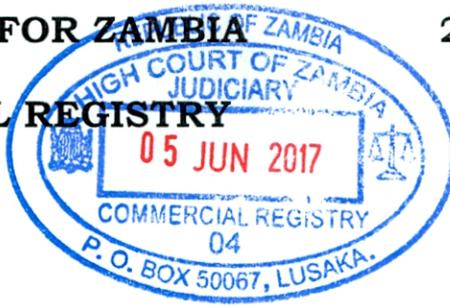


IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0402**
AT THE COMMERCIAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)



IN THE MATTER OF : **An application under Order 30 Rule 14 of the High Court Rules of the High Court Act Chapter 27 of the Laws of Zambia as read with Order 88 of the Rules of the Supreme Court, 1999 Edition**

IN THE MATTER OF : **A Third-Party Mortgage relating to Subdivision 456 of Farm No 451a, Lusaka in the name of Michael Mangelele Inambao**

IN THE MATTER OF : **A fixed debenture on the Heidelberg Printing Press A1 Machine**

IN THE MATTER OF : **An Order for Foreclosure, Possession and Sale of Mortgaged properties**

BETWEEN:

INVESTTRUST BANK PLC

APPLICANT

AND

MIPAL PRINTERS LIMITED

1ST RESPONDENT

MICHAEL MANGELELE INAMBAO

2ND RESPONDENT

PAULINE MANAYIWA TANAYE INAMBAO

3RD RESPONDENT

Before the Honourable Justice Irene Zeko Mbewe

For the Plaintiff: Ms T Sakala of Messrs Fraser Associates

For the Defendant: Mr. N Inambao of Messrs ICN Legal Practitioners

JUDGMENT

Cases Referred to:

1. *Reeves Malambo v Patco Agro Industries Limited SCJ No 20 of 2007*
2. *Mulenga Edgar Hamuwele and Zambia National Commercial Bank [2010] 1 ZR 50*
3. *Informatics Limited and Others v Stanbic Bank Zambia Limited [2011] ZR 89*
4. *Mountstephen v Lakeman [1874] L.R 7 Q.B 196*

Legislation Referred To:

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

Other Works Referred To:

1. *Oxford Dictionary of Law, 6th Edition at page 246.*

This matter was commenced by the Applicant by way of Originating Summons on the 10th day of August 2016 pursuant to **Order 30 Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia** against the Respondents seeking the following reliefs:

- i) *Immediate payment of monies secured by mortgage which as at 27th June 2016 stood at K866,059.69*
- ii). *Contractual interest*
- iii) *Sale of Subdivision No 456 of Farm 401a Makeni Lusaka*
- iv). *Foreclosure Order on subdivision No 456 of Farm No 401a Makeni Lusaka*
- v) *Delivery and possession of subdivision No 456 of Farm 401a Lusaka*
- vi) *Delivery and possession of the Heidelberg Printing Press A1 Machine*
- vii) *Further or other relief*
- xii) *Interest*
- ix) *Costs*

The Applicant in support of the application filed an affidavit in support deposed to by Crispin Isukanji Daka the Acting Head of Credit Department in the Applicant Bank. The gist of his evidence is that by loan agreement and facility letter dated 14th April 2012 the Applicant availed a credit facility to the 1st Respondent in the sum

of ZMW700,000 (**Exhibit CID1-2**) out of which ZMW293,316 was for re-financing the 1st Respondent's existing loan at Stanbic Zambia Limited and ZMW407,000 was to finance the acquisition of a five colour Heidelberg Printing Press A1 Machine. The evidence reveals that the funds were disbursed on 19th May 2012 to the 1st Respondent through its Account No 12110151319026 with the repayment account designated to Account No 120110151219013.

The evidence reveals that the loan is secured by a Third-Party Mortgage over Subdivision 456 of Farm 401a Makeni, Lusaka (**Exhibit "CID4-5"**), a fixed debenture over the Heidelberg Printing Press A1 Machine, a director's guarantee in the names of the 2nd and 3rd Respondent in favour of the Applicant to the extent of ZMW700,000 plus interest. (**Exhibit "CID 8"**). That the principal sum and all interest accruing would be repaid within a period of 36 months from the date of the Loan Agreement, and in default the Applicant is at liberty to enforce the security. The evidence reveals that as at 28th July 2016 the 1st Respondent is indebted to the Applicant in the sum of ZMW866,059.69 made up as follows: Account No 121210151219026 in the sum of ZMW703,871 and

Account No 120110151219013 in the sum of ZMW162,188.09. A copy of the 1st Respondent's statement of accounts is exhibited (**Exhibit "CID-9"**).

The Applicant filed skeleton arguments and cited the case of **Reeves Malambo v Patco Agro Industries Limited**¹ in support of the proposition that where a default in redeeming his property or repaying the debt, the mortgagor has a right to foreclose and sell the property which forms the subject of the security. It is submitted that the provisions of the facility letter accorded the Bank full ownership of the Heidelberg Printing Machine. That as debenture holders, the Applicant is entitled to take possession of the Heidelberg Printing Machine and cited the case of **Mulenga Edgar Hamuwele and Zambia National Commercial Bank**². On personal guarantees, Counsel cited the case of **Informatix Limited and Others v Stanbic Bank Zambia Limited**³.

The 1st Respondent opposed the application by way of affidavit deposed to by Michael Manglelele Inambao the Managing Director in the 1st Respondent Company. The gist of the evidence is that the 1st Respondent executed a loan agreement and facility letter dated 18th

April 2012 which the 1st Respondent continues to service. That the Applicant has been increasing interest rates thereby increasing the 1st Respondent's indebtedness. That in a letter dated 30th June 2016, the Applicant made a demand for the sum of ZMW935,160.70 (**Exhibit "MM1"**). According to the 1st Respondent this computation does not reflect the correct outstanding balance on the loan and seeks a reconciliation (**Exhibit "MM12"**). That the 1st Respondent is desirous to liquidate the facility subject to a reconciliation of the claimed amount and consequently, it would be unjust to allow the Applicant to foreclose on the security being Subdivision 456 of Farm 401a, Lusaka and proceed to sell the same.

In the Applicant's Affidavit in Reply, it is deposed that the loan facility is to have been paid not later than 19th May 2015 and that the Applicant has the discretion during the subsistence of the loan to adjust interest rates depending on the revision of the Bank of Zambia policy rate, and notification is by way of displaying the interest rates in its banking hall.

At the hearing, the parties relied on their affidavits, skeleton arguments and oral submissions.

I have carefully considered the affidavit evidence, skeleton arguments, oral submissions by Counsel for both parties and have fully applied my mind to the authorities to which my attention was drawn.

The Applicant's application is predicated on **Order 30 Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia** which makes provisions for the recovery of monies secured by a mortgage or foreclosure and sale of such secured property. The Order states 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.

In principle, the 1st Respondent admits their indebtedness to the Applicant. The bone of contention is the computation of the interest rates which the 1st Respondent alleges is excessive.

I have reproduced the relevant clause on interest in the facility letter of 18th April 2012. Clause 7 states as follows:

"7.1 The repayment amount in clause 5 above is inclusive of interest at the rate of 19% per annum, being our base lending rate currently at 16% plus a margin of 3%.

7.2 The bank's base rate is subject to revision at the Bank's discretion, depending on market forces and

such changes will be advertised in the press and posted on notices in the Bank's banking halls.

- 7.3 In the event of default, the Bank reserves the right to change interest on the unpaid balance at the aforementioned rates for the period of default.**

In the Loan Agreement, clause 4 on interest states as follows:

- 4.1 The Borrower shall pay interest, on the Interest Payment Dates, during the period of the loan, at the rate of 19% per annum, being 10% above the Bank of Zambia Policy Rate currently at 9% which rate is subject to revision on a monthly basis at the discretion of the Bank of Zambia.**
- 4.2 Interest shall be computed on the basis of 365 days year and the actual number of days elapsed and shall be compounded quarterly in case any interest payment which is due is unpaid.**
- 4.3 If the Borrower fails to pay any sum on the date due for payment hereunder, the Borrower shall pay**

additional interest on such sum, from the due date thereof up to the date of actual payment, at the interest rate mentioned under clause 4.1 above.

A perusal of the facility letter and loan agreement cited above shows that there was an agreed rate of interest subject to any variations in the Bank of Zambia policy rate plus a margin being 10% at the material time. I find that in the facility letter of 18th April 2012 at clause 7.1 and clause 4.1 of the loan agreement, not only did the parties agree to contractual interest but to compound interest. I find that the charging of compound interest escalates the outstanding amount.

The 1st Respondent bemoans the lack of information as to the applicable interest rates charged by the Applicant. I find that in accordance with terms of the agreement by the parties, the mode of notification of variation of interest rates is through the newspapers and in the Applicant's banking halls. In my considered view, that constitutes sufficient notice. I opine that the 1st Respondent as a customer of the Bank is at liberty at any time to request for bank statements or such other information to ascertain the interest

chargeable on the loan facility. The 1st Respondent argues that it requested for a bank reconciliation from the Applicant on 11th July 2016. I find that this request from the 1st Respondent to the Applicant has come rather late in the day.

The 1st Respondent argues that in a letter of demand dated 30th June 2016 from the Applicant's Advocates, it indicates that a sum of ZMW935,160.70 is owing whilst the claimed sum in the Originating Summons is ZMW866,059.69. The Applicant offered an explanation as to the variation in amounts and advised the 1st Respondent that as at 21st July 2016 the outstanding amounts stood at ZMW160,980.28 for the overdraft and ZMW701,272.00 for the loan. In this respect, I find the Applicant's explanation credible whilst the 1st Respondent's argument is superfluous. I say so as the Applicant in its affidavit in support of the Originating Summons produced a bank statement itemising the principal amount, interest rate, interest accrued, amount due and due date ("**Exhibit CID-9**"). On the other hand, I find that the 1st Respondent has not shown how much it has paid towards its indebtedness which is easily

ascertainable by showing bank deposit slips or bank transfers made.

From the evidence on record, I find that the interest calculated by the Applicant is that agreed to by the 1st Respondent and reflected in the facility letter and loan agreement.

The 2nd and 3rd Respondent in securing the loan facility provided a personal guarantee (**Exhibit CID-8**). According to the terms of the guarantee the total amount recoverable shall not exceed the sum of ZMW700,000. It is trite that a guarantor is ordinarily liable for the debt or default of another who is the party primarily liable for the debt according to the **Oxford Dictionary of Law, 6th Edition at page 246**. I am fortified by the case of **Mountstephen v Lakeman**⁴ where it was held that:

"A guarantee is essentially a contract for an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, without the support it must fail."

I find that the 2nd and 3rd Respondent's liability arises where the 1st Respondent as principal debtor is in default.

The Applicant claims for delivery and possession of the Heidelberg Printing Machine under a debenture. Though a copy of the debenture has not been exhibited, the Applicant's affidavit evidence is not contested by the Respondents herein. I find that the Applicant is entitled to take possession of the Heidelberg Printing Press A1 Machine.

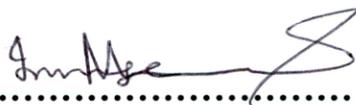
The net result is as follows:

1. Judgment is entered in favour of the Applicant in the sum of ZMW866,059.69 plus contractually agreed interest 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. The Judgment sum shall be paid within fifty (50) days from date of Judgment and in default, the Applicant shall foreclose, take possession of Subdivision 456 of Farm 401a Lusaka and exercise its statutory power of sale.

2. The 1st Respondent shall deliver and the Applicant shall take possession of the Heidelberg Printing Press A1 Machine. The Applicant shall render an account of the proceeds of sale of the mortgaged property and asset.
3. In the event that the proceeds realised from the sale of the mortgaged property and the asset are not sufficient to expunge the debt owing, the Applicant shall be at liberty to execute on the personal guarantees of the 2nd and 3rd Respondent who are liable to pay the Applicant up to ZMW700,000.
4. Costs to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Delivered in Lusaka this 5th day of June, 2017.



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IRENE ZEKO MBEWE
HIGH COURT JUDGE