

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HPC/0151**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**



**INDO ZAMBIA BANK LTD**

**APPLICANT**

**AND**

**FALLSWAY TIMBER**

**1<sup>ST</sup> RESPONDENT**

**SHANJIBAI BHANABHAI VORA**

**2<sup>ND</sup> RESPONDENT**

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

*For the Applicant :*

*Mr. M. Ndhlovu of Messrs MRN Legal Practitioners*

*For the 1<sup>st</sup> Respondent:*

*Mr. Kearns of Messrs Willa Mutomfwe and Associates*

*For the 2<sup>nd</sup> Respondent:*

*No appearance*

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## **J U D G M E N T**

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**Cases Referred To:**

1. *Match Corporation Limited v Development Bank of Zambia and Attorney-General [1999] ZR 13*

2. *S. Brian Musonda (Receiver of first Merchant Bank Zambia Limited) In Receivership v Hyper Food Products Ltd & Others [1999] ZR 124*
3. *Jackson Mwape & 61 Others v ZCCM Holdings Limited Plc SCZ Judgment No 23 of 2014*
4. *Ash v Hutchinson (1936) Ch 489*
5. *Reeves Malambo v PATCO Agro Industries Limited SCZ Judgment No 20 of 2007*
6. *Kanjala Hills Lodge Limited and Another v Stanbic Bank [2012] 2 ZR 172*

**Legislation Referred To:**

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court 1999 Edition.*

**Other Works Referred To:**

1. *Snell's Equity, 29<sup>th</sup> Edition*

The Applicant commenced this action by way of Originating summons dated 29<sup>th</sup> March 2017 claiming for the following reliefs:

- i The 1<sup>st</sup> Respondent immediately settles principal and contractual interest thereon due to the applicant pursuant to a facility agreement dated 15<sup>th</sup> September 2014, 12<sup>th</sup> June 2015 and restructured facility dated 12<sup>th</sup> October 2016 signed

by the Applicant and the 1<sup>st</sup> Respondent which as at February 2017 was at US\$524,710.02 and ZMW4,679,510.65.

- ii That should the 1<sup>st</sup> Respondent fail to pay the said US\$524,710.02 and ZMW4,679,510.65 due to the Applicant, the properties comprised in the Mortgage Deed and further charge being Stand Number 2573 Livingstone and Subdivision A of Farm Number 9170 Livingstone be delivered to the Applicant to enable the Applicant exercise its power to sell, assign, transfer or otherwise dispose of the said mortgaged properties.
- iii That the costs and occasioned by these proceedings be borne by the Respondents.

In the supporting affidavit deposed to by Tresford Tembo a Branch Manager in the Applicant's Livingstone Branch, the deponent avers that by a facility dated 15<sup>th</sup> September 2014, the 1<sup>st</sup> Respondent was availed bank facilities by way of loans of :

- (i) US\$530,000 taking over an existing term loan from ZANACO at an agreed rate of 2% above the prevailing US\$ base rate

which at the material date was above 11% per annum, the effective rate being 13% per annum.

- (ii) A loan of ZMW1,150,000 to finance purchase of machinery, tractor and trucks for a wood processing plant at the rate of 11% above the Bank of Zambia Policy rate which was at 12% per annum, the effective rate being at 23% per annum.
- (iii) A loan of Zambia Kwacha ZMW1,110,000 to finance purchase of plant and machinery for a food processing plant with interest as in (ii) above.
- (iv) An overdraft of ZMW1,700,000 as working capital for day to day operations of the business with interest of 23% per annum.

The facility agreement is **Exhibit "TT 1"**. The facilities were secured by a Legal Mortgage over Stand Number 2573 Livingstone and Subdivision A of Farm 9170 Livingstone and a Third-Party Mortgage was duly created (**Exhibit "TT 2"**). The deponent avers that by another facility agreement dated 12<sup>th</sup> June 2015, the facility

was secured by a Further Charge over Stand 2573 Livingstone and Subdivision A of Farm 9170 Livingstone (**Exhibit “TT 4”**).

That the 1<sup>st</sup> Respondent has defaulted in its obligations to settle the facilities in the manner stipulated by the facility agreements (**Exhibit “TT 7”**). According to the Applicant, as at February 2017 the 1<sup>st</sup> Respondent’s unsettled loans as restructured stand at US\$24,710.02 and ZMW4,679,510.65 (**Exhibits “TT 8” and “TT 9”**). The deponent avers that a final demand letter was sent to the 1<sup>st</sup> Respondent on 28<sup>th</sup> February 2017 and the 1<sup>st</sup> Respondent failed to make a reasonable repayment proposal (**Exhibit “TT 10-11”**).

The Applicant prays that the 1<sup>st</sup> Respondent be ordered to settle its debt to the Applicant and in default the Applicant forecloses, takes possession and disposes of the mortgaged properties.

In an opposing affidavit filed on 12<sup>th</sup> May 2017 and deposed to by Prana V. Kumar Vora the Managing Director of the 1<sup>st</sup> Respondent, it is admitted that various arrangement for secured funding was availed by the Applicant. According to the deponent, the parties have enjoyed a 20-year business relationship and that following the

imposition of a ban on the importation and exportation of timber by the Government, this negatively impacted the 1<sup>st</sup> Respondent business activities and revenue streams. That the 1<sup>st</sup> Respondent made all reasonable efforts to discharge their obligations by making payments to the Applicant (**Exhibit "PV 1"**). It is deposed that the Respondents intend to procure a purchaser for their properties to clear the arrears and that the negotiations have reached an advanced stage (**Exhibit "PV 2"**). That the Respondents seek an Order for equitable relief to extend the right of redemption to permit the Respondents to pay and discharge their indebtedness to the Applicant.

The 2<sup>nd</sup> Respondent herein Shanjibai Bhanabhai Vora, opposed the application by way of affidavit. The salient facts in the affidavit are that following a ban on timber exports, this closed the entire industry from 8<sup>th</sup> November 2012 to 30<sup>th</sup> April 2014 thereby paralysing the 1<sup>st</sup> Respondent's business (**Exhibit "SBV 1"**). That the Ministry of Finance imposed a 40% export duty on export of timber effective 1<sup>st</sup> January 2016 making the 1<sup>st</sup> Respondent's business non-viable and this affected their orders which had to be

cancelled and consequently the 1<sup>st</sup> Respondent could not supply its clients in South Africa and Botswana (**Exhibit "SBV 2"**). That fees, royalties and charges increased three times over and resulted in the 1<sup>st</sup> Respondent loss of income (**Exhibit SBV3"**). That in 2017, the Government increased the export levy by K10 on timber per kilogram. According to the 1<sup>st</sup> Respondent, it has been servicing the loan on a regular basis up to December 2016. That due to the export levy, the 1<sup>st</sup> Respondent's source of income was paralysed especially that the facility was a project finance. That the 1<sup>st</sup> Respondent is in the process of disposing of its real property. It is deposed that the 1<sup>st</sup> Respondent has never defaulted in its loan repayments until the recent government policies were introduced.

In an affidavit in reply dated 30<sup>th</sup> May 2017, the deponent Tresford Tandeo, avers that the 1<sup>st</sup> Respondent is not entirely dependent on the timber business as it is also involved in food processing which activity is fully operational and generates income. That there is a registered Debenture dated 15<sup>th</sup> October 2014 (**Exhibit "TT 12"**). According to the deponent, the 1<sup>st</sup> Respondent started defaulting on the terms of the facility agreement as early as 2015 prompting the

Applicant to make a formal demand on 14<sup>th</sup> October 2015 and May 2016 (**Exhibit “TT 13” and “TT 14”**). That the 1<sup>st</sup> Respondent had intimated to sell its Choma property on 16<sup>th</sup> February 2017 and made an undertaking to pay ZMW2,000,000 by 10<sup>th</sup> March 2017 which payment has not been met. (**Exhibit “TT 15”**)

In its skeleton arguments, Counsel for the Applicant contends that the 1<sup>st</sup> Respondent has shown their inability to settle the debt due to a government ban of timber trading. The case of **Match Corporation Limited v Development Bank of Zambia and the Attorney-General**<sup>1</sup> was cited in respect to the equity of redemption. Counsel argues that the Respondents have not given any good reason to justify an extension of time to suspend the exercise of the Applicant as a mortgagee. The case of **S. Brian Musonda (Receiver of first Merchant Bank Zambia Limited) In Receivership v Hyper Food Products Limited & Others**<sup>2</sup> was cited in support of this argument.

Counsel for the 1<sup>st</sup> Respondent in its skeleton arguments argues that the Court should exercise its equitable jurisdiction to interfere with the Applicant's right to enforce their security under the



Mortgage Deed by extending the right of redemption for a reasonable period in favour of the Respondents. Counsel for the Respondents relied on the **S. Brian Musonda (Receiver of first Merchant Bank Zambia Limited in Receivership) v Hyper Food Products Limited & Others**<sup>2</sup>. In support of the proposition that the Respondents have not defaulted in payments but are in arrears due to unforeseen legislative changes on the ban placed on timber selling. The case of **Jackson Mwape & 61 Others v ZCCM Holdings**<sup>3</sup> was stated where the Court held that:

**“the contract must be governed by the Laws of Zambia, it must become impossible of performance; and the parties must be discharged from further performance as a result of impossibility of performance”.**

That the Respondents have disclosed exceptional circumstances that would allow an extension of payment of the instalments due. That the Court should exercise its discretion to interfere with the mortgagee's right to enforce its securities by extending the right of redemption. Counsel for the 1<sup>st</sup> Respondent prays that the Court exercises its equitable jurisdiction to ascertain the actual amount

due after reconciliation, and to extend the equitable right of redemption to a period of not less than six (6) months from the date of Judgment.

The 2<sup>nd</sup> Respondent did not file skeleton arguments.

At the hearing on 10<sup>th</sup> July 2017, Counsel for the 2<sup>nd</sup> Respondent was not before Court and there was no explanation as to their absence. I proceeded to hear the matter as there was an affidavit of service showing that Counsel for the 2<sup>nd</sup> Respondent was aware of the date of hearing. There was no explanation as to his absence. Further, there is enough material filed by the 2<sup>nd</sup> Respondent for me to properly determine the matter, and the 2<sup>nd</sup> Respondent will therefore not be prejudiced.

I have carefully considered the affidavit evidence, as well as the parties' skeleton arguments supported by list of authorities in respect of their respective rival arguments. I have considered the authorities drawn to my attention.

It is not in dispute that the 1<sup>st</sup> Respondent was availed a loan facility by the Applicant dated 15<sup>th</sup> September 2014 wherein the 1<sup>st</sup>

Respondent was availed bank facilities by way of loans of US\$530,000 taking over an existing term loan from ZANACO at an agreed rate of 2% above the prevailing US\$ base rate which at the material date was above 11% per annum, the effective rate being 13% per annum. It is not in dispute that the Applicant availed the 1<sup>st</sup> Respondent a loan of ZMW1,150,000 to finance the purchase of machinery, tractor and trucks for a wood processing plant at the rate of 11% above the Bank of Zambia Policy rate which was at 12% per annum, the effective rate being at 23% per annum. It is common cause that a further loan of Zambia Kwacha ZMW1,110,000 to finance purchase of plant and machinery for a food processing plant with interest at the rate of 11% above the Bank of Zambia Policy rate which was at 12% per annum, the effective rate being at 23% per annum. It is not in dispute that the 1<sup>st</sup> Respondent was availed an overdraft of ZMW1,700,000 as working capital for day to day operations of the business with interest of 23% per annum. It is not in dispute that the facilities were secured by a legal mortgage over Stand Number 2573 Livingstone and Subdivision A of Farm 9170 Livingstone registered in the 2<sup>nd</sup> Respondent.

I have perused the record and find that the 1<sup>st</sup> Respondent is not denying its indebtedness to the Applicant. This can be discerned from paragraphs 13 and 14 of the 1<sup>st</sup> Respondent's affidavit in opposition dated 12<sup>th</sup> May 2017 which states as follows:

*"13. That it is the Respondent's intention to service their arrears under the arrangement entered into with the Applicant bank and it was merely because of the constraints on their business activities caused by the introduction of the embargo and/or ban on the importation/exportation of timber by the Government of the Republic of Zambia.*

*14. That I have therefore instructed my Advocates to seek the granting of an Order for equitable relief to extend the right of redemption (if this is so determined by this Honourable Court to apply) for a reasonable period of time. An admission under **Order 27 Rule 3 (2) Rules of the Supreme Court, 1999 Edition** defines an admission. It states that such an admission may be express or implied, but they must be clear,"*

In the case of **Ash v Hutchinson (1936) Ch 489<sup>4</sup>**, Greene J stated in regard to admissions that:

**“A Plaintiff who relies on the proof of a substantial part of his case upon admissions in the defence, must in my judgment, show that the matters in question are clearly pleaded and as such clearly admitted; he is not entitled to ask the court to read meanings into his pleadings which upon a fair construction do not clearly appear in order to fix the Defendant with an admission.”**

In my considered view, the paragraphs cited in the preceding paragraphs are clearly an admission. I am therefore satisfied that the 1<sup>st</sup> Respondent herein has unequivocally admitted its indebtedness to the Applicant. I accordingly enter Judgment in favour of the Applicant against the 1<sup>st</sup> Respondent for the payment of the sum of US\$524,710.02 and ZMW4,679,510.65 plus interest.

In the case of the Judgment sum of US\$524,710.02, interest shall accrue at the contractually agreed rate from date of the writ until

Judgment and thereafter at the dollar commercial lending rate until full payment.

The Judgment sum of ZMW4,679,510.65 shall accrue interest at the contractually agreed rate from date of the writ to date of Judgment and thereafter at the commercial lending rate as determined by Bank of Zambia.

The 1<sup>st</sup> Respondent contends that there is need for a reconciliation of its accounts. The Applicant in its affidavit in support of the originating summons exhibited the 1<sup>st</sup> Respondent's loan statement account (**Exhibit "TT8 and 9)**. These statements are also exhibited in the 1<sup>st</sup> Respondent's affidavit in opposition (**Exhibit "PV1"**). The 1<sup>st</sup> Respondent seeks a reconciliation without any further explanation and justification. The loan account statement clearly shows the movement on the loan account in terms of credits and debits. If anything, the loan statement of account is not disputed by the 1<sup>st</sup> Respondent. Therefore, the loan statement of accounts stands as exhibited.

The next issue for determination is whether the Applicant is entitled to the reliefs sought in the originating summons. The Applicant's

application is predicated on **Order 30 Rule 14 Rules of the High Court, Cap 27 of the Laws of Zambia** which states as follows:

**"14. Any mortgagee or mortgagor whether legal or equitable on 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) 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.**

It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure and delivery up of

possession of the mortgaged property, and sell of the mortgaged property. These remedies are cumulative and come into play where there is default on the part of the borrower. Instructive is the case of **Reeves Malambo v PATCO Agro Industries Limited**<sup>5</sup> where the Supreme Court held as follows:

**"A mortgagee is at liberty to exercise his right to foreclosure 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."**

In **Kanjala Hills Lodge Limited and Another v Stanbic**<sup>6</sup>, the Supreme Court held that:

**"once there is a default such as the default of a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to him."**



It is trite that a mortgagor has a right in equity to redeem even after the date fixed by the mortgage period for repayment has passed. The Court in exercise of its powers to afford the mortgagor the equity of redemption is duty bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of its relief.

The 1<sup>st</sup> Respondent requires an extension of time within which to redeem the mortgaged properties. Their proposal for repayment is for a period of six (6) months from date of Judgment. I have perused the record, and the evidence shows that the 1<sup>st</sup> Respondent has abrogated several undertakings of settling their indebtedness. This to me indicates an inability to pay as evidenced by paragraph 14 of the 1<sup>st</sup> Respondent's affidavit in opposition. According to the Applicant, the 1<sup>st</sup> Respondent made an undertaking to pay ZMW2,000,000 by 10<sup>th</sup> March 2017 which did not materialise. That the 1<sup>st</sup> Respondent started defaulting as far back as 2015 prompting the Applicant to demand repayment of its monies.

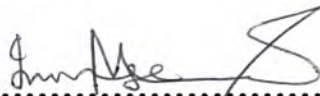
In view of the above, and in exercising my discretion, the Judgment sums shall be paid within a period of one hundred and twenty days

(120) days/four (4) months of the Judgment, failure to which the Applicant shall foreclose and take possession of Stand Number 2573 Livingstone and Subdivision A of Farm Number 9170 Livingstone being the mortgaged properties registered in the 2<sup>nd</sup> Respondent. The Applicant shall be at liberty to sell the mortgaged properties after foreclosure without further recourse to the Court.

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

Leave to appeal granted.

Dated this 21<sup>st</sup> day of August 2017.



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