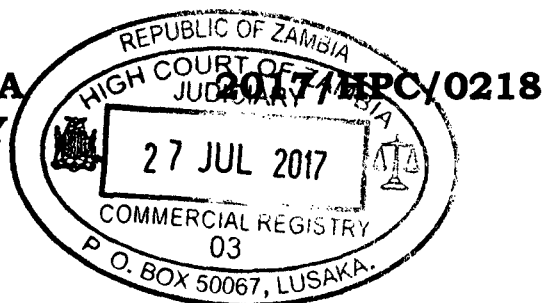


**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



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

IN THE MATTER OF: THE PROPERTY COMPRISED IN A LEGAL MORTGAGE RELATING TO STAND NO. 2400 LUSAKA

IN THE MATTER OF: FORECLOSURE, POSSESSION AND SALE OF THE MORTGAGED PROPERTY

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK PLC APPLICANT

AND

FELOPATER ZAMBIA LIMITED	1ST RESPONDENT
WILLIAM NAGIB REZK	2ND RESPONDENT
WILLIAM ANTONEY REZK	3RD RESPONDENT

**Before the Honourable Mr. Justice W. S. Mweemba in Chambers
at Lusaka**

For the Applicant: *Mrs. K. Musana, In-House Counsel
ZANACO*

For the Respondents: *Mr. D. K. Kasote, Messrs Chifumu Banda
& Associates*

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia**

2. Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia

CASES REFERRED TO:

- 1. Santley V Wilde (1899) CA 474.**
- 2. Kanjala Hills Lodge Limited and Another V Stanbic Bank (Z) Ltd. (2012 Vol. 2) 285**
- 3. Avon Finance Company Limited V Bridger (1985) 2 All ER 281.**

WORKS REFERRED TO:

- 1. Halsbury's Laws of England, 4th Edition, Volume 32.**

The Applicant by way of Originating Summons filed into Court on 15th May, 2017 made pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia seeks the following remedies or reliefs against the Respondents:

1. Payment of all monies and contractually agreed interest due and owing to the Applicant under a Credit Facility Letter dated 17th September, 2015 for K2,000,000.00 New Overdraft Limit and K5,154,000.00 amalgamation of all existing facilities into a Restructured Medium Term Loan Facility, which facilities were secured by a Legal Mortgage and Further Charges relating to Stand No. 2400 Lusaka (the Mortgaged Property) and which monies stand at K2,629,880.36 and K5,558,582.32 respectively as at 3rd May, 2017;
2. An Order to Foreclose on the Mortgaged Property;
3. Delivery of vacant possession of the Mortgaged Property by the 1st Respondent to the Applicant;

4. An Order for Sale of the Mortgaged Property by the Applicant;
5. An Order that the 2nd and 3rd Respondents being Guarantors of the 1st Respondent honour their guarantees in the event of the 1st Respondent failing to settle its indebtedness in full to the Applicant;
6. Any other relief the Court shall deem fit; and
7. Costs.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 15th May, 2017. The Affidavit in Support was sworn by Jerry Muchimba a Corporate Recoveries Specialist in the Special Assets Management Department of the Applicant bank. It is deposed that the 1st Respondent was on 17th September, 2015 availed facilities of K2,000,000.00 being a New Overdraft Limit and K5,154,000.00 resulting from the amalgamation of all existing facilities into a Restructured Medium Term Loan Facility. A copy of the Credit Facility Letter dated 17th September, 2015 signed by the 1st Respondent's authorized officers is exhibited marked "JM1".

It is stated that it was an agreed term of the Credit Facility Letter in Clause 2.1 that, interest would be calculated at the variable Bank of Zambia Policy Rate plus a margin of 6.25% (current effective rate of $12.5\% + 6.25 = 18.75\%$) per annum on the facilities. That it was further a term of the Credit Facilities granted that they would be secured by inter alia a Legal Mortgage relating to Stand No. 2400 Lusaka in the name of the 1st Respondent. The debt was further

secured by Further Charges over the Mortgaged Property. Copies of the said Legal Mortgage and Further Charges are exhibited collectively marked "JM2". Copy of the Certificate of Title relating to the Mortgaged Property is exhibited marked "JM3".

It is averred that it was also an agreed term of the Credit Facilities granted that they would be guaranteed by the 2nd and 3rd Respondents. A copy of the unlimited Guarantee is exhibited marked "JM4".

It is deposed that the 1st Respondent has failed to make the payments due under the facilities. That despite reminders to settle their indebtedness, the Respondents have failed and/or neglected to do so. Copies of reminder letters to the Respondents are exhibited collectively marked "JM5". That to date, the Credit Facilities remain unpaid and stand at the sum of K2,629,880.36 and K6,558,582.32 respectively as at 3rd May, 2017. Copies of the 1st Respondent's Statement of Account are exhibited collectively marked "JM6".

The 3rd Respondent filed an Affidavit in Opposition on 29th June, 2017 on behalf of the Respondents. He stated that the Respondents are truly indebted to the Applicant in the stated amounts of K2,629,880.36 and K6,558,582.32 respectively as at 3rd May, 2017. That the Respondents are unable to settle the debt in one lump sum and are proposing to settle the same in monthly in the following manner:

- (a) K3,500,000.00 on or before 30th September, 2017; and

(b) The balance on or before 31st December, 2017.

That the Court should grant the Respondents an order to settle the debt in installments as outlined above.

Counsel for the Applicant filed Skeleton Arguments into Court on 15th May, 2017. She gave a summary of the background leading to the current application. She submitted that the action is filed pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“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 property subject to the charge

or by any other person in, or alleged to be in possession of the property....”

Counsel further submitted that the learned authors of Halsbury's Laws of England, 4th Edition, Volume 32 at paragraph 402 state that a mortgage consists of two things, namely a personal contract of a debt and a disposition or charge of the mortgagor's estate or interest as security for the repayment of the debt.

The Applicant's Counsel also relied on the case of **SANTLEY V WILDE (1)** in which Judge Lindley defines a mortgage as follows:

“A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given”.

The case of **KANJALA HILLS LODGE LIMITED & ANOTHER V STANBIC BANK ZAMBIA LIMITED (2)** was also cited. In that case the Supreme Court held thus:

“The Appellants having defaulted in their repayment obligation cannot hide behind the right of redemption. This view is buttressed in Atkins Court Forms Vol. 28 where the learned authors have stated at page 8 that:

When the mortgagor defaults the mortgagee is entitled to pursue all his remedies concurrently since the right of redemption is an equitable right, the Appellant's conduct is certainly contrary to the maxim that he who comes to equity must come with clean hands.

Further, the learned Authors of Megarry's Manual of the Law of Real Property have also stated that once there is a breach of a condition which had to be complied with to keep alive the legal right of redemption, the mortgagee may commence foreclosure proceedings.

Therefore, in this case the Respondent was entitled to commence an action by Originating Summons for payments of sums due, for foreclosure, sale and possession”.

The case of **AVON FINANCE COMPANY LIMITED V BRIDGER (3)** was also cited in which Lord Denning, MR opined as follows:

“Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. Take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and a friend guarantees it. The guarantor gives his bond and gets nothing in return. The common law will not interfere”.

It was submitted that in *casu*, the Affidavit in Support of the Originating Summons herein show that the Respondents have failed to honour their obligations to pay back the monies advanced to the 1st Respondent under the Credit Facilities which were secured by the Legal Mortgage, Further Charges and unlimited Guarantee

aforsaid. That to-date the facilities remain unpaid and stand at the sum of K2,629,880.36 and K6,558,582.32 respectively as at 3rd May, 2017.

It was finally submitted by learned Counsel for the Applicant that demand having been made by the Applicant and the Respondents having failed and/or neglected to pay the money outstanding the Applicant should be granted the reliefs claimed.

The Respondents did not file any Skeleton Arguments.

When the matter came up for hearing on 14th July, 2017 the learned Counsel for the Applicant submitted that the Respondents' Affidavit in Opposition reveals an admission. That since the Respondents are desirous of liquidating the amounts owing they ought to have made an application using the appropriate order. The Learned Counsel for the Respondents confirmed that the Respondents are indeed admitting the debt but have proposed how the debt ought to be paid. He stated that as the Respondents have not wasted the Court's time costs should be in the cause.

I have considered the Applicant's claim together with the Affidavit in Support and Skeleton Arguments. I note that by their Affidavit in Opposition the Respondents do in fact admit owing the amounts claimed by the Applicant bank.

I accept the Applicant's submission including the contention that if the Respondents wished to pay the amounts due and owing to the Applicant by installments they should have made an application

pursuant to the appropriate order, namely Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.

From the evidence adduced by the Applicant bank and the Respondents own admission it is clear that the Respondents owe the amounts claimed.

I accordingly enter Judgment in favour of the Applicant Bank against the Respondents for the payment of K2,629,880.36 and K6,558,582.32 respectively and contractual interest from 4th May, 2017 to date of Judgment and thereafter at the current bank lending rate as determined by Bank of Zambia up to day of full payment.

The Judgment sums together with interest must be paid by the 1st Respondent within 90 days from date hereof.

All the remedies or reliefs endorsed on the Originating Summons are hereby granted.

In the event that the Judgment debt and interest remains unpaid at the expiry of the said period of 90 days the 1st Respondent shall deliver vacant possession of the Mortgaged Property being Stand No. 2400 Lusaka in the Lusaka Province of Zambia to the Applicant bank who shall be at liberty to foreclose and exercise its right of Sale.

Should there be any balance outstanding after such sale of the Mortgaged Property the 2nd Respondent and 3rd Respondent shall as Guarantors pay any shortfall.

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

Leave to appeal is granted.

Delivered at Lusaka the 27th day of July, 2017.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE