IN THE HIGH COURT FOR ZAMBIA 2012/HPC/0675

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

In the matter of:	An application for vacant possession and sale of Stand No. 896, situate in the Lusaka Province of the Republic of Zambia
In the matter of:	Order 88 rule 1 of the Supreme Court Rules of England, Supreme Court Practice (White Book) Vol. 1, 1999 Edition.

BETWEEN:	**FINANCE BANK ZAMBIA LIMITED**	**APPLICANT**
	AND	
	BETRICH INVESTMENTS LIMITED	**1ST RESPONDENT**
	BETTY CHIZYUKA	**2ND RESPONDENT**
	RICHARD CHIZYUKA	**3RD RESPONDENT**
	HOTEL MACHA-LENI LIMITED	**CLAIMANT**

Coram: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the 16th day of March, 2018.

For the Applicant:	**Mr. M. A. Mukupa of Messrs. Isaac and Partners.**
For the Respondents and Claimant:	**Mr. M. M. Haimbe of Messrs. Sinkamba Legal Practitioners.**

RULING

Cases referred to:

1. *Clementina Banda v. Boniface Mudimba (2011) Z.R. Vol. 3 Page 162.*
2. *Zambia Telecommunications Company Limited v. Muyawa Liuwa, SCZ Judgment No. 16 of 2002.*

Legislation referred to:

1. ***Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
2. ***Orders 2, rule 2 and 45/3/5 of the Rules of the Supreme Court, 1999 Edition.***
3. ***Sections 5 and 24 of the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia.***
4. ***Section 67 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.***

This is the Respondents' application to set aside Writ of Possession and Execution and to Discharge Mortgage pursuant to Order 3, rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia, Order 2, rule 2 and Order 45/3/5 of the Rules of the Supreme Court, 1999 Edition.

The brief background to the application is that on 21st July, 2014 this Court entered judgment for the Applicant in the sum of US$809.891.16 being the monies outstanding on the credit facilities as at the 30th day of November, 2012 together with interest at the agreed compounded rate up to the date of the judgment and thereafter at the prevailing commercial bank lending rate as determined by the Bank of Zambia until full satisfaction of the Judgment sum.

The Respondents were given a moratorium of Ninety (90) days within which to pay the aforestated Judgment debt and interest, in default of which the Applicant was at liberty to foreclose, possess the mortgaged property, being Stand No. 896, Lusaka and dispose of the same by way of sale. Costs of the proceedings were awarded to the Applicant. The Respondents having defaulted in settling the judgment debt within the ninety-day period, the Applicant proceeded to foreclose the mortgaged property and caused to be executed a Writ of Possession of the said property on 27th October, 2014. An *ex-parte* Order for Stay of Execution of Writ of Possession was subsequently granted to the Respondents. It is the said Writ of Possession which is the subject of the application before this Court.

The application is supported by an Affidavit in Support deposed to by Richard Chizyuka, the 3rd Respondent herein, dated 5th December, 2016, List of

Authorities and Skeleton Arguments of even date. The application is further buttressed by an Affidavit in Reply sworn by the same deponent and filed into Court on 15th February, 2017, together with Skeleton Arguments of even date.

On its part, the Applicant filed an Affidavit in Opposition deposed to by one Hendrix Chiyengi, the Applicant's Debt Recoveries Manager, dated 27th February, 2017; Skeleton Arguments and List of Authorities filed on 31st January, 2017 and 27th February, 2017.

At the hearing, Mr. Haimbe, learned Counsel for the Respondents, stated that they were relying on the Affidavits filed in support of the application together with List of Authorities and Skeleton Arguments.

In response, Mr. Mukupa, learned Counsel for the Applicant indicated that the Applicant would rely on the Affidavit of Hendrix Chiyengi, List of Authorities and Skeleton Arguments filed in opposition to the application. He submitted that the gist of the Applicant's argument is that this Court granted judgment to the Applicant on 21st July, 2014 to foreclose, take possession and sell property in the event of default in payment of judgment sum. That the Applicant indulged the Respondents for a period of over two and a half years from the date of judgment before it exercised its right to foreclose on the property.

Regarding the Claimant's argument that they did not have notification of the judgment of the Court, Mr. Mukupa submitted that the Applicant found the same surprising considering the fact that Mr. Richard Chizyuka who swore the Affidavit on behalf of the 1st Respondent, himself and the Claimant, is both a director and a shareholder in both the 1st Respondent Company and the Claimant Company and was at all material times aware of the judgment of this Court.

Mr. Mukupa submitted that it is a mockery of this Court for the Claimant to claim that it did not have actual notice when its directors and shareholders are one and the same people as those for the 1st Respondent company. He concluded by submitting that the Applicant had properly exercised its right to

foreclose on the property and that the only cure to the problem was the Respondents paying the judgment debt. He thus prayed that the application be dismissed with costs for lack of merit and for being frivolous.

Submitting in reply, Mr Haimbe stated that, firstly, the judgment in this case is against the Respondents and not the Claimant. Secondly, that it is not the judgment that was delivered in this Court that is in issue before the Court but the post-judgment conduct of the Applicant. It was Mr. Haimbe's further submission that the Respondents totally agree that the Applicant is entitled to its money and that the record will show that the Respondents made every effort to ensure that the judgment debt is paid.

According to Mr. Haimbe, the Applicant gave an irrevocable undertaking in a letter dated 1st July 2015, exhibited in the Affidavit in Support as exhibit ''RMC7''. That the letter is proof that the Applicant was aware of the arrangements made by the 1st Respondent for Development Bank of Zambia (DBZ) to pay off the debt. That in support thereof, the Applicant undertook to surrender the securities in the form of the original Certificate of Title to DBZ to allow for a refinancing to take place. That in so doing, the Applicant waived its right to execute in favour of allowing DBZ to pay the debt on behalf of the Respondents. Thus, the Applicant is precluded from taking out a Writ of Possession.

As authority, he referred this Court to the case of *Clementina Banda v. Boniface Mudimba*[1], where the court held as follows:

> *"There are two types of waiver, 'waiver by election' and 'equitable waiver'. Waiver by election occurs when a party acts to the knowledge of another party in a way that is consistent with choosing to rely on one of two alternatives and mutually exclusive rights... the effect of such an election is that the party will be precluded from asserting the other right..."*

Reacting to his learned colleague's submission that the Claimant's claim that it was not aware of the judgment herein was a mockery of this Court, Mr. Haimbe submitted that nowhere on the record has the Claimant said that it

was unware of the judgment. That the only issue of lack of notice raised by the Claimant is the fact that it was not given notice to vacate as a tenant as provided by the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia.

He reiterated his submission that there has never been an assertion by the Claimant that it was unaware of the judgment and that there is no dispute by the Applicant that the Claimant was a tenant of the 1st Respondent. On these grounds, he urged this Court to grant the application being sought with costs.

I have perused the various Affidavits in Support of the application, List of Authorities and Skeleton Arguments filed by the Respondents on 5th December, 2016 and 15th February, 2017. I have equally scrutinised the opposing Affidavits filed into Court on 27th January, 2017, List of Authorities and Skeleton Arguments filed by the Applicant on 31st January, 2017 and 27th February, 2017.

The issue for determination by this Court, in my considered view, is whether or not the Respondents have advanced plausible grounds to warrant the setting aside of the Writ of Possession executed by the Applicant on 27th October, 2014 pursuant to a Judgment delivered by this Court on 21st July, 2014 in favour of the Applicant. An *ex-parte* Order for Stay of Execution of the Writ of Possession which stayed the sale of the mortgaged property, namely Stand No. 896, Lusaka, was granted to the Respondents on 6th December, 2016 pending the hearing and determination of the application to set aside Writ of Possession.

The Respondents have advanced a number of arguments in support of their application, the nub being that the Writ of Possession should be discharged because the Applicant breached its duty not to act in a manner that could cause a debtor to fail to pay its debt especially that the Applicant formally and in writing, irrevocably undertook to directly surrender to the DBZ the Certificate of Title to stand No. 896, Lusaka after finalising the re-financing facility and once DBZ disbursed the proceeds of the re-financing agreement directly into the 1st Respondent's account.

According to the Respondents, the Applicant's action of taking possession of the property and thereby effectively closing down a fully functional business had the effect of negatively impacting on the Respondent's ability to settle the judgment debt in light of DBZ's decision subsequent to the possession of Stand No. 896 not to go ahead with the re-financing. They argue that since the Applicant breached its duty towards the Respondents, the mortgage should be discharged.

Further, that by consenting and acquiescing to the Respondents' application for refinancing from DBZ and aiding the Respondents in their endeavour through undertaking to surrender the title deeds, the Applicant was precluded from unilaterally and abruptly issuing a Writ of Possession. That under the circumstances, the Applicant waived its right to unilaterally take possession of the property without due notice.

In response, the Applicant argued that contrary to the Respondent's allegation, the issuing of the Writ of Possession was in no way malicious or unreasonable or let alone, issued irregularly. That the Applicant reasonably believes that the 2nd and 3rd Respondents incorporated Hotel Macha-Leni a year after commencement of the foreclosure proceedings for the purpose of depriving the Applicant the fruits of its judgment and that therefore, this is a fit and proper case in which the Court should lift the corporate veil to see the true identity of the persons behind the transactions. The Applicant argued further, that it had no obligation to the Claimant under the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia because the 2nd and 3rd Respondents are the principal officers of the 1st Respondent and the Claimant was at all material times, aware of the Court's judgment and had actual notice of the same.

The Applicant argued, in addition, that it did not act unreasonably as the Respondents had failed to refinance the loan within a reasonable time since two years and five months had lapsed since obtaining judgment and DBZ financing had delayed by a period of one year and five months from the date

the Applicant made the undertaking to release the security to DBZ as shown by exhibit "RMC7" in the Affidavit in Support.

The Applicant further contended that they had notified the Respondent's advocates on the record at the time, Messrs Muleza Mwiimbu and Company, on 28th October, 2016 of their intention to issue a Writ of Possession of the property. The Applicant asserted that since the re-financing was not availed to the Respondents, the Applicant was not under any legal obligation to release the title as the condition precedent under the irrevocable letter of undertaking to release security, was not met. That the Applicant has given the Respondent ample time within which to settle its debt and it cannot, therefore, be said that it acted in such a manner that caused the 1st Respondent to fail to pay its debts.

It was, therefore, the Applicant's contention that it did not breach any duty owed to the Respondents, but was magnanimous enough to give the Respondents time within which to pay their debt, but that to its surprise, the Respondents incorporated a company and are hiding behind that company in order to deprive the Applicant the fruits of its judgment. That it is the Applicant's belief that it acted within its rights as judgment creditor as empowered by the judgment of this Court.

I am of the view that despite the Respondent's robust arguments, the application to set aside the Writ of Possession lacks merit for the reasons advanced below.

The Respondents have argued that the application to set aside the Writ of Possession is anchored on the letter written by the Applicant on 1st July, 2015 and exhibited as "RMC7" in the Affidavit in Support of the application, in which it is stated in part in paragraph 3 as follows: -

> *"In this regard, our client irrevocably undertakes to release the original Certificate of Title relating to Stand No. 896, Lusaka ... to yourselves, together with the necessary documentation required to discharge its interest over the*

said property as soon as you avail our client with the amount currently outstanding, plus continuing interest".

The last part of the quoted passage which, in my view, is unambiguous, shows that the release of the original Certificate of Title by the Applicant to DBZ was predicated upon DBZ availing the 1st Respondent the outstanding amount plus continuing interest which was to be used to settle the debt. DBZ decided not to proceed with the refinancing it had undertaken to do and thus, the condition precedent to the Applicant's undertaking to release the original Certificate of Title of Stand No. 896, Lusaka was never met. I therefore, concur with the Applicant's contention that it was not under any legal obligation to release the Certificate of Title as the condition precedent for the release of the security was not fulfilled.

The Respondents have also argued that the Applicant exercised its option not to issue a Writ of Possession against the Respondents pursuant to the judgment herein by choosing the option to await the refinancing by DBZ. They submitted that by choosing the latter option, the Applicant was precluded from asserting the other right, namely, the right to issue a Writ of possession, and in that regard, cited the case of *Clementina Banda v. Boniface Mudimba* referred to earlier. That in as much as the Applicant had a right to issue a Writ of Possession to enforce the judgment herein, it elected to waive that right when it elected to await the financing from DBZ.

The *Clementina Banda v. Boniface Mudimba* case cited by the Respondents, which describes the two types of waiver correctly states the law relating to waivers. However, I am of the view that in the case in *casu* the Applicant did not, by undertaking to release the Certificate of Title, elect to waive its right to issue a Writ of Possession. I opine that the undertaking was made in good faith with the expectation that DBZ would bail the 1st Respondent out as expected; hence its undertaking to release the Certificate of Title to the mortgaged property as soon as DBZ availed the 1st Respondent with the amount outstanding, plus continuing interest.

I am in agreement with the submission by the Applicant that the objective of any mortgage action is to ensure that the mortgagee recovers the monies due to it within a reasonable time. Judgment in this case was delivered in July, 2014, which is about four years ago and the Applicant has not yet enjoyed any of the fruits of its success. As the Supreme Court stated in the case of *Zambia Telecommunications Company Limited v. Muyawa Liuwa*[2], courts do not make it a habit of depriving successful litigants fruits of their judgment.

I do not find that the Applicant breached any duty owed to the 1st Respondent not to act in a manner that could cause the 1st Respondent to fail to pay its debt and necessitate the discharge of the mortgage. Notably, there are rules pertaining to discharge of mortgages which the 1st Respondent has not met in this case. As the Applicant correctly submitted, it is trite law that a mortgage can only be discharged when all the monies secured by the mortgage plus interest have been paid. Once the monies have been paid in full, the mortgage can then be discharged in accordance with the provisions of Section 67 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. There is no evidence before this Court that the 1st Respondent has settled its indebtedness to the Applicant to call for the discharge of the mortgage in issue. Therefore, the prayer to discharge the mortgage is misconceived.

The Applicant has argued that it had no obligation to the Claimant under the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia because the 2nd and 3rd Respondents are the principal officers of the 1st Respondent and the Claimant Company and therefore, the Claimant was at all material times, aware of the Court's judgment and had actual notice of the same. However, I am of the considered view that the positions of the 2nd and 3rd Respondents in the 1st Respondent and Claimant Companies notwithstanding, the Claimant was the 1st Respondent's tenant and therefore, the Applicant had an obligation as mortgagee in possession to give the Claimant the statutory six-month notice of termination of the lease agreement. The relevant parts of Section 5 (1) and (2) of Chapter 193 provide that:

> *"The Landlord may terminate a tenancy to which this Act applies, by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end...*
>
> *(2) subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect unless it is given not less than six months..."*

Whereas the notice under section 5 is given by the landlord, in a situation such as the present one, where the mortgagee is in possession of the premises, the mortgagee takes on the role of the landlord by virtue of section 24 of the Act. The said section stipulates as follows:

> *"24. Anything authorised or required by the provisions of this Act, other than subsection (2) or (3) of section twenty-one, to be done at any time by or with the landlord, shall, if at that time the interest of the landlord in question is subject to a mortgage and the mortgagee is in possession or a receiver appointed by the mortgagee or by the Court is in receipt of the rents and profits, be deemed to be authorised or required to be done by, to or with the mortgagee instead of that landlord."*

I have examined subsections (2) and (3) of Section 21 as referred to in Section 24 above and I am of the opinion that the exception created by the said subsections does not apply to the circumstances currently under consideration.

Having found that the Applicant as mortgagee in possession took on the role of landlord, I make the following order, namely, that the Applicant shall give the Claimant the requisite six (6) months' notice of termination of the tenancy agreement relating to Stand No. 896, Lusaka in accordance with Section 5 (1) of the Landlord and Tenant (Business Premises) Act.

With respect to the Applicant's claim that the 2nd and 3rd Respondents fraudulently incorporated a company in order to deprive the Applicant the fruits of its judgment and that therefore, this is an appropriate case for the Court to pierce the company's corporate veil, it is my considered view that while ordinarily an application for the same is required, there is nothing to stop the

Court, in exercise of its inherent jurisdiction, to lift the corporate veil in the interest of justice, where there is an allegation and the evidence adduced necessitates the lifting of the veil to reveal the identities of the persons behind the company. However, for purposes of the present application to set aside Writ of Possession, that course of action is unnecessary.

Having found that the application lacks merit, it is dismissed with costs. The *Ex-parte* Order for Stay of Execution of Writ of Possession granted to the Respondents on 6th December, 2016 is discharged forthwith.

Leave to appeal is granted.

Delivered at Lusaka the 16th day of March, 2018.

W. S. Mwenda (Dr)
HIGH COURT JUDGE