

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

**2017/HPC/0269**

**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 LEGAL MORTGAGE OVER SUBDIVISION  
NO. 'Z8' OF SUBDIVISION NO. 2 OF SUB  
DIVISION 'E' OF FARM NO. 32a, LUSAKA

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

**BETWEEN:**

**ELPE FINANCE LIMITED**

**APPLICANT**

**AND**

**IGNATIUS ANAYAWA**

**RESPONDENT**

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

*For the Applicant: Mr. T. Chali, Messrs H. H. Ndhlovu & Company*

*For the Respondent: Mr. M. C. Hamachila, Messrs Iven Mulenga &  
Company*

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**JUDGMENT**

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**LEGISLATION REFERRED TO:**

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

**CASES REFERRED TO:**

1. Chapelton V Barry Urban District Council (1940) 1 KB 532.

**2. L'Estrange V F. Graucob Limited (1934) 2 KB 394.**

**3. S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1999) ZR 124.**

The Applicant by way of Originating Summons filed into Court on 20<sup>th</sup> June, 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 Respondent:

1. Payment of the sum of K286,697.13 together with interest thereon at the agreed rate and other charges due and owing to the Applicant by virtue of a Loan Facility availed to the Respondent and secured by a Legal Mortgage over Subdivision No. 'Z8' of Subdivision No. 2 of Subdivision "E" of Farm No. 32a Lusaka;
2. Foreclosure;
3. Possession;
4. Sale of the said Mortgaged Property;
5. Any other relief the Court may deem fit; and
6. Costs.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 20<sup>th</sup> June, 2017. The Affidavit in Support was sworn by Gabriel Sikanyika the Manager of the Applicant's Lusaka Branch. It is deposed that on or around 18<sup>th</sup> January, 2017 the Respondent was availed a loan facility in the sum of K250,000.00 by the Applicant. That the

loan was secured by a Legal Mortgage registered on 19<sup>th</sup> January, 2017 over property known as Subdivision No. "Z8" of Subdivision No. 2 of Subdivision "E" of Farm No. 32a Lusaka owned by the Respondent. A copy of the Memorials in the Certificate of Title showing an endorsement of the said Legal Mortgage and a Ministry of Lands, Natural Resources and Environmental Protection Printout is exhibited marked "GS1a".

It is stated that the first instalment of the amount was due after 30 days from the date the loan was issued with compound interest at the rate of 5% percent per annum. A copy of the Legal Mortgage Deed is exhibited marked "GS2".

It is deposed that the Respondent has not paid any instalment towards the borrowed sum to date. That the Respondent has perpetually defaulted and/or failed to pay the said loan as agreed and the outstanding balance stands at K286,697.13 as at 22<sup>nd</sup> May, 2017. A copy of the Statement of Account is exhibited marked "GS3".

It is stated that the Applicant effected demand for payment. A copy of the Demand Letter dated 29<sup>th</sup> May, 2017 is exhibited marked "GS4". That the Respondent has no credible Defence to the claims raised by the Applicant.

Counsel for the Applicant filed Skeleton Arguments into Court on 20<sup>th</sup> June, 2017. He submitted that the Court has the power to order the reliefs that the Applicant seeks. That the application is

predicated on **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 right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course on 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...”**

It was the Applicant’s Counsel’s contention that as a result of the Respondent’s continuous default in payment of the Loan Facility availed to him by the Applicant on or about 18<sup>th</sup> January, 2017 the Applicant is entitled to possess, foreclose and sale property known as Subdivision No. “Z8” of Subdivision No. 2 of

Subdivision "E" of Farm No. 32a Lusaka which property is subject to a Legal Mortgage registered on 19<sup>th</sup> January, 2017.

An Affidavit of Service sworn by one Moses Phiri and filed into Court on 10<sup>th</sup> August, 2017 shows that the Respondent was served with the Originating Summons, Affidavit in Support of Originating Summons, Skeleton Arguments, Notice of Appointment to Hear Originating Summons and Draft Consent Judgment on 20<sup>th</sup> June, 2017.

The Respondent has not opposed the Applicant's application herein. At the hearing of the Originating Summons on 13<sup>th</sup> September, 2017 the Respondent's Counsel told the Court that his client admits owing the amount claimed but wished to negotiate for a lower interest rate.

I have considered the Applicant's claim together with the Affidavit in Support and Skeleton Arguments.

I note that at paragraph 6 of his Affidavit in Support of Originating Summons the deponent (Gabriel Sikanyika) states that the first instalment payable on the amount advanced was due after 30 days from the date the loan was issued with Compound Interest at the rate of 5 per cent per annum. This assertion that the applicable interest was compound interest at the rate of 5 percent per annum is repeated at paragraph 4, page 2 of the Applicant's List of Authorities and Skeleton Arguments filed into Court on 20<sup>th</sup> June, 2017 where it is stated that:

**“... The Respondent was supposed to make the first instalment of the said amount after 30 days from the date the loan was issued with Compound Interest at the rate of 5 percent per annum”.**

A perusal of the Legal Mortgage Deed dated 19<sup>th</sup> January, 2017 exhibited to the Affidavit in Support of Originating Summons marked “GS2” in the Second Schedule shows that the contractual interest agreed between the Applicant and the Respondent is Compound Interest at the rate of 18 percent per month. This is the agreed interest rate which as a matter of fact is reflected in the Letter of Demand dated 29<sup>th</sup> May, 2017 from the Applicant’s Advocates to the Respondent and also in the Statement of Account.

It is clear that the interest Clause was incorporated in the agreement between the parties. While no Facility Letter was exhibited to the Originating Summons by the Applicant, the Legal Mortgage Deed contains the Second Schedule referred to above. It is trite law that incorporation of contractual terms can occur, among others, by giving notice of a particular term at the time of the contract, by custom of trade, by implication and by signing a contractual document. And in the case of contractual documents, for clauses or terms to be considered incorporated they must be found in a document intended to be contractually binding (See **CHAPELTON V BARRY URBAN DISTRICT COUNCIL (1)**).

Moreover, it is also trite that if one signs a contractual document it is automatically considered to be binding, even if the party has not read the terms. In this respect, in **L'ESTRANGE V F. GRAUCOB (2)** the English Court of Appeal held that a written document was contractually binding even though the Claimant had not read the document and the clause was in "*regrettably small print*".

In this case, the Legal Mortgage Deed is a written contractual document which was signed by the respective parties and was intended to be legally binding. I therefore find that the interest applicable to the loan of K250,000.00 was Compound Interest at a rate of 18% per month.

From the evidence adduced by the Applicant, I am satisfied that the Applicant has proved its case on the balance of probabilities.

I accordingly enter Judgment in favour of the Applicant against the Respondent for payment of the sum of K286,697.13 and contractual interest from 23<sup>rd</sup> 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 sum together with interest must be paid within 30 days from date hereof.

As espoused in the case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED,**

**TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (3)**, a mortgagee has several remedies available which are cumulative. It follows that 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 30 days the Respondent shall deliver possession of the Mortgaged Property namely Subdivision No. "Z8" of Subdivision No. 2 of Subdivision "E" of Farm No. 32a Lusaka to the Applicant who shall be at liberty to foreclose and exercise its right of Sale.

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

Leave to appeal is granted.

Delivered at Lusaka the 29<sup>th</sup> day of September, 2017.



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**William S. Mweemba**  
**HIGH COURT JUDGE**