

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

(Civil Jurisdiction)

2016/HPC/0057

IN THE MATTER OF:

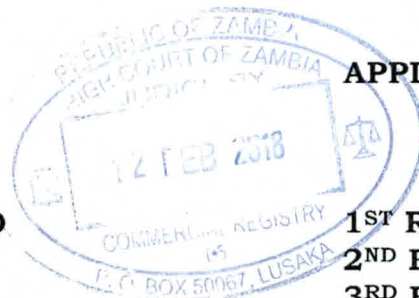
Order XXX., Rule 14 of the High Court Rules
High Court Act, Chapter 27 of the Laws of
Zambia

B E T W E E N :

INDO-ZAMBIA BANK LIMITED

AND

JUBCON STATIONERS LIMITED
WILSON NGANGULA
JUBIDIOUS SIAMAWA



APPLICANT

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Before Lady Justice B.G Lungu on 3rd March, 2017 in chambers at Lusaka.

For the Applicant, Mr. M. Ndhlovu, Messrs MRN Legal Practitioners.

J U D G M E N T

Cases referred to:

1. *Salt v. Marquis of Northampton (1892) A.C. 1;*
2. *Match Corporation Limited and Development Bank of Zambia and the Attorney General, S.C.Z. Judgment No. 3 OF 1999.*

Legislation and Other Materials referred to:

1. *Order XXX., rule 14, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*

2. **Order III, rule 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;**
3. **David J. Hayton, Megarry's Manual of the Law of Real Property, 6th Edition.**

By Facility Agreement dated 26th February 2015, the 1st Respondent obtained an Overdraft Facility from the Applicant for the sum ZMW 500,000.00. The Facility attracted interest at a rate of 12% over the Bank of Zambia Rate.

The Facility was secured by two registered Third Party Mortgages of 13th September, 2013 and 26th November, 2013, relating to Holding No. 33826/917, Kamwala South, Lusaka and Holding No 15358/1080 Kamwala South Resettlement Area, respectively. The Deeds were executed by the 2nd Respondent, as beneficial owner of the properties and were made in favour of the Applicant.

In terms of Covenant 3 in the Mortgage Deed of 26th November, 2013, payment of the monies secured becomes due upon demand by the Applicant.

By letter dated 9th December, 2015, the Applicant, through their lawyers, caused demand to be made on the 1st Respondents for payment of the sum of K721, 722.56. The demand not having been settled, the Applicant now brings this action pursuant to **Order XXX., rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**, claiming:

- i. That the 1st Respondent immediately settles the sum of K722, 051.00 due to the Applicant as at 31st December, 2015;
- ii. That should the 1st Respondent fail to pay the principal and interest due, the mortgaged properties be delivered to the Applicant to enable the Applicant to exercise its power to sell, assign, transfer or otherwise dispose of the mortgaged properties; and
- iii. That costs of and occasioned by these proceedings be borne by the Respondents.

In support of its claim, the Applicant filed an Affidavit in Support, through which it tendered: (i) a copy of the Facility Agreement of 26th February, 2015, exhibit "**PN1**"; (ii) a copy of the registered Third Party Mortgages of 26th November 2013 and 13th September, 2013, exhibits "**PN2**" and "**PN3**" respectively; (iii) a copy of the 1st Respondent's Statement of Account bearing a run date of 19th January, 2017, exhibit "**PN4**"; (iv) the letter of demand of 9th December, 2015, exhibit "PN5"; and (v) a copy of the response to the letter of demand date 17th December, 2017.

In essence, the Applicant contends that on the basis of the 1st Respondent's failure to settle the Facility on the agreed terms, it ought to be permitted to exercise its rights under the Mortgage Deeds.

By Affidavit in Opposition dated 3rd March, 2016 deposed to by the 3rd Respondent and a Director in the 1st Respondent, the Respondents admitted being in default and owing the amount claimed by the Applicant.

Notwithstanding the admission, the Respondents beseeched the Court to grant them time to redeem the mortgage. The supplementation was made on the strength of **Order III, rule 2 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**, the erudition of **David J. Hayton, Megarry's Manual of the Law of Real Property, 6th Edition**, and the cases of **Salt v. Marquis of Northampton (1892) A.C. 1**.¹ and **Match Corporation Limited and Development Bank of Zambia and the Attorney General, S.C.Z. Judgment No. 3 OF 1999**.²

I have given careful consideration to the Respondents' request in the light of authorities cited. I do not propose to extensively explore the principles associated with the right to redeem as the law as it stands is renowned. For purposes of brevity, I acknowledge that the mortgagor has a right, in equity, to redeem even after the date fixed by the mortgage agreement for repayment has passed.

I also accept that the mortgagor's right to redeem is well articulated in case law and literary works cited.

The quintessence of the cited authorities is that the Court has the power to interfere with the contractual rights of a mortgagee by

extending the time in which the mortgagor can settle its outstanding indebtedness before foreclosure is rendered absolute. The interference, however, is motivated by there being reasonable prospects that the monies due can be paid within a reasonable time.

In considering the equitable relief, I am alive to the caution that was expressed by the Supreme Court in the ***Match Corporation v DBZ*** case, where it was stated as follows:

"The relief which equity affords requires that a reasonable balance be struck between the right to redeem within any extended period beyond that stipulated in the contract and the right of the other party to the benefit of the security in case of inexcusable default or in a hopeless case where for instance there is in fact no reasonable prospect of the borrower ever being able to pay."

With the aforementioned caution in mind, I revisited the affidavit evidence before me to assess whether the Respondents laid any foundation for the Court to arrive at the conclusion that there exist reasonable prospects that the monies due can be paid within a reasonable time.

My analysis of the affidavit evidence did not yield any positive results. The opposite occurred in that the Affidavit in Opposition revealed that the Respondent's themselves were relying on the disposal of the mortgaged property to settle the indebtedness. No other prospects were identified.

In view of the absence of any articulated reasonable prospects that the monies can be paid within a reasonable time, I cannot justify the Court's intervention to deny the Applicant the right to the immediate benefit of the securities that it holds. Accordingly, Judgment is entered in favour of the Applicant as follows:

1. That the 1st Respondent, within seven (7) days of this Judgment, shall pay all monies due to the Applicant, which as at 31st December, 2016 stood at ZMW 722, 051.81, plus interest, costs and all other charges due and owing to the Applicant by the Respondents. Interest shall be applied at the contractual rate from 31st December, 2016 to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement.
2. Since a legal mortgagee gives the mortgagee a legal estate, the Applicant is at liberty to take immediate possession of the mortgaged property.
3. In the event that the 1st Respondent fails to liquidate the Judgment Debt and interest within 7 days from the date of Judgment, the Applicant shall be at liberty to exercise the right of sale over Holding numbers 15358/1080 and 33826/917 Kamwala South.
4. Costs incidental to these proceedings shall be borne by the Respondents, such costs to be taxed in default of agreement.

Leave to appeal is granted

Dated the 12th day of February, 2018



.....
Hon. Justice B.G.Lungu
High Court