

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

(Civil Jurisdiction)

2016/HPC/0485

IN THE MATTER OF:

Order XXX Rule 14 of the High Court Rules
and Order VI Rule 2 of the High Court Rules
High Court Act, Chapter 27 of the Laws of
Zambia

B E T W E E N :

DEVELOPMENT BANK OF ZAMBIA

AND

WESTONE DRIVEWAYS LIMITED
GEOFFREY NAMBAYO THOMPSON
DOUGLASS KAJASICHE CHILUNGU



Before Lady Justice B.G Lungu on 2nd March, 2017 in chambers at Lusaka.

For the Applicant, Mrs N Muma, In - house Counsel
For the Respondents, S K Simwanza, Messrs Lungu Simwanza & Co.

J U D G M E N T

Cases referred to:

1. *Reeves Malambo v Patco Agro Industries Limited (2007) ZLR. 177;*
2. *Courtyard Hotel Limited and Others v First National Bank Zambia Limited and Another (SCZ Appeal No. 006/2015);*
3. *Kanjala Hills Lodge Limited & Another v Stanbic Bank Zambia Limited [2012] 2 ZR, 285;*
4. *Musonda (Receiver of First Merchant Bank Zambia Limited (in receivership) v Hyper Foods Products and Others (1999) Z.R. 124.*

Legislation and Other Materials referred to:

- 1. Order XXX., rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;**
- 2. Section 65 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia;**
- 3. Section 19 of the Conveyancing and Law of Real Property Act 1881;**
- 4. Section 4 (2), Statute of Frauds (1677);**
- 5. Section 66 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.**

The Applicant commenced this action against the Respondents on 5th October, 2016 by way of Originating Summons. The reliefs sought are:

1. Payment by the 1st Respondent to the Applicant of the sum of ZMW 1, 259, 601.23 plus interest accrued thereon under the Facility Letter dated 6th February, 2014 ;
2. Delivery up by the Respondents to the Applicant of the Mortgaged leasehold property, namely Lot No. 19063/M, Lusaka;
3. Order of foreclose;
4. Order of Sale of the leasehold property;
5. As further or alternative relief, an order against the 2nd and 3rd Respondents as Guarantors for payment of the sum of due plus interest accrued thereon;
6. Any other relief the Court may deem just and equitable.

The Originating Summons was filed together with an Affidavit in Support sworn by Jala Hapunda, the Risk Officer in the employ of the Applicant. List of Authorities and Skeleton Arguments were also filed at the same time.

According to the Affidavit in Support, the Applicant extended a medium term loan in the sum of ZMW 1, 060, 000.00 to the 1st Respondent. The loan was extended in accordance with a Facility Letter dated 6th February, 2014 which was executed by both parties, exhibit "**JH1**".

The Facility was deposed to have been secured by way of: (i) A Third Party Mortgage over Lot No. 19063/M Lusaka, exhibit "**JH2**"; (ii) A Fixed and Floating Debenture over the 1st Respondent's assets, exhibit "**JH3**"; (iii) Shareholders' and Directors' Guarantees executed by the 2nd and 3rd Respondents, exhibit "**JH4**"; and (iv) Subordination of all existing and future loans to the Borrower by the shareholders pursuant to a Subordination Agreement, exhibit "**JH5**".

The Affidavit in Support reveals some key terms of the Facility Letter. Firstly, clauses 4 and 5 were referenced as prescribing the loan repayment term of 54 equal monthly instalments for the principal and sixty months for interest. Repayments were stated to be effective from the date of first drawdown, with a six months moratorium from draw-down for repayments of the principal.

Secondly, clause 10 of the Facility Letter was deposed to prescribe events of default, which events included the failure by the Borrower to make payment of any amount due by a due date. In the event of such default, clause 10 created and vested in the Applicant, the contractual right to render the full amount of the Facility then outstanding, together with, *inter alia*, all charges accrued thereon and additional interest, immediately due and payable.

The deponent of the Affidavit in Support also illuminated that from the perspective of the Mortgage Deed, default by the Respondents yielded the power of sale vested in the Applicant by the Deed.

Aside activating enforcement of the Mortgagee Deed, default was deposed to trigger enforcement of the Shareholders' Guarantee. In particular, reference was made to clause 1 of the Guarantee which obliged the Guarantors to pay the Applicant any monies due by the 1st Respondent in any instance where the 1st Respondent made default of payment beyond a period of 30 days.

As regards the 1st Respondent's performance in servicing the debt, it was avowed that there had been a total failure to service the facility, which culminated in a state of default. Additionally, it was attested that notwithstanding written demands issued by the Applicant to the Respondents, the Respondents had not made any payments to the Applicant. The letters of demand were exhibited,

marked "**JH6**", "**JH7**" and "**JH8**". The deposition concluded by specifying that the Respondents' indebtedness, as at 30th September, 2016, stood at ZMW1,258, 601.23 as evidenced by exhibit "**JH9**", the 1st Respondent's Loan Statement Account.

In seeking relief the Applicant took refuge in **Order XXX., rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia, Section 65 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia and Section 19 of the Conveyancing and Law of Real Property Act 1881.**

Additionally, the Applicant canvassed the argument that the Respondents' default activated the Applicant's right to pursue available remedies, including the right to sale the mortgaged property. That argument was tendered on the strength of the case of **Reeves Malambo v Patco Agro Industries Limited (2007) ZLR. 177¹** where it was held that "*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 past.*"

Further reliance was placed on the case of **Courtyard Hotel Limited and Others v First National Bank Zambia Limited and Another (SCZ Appeal No. 006/2015)²**, where the Supreme Court reiterated the position articulated in the case of **Kanjala Hills Lodge Limited &**

Another v Stanbic Bank Zambia Limited [2012] 2 ZR, 285³. In the ***Kanjala Hills Lodge*** case the Court pronounced that "*once there is default on a condition, such as the default on a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to him...*"

With respect to the import of the Guarantee, the Applicant, chiefly relying on the ***Statute of Frauds (1677)***, put forward the argument that the Guarantee made by the 2nd and 3rd Respondents constituted an enforceable special promise to answer for the debt of the 1st Respondent.

My observation is that the general rule underpinning that English statute is that a promise to pay the debt of another person must be evidenced by some writing if it is a collateral promise of Suretyship. A collateral promise is one secondary or ancillary to some other promise. *In casu*, the Guarantee is evidently collateral to the Facility Agreement.

Section 4 (2) of the statute reads as follows:

"...no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Thus, the Court was invited to acknowledge that the Guarantee is enforceable and to grant the relief sought against the guarantors.

I now direct my attention to the Respondents, who took issue with the Applicants' claim and filed in a joint Affidavit in Opposition. The Affidavit was deposed to by the 2nd and 3rd Respondents. No legal arguments by way of Skeleton Arguments and List of Authorities were tendered.

In their joint Affidavit, the Respondents admitted that the 1st Respondent obtained a facility in the sum of ZMW1,060,000.00 from the Applicant on the terms articulated in the Facility Letter.

The Respondents also admitted that the Facility was secured by way of a mortgage over Lot No. 19063/M, Lusaka and a Shareholders' Guarantee.

However, the Respondents denied not having made any payments towards interest or the principal instalments. According to the deponents, although the Respondents had delayed in making repayments, payments were made.

Three specific examples of payments were given. Firstly, the sum of ZMW7, 171.44 was deposed to have been made on 20th June, 2014. A further payment of ZMW8, 988.45 was averred to have been made on 16th September, 2014. To evidence payment, the Respondent's

relied on exhibit "**GTDC1**", letters of instruction to the 1st Respondent's bankers to transfer the funds to the Applicant.

Thirdly, a cheque payment of ZMW50,000.00 was attested to have been made on 10th June, 2016 by Zamastone Limited for the benefit of the Respondents, as evidenced by a letter from Zamastone Limited to the Applicant, a receipt of the cheque payment from the Applicant and a cheque deposit slip , all forming part of exhibit "**GTDC1**".

In summation, the Respondents admitted that they had a backlog of overdue loan installments to the Applicant but they were desirous of liquidating the debt if given an opportunity.

In Reply to the Affidavit in Opposition, the Applicant clarified that the Respondent had indeed made payments towards debt service, albeit such payments were irregular, staggered and insufficient. A breakdown of the payments that the Applicant received was given. It included all three payments referred to in the Affidavit in Opposition. The Respondent's Loan Account Statement, exhibit "**JH10**" was produced, disclosing a closing balance of ZMW 1, 234, 084.46 as at 3rd November, 2016. The Affidavit in Reply was filed on 18th November, 2016. As with the Affidavit in Support, it was deposed to by Jala Hapunda.

When the matter came up for hearing, Counsel for the Applicant relied on the Affidavit in Support, Affidavit in Reply and Skelton Arguments filed. Counsel prayed that the reliefs be granted as set out in the Originating Summons.

Counsel for the Respondents relied on the Affidavit in Opposition, with emphasis on paragraph 9-13 of the said Affidavit.

I have carefully studied the Affidavit evidence before me and I am satisfied that the 1st Respondent obtained a loan in the sum of ZMW1, 060, 000.00 from the Applicant. I am also satisfied that the loan was given on the security of, inter alia, a Third Party Mortgage over Lot No. 19063/M. Lusaka and Shareholders' and Directors' Guarantee.

Given the undisputed facts, I have identified a quartet of questions, whose answers are critical to determining this cause. These questions are: Firstly, has the loan become due and payable? If so, how much is payable? Thirdly, have the securities become enforceable? If so, what remedies are available to the Applicant.

It is clear to my mind, that the answer to the first question is informed by Clause 10 of the Loan Agreement, exhibit "**JH1**". Clause 10 unequivocally renders failure to make payment of any amount due by the due date a default. The Clause further entitles the

Applicant to recall the entire loan, inclusive of outstanding interest in the event that the borrower makes default.

By their own admission, the Respondents have acknowledged lapses in making the required monthly installment payments. Thus, in light of demand having been made, I bear no apprehension in determining that the loan is due and payable pursuant to clause 10 of the Facility Letter.

Moving to the second question as to quantum, exhibit "**JH10**" to the Affidavit in Reply, the Loan Statement Account, discloses that as at 3rd November, 2016, the outstanding amount including interest stood at the sum of ZMW 1, 234, 084.46.

My examination of the Loan Statement confirms that the three payments which the Respondents took issue with as not having been credited are reflected in this latter Statement of Account. Accordingly, I find that the amount due as at 3rd November, 2016 stood at the sum of ZMW 1, 234, 084.46.

Penultimately, I focus on the question whether the securities have become enforceable.

According to covenant 7 of the Mortgage Deed, default for thirty (30) days in the repayment of any principal monies due attracts the following consequences (i) the principal sum secured and all

accrued unpaid interest becomes immediately payable and (ii) the security becomes enforceable.

In terms of clause 1 of the Guarantee, exhibit "**JH4**", the 2nd and 3rd Respondents jointly and severally contracted to pay any principal monies and interest or other monies due by the 1st Respondent under the Facility Letter of 6th February, 2014 if the 1st Respondent made default for more than thirty(30) days.

In casu, exhibit "**JH6**", the letters of demand evidence default by the 1st Respondent in excess of 30 days. Thus, I would answer the question being considered by saying that both the Mortgage and Guarantee are enforceable in accordance with the illumed respective terms and conditions of the securities.

Ultimately, I consider the remedies that are open to the Applicant. A convenient starting point in evaluating the options would be the statutory basis upon which the Applicant relies, namely, **Section 65 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia**.

Section 65 of the Lands and Deeds Registry Act expressly vests upon a mortgagee, a bouquet of rights over mortgaged property. In so far as the reliefs are identified, Section 65 reads to include:

"...a power of sale, the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them and, in the case of land held in leasehold, the right to receive any notice

relating to the land the subject of the mortgage which under any law or instrument the mortgagor is entitled to receive."

Moreover, **Section 66 of the Lands and Deeds Registry Act** transcends mere identification of the remedies to specifically address the power of sale. Section 66 prescribes that a power of sale of the whole or any part or parts of any property subject to a mortgage made by deed becomes exercisable by a mortgagee when the mortgage money payable thereunder has become due and the mortgage is not redeemed before sale.

In addition to being recognised by statute, the remedies of possession and the power of sale are expressly made available to the Applicant by Covenant 8 of the Mortgage Deed.

I pause briefly to quote the quondam Chief Justice, Mathew Ngulube, in the case of ***Musonda (Receiver of First Merchant Bank Zambia Limited (in receivership) v Hyper Foods Products and Others (1999) Z.R. 124⁴***, that"

"The mortgagee's remedies are truly cumulative."

In view of the recognition that the remedies that are available are cumulative, and bearing in mind: (i) the undisputed facts before Court; (ii) the terms of Section 10 of the Facility Letter; (iii) Covenant 7 of the Mortgage Deed; and (iv) Clause 1 of the

Guarantee, I indubitably find that the Respondents' default has activated the Applicant's right to enforce the Third Party Mortgage and the Guarantee. Accordingly, Judgment is entered in favour of the Applicant, cumulatively, as follows:

1. That the 1st Respondent, within fourteen days of this Judgment, shall pay all monies due to the Applicant, which as at 3rd November, 2016 stood at ZMW 1,234, 084.46, plus interest, costs and all other charges due and owing to the Applicant by the Respondent. Interest shall be applied at the contractual rate from 5th October, 2016 to date of Judgment and thereafter at the Bank of Zambia short term lending rate until date of full and final settlement.
2. In the event that the 1st Respondent fails to liquidate the Judgment Debt and interest within 14 days from the date of Judgment, foreclosure relating to Lot No. 19063/M, Lusaka will automatically be rendered absolute upon which the right to redeem in equity and at law shall stand extinguished.
3. The Applicant is at liberty to take immediate possession of the mortgaged property.
4. The Applicant may exercise its right of sale after foreclosure has been rendered absolute.
5. The Applicant is at liberty to enforce the Guarantee signed by 2nd and 3rd Respondents. That is, the 2nd and 3rd Respondent are by this Judgment jointly and severally liable for the Judgment Debt.

6. 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

A handwritten signature in black ink, appearing to be 'B.G. Lungu', written over a horizontal dotted line.

Justice B.G. Lungu

HIGH COURT JUDGE