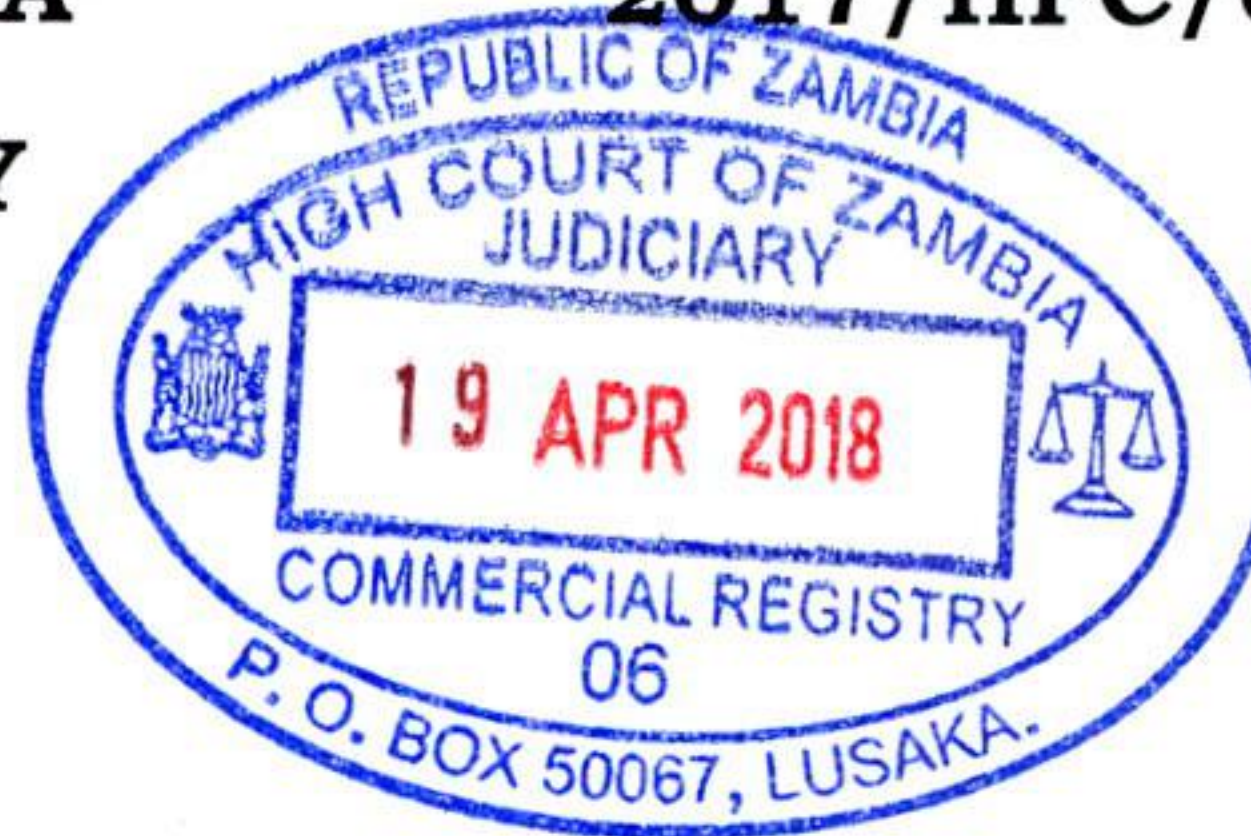


**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2017/HPC/0412**



**IN THE MATTER OF:**

**The Conveyancing and Law of  
Property Act 1881**

**AND**

**IN THE MATTER OF:**

**An application for Foreclosure  
and Possession of property known  
as Stand No. 24634 Lusaka in the  
City and Province of Lusaka in  
the Republic of Zambia pursuant  
to a legal mortgage.**

**AND**

**IN THE MATTER OF:**

**Order XXX Rule 14 of the High  
Court Rules Chapter 27 of the  
Laws of Zambia as read with Order  
88 Rule 1 and 3 of the Supreme  
Court Practice 1999.**

**BETWEEN:**

**ZAMBIA NATIONAL BUILDING SOCIETY**

**APPLICANT**

**AND**

**MARY LESA ZULU**

**RESPONDENT**

**Before the Honourable Madam Justice Irene Zeko Mbewe**

*For the Applicant* : *Mr. S. K. Simwanza, Lungu of Messrs Simwanza & Company*

*For the Respondent* : *Mr. B. Gondwe of Messrs Buta Gondwe & Associates*

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## **J U D G M E N T**

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### **Cases Referred To:**

1. *Santley v Wilde (1899) CA 474*
2. *Reeves Malambo v Patco Agro Industries SCZ Judgment No. 20 of 2007*
3. *Michelo Mwiinga and Others v Zambia National Commercial Bank Plc SCZ Judgment No. 51 of 2014*
4. *Barclays Bank Plc v Tennet (1984) CA 242*

### **Legislation and Other works Referred to:**

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*
3. *Halsbury's Laws of England*

By way of Originating Summons, the Applicant commenced proceedings against the Respondent claiming for the following reliefs:

1. Payment of the sum of ZMW618,414.32 being the outstanding balance owing to the Applicant under credit

facility availed to the Respondent, and secured by a mortgage and Further Charge over Stand No. 24634 Lusaka.

2. Delivery up of vacant possession by the Respondent property namely Stand No. 24634 Lusaka.
3. That the mortgage be enforced by an Order of foreclosure and sale.
4. Interest accruing on the loan.
5. Further and any other relief the Court may deem fit and just.
6. Costs.

In its supporting affidavit deposed to by Marian Mulube Sampa, the Loan Recoveries Manager in the Applicant's company, it sets out the principal facts for the application and the same can be summarised as follows: that the Respondent was an employee of the Applicant who obtained a staff loan of Three Hundred and Fifty Thousand Kwacha (ZMW350,000.00) (Exhibit "MMS 1"), a further amount of One Hundred Thousand Kwacha (ZMW100,000.00) (Exhibit "MMS 2-3") and availed a Medium Term loan in the sum of

Fifty-Eight Thousand Kwacha (ZMW58,000.00) (Exhibit "MMS 4-5"). These sums disbursed to the Respondent were secured by a Mortgage and Further Charge over Stand 24634 Lusaka jointly owned by Stephen Mvula Zulu and the Respondent (Exhibit "MMS6"). That upon termination of the Respondent's employment with the Applicant, the staff loan was converted to a medium term loan. According to the deponent, the balance owing and due to the Applicant on the staff mortgage is ZMW554,908.87, Sixty Three Thousand Five Hundred and Five Kwacha Sixty-Five Ngwee (ZMW63,505.65) on the Medium Term loan totalling Six Hundred and Eighteen Thousand Four Hundred and Fourteen Kwacha and Thirty Two Ngwee. (ZMW618,414.32). That the Respondent has defaulted in her repayments to the Applicant.

In opposing the application, an affidavit deposed to by Mary Lesa Zulu the Defendant herein was filed into Court on 25<sup>th</sup> September 2017. She averred that as an employee of the Applicant, she obtained a mortgage loan at a staff rate with respect to Stand 24634 (MLZ1). The deponent averred that Clause 4 of the Mortgage Deed, monies can only be paid upon demand and that no such demand

has been made by the Applicant. According to the Respondent, the matter is prematurely before Court and constitutes an abuse of court process. That according to Clause 5 of the Mortgage Deed, the demand is by way of six (6) months' notice. The Respondent averred that following her wrongful termination of employment, the Applicant refused to renew her contract and consequently she made a counterclaim for the underpayment of her terminal benefits (Exhibit MLZ2"). That the mortgage security comprises a residential property and that a special dispensation of the law applies to such security and therefore the application before Court is misconceived and should be dismissed with costs.

In its further affidavit in opposition, the Respondent averred that money due from the Applicant has been applied towards her mortgage debt. That the Court considers the counterclaim and grant the benefits arising out of the unresolved matters between the parties arising from her employment.

In its affidavit in rejoinder, the Applicant averred that it duly made a demand on the Respondent by way of a letter dated 16<sup>th</sup> November 2016 (Exhibit "MMS 1"). That a mortgage action is an

independent action and does not depend on whether or not a mortgagor is owed money, and therefore the Respondent owes the sum of ZMW618,414.32.

The Applicant filed skeleton arguments and list of authorities on 12<sup>th</sup> September 2017. The Court's attention was drawn to the case of **Santley v Wilde [1899] CA 474<sup>1</sup>** and the learned authors of **Halsbury's Laws of England Volume 32 at paragraph 402** which both define a mortgage. Reliance was further placed on the case of **Reeve Malambo v Patco Agro Industries Limited SCZ Judgment No. 20 of 2007<sup>2</sup>** on the remedies available in a mortgage action. In aid of its argument on a counterclaim, the case of **Michelo S. George Mwiinga and Florence Mwiinga v Zambia National Commercial Bank Plc (2012) SCZ Judgment No. 51/2014<sup>3</sup>** **Barclays Bank Plc v Tennet (1984) C.A 242<sup>4</sup>** was cited.

The Respondent did not file skeleton arguments.

At the hearing, Counsel for the Applicant relied on the affidavit evidence, skeleton arguments and oral submissions, whilst the Respondent relied on the affidavit evidence.

Having set out the parties' positions and having considered all the eminent points of view of both Counsels, the affidavit evidence and applicable authorities, I now embark on analysing and determining the issues as follows:

- (1) Whether the demand was made in accordance with the terms of the Mortgage Deed.
- (2) Whether the Applicant is entitled to the relief sought.
- (3) Whether the Court should consider the counterclaim made in Cause No. IRC/LK/181/2016.

It is not in dispute that the Respondent as an employee of the Applicant was availed a mortgage facility on 5<sup>th</sup> August 2010, a further amount of ZMW100,000.00 secured by a Further Charge, and a medium term loan on 26<sup>th</sup> June 2015. That the security for all the amounts was a mortgage over Stand 24634 Lusaka registered on 20<sup>th</sup> August 2010 and a Further Charge registered on 23<sup>rd</sup> March 2016.

The Applicant argues that the Respondent defaulted and monies are due and owing in the total sum of ZMW618,414.32. On the other hand the Respondent canvassed that the matter is prematurely

before Court as no demand was made as required under Clause 4 and 5 of the Mortgage Deed. According to the Applicant, a demand was made on 16<sup>th</sup> November 2016. I have reproduced Clause 4 and 5 of the Mortgage Deed which read as follows:

“4. **If Default** shall be made by the Borrower for one month in the payment of some instalment or other money herein or in any deed or instrument made supplemental to or collateral with these presents covenanted to be paid by the Borrower or if he shall make default in the observance or performance of the stipulations agreements provisions (other than for the payment of money) herein or in any such deed or instrument contained or implied or of some or one of them or if the Borrower or any one the persons included in that expression shall become bankrupt or have a receiving order made against him or enter into any statutory or other composition or arrangement with or for the benefit of his creditors pr of (being a corporation) an order is made or an effective resolution passed for winding up or a receiver is appointed for debenture or debenture



*stock holders of the Borrower then and in any such cases notwithstanding the covenant for the payment of the principal sum by instalments the whole of the balance of the principal moneys then remaining secured hereunder shall immediately become due and payable by the Borrower to the society and be recoverable by the Society on demand with interest thereon at the said rate (computed and charged as herein before provided) until payment thereof Provided Always that subject and without prejudice to the right of the Society at any time thereafter to recover on demand the whole of such moneys and interest thereon the Borrower shall continue liable under his covenants in that behalf herein before contained to pay the Society the principal sum and interest thereon by the said monthly instalments and to pay all other moneys which according to the rules or by virtue of these presents have or shall become payable”.*

5. *Notwithstanding the provisions hereon for the payment of the principal sum and interest thereon by instalments the*

*Society may at any time by six months' notice in writing to the Borrower call in and require payment of the whole of the balance of principal sum and interest thereon owing to the Society hereunder and the Borrower covenants upon the expiration of any such notice to pay to the Society all moneys then remaining owing to the society under this security and pay interest thereon at the rate aforesaid until actual payment."*

As to what a demand is, the learned authors of **Black's Law Dictionary, 5<sup>th</sup> Edition Pocket Edition, Thomson Reuters** define it as follows:

**"to claim as one's due; to require; to seek relief"**

The question then is did the Applicant make a demand to the Respondent and in what form did it take, if at all? The starting point is to examine the clauses in the Mortgage Deed which is the primary document underpinning the parties rights, obligations and remedies. Specifically, Clause 4 of the Mortgage Deed states that where the Respondent defaults in payment of the monthly instalments, the whole of the balance of the principals' moneys

remaining secured shall immediately become due and payable and recoverable upon demand by the Applicant. It is my considered view that Clause 4 is applicable herein as the Respondent has not disputed that it is in default and has failed to meet its monthly instalments.

The Respondent argues that no demand has been made for the total sums claimed in the proceedings and therefore the matter is prematurely before Court and is an abuse of court process. It is not in dispute that the medium term loan was secured by Stand 24634 Lusaka as discerned from the Applicant's letter dated 16<sup>th</sup> July 2015 whose terms are governed by the Mortgage Deed. From the evidence on record, I find that in the letter dated 16<sup>th</sup> November 2016, the Applicant made a partial demand for the sum of ZMW37,248.28 in respect to the medium term loan. Reading the contents of the letter dated 16<sup>th</sup> November 2016 and Clause 4 of the Mortgage Deed, it is evident that there has been no demand from the Applicant indicating the nature and extent of the Respondent's default and importantly the amount the Respondent is required to pay in totality as the demand letter on record only refers to the

medium term loan. In the absence of any evidence by the Applicant to the contrary, the Court accepts and finds that the Applicant has not fully complied with Clause 4 of the Mortgage Deed. In view of the partial compliance, and in exercise of this Court's inherent powers, the Applicant is ordered to comply with Clause 4 by writing a formal demand to the Respondent stating the nature and extent of her total indebtedness.

In terms of Clause 5 of the Mortgage Deed, my interpretation is that it gives the Applicant power to call in payment of the whole of the balance of the principal sum and money at any time, by giving a six months' notice in writing to the Respondent as a borrower. I opine that the Respondent cannot rely on Clause 5 of the Mortgage Deed as the same is not available nor is it applicable where the Respondent as mortgagor defaults in the monthly instalment payments.

The second issue for determination is whether the Applicant is entitled to the reliefs sought. The Respondent has not taken issue with her indebtedness to the Applicant, except to state that no formal demand has been made for the claimed sum of

ZMW618,414.32. As to the reliefs available on default, I lean on the learned authors of **Atkins Court Forms, Volume 28** who at page 8 state as follows:

*“When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies.”*

It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure and delivery up of possession of the mortgaged property, and sell of the mortgaged property which remedies are cumulative and come into play where there is default on the part of the borrower. On the authority of Reeves **Malambo v PATCO Agro Industries Limited [2003] ZR 71<sup>4</sup>** the Supreme Court held as follows:

*“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 passed.”*

I further concur with the submissions and authorities cited by Counsel for the Applicant in respect to the law and principles on mortgages. I opine that the Applicant having partially complied with Clause 4 of the Mortgage Deed cited aforesaid in respect to the medium term loan, the remedies of foreclosure, possession and power of sale of the mortgaged property being Stand No 24634, Lusaka are available to the Applicant.

The Respondent argues that she has a counterclaim against the Applicant arising from her wrongful dismissal occasioned by the Applicant. In Cause No. IRC/LK/181/2016 pending before the Industrial Relations Court, the Respondent's dispute is over unpaid benefits arising from her tenure of employment with the Applicant. The cause herein is a mortgage action for outstanding amounts. I find that though the parties are the same, the cause of action, subject matter and claims are different. In my considered view, the cause of action in which the counterclaim is made has no relevance to the mortgage action in the present case, nor is it a commercial action falling within the ambit of the Commercial Court Division. This argument is without merit.

On the whole, and in view of the Respondent's indebtedness which is admitted, and following the Applicant's partial compliance of Clause 4 of the Mortgage Deed, I hereby direct and order as follows:

1. That pursuant to Clause 4 of the Mortgage Deed, the Applicant makes a formal demand to the Respondent for the outstanding claimed sum of ZMW618,414.32 within 7 days of this Judgment.
2. Following receipt of the demand from the Applicant, the Respondent is to pay the Judgment sum of ZMW618,414.32 plus interest at the short term deposit rate from date of the Originating Summons to date of Judgment and thereafter at the commercial lending rate until full payment. The Judgment sum is to be paid within one hundred and twenty days (120) days of receipt of the demand in paragraph (1). In default of payment, the Applicant shall be at liberty to foreclose, take possession of the mortgaged property namely Stand No 24632, Lusaka and exercise the power of sale without further recourse to this Court.

3. In the circumstances of this case, each party shall bear its own costs.

Dated in Lusaka this 19<sup>th</sup> day of April, 2018.

A handwritten signature in black ink, appearing to read 'Irene Zeko Mbeve', is written over a horizontal dotted line.

**HON. IRENE ZEKO MBEWE  
HIGH COURT JUDGE**