and averred that what he was disputing was its registration. The record clearly shows a duly registered legal mortgage, and in my considered view, I find that the Defendant is running away from his obligations created under the legal mortgage. The creation of a mortgage is accompanied by remedies. It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure, delivery up of possession of mortgaged property and sell of the mortgaged property. These remedies are cumulative, and instructive is the case of **S Brian (Receiver of First Merchant Bank Zambia Limited (In**

**Receivership) v Hyper Food Products <sup>9</sup> and Reeves Malambo v Patco <sup>6</sup>.**

The Respondent has gone to great lengths to adduce evidence on the purported wrongful dismissal of his employment resulting in his failure to meet his obligations under the mortgage to which he wholly blames the Applicant. The Respondent contends that the Applicant never prepared and availed him any bank statements regarding the loan and that any demand before and after commencement of this action is contrary to law. Counsel for the Respondent did not cite any authorities to support this proposition. I opine that after the Defendant was suspended and subsequently had his employment terminated, the Defendant was obligated to service the said mortgage. I take the position that whoever secures a loan from a bank under agreed terms is obliged to pay the same, and the lender is mandated to recover the loan in the event of default. In the Applicant's bundle of documents at page 23-26 a statement of accounts as at 14<sup>th</sup> January 2016 is exhibited. I opine that not only is the statement of account sufficient, but it is incumbent upon the Respondent being fully aware of his obligations

and indebtedness to the Applicant to have requested for monthly or periodic statement of accounts. Evidently, this was not done. As regards the amount owing, it is trite that once a mortgagor falls into arrears of monthly instalments, the whole amount outstanding on the loan becomes due and recoverable entitling the mortgagee to the remedies of foreclosure, possession and power of sale.

By way of counterclaim, the Respondent seeks the unpaid principal and interest to be borne by the Respondent as it occasioned the separation by unlawfully and fraudulently suspending him on a charge that is not in the Applicant's Disciplinary Code, and eventually dismissing him on a charge different from the one on which he had been suspended and had been exonerated. In the alternative for an order that the Applicant compensates the Respondent by paying him the market value of the mortgaged property resulting in the loss of property due to inability to pay, occasioned by the Applicant. The Defendant seeks damages for emotional stress, punitive and exemplary damages, interest on the said sum and damages. The issue of damages was explained in the

case of **Zambia National Building Society v Ernest Mukwamataba Nayunda**<sup>10</sup> where the Court stated that:

**"The essence of damages has always been that the injured party should be put as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position not be unjustly enriched."**

The Respondent did not adduce any evidence to support his counterclaim, and in this respect, I can find no basis to award any form of damages.

The Respondent having admitted his indebtedness to the Applicant, I accordingly enter Judgment in favour of the Applicant against the Respondent for the payment of ZMW549,506.68 and interest at the short-term deposit rate from date of Originating Summons to date of Judgment and thereafter at the current lending rate as determined by Bank of Zambia until full payment.

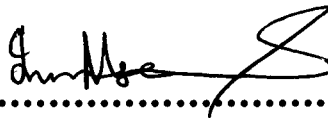
The Respondent is to pay the Judgment debt within sixty (60) days and in event of default, the Applicant is at liberty to foreclose, take possession of the mortgaged property being Stand 843 of 8538 Kamwala/Kabwata Lusaka and exercise the power of sale over the mortgaged property.

In default, the Deed of Transfer shall be executed by the Registrar of the High Court pursuant to Section 14 of the **High Court Act, Cap 27 of the Laws of Zambia.**

Costs awarded to the Applicant and in default of agreement to be taxed.

Leave to appeal granted.

Dated at Lusaka this 25<sup>th</sup> day of July, 2017.



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**HON IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**