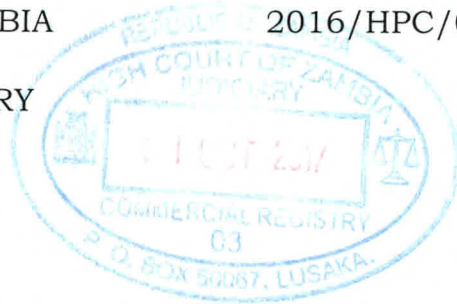


IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA



2016/HPC/0036

**(Commercial Jurisdiction)**

IN THE MATTER OF: ORDER 88 OF THE RULES OF THE SUPREME COURT, WHITE BOOK AND ORDER XXX RULE 14 HIGH COURT RULES CAP 27 OF THE LAWS OF ZAMBIA

**AND**

IN THE MATTER OF: SUBDIVISION B OF STAND NO. 12755  
MUMBWA ROAD MAIN INDUSTRIAL AREA  
LUSAKA

**BETWEEN:**

AFRICAN BANKING CORPORATION (Z) APPLICANT  
LIMITED

**AND**

SWIFT CARGO SERVICES LIMITED 1<sup>ST</sup> RESPONDENT  
GOODWARD MULUBWA 2<sup>ND</sup> RESPONDENT  
YVONNE MULUBWA 3<sup>RD</sup> RESPONDENT

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

*For the Applicant: Mr. Mark Haimbe of Messrs Sinkamba Legal Practitioners*

*For the Defendant: Mr. Roy Mwala of Messrs A. M. Wood & Company*

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## R U L I N G

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### **Cases Referred To:**

1. *Esso Petroleum Co. Ltd v Harper's Garage Ltd (1967 1 All ER 699*
2. *S. Musonda (Receiver for the First Merchant Bank Ltd) v Harper Food Ltd and Others SCZ Judgment No. 16 of 1999*
3. *Zambia Seed Company Limited and Chartered International (Pvt) Limited SCZ Judgment No. 20 of 1999*
4. *Winchester Cigarette Machinery v Pine C. A No. 2 of 1993*
5. *Pakisa Bakery Limited and Another v Aetos Transform Limited (2011) ZR 275*
6. *Reeves Malambo v Patco Agro Industries Limited Judgment No. 20 of 2007*

### **Legislation Referred To:**

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England (White Book) 1999 Edition*

This is a Ruling on the Applicant's notice of motion to raise a preliminary issue on a point of law and to determine a point of law pursuant to **Order 3 Rule 2 of the High Court Rules, Chapter 27**

**of the Laws of Zambia and Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999 Edition.**

The notice of motion filed on 16<sup>th</sup> November 2016 raised the following preliminary issues:

1. Whether or not the applications to stay enforcement and/or possession and to declare and determine that Judgment debt has been paid in full are properly before this Court in light of the fact that the Respondent's rights have been extinguished by the foreclosure herein.
2. Whether or not the applications to stay enforcement and/or possession and to declare and determine that Judgment debt has been paid in full are properly before this Court in light of the fact that the parties herein executed a Consent Order which finally determined the matter.

In the supporting affidavit deposed to by Chilufya Kaka the Country Credit Manager in the employ of the Applicant, the salient facts are that the 1<sup>st</sup> Respondent herein filed an application to stay enforcement and/or possession pending the determination of the application to declare and determine that the Judgment debt has

been paid in full, and therefore that the said application is incompetent. It is deposed that a Judgment was entered in favour of the Applicant on 8<sup>th</sup> May 2015 in which the Respondent was ordered to pay the sum of K4,795,802.38 with interest payable within 45 days failure to which the Applicant would be at liberty to foreclose upon Subdivision B of Stand No. 12755, Mumbwa Road, Lusaka and enforce the guarantees. That by an Order dated 5<sup>th</sup> August, 2015 the 1<sup>st</sup> Respondent was granted leave to pay the Judgment debt in three equal instalments, and in default the whole amount outstanding shall be due and payable and that the Applicant was at liberty to enforce its rights under the mortgage deed. According to the deponent, the 1<sup>st</sup> Respondent failed to pay the Judgment sum and as such its rights in the property were extinguished subsequent to which the Applicant's right to foreclose against the property was confirmed by a Consent Order dated 2<sup>nd</sup> February 2015 entered into by the parties.

That in paragraph 2 of the said Consent Order it was agreed that in the event that disposal of Stand No. 4161 Kitwe under Cause No. 2014/HPC/0357 did not materialise, the Respondents would at the



material time settle the balance of the outstanding debt within a month upon being served with a notice to pay the whole balance by the Applicant. That the said property in Kitwe has not been sold as the Respondents obtained a stay under Cause No. 2014/HPC/0357. That it was a term of the Consent Order that the Applicant would enforce its rights under the mortgage deed and debenture upon failure to settle the amounts due by the Respondents. In terms of challenging a Consent Order where a party is not satisfied, it is deposed that the only way was to commence a fresh action and therefore the Respondent's application is before a wrong forum and ought to be dismissed.

In its skeleton arguments, the Applicant's argue that the Respondent's equity of redemption herein has been extinguished and no longer exists and therefore the Applicant cannot be entitled to the relief sought in their application. The case of **Esso Petroleum Co. Limited v Harper's Garage Limited (1967) 1 All ER 699<sup>1</sup>**, was referred to where it was held that:

*"The mortgagor's right of redemption continues until the mortgagor's title is extinguished or his interest is destroyed by*

*the sale of the property e.g. pursuant to a Court Order to foreclose.”*

Further that this position was upheld by the Supreme Court in the case of **S. Musonda (Receiver for the First Merchant Bank Ltd) v Harper Food Products Ltd and Others SCZ Judgment No. 16 of 1999<sup>2</sup>** when it was stated that:

*“Further, a decree absolute of foreclosure extinguishes the equity of redemption and vests the mortgagor’s entire interest in the property in the mortgagee, so that the mortgagor’s property belongs to the mortgagee absolutely.”*

Counsel for the Applicant argues that in the present case the equity of redemption was extinguished sometime in December 2015 following an Order dated 5<sup>th</sup> August 2015 in which the Respondents were given three months to settle the Judgment sum. That upon failure to settle the Judgment sum, the Respondents lost their right to redeem the mortgage, hence giving the Applicant the right to foreclose as per agreement in the Consent Order. That the Respondents having lost the mortgaged property, cannot seek the relief sought in their application and the Applicant cannot be

restrained from enforcing its rights under the mortgage and debenture.

In respect to the second question raised, the Applicant submits that the issues surrounding enforcement of the mortgage deed and debenture were resolved by Consent Order to which each party appended their signatures. That stemming from that consent, if the Applicant intends to exercise its powers, such powers cannot be challenged in this action. In support of this submission, the case of **Zambia Seed Company Limited and Chartered International (PVT) Limited SCZ Judgment No. 20 of 1999<sup>3</sup>** was cited where it was held that:

*“By law the only way to challenge a Judgment by consent would be to start an action specifically to challenge that consent Judgment.”*

The 1<sup>st</sup> Respondent filed an opposing affidavit together with skeleton arguments and list of authorities on 22<sup>nd</sup> November, 2015. The affidavit is deposed to by Oscar Twelesi the Management Accountant in the 1<sup>st</sup> Respondent who filed an application to stay enforcement and/or possession to determine and declare the



Judgment debt has been paid in full. It is deposed that the said applications are of merit and ought to be sustained. The deponent conceded that the Consent Order dated 5<sup>th</sup> August, 2015 provided that in the event of default, the whole amount outstanding shall be due and payable and that the Applicant would be at liberty to enforce its rights under the mortgage. According to the deponent, the Applicant did not disclose the following material facts in the affidavit in support:

- i. Subsequent to the Order of 5<sup>th</sup> August 2015 the parties executed a Consent Order on the 21<sup>st</sup> October 2015 which at Clause 4 (ii) the proceeds of the disposal of a property under Cause No. 2014/HPC/0357 would be utilised to settle any debt outstanding (Exhibit "OT1").
- ii. That the Consent Order referred to in paragraph 13 of the affidavit in support provided at Clause 1 that pending the finalisation of the transaction under Cause No. 2015/HPC/0036 the 1<sup>st</sup> Respondent would pay the monthly sum of K186,000.00 being instalment payment for vehicle and asset financing plus interest. That the



said monthly payments were to be paid from 30<sup>th</sup> August 2015 and terminating on 30<sup>th</sup> October 2017.

It is deposed that if the 1<sup>st</sup> Respondent settled the Judgment debt as provided by either Consent Order it would be absolved of any liability as regards its debt as the latter would have been liquidated. That the 1<sup>st</sup> Respondent as of 24<sup>th</sup> March 2016 had paid a total of K4,811,806.00 to the Applicant as evidenced by Exhibit "OT5", and following this payment, the 1<sup>st</sup> Respondent on 29<sup>th</sup> March 2016 wrote to inform the Applicant of the said payment. That since the 1<sup>st</sup> Respondent paid the full amount as at March 2016 and not October 2017, there has been no default on its part and that there has never been any foreclosure as a consequence of the Consent Orders. Further, that no notice to pay has been issued by the Applicant as stipulated by the Consent Orders, and as such the 1<sup>st</sup> Respondent's rights in the property were not extinguished and therefore the 1<sup>st</sup> Respondent's applications are competently before Court. That the Order for stay filed on 20<sup>th</sup> October 2016 was signed by **Honourable Justice S. B. Nkonde** on 21<sup>st</sup> October 2016, and that failure to dispose of the property as provided under the

Consent Order under Cause No. 2014/HPC/0357 had nothing to do with the stay mentioned in paragraph 15 of the Applicant's affidavit in support. (Exhibit "OT 2"). That based on the foregoing, the 1<sup>st</sup> Respondent had a right to pay off the debt and redeem the mortgage as it was expressly allowed to do so.

In respect to challenging the Consent Orders, it is deposed that the applications by the 1<sup>st</sup> Respondent are not meant to challenge any of the Consent Orders but rather the substantive application to determine and declare that the debt herein has been fully settled (Exhibit "OT 2", "OT 3" and "OT 5"). That the application for stay is necessary pending such determination as the substantive application would be rendered nugatory if the mortgaged properties were disposed of by the Applicant in which event an injustice would have taken place. It is deposed that the Applicant's Notice of Motion herein is frivolous, malicious and unfounded, and that it is devised to waste the Court's time as well as perpetuate an injustice as the Applicant has been paid in full.

In its skeleton arguments, Counsel for the Respondents' argued that there has never been any foreclosure, possession or sell of the

mortgaged property and that the affidavit in support of originating summons shows that the property charged as security for the facility was Subdivision B of Stand No. 12755 Mumbwa Road, Lusaka. That in respect to the security in the debenture dated 20<sup>th</sup> September 2012, it was submitted that the Applicant had never called or enforced the debenture. It is contended that the 1<sup>st</sup> Respondent's right or equity of redemption was never extinguished and that the same could only have been extinguished if the mortgaged property was sold. Further that the Consent Judgments executed herein and under Cause No. 2014/HPC/0357 both availed the Respondents' rights to pay off the debt herein. It is argued that in the circumstances, the equity of redemption of the 1<sup>st</sup> Respondent was confirmed and asserted by the mutual and voluntary execution thereof and that it is absurd for the Applicant to state that the 1<sup>st</sup> Respondent's equity of redemption was extinguished when it consented to the Respondents' paying off the debt. It was submitted that if the Applicant is dissatisfied with the contents and intent of the Consent Orders, it is at liberty to challenge the said Consent Orders by commencing a fresh action and the said action to challenge the Consent Orders would be



academic as it would have been overtaken by events in light of the payments made. Further that the 1<sup>st</sup> Respondent exercised its equity of redemption by paying off the debt and that in that cause, the Applicant cannot continue to hold on to the Respondents' property hence the only forum with requisite authority to determine this matter is this Court.

On the second question raised, it is submitted by Mr. Haimbe that the same is absurd and misconceived and referred to the case of **Zambia Seed Company Limited v Chartered International (PVT) Limited**<sup>3</sup> where it was held that the only way to challenge a Judgment by consent would be to start a separate action. Counsel argues that the applications by the Respondents are not a challenge of the Consent Orders. That the stay of execution granted herein is permissible under the law to prevent the substantive application being rendered nugatory, and that it does not challenge the Applicant's right to enforce the Judgment but merely prevents an injustice from happening in light of payment and settlement of the debt by the 1<sup>st</sup> Respondent. Counsel contended that the Applicant cannot be paid in full and still be allowed to dispose of the



Respondents' property as that would be inherently and patently unjust. That the Consent Orders referred to herein both allowed the Respondents to settle the debt which is exactly what the 1<sup>st</sup> Respondent did in this case. Counsel reiterated that what the Respondents are requesting is for the Court to determine whether the Judgment debt has been settled.

The Applicant filed an affidavit in reply dated 9<sup>th</sup> December 2016 deposed to by Chilufya Kaka. The deponent averred that the Respondents paid the principal debt but failed to pay the accrued interest of which they admitted their indebtedness (Exhibit "CK 1"). That the Consent Order did not or intend to revive the 1<sup>st</sup> Respondent's equity of redemption and that the Respondents are proscribed from inserting terms in the Consent Order which the parties did not agree upon.

At the hearing of the notice of motion to raise a preliminary issue on a point of law, Mr. R. Mwala Counsel for the Applicant placed reliance on the respective affidavits filed herein as well as its skeleton arguments. Counsel argues that the Respondent's application is for stay of enforcement and as per requirement they

ought to show why their application should be granted. The case of **Winchester Cigarette Machinery v Pine C. A. No. 2 of 1993<sup>4</sup>** was cited where it was held that:

*“In considering whether to grant a stay of execution of a monetary the court in exercise of its unfettered jurisdiction must start with the assumption that there has been a good reason to deny the Judgment creditor of the fruits of its Judgment.”*

Counsel referred to the case of **S. P. Mulenga v Investrust Merchant** and submitted that the Applicant was granted Judgment to be paid with interest and the Respondents' argued that the Judgment debt had been fully paid as its only reason for making an application for a stay of execution. That stemming from the affidavits on record, the Respondent has shown no cause as to why a stay of enforcement should be granted

In response, Counsel for the 1<sup>st</sup> Respondent, submitted that the Notice of Motion by the Applicant is in two parts, the first being whether or not the application to stay enforcement and/or possession and declare that the Judgment debt has been paid in full is properly before this Court. On the second limb, whether or

not the application to stay enforcement is properly before Court in light of the fact that the parties executed a Consent Order which fully determined the matter. Counsel argued that the Notice of Motion is not only challenging the stay but the substantive application upon which the stay was predicated and grounds upon which the Applicant relies on are that the Respondent's rights have been extinguished by the foreclosure hearing. He submitted that the Respondents oppose the Notice of Motion on grounds that the Consent Order in question provided for repayment of the Judgment debt and that by virtue of that, the Applicant acquiesced to the 1<sup>st</sup> Respondent redeeming the loan and therefore the right of redemption still existed.

In respect to the argument that the 1<sup>st</sup> Respondent wishes to challenge the Consent Order, Counsel submitted that there is no evidence led by the Applicant in support of this. Counsel argued that the issue is whether or not the Judgment debt has been paid in full in light of the K400,000.00 paid by the 1<sup>st</sup> Respondent and that that is the issue for determination by this Court.



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• In rely, Mr. Mwala Counsel for the Applicant submitted that the application is merely for a stay of enforcement and the only issues raised are issues of law which the party has leverage to submit at any time if supported by averment in an affidavit. Counsel referred to the case of **Pakisa Bakery Limited and Another v Aetos Transform Limited (2011) ZR 275<sup>5</sup>** in which the Supreme Court stated that:

*“Sufficient cause’ shown seems to require a judge or court to make an inquiry into the reasons. An inquiry should be made as to the reasons for the application and whether or not the same reasons will entitle the defendant to the relief sought which is stay.”*

Counsel submitted that a party making an application for stay must show sufficient cause and the onus is on him to prove why the application should be granted. Counsel reiterated that the 1<sup>st</sup> Respondent's affidavit shows that the only reason on which the Court should grant its application is that the full amount has been paid which position has been dispelled with the letter of August 2016 in which the 1<sup>st</sup> Respondent admitted its indebtedness to the



Applicant. Counsel alluded to the fact that the parties entered into a Consent Order which stipulated what should occur in instances of default, entitling the Applicant to enforce the mortgage. In conclusion, Counsel submitted that the Respondent is improperly before this Court and its application must be dismissed with costs to the Applicant.

The Applicant's notice of motion herein raises two preliminary questions for determination which I have paraphrased as follows:

- i. Whether or not the applications to stay enforcement and to declare that Judgment debt was fully paid is properly before Court in light of the fact that the 1<sup>st</sup> Respondent's rights have been extinguished by foreclosure;
- ii. Whether or not the said applications are properly before Court in light of the fact that a Consent Order executed by the parties finally determined the matter.

I have considered the affidavit evidence and arguments advanced by the parties herein. The following are my findings in relation to the questions raised. It is not in dispute that the parties executed a Consent Order dated 2<sup>nd</sup> February 2015 in which it was agreed that

if disposal of Stand No. 4161 Kitwe contained in a Consent Order under Cause No. 2014/HPC/0357 fails, the Respondents are to settle the outstanding balance within a month failure to which the Applicant shall be at liberty to enforce its rights under the mortgage. A subsequent Consent Judgment was entered on 12<sup>th</sup> May 2015 in favour of the Applicant, also stating that if the 1<sup>st</sup> Respondent failed to settle the Judgment sum of ZMW4,713,895.38 plus interest within 45 days the Applicant would be at liberty to repossess and sell the mortgaged property known as S/D B of Stand No. 12755 Mumbwa Road, Lusaka and to enforce the guarantees.

A perusal of the record shows that there has been a myriad of applications in this matter including summons for an Order to determine and declare whether the 1<sup>st</sup> Respondent has settled the Judgment debt, and summons for an ex-parte Order to stay enforcement and/or possession. It is on that premise that the Applicant filed this notice of motion to raise a preliminary issue on a point of law.

In the first limb, the Applicant raises the issue of the 1<sup>st</sup> Respondent's rights having being extinguished by foreclosure, and in support of this argument the case of **Esso Petroleum Co. Ltd v Harper's Garage Ltd**<sup>1</sup> was cited in stressing the point that the mortgagor's right of redemption is extinguished by the sell of the property. That in this case, the 1<sup>st</sup> Respondent's right of redemption was extinguished by virtue of a Consent Order dated 5<sup>th</sup> August 2015, wherein the Respondents had three months to settle the Judgment of which they defaulted and that the Applicant can enforce its right of foreclosure. The 1<sup>st</sup> Respondent on the other hand insists that there has been no foreclosure, possession or sell of the mortgaged property, therefore its right of equity of redemption was never extinguished as alleged by the Applicant. Further that the Consent Judgment executed herein and under Cause No. 2014/HPC/0357 availed the Respondent's right to pay off, of which the Applicant accepted and that the debt has been paid in full.

It is trite that a mortgagor has several cumulative remedies available as espoused by the Supreme Court in the case of **Reeves**



**Malambo v Patco Agro Industries Limited Judgment No. 20 of 2007<sup>6</sup>** where it 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 term at law as soon as the day fixed for redemption has passed.”*

I am mindful that the right of redemption is an equitable relief of which this Court has the power to administer pursuant to Section 13 of the **High Court Act, Cap 27 of the Laws of Zambia**. The issue of when the equity of redemption is extinguished is a matter of fact, and as earlier stated, there is no evidence to suggest that the Applicant has exercised its right to foreclosure or sell the mortgaged property. I find that the 1<sup>st</sup> Respondent has shown that it paid some monies towards liquidating its indebtedness to the Applicant. It is apparent that payments were made outside the period specified in the Consent Order dated 12<sup>th</sup> May 2015. I find that the Applicant cannot have the best of both worlds by asserting



that the 1<sup>st</sup> Respondent acted outside the terms of the Consent Order whilst accepting payment of monies outside the term of the Consent Orders. Since there is evidence that payments have been made to the Applicant, it is not farfetched for the 1<sup>st</sup> Respondent to bring an application to stay enforcement and/or possession and to declare and determine that Judgment debt has been paid in full. I opine that it is the only way to determine whether the 1<sup>st</sup> Respondent's rights have been extinguished or not. As the notice of motion to raise preliminary issues are intended to dispose of the matter summarily, I opine that doing so will result in an injustice as this matter requires further interrogation by proof of evidence and hearing the parties herein.

On the second limb, the Applicant contends that the issues surrounding the mortgage deed and debenture were all resolved by the consent and that it intends to exercise its power under the said consent and that such cannot be challenged in this action and in support of this argument cited the case of **Zambia Seed Company Limited and Chartered International (PVT) Limited<sup>3</sup>**.

The 1<sup>st</sup> Respondent contends that the same is misconceived as its applications are not designed to challenge the Consent Orders but for a declaration that the debt has been paid in full. My understanding of the 1<sup>st</sup> Respondent's applications is that the same are not intended to challenge the terms of the Consent Order executed by the parties. I am in agreement with the Applicant that the only way to challenge a Consent Judgment is by commencing a fresh action against the said Judgment. However, as earlier stated, the 1<sup>st</sup> Respondent's applications are not challenging the Consent Order but simply seeking determination and declaration that the Judgment debt has been paid in full. I am of the considered view that this preliminary issue is incompetently before this Court.

Based on the foregoing reasons, I accordingly dismiss the Applicant's notice of motion to raise a preliminary issue on a point of law.

Costs to the 1<sup>st</sup> Respondent to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 31<sup>st</sup> day of October, 2017.

A handwritten signature in black ink, appearing to read 'Irene Zeko Mbeve', written over a horizontal line.

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