

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

2016/HPC/0119

(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK LIMITED APPLICANT

AND

J.MWAMULIMA PROPERTIES IMPORT
& EXPORT LTD

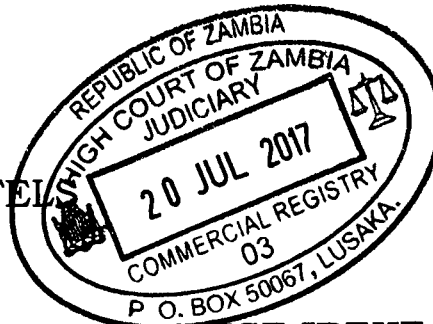
1ST RESPONDENT

JOHN MWAMULIMA

2ND RESPONDENT

QUEENS HILLS HOTEL

3RD RESPONDENT



BEFORE THE HON LADY JUSTICE IRENE ZEKO MBEWE

For the Applicant : *Ms Joy Mutemi of Mesdames Theotis
Mataka and Sampa*

For the 1st Respondent : *N/A*

For the 2nd Respondent : *N/A*

For the 3rd Respondent: *N/A*

JUDGMENT

Cases Referred To:

1. *Reeves Malambo v PATCO SCZ No 20 of 2007*
2. *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited In Receivership v Hyper Food Products [1999] Z.R 124*

3. *Kanjala Hills Lodge, Veronica Namakau Jayetileke v Stanbic Zambia Limited* [2012] 2 Z.R 172

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*

Other Works Referred To:

1. *Halsbury's Laws of England Volume 32*
2. *Mergarry's Manual of the Law of Real Property , Sweet and Maxwell.*

The Applicant by way of Originating Summons commenced this action against the 1st, 2nd and 3rd Respondent claiming for the following reliefs:

- 1. Payment of all sums of money which as at 12th February 2016 stood at ZMW5,132,793.00 on the existing term loan and the sum of ZMW3,049,103.00 on the renewed and enhanced overdraft interest, costs and other charges due and owing to the Applicant by the 1st Respondent.**
- 2. An order that in the true construction of the said loan facility, the rate of interest payable on the existing term loan is 5% margin above the Ruling fluctuating bank base rate then of 19% per annum and at a fluctuating interest base rate of 19% per annum calculated on the daily**

overdrawn balances for the renewed and enhanced overdraft.

3. Foreclosure.

4. Possession of Stand No.4938, Livingstone, a Third Party Mortgage over Stand No.1492, Livingstone Mushily Way, Livingstone, Plot No.937, Nkumbi Way, Livingstone and another First Legal Mortgage over Stand No.2582, Chitimukulu Road, Livingstone, Plot No. 2613/2013, Livingstone and another Third Party Mortgage over Stand No. 5058, John Hunt Way, Livingstone.

5. Sale of the said charged properties.

6. Further or other relief that the court may deem fit; and

7. Costs.

In support of the Originating Summons is an affidavit deposed to by Arnold Chinyama the Senior Manager in the Applicant company. It is deposed that the Applicant by a facility letter dated 22nd December 2010, availed the 1st Respondent with a renewed and enhanced overdraft facility in the sum of ZMW3,000,000=00 at a fluctuating interest base rate of 19% per annum calculated on the daily overdrawn balances and also an existing term loan in the sum of ZMW4,000,000.00 at an agreed interest rate of 5% margin above the Ruling fluctuating Bank's base rate then of 19% per annum. That there was reconstruction of the said overdraft and term loans

on 10th November 2011 and 10th December 2012 respectively, effectively bringing the existing overdraft to ZMW3,000,000.00 at the variance Bank of Zambia Policy Rate of 9.25% plus a margin of 7% per annum and adjusting existing term loan to ZMW3,553,000.00 at the variance Bank of Zambia Policy Rate of 9.25% plus a margin of 12%.

The deponent avers that the said facilities were secured by a Third Party Mortgage over Stand No. 4938, Livingstone and Stand No. 1492, Mushili Way, Livingstone, between the Applicant, the 1st Respondent and the 2nd Respondent, a First Legal Mortgage over Plot No.937, Nkumbi Way, Livingstone and Stand No. 2582, Chitimukulu Road, Livingstone between the Applicant and the 1st Respondent, a Third Party Mortgage over Plot No. 2613/2013, Livingstone and Stand No. 5058, John Hunt Way, Livingstone entered into between the Applicant and the 3rd Respondent (**Exhibit "AC-3"**).

It is the deponent's evidence that the overdraft was to expire on 30th November 2013 whilst the term loan was to be paid on or before 30th April 2014 in equal monthly instalments of ZMW145,000.00.

The deponent avers that the Applicant has the custody of the certificates of title of the respective properties (**Exhibit "AC5"**). That despite the 1st Respondent's undertaking to settle its indebtedness in equal monthly instalments it failed to do so. The deponent avers that the Applicant made a demand for payment of the outstanding amount on the loan and overdraft by way of letters dated 21st May 2013 (**Exhibit "AC-7"**). It is the deponent's evidence that the 1st Respondent's indebtedness to the Applicant is the sum of ZMW3,049,103.89 on the overdraft and ZMW5,132,793.00 on the term loan and that the 1st Respondent has not made any further payment towards settlement of the amount due and owing to the Applicant thus the amount remains as stated above (**Exhibit "AC-8"**).

In opposing the Originating Summons for foreclosure, the Respondents filed an affidavit dated 22nd April 2016 deposed to by John Mwamulima, the 2nd Respondent herein as Chief Executive Office of the 1st and 3rd Respondent Company. The deponent avers that the Originating Summons and supporting affidavit are irregular and an abuse of court process as the Applicant through its

Advocates first attempted to commence a similar action by way of summons to amend defence and supporting affidavit in Livingstone under Cause No. 2015/HL/68. According to the deponent that the said Livingstone action failed as there is another action between the same parties under Cause No.2015/HL/31 which was stayed pending determination of the contempt of court action in the Supreme Court. It is deposed that the Applicant's application for leave to amend defence was dismissed on 30th November 2015.

On the issues raised in the Originating Summons and affidavit in support, the deponent contends that there exists a Consent Order under Cause No.2013/HL/31 in which parties agreed on settlement of the loans and interest thereby liquidating all the outstanding loans with the Applicant. The deponent avers that there is still in force a Stay of Execution dated 19th April 2013 which the Applicant failed to discharge and that the Applicant had advised its Advocates not to proceed with the action for foreclosure as the action under Cause No. 2015/HL/68 restrains the Applicant to do so.

The deponent avers that the Applicant's action is contrary to the terms of the Order of injunction to stay execution and Notice of

Motion for contempt proceedings in the Supreme Court pending determination. According to the deponent, this action by the Applicant is not only irregular but prejudicial to the existing Orders and that this action is a deviation of the Respondents' action as it is covered in clauses 1 and 2 of the Consent Settlement Order. The deponent avers that it is surprising that the Applicant is receiving money from the Government by virtue of the Deed of Assignment of Receivables by Government to liquidate the credit facilities, but continues to charge erroneous interest against the said liquidated credit facilities which in itself is tantamount to mortgage mismanagement.

The deponent avers that it is erroneous for the Applicant to commence this action premised on the reliefs being sought including erroneous charges which according to the deponent is confirmed by the letter from the Bank of Zambia dated 22nd September 2014 (**Exhibit "JM9"**). According to the deponent, that out of the sum of ZMW3,398,846.75 plus interest, the Government has paid ZMW902,211.41 to the Applicant by virtue of the Deed of Assignment of Receivables. In conclusion, the deponent craves the

indulgence of this Court to dismiss the Applicant's action with costs on the basis that it is irregular and an abuse of court process as it is contemptuous and prejudicial to the current similar proceedings before this Court and the Supreme Court.

The Applicant filed an affidavit in reply to the opposing affidavit on 8th August 2016 deposed to by Arnold Chinyama. The deponent avers that the issues raised by the Respondents under paragraphs 5-8 were dealt with by this Court in its Ruling dated 7th July 2016 which dismissed the 2nd Respondent's application to dismiss action for irregularity and abuse of court process. The deponent avers that the Consent Settlement Order (**Exhibit "JM4"**) did not represent an agreement between the parties for settlement of all outstanding loans and that as shown in paragraph 6 of the Originating Summons the overdraft and term loan were secured by mortgages on five (5) properties other than Stand No.5058 Livingstone which is the only property subject to the Consent Settlement Order. Further that the said Consent Settlement Order categorically stated that the execution of the Deed of Assignment of Receivables by the Government would not be construed as a full discharge of the 1st

Respondent's indebtedness to the Applicant and that the received payments would be applied towards reduction of the 1st Respondent's indebtedness while clause 3 of the Consent Settlement Order provided for determination of the 1st Respondent's claim against the Applicant for damages and costs to be determined by trial.

The deponent avers that the Originating Summons shows that the Applicant only received ZMW535,223.41 in the 1st Respondents' overdraft account from the Government on 19th August 2014 and ZMW366,985.00 on 14th April 2015 leaving an outstanding balance of ZMW2,485,808.81 which has accumulated interest and other agreed bank charges which as at 12th February 2016 stands at ZMW3,049,103.89. That in pursuance of the Consent Settlement Order the Applicant provided its account details to First National Bank for payment of ZMW3,000,000.00 but no credit was received in either the 1st Respondent's overdraft account or the loan account whose exposure as at 11th February 2016 stands at ZMW5,132,793.00.

The deponent avers that the ex-parte order to stay execution exhibited in the Respondents' affidavit stayed execution of a Ruling dated 20th May 2016 which declined the 2nd Respondent's application for an interim injunction to restrain the Applicant from interfering with Stand No. 5058 John Huntway, Livingstone pending an appeal and has no bearing on this action. The deponent avers that the Order for stay of execution (**Exhibit "JM5"**) as well as Order of interim injunction (**Exhibit "JM6"**) cannot be sustained on a discontinued matter as the same fell off once the matter was discontinued as provided in the Consent Settlement Order. That the Notice of Motion before the Supreme Court has no bearing on this action as it culminated from the refusal of the High Court Judge to grant leave to the 1st and 2nd Respondent to institute contempt proceedings.

The deponent avers that execution of the Consent Settlement Order was hindered when First National Bank Zambia failed to pay the Applicant the sum of ZMW3,000,000.00 which consequently led to the Applicant failure to honour its undertaking and discharge the mortgage over Stand No.5058, Livingstone. According to the

deponent the said amount remains unpaid and that the interest charged on both the 1st Respondent's account is in accordance with the final restructured facility letter in the affidavit in support of foreclosure (**Exhibit "AC2"**).

From the affidavit evidence, it is common cause that the Applicant availed an overdraft and loan facility to the 1st Respondent in the respective sums of ZMW3,000,000.00 and ZMW4,000,000.00 on 10th December 2010 and the same were restructured on 22nd December 2012 bringing the overdraft to ZMW3,000,000.00 at the rate of 9.25% plus a margin of 7% per annum, and the term loan was adjusted to ZMW3,553,000.00 at the rate of 9.25% plus a margin of 12%. It is also not in dispute that the aforementioned facilities were secured by a number of properties namely Stand No. 4938, Livingstone, Stand No.1492, Mushili Way, Livingstone, Plot No.937, Nkumbi Way Livingstone, Stand No.2582 Chitimukulu Road, Livingstone, Plot No.2613/2013 Livingstone and Stand No.5058 John Huntway, Livingstone. The fact that the overdraft was to expire on 30th November 2013 and the loan was to be paid on or before 30th April 2014 is also not in dispute.

It is not in dispute that a Consent Settlement Order dated 13th August 2014 was entered into in which the Applicant was to issue a letter of understanding to First National Bank Zambia to release the certificate of title relating to Stand No.5058 Livingstone on condition that First National Bank Zambia pays the Applicant a sum of ZMW3,000,000.00 towards reduction of the 1st Respondent's indebtedness to the Applicant. It is common cause that in the Consent Settlement Order it was agreed that execution of the Deed of Assignment of Receivables by the Government shall not be construed as full discharge of the 1st Respondent's indebtedness to the Applicant.

The issue for determination is whether or not the 1st Respondent is indebted to the Applicant. Secondly whether the Applicant is entitled to the reliefs sought of foreclosure, possession and power of sale of the mortgaged properties herein.

For the clarity of issues and due to the various averments by the parties referring to other causes of actions and agreements, the following is the chronology of events in this matter.

The 1st Respondent commenced an action Cause No 2013/HL/31 against the Applicant and two other parties which culminated into a Consent Settlement Order on 13th August, 2014 between the 1st Respondent and Applicant herein. The Consent Settlement Order had the effect inter alia of discontinuing Cause No 2013/HL/31.

Under Cause No 2013/HL/31, the 1st Respondent appealed to the Supreme Court and the Notice of Motion by the 1st Respondent to the Supreme Court under Cause 2013/SCZ/8/375 culminated from the refusal by the High Court on 12th December 2013 to grant leave to the 1st Respondent to institute contempt proceedings against the Applicant after the Applicant reported the 1st Respondent to the Credit Reference Bureau Africa. According to the High Court Ruling of 12th December, 2013, the refusal for leave to commence contempt proceedings against the Applicant was denied on the ground that the 1st Respondent would suffer no prejudice during the determination of the matter on appeal. Cause No 2013/HL/31 was discontinued.

At some point in 2013, an undated Deed of Assignment of Receivables between the 1st Respondent as Assignor, the Ministry

of Finance Represented by the Secretary to the Treasury and the Applicant both as Assignees was entered into. This arose from a Court Judgment dated 8th February 2012 to effect payment of all the net receivable from the Government for payment to the Applicant herein on behalf of the 1st Respondent. The record shows that the said Deed of Assignment of Receivables was not executed by the Secretary to the Treasury.

Following the Consent Settlement Order of 13th August 2014, a second action was commenced by the 1st Respondent against the Applicant herein under Cause No 2015/HL/68 claiming the following reliefs—

- (a) specific damages of K3.0 million occasioned by the Defendant's delay to surrender the certificate of title of Stand No 5058 John Hunt Way, Livingstone to First National Bank Plc who were willing and ready to facilitate funding**
- (b) General damages on account of the Defendant's adverse report on the Plaintiff to the Credit Reference Bureau despite an injunction restraining the Defendants to do so, which damages are in the sum of K16,440,000.00**

- (c) Costs occasioned by the previous action under cause number 2013/HL/31**
- (d) Interest at the current commercial bank lending rate**
- (e) Costs of this action**
- (f) Any other relief that the Court may deem fit.**

The Applicant herein then made an application to amend its defence under Cause No 2015/HL/68 for purposes of including a claim for relief as mortgagees. The application was declined and instead the Court ordered that the Applicant commences a separate action which is the present action.

The 2nd Respondent applied to dismiss the current action for being an abuse of court process and this Court found that the present application is properly before the Court and granted the 2nd Respondent leave to appeal its decision. The 2nd Respondent filed an application for a stay of proceedings pending appeal and the Court in its Ruling of 7th July 2016 declined to grant the Order. The 2nd Respondent proceeded to appeal to the Court of Appeal without leave from this Court, and the appeal was dismissed. The 2nd Respondent then appealed to the Supreme Court against this

Court's Ruling of 7th July 2016 denying the 2nd Respondent an Order to stay proceedings pending appeal. In the mean while, the Originating Summons was heard on 16th January, 2017. On 11th April 2017 the Supreme Court granted an ex parte stay of proceedings pending appeal.

Having set out a summary of the chronology of events prior to this matter, I now turn to the substantive issues before me. The application before this Court is predicated on **Order 30 Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia** which gives this Court the jurisdiction to entertain the Applicant's application and provides as follows:

"14. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the

summons be specified, and as the circumstances of the case may require that is to say -

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee.

The documentary evidence on record shows that the 1st Respondent is not disputing its indebtedness but simply alleging that there is a loan repayment agreement covered in the Consent Settlement Order and Deed of Assignment of Receivables.

In order to discern whether there is a loan repayment agreement between the Applicant and 1st Respondent, it is imperative to revert to the Consent Settlement Order of 13th August, 2014 relied upon by the 1st Respondent which provides as follows:

BY CONSENT of the parties herein IT IS ORDERED as follows:

- 1. That the Plaintiff shall discontinue this action forthwith and that the Defendant shall in consideration thereof issue a letter of undertaking to First National Bank Zambia to release the Certificate of Title relating to Stand No 5058 Livingstone and discharge the registered encumbrances thereon upon First National Bank Zambia paying to the Defendant the sum of K3.0 million (Three Million Kwacha) towards reduction of the Plaintiffs indebtedness to the Defendant.**
- 2. That execution of the Deed of Assignment of Receivables by the Government of the Republic of Zambia (GRZ) shall not be construed as full discharge of the Plaintiffs indebtedness to the Defendant. All payments that will be received by the Defendant from GRZ under the**

Assignment of Receivables shall be applied towards reduction of the Plaintiff's indebtedness to the Defendant.

3. That the Plaintiff claims against the Defendant for damages and costs occasioned from this matter shall be subjected to trial and wholly determined by Court.

The 1st, 2nd and 3rd Respondent argue that the Applicant's application for foreclosure is erroneous and a deviation from the Consent Settlement Order. From a perusal of the said Consent Settlement Order, it is my considered view that the said Order outlines the obligations of the 1st Respondent towards the Applicant in respect of Stand No.5058 Livingstone by the payment of a sum of ZMW3,000,000.00 to the Applicant by First National Bank Zambia in order to reduce the 1st Respondent's indebtedness to the Applicant. The evidence on record shows that the Consent Settlement Order was not complied with hence the retention of the Certificate of Title relating to Stand 5058, Livingstone and the continuation of the mortgaged property as security for the facilities obtained by the 1st Respondent from the Applicant. Overall, I find

that the 1st Respondent cannot rely on the Consent Settlement Order to avoid liquidating its debt with the Applicant.

The 1st Respondent made reference to the Deed of Assignment of Receivables which as earlier stated was not executed by the Secretary to the Treasury even though two payments were made to the Applicant in respect to the 1st Respondent's indebtedness. I wish to dispel the notion by the 1st Respondent that the Deeds of Assignment of Receivables and Consent Settlement Order are an assurance that the Applicant's credit facilities shall be liquidated. I opine from the wording of the Consent Settlement Order, that the Deed of Assignment of Receivables is not to be construed as constituting a full discharge of the 1st Respondent's indebtedness to the Applicant (even assuming that it had been duly executed by the parties therein). What this means is that the 1st Respondent has a continued obligation to settle its indebtedness to the Applicant.

In terms of the relief of foreclosure which the 1st, 2nd and 3rd Respondent dispute that the Applicant is not entitled to, it is trite

that a mortgagee is entitled to relief, and the remedies available to a mortgagee are cumulative. I am guided by the case of **Reeves Malambo v Patco Agro Industries Limited**¹ where the Supreme Court held that:

"A mortgagee is at liberty to exercise his right to foreclose 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 terms at law as soon as the day fixed for redemption has past"

This was further elucidated by the Supreme Court in the case of **S Brian Musonda (Receiver of First Merchant Bank Zambia Limited In Receivership v Hyper Food Products**² where it was held as follows:

"It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure, delivery up of possession of the mortgaged property and sale of the mortgaged property. These remedies are cumulative."

The learned authors of Megarry's Manual of the Law of Real Property at page 474 stated that:

“The right to foreclose does not arise until the legal right to redeem has ceased to exist i.e. until the date for redemption has passed or until breach of a condition which had to be complied with to keep alive the legal right of redemption, once this has happened, the mortgagee may commence foreclosure proceedings”

It is trite that once a mortgage falls into arrears of monthly instalments, the whole amount outstanding on the loan becomes due and is recoverable entitling the mortgagee to foreclosure, possession and power of sale.

In the facility letters dated 10th December 2012, Clause 7.3 which is the default clause provides as follows:

"7.3 If any of the following events occur (The "events of Default") individually and/or collectively, the Bank shall at its sole discretion have the right without

prejudice to other rights available to it, to cancel the credit facilities by the Borrower thereby making all amounts outstanding immediately due and payable, and thereafter claim immediate payment of all such amounts to the Bank."

The above clause empowers the Applicant to immediately call on the overdraft and term loan facility should the 1st Respondent fail to make payments, which in this case it has lamentably failed to do. I am ably guided by the Supreme Court in the case of **Kanjala Hills Lodge v Veronica Namakau Jayetileke v Stanbic Zambia Limited**³ where the Supreme Court held that the mere fact that there is a default clause is a clear indication that the Respondents (as Lenders) were entitled to invoke it on default.

The 1st, 2nd and 3rd Respondent allege that the Applicant is receiving money from the Government by virtue of the Deed of Assignment of Receivables but continues to charge what is being called erroneous interests which is tantamount to mortgage mismanagement. The question that begs an answer in this respect is the agreement

between the parties on the issue relating to the interest rate and payment of interest.

The starting point is to look at the documentary evidence on record. The payment and accrual of the interest is provided under Clause 2 of the facility letter dated 10th December 2012 in respect of both the overdraft of ZMW3,000,000.00 and the loan facility of ZMW3,553,000.00.

Clause 2 on Bank charges in the facility letter of 10th December 2012 provides as follows:

"2.1 Interest

Interest is calculated on the cleared balance of your account at the close of business every day. The cleared balance will not include the value of credits paid in your account which has not been cleared. Details of clearance times and the dates on which interest is either paid or charged can be obtained from your branch."

Overdraft facility - J Mwamulima Properties Import and Export Limited shall pay interest to the Bank at the variable Bank of Zambia Policy Rate plus a margin of 7% (current and initial effective rate of $9.25\% + 7\% = 16.25\%$) per annum calculated on the daily debit or overdrawn balances and payable monthly in arrears by debit to the account.

Loan facility - J Mwamulima Properties Import and Export Limited shall continue to pay interest to the Bank at the variable Bank of Zambia Policy Rate plus a margin of 11.75% (current and initial effective rate of $9.25\% + 7\% = 21.25\%$) per annum calculated on the daily debit or overdrawn balances and payable monthly in arrears by debit to the account.

The Bank of Zambia Policy Rate is currently at 9.25% per annum and is subject to change from time to time which changes are announced by the bank of Zambia

Any interest that is not paid monthly will be compounded at the aforesaid rate."

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

The interest clause clearly stipulates as to how interest shall accrue and how it is to be calculated and paid by the 1st Respondent in respect to the overdraft and term loan facility. In my considered view, I do not see how this amounts to mortgage mismanagement of the interest as alleged by the 1st, 2nd and 3rd Respondent as the parties expressly agreed on how interest shall be charged on the overdraft and term loan facility availed to the 1st Respondent. In my considered view, it is the 1st Respondent's acts of failing and or neglecting to honour their obligations which has resulted in the default.

The Applicant claims for an Order that on the true construction of the said term loan facility, the rate of interest payable on the existing term loan is 5% margin above the ruling fluctuating bank

base rate then of 19% per annum and at a fluctuating interest base rate of 19% per annum calculated on the daily overdrawn balances for the renewed and enhanced overdraft. A perusal of the record shows that the security documents, namely Mortgage Deeds were executed prior to the facility letter of 10th December 2012. In my considered view, the facility letter takes precedent and supersedes any interest rates provided for in the Mortgage Deeds. I therefore have to give effect to the "letter" and "spirit" of the facility letter and as such the parties are bound by its terms. I find that the applicable interest rate for the overdraft is 16.25% whilst the term loan facility is 21.25%, and such other variations will only be applicable if there is proof that the Applicant notified the 1st Respondent in writing pursuant to Clause 2.1 of the facility letter dated 10th December 2012.

In summation, I find that a prudent business entity is expected to make good its obligations and indebtedness. I find that a party in default cannot be allowed to benefit from its transgressions. If Courts were to allow debtors avoid paying their debts, the Banks

will be crippled if not driven out of business. The Courts will not aid any defaulters in their quest to run away from their obligations but will uphold the rights of the Applicant to recover the monies lawfully advanced to the 1st Respondent. It is the duty and responsibility of our Courts to uphold the sanctity of lawful commercial transactions and to ensure that parties to such transactions fulfill their respective obligations.

Another bone of contention by the 1st, 2nd and 3rd Respondent is that the current action is an abuse of court process as there is an Order stay of execution staying execution of a Ruling dated 20th May 2013 which declined the Respondents' application for an interim injunction. I concur with the Applicant that the said Order has no bearing on this action as it arose under Cause No.2013/HL/31 which was discontinued by virtue of the Consent Settlement Order dated 13th August 2014.

The net sum is that I enter Judgment in favour of the Applicant against the 1st Respondent in the sum of ZMW3,049,103.89 and

ZMW5,132,793.00 in respect to the term loan facility and overdraft respectively inclusive of interest as at 12th February 2016.

I further Order and direct as follows:

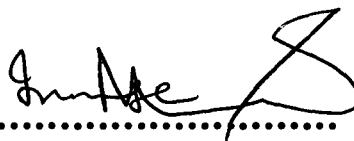
1. For the period from 10th December 2012 to date of Originating Summons, the Applicant shall charge interest at the fixed rate of 16.25% for the overdraft and 21.25% for the term loan (unless it can show that the 1st Respondent was notified of the variation in the interest rate in writing) and such interest shall be calculated in accordance with Clause 2.1 of the facility letter dated 10th December 2012. This re-computation shall be done and notified in writing to the 1st Respondent within fourteen (14) days of this Judgment.
2. The re-computed amount shall attract interest at the short term deposit rate from date of the Originating Summons to date of Judgment and thereafter at the commercial lending rate as determined by Bank of Zambia until full payment.
4. The 1st Respondent shall settle the re-computed amount plus interest within 60 day after receipt of the re-computed amount. In default the Applicant shall be at liberty to

foreclose, take possession of the mortgaged properties namely Stand No.4938, Livingstone belonging to the 2nd Respondent, Stand No.1492, Mushili Way, Livingstone, belonging to the 2nd Respondent, Plot No.937 Nkumbi Way, Livingstone and Stand No.2582 Chitimukulu Road, Livingstone belonging to the 1st Respondent, Plot No.2613/2013, Livingstone and Stand No.5058 John Hunt Way, Livingstone belonging to the 3rd Respondent, and exercise the power of sale without any further recourse to the Court.

4. In default thereof, the Deed of Transfer shall be executed by the Registrar of the High Court in terms of Section 14 of the **High Court Rules, Cap 27 of the Laws of Zambia.**
5. Costs awarded to the Applicant and in to be agreed, and in default taxed.

Leave to appeal is granted.

Delivered this 20th day of July 2017.



.....
IRENE ZEKO MBEWE
HIGH COURT JUDGE