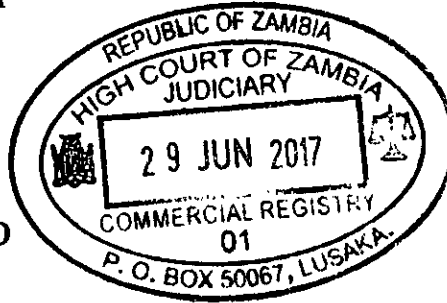


IN THE HIGH COURT FOR ZAMBIA  
IN THE COMMERCIAL DIVISION  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2016/HPC/0335



BETWEEN:

ZAMBIAN HOME LOANS LIMITED

AND

DAILESS MATOKA

APPLICANT

RESPONDENT

Before Hon. Lady Justice Dr. Winnie S. Mwenda at Lusaka this 29<sup>th</sup> day of June, 2017.

For the Applicant:

Mr. L. Mwanabo of Messrs LM Chambers

For the Respondent:

Mr. I. Muluba, Legal Aid Board

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## RULING

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**Cases referred to:**

1. *Kasengele v. Zambia National Commercial Bank Limited, SCZ Judgment No. 11 of 2000.*
2. *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) v. Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One Trading (Z) Limited SCZ Judgment No. 16 of 1999; Appeal No. 18 of 1999*

**Legislation referred to:**

1. *Order 30 rule 14 of the High Court rules, Chapter 27 of the Laws of Zambia.*

Zambian Home Loans Limited, the Applicant herein, filed in Court on 7<sup>th</sup> July, 2016 an Originating Summons and Supporting Affidavit for the determination of the following claims: -

- (i) Payment of all monies which as at 28<sup>th</sup> April, 2015 stood at a total of ZMW409,143.83 plus interest thereon at the agreed rate of 27.5% per annum and other charges due; all secured by a First

- Legal Mortgage over plot No. 2282/F/33a Lusaka, and a Further Charge over the same property;
- (ii) Foreclosure, possession and sale of the said mortgaged property being plot No. 2282/F/33a, Lusaka;
  - (iii) Any further or other relief the Court may deem fit;
  - (iv) Legal costs of and incidental to this action.

Joel Makelele, Head – Portfolio Management and Governance in the employ of the Applicant company, deposed to the Affidavit in Support of the Originating Summons and averred that on or around 27<sup>th</sup> February, 2015, Dailess Matoka, the Respondent herein, was availed a Loan Facility in the sum of ZMW290,000.00 to facilitate construction of residential structures as evidenced by exhibit “JM1” annexed to the Affidavit. It was Joel Makelele’s evidence that the Respondent’s borrowing was secured by a mortgage over plot No. 2282/F/33a situated in the Lusaka Province of the Republic of Zambia registered in the name of Dailess Elizi Matoka. As evidence of the security, copies of the Certificate of Title and Mortgage Deed were exhibited as “JM2a” and “JM2b”, respectively.

On 1<sup>st</sup> July, 2015 the Respondent was further availed a loan facility of ZMW61,511.00 on a Further Charge, bringing the total monies owed to ZMW351,511.00. A copy of the Further Charge was exhibited as “JM3” in the annexures to the affidavit.

Joel Makelele deposed that the Respondent has been breaching her repayment obligations and the Applicant company has effected several demands for the outstanding sum, one such letter of demand having been written on 4<sup>th</sup> May, 2016 and exhibited as “JM4”. It was the deponent’s evidence that despite the demands for payment, the Respondent has failed and/or neglected to settle the outstanding loan amount and that as at 28<sup>th</sup> April, 2015, the loan stood at a total sum of ZMW409,143.83 plus interest thereon at the agreed rate of 27.5% and other charges due and owing to the Applicant Company as evidenced by exhibit “JM5”, being a loan statement.

On the 4<sup>th</sup> October, 2016, the Respondent filed in Court an Affidavit in Opposition wherein she deposed that contrary to the averment by Joel Makelele in the Affidavit in Support, she applied for the loan facility on 27<sup>th</sup> February, 2015 which application was only approved on 7<sup>th</sup> May, 2015 as evidenced by exhibit "DEM1", being a true copy of the loan facility approval letter. That it is therefore, inconceivable that the Respondent could have been given the loan on 27<sup>th</sup> February, 2015 as alleged by the Applicant as she only signed the loan facility approval letter on 8<sup>th</sup> May, 2015 as per the copy of the letter of offer exhibited as "DEM2" annexed to the Affidavit in Opposition.

The Respondent denied breaching her repayment obligations and averred that in the letter of offer of Construction Finance Mortgage (CFM) loan, among the terms and conditions that apply to the home loan facility is the repayment period, which is the maximum construction period plus 10 years. Further, that in the letter of offer, there was a payroll deduction instruction clause under which she authorised her employer to be deducting from her monthly salary the monthly repayment instalments for payment of the loan to the Applicant until the loan is fully paid.

It was the Respondent's further averment that the only demand letter which was sent and which she received was the one dated 4<sup>th</sup> May, 2016 when the Applicant through its advocates, demanded to be paid the principal sum plus interest for the outstanding balance of ZMW409,143.83 plus 10% collection charge within seven days of receipt of the demand letter when in fact the terms and conditions set out in the offer letter provided that the repayment period is the maximum construction period plus 10 years. She exhibited the letter of demand as "DEM3".

It was the Respondent's additional evidence that all payments were made directly from her payroll to the Applicant but that in September, 2015, there was a change in the operation system for the United Nations Secretariat of which the Economic Commission for Africa is part, and payment could no longer be made directly from her payroll as the system could no longer allow

third-party payments, a fact which was brought to the attention of the Applicant.

According to the Respondent, when her employer could no longer pay directly into the Applicant's account, she made efforts to pay into the Applicant's account within five days of the date on which the monthly instalment was due. Further, that with the falling of the exchange rate on the Kwacha currency, the Respondent's net pay was determined by the ruling rate each month. The rate fell below the agreed amount and the monies available were paid to the Applicant. The Respondent exhibited copies of deposit slips as proof of the payments. These were marked as exhibits "DM4". She further deposed that measures to mitigate the issues were communicated to the Applicant including a request to have the headquarters loan repayments reduced and the period extended.

It was the Respondent's further evidence that monthly instalments for October and November, 2015 were not paid due to non-receipt of salary for the two months because being remunerated in United States Dollar, the exchange rate was so low that the loan repayment at headquarters took all the net pay and this was brought to the attention of the Applicant. The Respondent exhibited copies of the statement of earnings and deductions for the months of October and November, 2015 as "DEM5". She denied that she failed, denied, omitted and/or neglected to settle the outstanding loan amount as according to her, the repayment period is the maximum construction period plus 10 years.

When the matter came up for hearing, the Respondent and her Counsel did not show up. After satisfying myself that service of the Notice of Hearing had been effected on Legal Aid Board, the Respondent's advocates, on 22<sup>nd</sup> March, 2017 and an Affidavit of Service had been filed by the Applicant's advocates on 24<sup>th</sup> March, 2017, I proceeded to hear the Originating Summons.

Mr. Mwanabo, learned Counsel for the Applicant, submitted that the Applicant would rely on the Affidavit in Support of the Originating Summons filed together with the Originating Summons on 7<sup>th</sup> July, 2016 as well as the Skeleton Arguments filed on 26<sup>th</sup> July, 2016. That, in addition, the Applicant would rely on the Affidavit in Reply to the Affidavit in Opposition filed in Court on 1<sup>st</sup> March, 2017.

According to Counsel, the gist of the Respondent's opposition to the Originating Summons was in her allegation that there was a delay in dispersing of funds by the Applicant and to that end, referred to exhibits "DEM1" and "DEM2" to show that instead of being disbursed in February, 2015 the loan was disbursed in May, 2015. The Applicant's response in the Affidavit in Reply was that what was disbursed in May, 2015 was a further loan and that exhibits "JM1" and "JM2" of the Affidavit in Reply shows that in fact there was a loan disbursed in February, being the initial loan.

Learned Counsel submitted that it is not in dispute that the Respondent received the money and neither is it in dispute that she defaulted in her payments as confirmed by herself in paragraph 10.1.7 of her affidavit. Further, Clause 10 of exhibit "DEM1" in the Affidavit in Support, under Terms and Conditions for Construction Finance Mortgage (CFM) Loan, the events of default are spelt out under (b) which stipulates an event of default as the Borrower failing to pay any sum payable under the Agreement on its due date for payment and (c) the Borrower breaching any terms and conditions of the Agreement, Letter of Offer, or the security held by Zambian Home Loans for the loan.

Counsel submitted that in terms of Clause 6 (e) of the Mortgage Deed exhibited as "JM2b" in the Affidavit in Support of Originating Summons, the principal and other monies secured become immediately payable and the security enforceable if the mortgagor makes default in observing or performing or fulfilling any of her obligations in the Loan Agreement including, but not limited, to the payment of the principal and interest, fees or other monies and

Zambian Home Loans by notice in writing to the mortgagor calls in the principal and other monies hereby secured.

In this instance the demand for payment was made on 4<sup>th</sup> May, 2016 as per exhibit "JM4" in the Affidavit in Support of Originating Summons and was received by the Respondent on 12<sup>th</sup> May, 2016. It was Counsel's submission that the Respondent has no defence to the claims herein and therefore, prayed that the Court may grant the relief prayed for in the Originating Summons.

I have perused the documents filed in support of the Originating Summons and the Skeleton Arguments filed herein. I have also considered the Respondent's Affidavit in Opposition to Originating Summons. As submitted by the Applicant, this Court is clothed with the jurisdiction to entertain the Applicant's application by virtue of Order 30 rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides as follows: -

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

*Payment of monies 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 Respondent contended in the Affidavit in Opposition that the money was disbursed late. The Applicant argued that the initial loan was disbursed in February and that the money disbursed in May was in fact a further loan. An examination of exhibit "JM1" in the Applicant's Affidavit in Support of Originating Summons, which is a letter dated 7<sup>th</sup> May, 2015 addressed to the Respondent referenced "Your Home Loan Application Dated 2015-02-27," shows that the letter advised the Respondent that her application for a Home Loan Facility was successful. This is the letter which the Respondent refers to when she said that her loan facility was only approved on 7<sup>th</sup> May, 2015. However, in the Applicant's Affidavit in Reply to Affidavit in Opposition to Originating Summons, a letter which is almost identical to exhibit "JM1" save for the date, is exhibited by the Applicant to prove that the first loan facility was availed to the Respondent on 27<sup>th</sup> February, 2015. It is surprising how the same letter ended up with two different dates.

It is my considered view, nonetheless, that whether the money was disbursed late or not is immaterial for purposes of the matter before Court since it is not in dispute that the Respondent was availed a loan facility and did receive the money. It is also not in dispute that the Respondent defaulted in paying back the loan, a fact admitted by the Respondent herself in paragraph 10.1.7. of her Affidavit in Opposition where she states that instalments for October and November, 2015 were not paid due to non-receipt of salary for two months.

The non-payment of the October and November, 2015 instalments by the Respondent is an event of default envisioned by Clause 10 (b) and (c) of the Letter of Offer. A demand was duly made by the Applicant on the Respondent on 4<sup>th</sup> May, 2016 whose receipt the Respondent acknowledged on 12<sup>th</sup> May, 2015. In the case of *Kasengele v. Zambia National Commercial Bank Limited*<sup>1</sup>, the Supreme Court held that inability to pay has never been and is not a defence to a claim and neither is it a bar to entering judgment in favour of a successful litigant. Therefore, the Respondent's reason for her failure to pay the October and November, 2015 instalments is not a defence to the Applicant's claims.

I am therefore, satisfied that the Respondent has no defence to the claims herein and that the Applicant has proved its case on a balance of probabilities.


In an earlier Supreme Court Judgment of *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) v. Hyper Food Products Limited, Tony's Hypermarket Limited, Creation One Trading (Z) Limited*<sup>2</sup>, the Court held that a mortgagee's remedies are cumulative. Therefore, on the strength of this authority, I enter judgment for the Applicant in the sum of ZMW409,143.83 plus interest thereon at the contractual rate of 27.5% per annum from the date of issue of the Originating Summons to the date of judgment and thereafter at average short term bank deposit rate as determined by the Bank of Zambia until full payment.

A moratorium of ninety (90) from the date hereof is granted to the Respondent in which to settle the judgment debt and interest. In the event that the Respondent defaults in repaying the judgment debt and interest, she shall deliver vacant possession of the mortgaged property being Plot No. 2282/F/33a, Lusaka in the Lusaka Province of the Republic of Zambia to the Applicant whereupon the Applicant shall be at liberty to foreclose, take possession of and exercise its right of sale of the mortgaged property.

Costs of and incidental to this action are awarded to the Applicant, to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 29<sup>th</sup> day of June, 2017.

  
Winnie S. Mwenda (Dr)  
**HIGH COURT JUDGE**