

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2014/HPC/0389

IN THE MATTER OF : AN APPLICATION FOR AN ORDER OF FORECLOSURE POSSESSION AND SALE OF PROPERTY KNOWN AS LOT No. 9056/M, LUSAKA, WHICH WAS SUBJECT OF A THIRD PARTY MORTGAGE AND FURTHER CHARGE BETWEEN THE APPLICANT AND THE RESPONDENTS AS SECURITY FOR AN OVERDRAFT FACILITY.

AND

IN THE MATTER OF : ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA

B E T W E E N :

INTERMARKET BANKING CORPORATION : **APPLICANT**
ZAMBIA LIMITED

And

BETTY MULONGOTI
SOUTHERN TRADE LIMITED
SOUTHERN WINE LIMITED



1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Delivered in Chambers before the Honourable Mr. Justice Sunday B. Nkonde, SC at Lusaka this 8th day of September, 2017.

For the Applicant : Mr. Robin Msoni of Messrs Willa Mutofwe & Associates

For the Respondents : Mr. G. Cornhil and Ms. C. Nayee of Messrs Wilson & Cornhill.

J U D G M E N T

CASE REFERRED TO:

1. *Union Bank Zambia Limited Vs. Southern Province Co-Operative Marketing Union Limited (1997) S.J. 30 (S.C);*
2. *Holmes Limited Vs Buildwell Construction Company Limited (1973) Z.R 97*
3. *Musonda Vs Investrust Bank Plc (3) SCZ/8/198/2009;*
4. *Investrust Merchant Bank Vs Lilyvale Farm Limited (2002) ZR.*

LEGISLATION REFERRED TO:

1. *Supreme Court Practice Rules, 1999 Edition (UK)*

In this matter, by way of Originating Summons dated 23rd September, 2014, the Applicant claims against the Respondents the following reliefs;

- (i) *An Order against the 2nd Respondent for the payment of the sum of ZMW2,711,662.42 being the outstanding sum on the Overdraft Facility advanced and owing;*
- (ii) *An Order against the 3rd Respondent for the payment of the sum of ZMW646,632.62 being the outstanding Overdraft facility advanced and owing;*
- (iii) *An Order that should the 2nd and 3rd Respondents fail to pay the aforementioned sums, the Third Party Mortgage created by the Applicant*

Bank over the 1st Respondent's property, namely, Lot. No. 9056/M, Lusaka be enforced by an Order of foreclosure, vacant possession and sale;

- (iv) Payment of interest at the agreed rate;*
- (v) Payment of all charges and Costs for and incidental to any Order for foreclosure, obtaining vacant possession and sale of the mortgaged property;*
- (vi) Cost and any further or other relief.*

According to the supporting affidavit dated 23rd September, 2014, by an Overdraft Facility Agreement dated 19th April, 2013, the Applicant Bank availed an overdraft facility to the 2nd Respondent for Order Financing in the sum of ZMW2, 200,000.00. As security for repayment of the said overdraft facility, the Applicant Bank created a Third Party Legal Mortgage over the 1st Respondent's property otherwise known as and situate at Lot Number 9056/M, Lusaka. It was an express term of the said Overdraft Facility Agreement that the overdraft facility would expire after 60 days from the date of approval and grant of the Facility. It was further an express term of the said Overdraft Facility Agreement that the effective interest rate applicable was 18.25% per annum, although it was further expressly agreed that the interest rate was subject to change at the Applicant's sole discretion and without notice.

In breach of the stated terms of the Overdraft Facility Agreement, the 2nd Respondent has failed and neglected to honour its repayment obligations. As a result the 2nd Respondent owed the Applicant Bank total arrears in the sum of ZMW2, 711, 662.42 as at 18th August, 2014. The Applicant wrote a letter of demand or notice of default to the 1st and 2nd Respondents. No response came from the Respondents.

Further, the Applicant Bank availed another overdraft facility dated 22nd April, 2013 to the 3rd Respondent, a sister Company to the 2nd Respondent, in the

sum of ZMW515,000.00. It was an express term of the said Overdraft Facility Agreement that it would expire after 30 days from the date of approval. As security for the repayment of the said overdraft facility, the Applicant created a Floating Charge over the 1st Respondent's property known as and situate at Lot Number 9056/M, Lusaka.

It was stated that in breach of the stipulated terms of the said Overdraft Facility Agreement, the 3rd Respondent has failed and neglected to honour its repayment obligations or to make good the default. Consequently, the 3rd Respondent owed the Applicant Bank unpaid overdraft arrears in the total sum of ZMW646,632.65 as at 30th August, 2014. The Applicant Bank wrote a Notice of default to the 1st and 3rd Respondents but both Respondents failed to settle their accounts.

The 1st Respondent filed an affidavit in opposition dated 13th January, 2015. It is deponed and as an admission that the Applicant did in fact avail an overdraft facility to the 2nd Respondent with a limit of ZMW2,200,000.00 secured by a Third Party Mortgage on the 1st Respondent's property otherwise known as Lot 9056/M, Lusaka. The overdraft facility provides for a facility fee of 5% of the whole facility.

It is stated, however, that exhibit "BB3" produced by the Applicant has debit entries that are not before Court. The Applicant recovered its full facility fee in the sum of ZMW110,000.00 via a debit on the 2nd Respondent's account on 22nd April, 2013 but despite the recovery, the Applicant still debited the account in respect of arrangement fees on 12th July, 2013 in the sum of ZMW107,015.95 which entry was later reversed on 11th September, 2013.

It was further stated that the Applicant wrongly calculated the interest on the amounts actually drawn by the 2nd Respondent. The correct position,

according to the 1st Respondent, is that the 2nd Respondent owes the Applicant the sum of ZMW143,397.68 as at 31st January, 2014.

Apart from the forestated, it is also deponed that the Applicant did avail to the 3rd Respondent an overdraft facility with a limit of ZMW515,000.00 on 3rd May, 2013 for a period of 30 days. The same was secured by way of further charge on the property in question.

It is, however, further deponed that exhibit "BB7" produced by the Applicant contains entries not relevant before the Court because just as in the first facility, 5% facility fee, amounting to ZMW25,750.00 was chargeable. The same was recovered by direct debit on 3rd May, 2013. The same amount was again debited from the 3rd Respondent's account on 21st June, 2013. According to the deponents, the Applicant once again miscalculated the interest payable under the facility and instead compounded the interest contrary to the provisions of the further charge. The 3rd Respondent nonetheless admits owing the Applicant the sum of ZMW131,434.59.

The Applicant filed in an affidavit in reply dated 18th February, 2015. It is deposed that exhibit "BB3" shows all the transactions made on the account of the Respondents to enable the Court appreciate how the claimed amount arose. To the Applicant, the evidence shows that the arrangement fee of ZMW107,015.00 was due and payable but the Respondents requested for a waiver of the said fee, hence the Applicant's reversal of the same on 11th September, 2013. The interest chargeable was to be compounded pursuant to Clause 1 of the Mortgage Deed.

It is stated that the Respondents do not only owe the Applicant the sum of ZMW143,397.68 and that, the Respondents are only addressing the issue of interest and are silent on the principal amount plus the accrued interest.

It is further stated that both overdraft facilities were supposed to run for 60 days and 30 days. Each time the agreed period elapsed, the Respondents would request for fresh facilities. An agreement fee for such new facilities would, therefore, become payable and thus, there was no replication of any arrangement fee payable. It follows that the calculations of interest showing a credit balance of ZMW131,434.59 are incorrect as they are not calculated in accordance with the agreed terms and they ignore the principal component of the total amount owed.

Learned Counsel for the Respondents made viva voce submissions to supplement the Skeleton Arguments filed. According to Counsel, **Order 18 Rule 7 (11) of the Rules of the Supreme Court of England (White Book) 1999 Edition** precludes the production of evidence relating to facts not pleaded. The facilities in issue were executed on 19th April, 2013 and 22nd April 2013. Exhibit "BB7" is a statement of claim showing the Respondents' accounts as far back as 1st October, 2012, before both facilities were availed to the Respondents. It is vehemently submitted that in this regard, all debits appearing in Exhibit "BB7" prior to 23rd April, 2013 are inadmissible in evidence.

With regards to interest, Counsel contends that the facility agreement provides for simple interest at 18.2%. The mortgage exhibited and marked "BB2" provides for simple interest of 26% per annum which can be compounded in the event of default. It is submitted that such a penalty clause is outlawed in Zambia. The Court was referred to the case of **Union Bank Zambia Limited Vs Southern Province Co-Operative Marketing Union Limited**⁽¹⁾ for this proposition. Counsel maintains that the applicable interest in this case is simple interest.

On arrangement fees, it is contended that the Applicant has been duplicating the arrangement fees payable contrary to the facility agreements. While it is

conceded that the Applicant is entitled to charge arrangement fees, the same cannot be duplicated in the absence of a contract to that effect. It is further contended that the Applicant is not allowed to add the arrangement fee to an overdrawn balance in order to calculate the interest accrued and, therefore, the excess arrangement fee should therefore be expunged from the record. Counsel maintains that the attendant interest and the allowed arrangement fees should be accounted for separately and not on the overdrawn balances.

In response, Counsel for the Applicant relies on the Applicant's Skeleton Arguments. First, with regard the Respondents' insistence that some debit entries on the statement of account should be expunged from the record, it is the Applicant's contention that the same is not properly before the Court as the same ought to have been made by way of Summons supported by an Affidavit. The nature of an overdraft facility is that the overdrawn account has transactions prior to that overdraft. According to Counsel for the Applicant, the same are relevant in these proceedings. In any event, Counsel argues, the Respondents have not shown the prejudice they might suffer as a result of showing the balances on the accounts prior to the overdrafts. It is submitted that all the entries are admissible.

On the issue of interest charged, the Applicant contends that the interest referred to herein is not penal interest but compound interest. All other references to the interest must be construed in light of the mortgage provisions because the Respondents were not charged replicated fees.

On the question of Arrangement Fees, Counsel for the Applicant argues that the parties herein enjoyed a cordial relationship; as a result the Respondents had requested for a waiver of the charge of arrangement fees hence the reversal of the fees charged by the Applicant. Otherwise the Applicant is properly entitled to charge the arrangement fees.

The Applicant's Counsel submits that there is no evidence that the Applicant has done anything contrary to what was agreed. Counsel has cited a passage in the case of **Holmes Limited vs Buildwell Construction Company Limited²** where it was held that:-

“ Where the parties have embodied the terms of the Contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written Contract.”

Thus, the Applicant prays that its claim be sustained.

I have considered the claim by the Applicant. I have further considered the contesting Affidavits, the arguments and authorities cited by respective Learned Counsel. I am grateful to all Learned Counsel on record for the useful authorities cited which have assisted greatly in arriving at this my Judgment.

The following facts are not in dispute and I find that the 2nd Respondent by an Overdraft Facility dated 19th April, 2013 obtained the sum of ZMW2,200,000-00 for Order Finance. The 3rd Respondent, by an Overdraft Facility Agreement dated 22nd April, 2013 obtained the sum of ZMW515,000-00. The said Overdraft Facilities were to run for sixty (60) days and thirty (30) days periods respectively. As security for the above sums, the 1st Respondent created a Third Party Legal Mortgage and a Further Charge over her property Lot Number 9056/M Lusaka. The 2nd and 3rd Respondent, however, defaulted in the repayment of the sums obtained. The said Overdraft Facilities remain unpaid by the Respondents to-date.

The Respondents have raised a number of issues in respect of the amount outstanding being claimed by the Applicant. It is contended that though the Applicant seeks the sums ZMW2,711,662.42 and ZMW646,632, the actual

amounts outstanding and payable by the 2nd and 3rd Respondents were ZMW 143,397.68 and ZMW 131,434.59 respectively as at 31st January, 2014.

As a starting point, I find it necessary to preliminary deal with the issue raised by the Respondent that the Applicant has produced Bank Statements showing debit entries made prior to the obtaining of the Overdraft Facilities.

I have perused the exhibit marked "BB3" attached to the supporting affidavit. Indeed, the same shows entries prior to 19th April, 2013 and 22nd April, 2013 in respect of transactions made by the Respondents herein.

In my view, while the production of such entries may be undesirable, the production does not prejudice the Respondents. I agree with the Applicant's explanation that they are merely showing the history of the account. The Respondents are not pleading any amounts prior to the date of the Overdraft Facilities. The argument by the Respondents in contesting the application before me is, therefore, without merit.

In my view the issues of real substance raised herein are as follows:

- i) *Whether the interest being charged was penal in nature.*
- ii) *Whether the Applicant has been duplicating the arrangement fees payable and adding the said fees to the overdrawn balance thereafter calculating interest on the said balances.*

In respect of whether the Applicant was charging penalty interest, the Respondents contend that the Applicant did so despite the fact that the agreements relating to the facilities provided for simple interest. Yet, the law as to charging of compound interest in this jurisdiction is clear: it is prohibited.

I have perused the facility letter, the Third Party Mortgage and Further Charge exhibited on record. In respect of the 2nd Respondents Overdraft Facility, interest as per exhibit marked "BB1" was stated at 25% per annum. The Third Party Mortgage under Clause 1 provided that:

"Interest shall be computed and compounded according to the usual mode of the bank.... Provided that after demand has been made interest charged shall be at the rate of 25% per annum and unsettled interest shall be compounded on the capitalized account balance.

From the evidence adduced, it is my view and finding that compound interest was agreed upon. The Parties herein agreed to the charging of compound interest under clause 1 of the Third Party Mortgage.

In respect of the Further Charge, Interest was at 24% per annum. I refer to Clause 2 of the said charge. I have perused the Bank Statements on record and it is my view that there was no penal interest charged.

The next cardinal issue is whether there was duplication of the facility arrangement fees on the two Overdraft Facilities. The Respondents contend that the facility fee sum of ZMW110,000 was debited on the 22nd April, 2013. Despite the debit, the Applicant on 12th July, 2013 debited the sum of ZMW107,015.95 as arrangement fees. Further that in respect of the Further Charge, the facility arrangement fee of ZMW25,750 was debited on the 3rd May, 2013 and again on the 21st June, 2013.

The explanation by the Applicant Bank is that the sum of ZMW107,015.95 was due but the Respondents had requested for a waiver and reduction of the Arrangement Fees. The Bank did reverse this amount on 11th September, 2013.

I have perused the Bank Statements exhibits marked "BB3" attached to the supporting affidavits. The same shows that the Bank debited the Respondents on the 22nd of April, 2013 with the Arrangement Fees of ZMW107,015.95. These fees were debited from the overdraft facility and interest was charged. The sum of ZMW107,015 was, however, reversed on the 11th September, 2013.

In respect of the arrangement fees of ZMW25,750, exhibit marked "BB7" shows debits of the said sums on 3rd May, 2013 and 21st June, 2013 and interest charged on the balances outstanding. The issue is whether the debits of arrangement fees were duplicated. In my view there was no duplication of arrangement fees. The sum of ZMW107,015.95 was reversed on 11th September, 2013.

In respect of the alleged duplication of the sum of ZMW25,750 debited on the 3rd May and 21st June, 2013, I am of the view that there was no duplication. The Overdraft Facility in respect of the 3rd Respondent was for a period of thirty (30) days. I refer to exhibit "BB5" attached to the affidavit in Support of the Originating Summons. This facility was extended by the Respondents. In addition, the 2nd Respondent requested that the 2nd Respondent's Overdraft Facility be extended. I refer to the exhibit marked "BM1" attached to the affidavit in Reply dated 18th February, 2015; namely a letter seeking to extend the Facility for the 3rd Respondent. Upon being renewed, a further arrangement fee became due, hence the debit of 21st June, 2013 in the sum of ZMW25,750.

The only issue of real contention in my view is the interest charged on the amount prior to the reversal of the entry. In other words, the interest charged on the sum of ZMW107,015.95 before the reversal of the said sum was effected on the 11th September, 2013. In fact, the Applicant in its affidavit in Reply dated 18th February, 2015 concedes in paragraph 7 that the actual interest gained over the sum of ZMW107,109.95 before the reversal is roughly

ZMW3,200. This amount or whichever such amount is refunded, in my view, and must be deducted from the outstanding amount owed.

The last real issue to be finally considered is whether the arrangement fees were added to the overdrawn balance and interest calculated thereon on the said balances. It is my considered view and finding that the arrangement fees were added to the overdrawn balances and interest accrued was calculated upon the said overdrawn balances. I refer to the Bank Statements on record showing the arrangement fees being added to the overdrawn balances namely the sums of ZMW110,000, ZMW25,750 and ZMW25,750. It is trite law that arrangement fees are separate charges. In the case of ***Musonda Vs Investrust Bank Plc***⁽³⁾ the Supreme Court stated that a bank cannot levy interest on other charges to arrive at the principal sum owing. This practice is not allowed by the law. In the case of ***Investrust Merchant Bank Vs Lilyvale Farm Limited***⁽⁴⁾, it was clearly stated that:

“Although the Appellant can charge legal fees and other usual bank charges, these cannot be capitalized into the principal utilized sum to attract interest as agreed. These charges stand on their own”.

It is my view that the amounts outstanding in respect of the two facilities being claimed herein contain other charges; namely, the arrangement fees. These said charges were added to the overdrawn balances and interest calculated on the balances. This is unacceptable as these arrangement charges stand alone and, therefore, I cannot enter Judgment in the claimed sums of ZMW 2,711,662.42 and ZMW 646,632.62 as the said sums have not been proved as outstanding.

Instead, I adjudge and Order that the sums due on the two Overdraft Facilities be ascertained by the Deputy Registrar of the Commercial Court. In re-

calculating the sums due, proper interest as agreed in the facility letter, Mortgage Deed and Further Charge shall be applicable.

Further, the arrangement fees of ZMW110,000, ZMW25,000 and ZMW25,750 stand alone and are not subject to interest. Any interest that had been calculated on the basis of the arrangement fees are deducted or deductible, including interest earned on the reversed sum of ZMW107,015.95.

For the foregoing reasons, I hereby Order that the said Deputy Registrar do ascertain the sums due taking into account the above pronouncements.

It is further Ordered that the amount inclusive of interest to be ascertained by the Deputy Registrar shall be paid by the Respondents within One Hundred and Twenty (120) days after assessment. In terms of the applicable interest rates and for the avoidance of any doubt, interest shall be at the average of the Short Term Deposit Rate of 6% per annum from the date of the Originating Process to the date of this Judgment and thereafter at the Commercial Bank Lending Rates as determined by the Bank of Zambia from time to time until full and final payment. In the event of default within the stated One Hundred and Twenty (120) days period, the Applicant shall be at liberty to foreclose, have vacant possession and sell the security or Mortgaged property.

Costs to the Applicant, same to be taxed in default of agreement.

Leave to appeal is granted.

Dated the 8th day of September, 2017



HON JUSTICE SUNDAY B. NKONDE, SC
HIGH COURT JUDGE