

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**1997/HP/0930**

**IN THE MATTER:**



**THE PROPERTY COMPRISED IN A  
LEGAL MORTGAGE RELATING TO  
STAND NO. 10445 LUSAKA IN THE  
LUSAKA PROVINCE AND MADE  
BETWEEN FIRST ALLIANCE BANK  
LIMITED ON THE ONE PART AND  
CHAINAMA HOTEL ON THE OTHER  
PART.**

**BETWEEN:**

**FIRST ALLIANCE BANK (Z) LIMITED**

**PLAINTIFF**

**AND**

**S P MULENGA ASSOCIATES**

**1<sup>ST</sup> DEFENDANT**

**INTERTIONAL**

**CHAINAMA HOTEL LIMITED**

**2<sup>ND</sup> DEFENDANT**

**SONNY PAUL MULENGA**

**3<sup>RD</sup> DEFENDANT**

**VISMER MULENGA**

**4<sup>TH</sup> DEFENDANT**

**FRANCIS MULENGA**

**5<sup>TH</sup> DEFENDANT**

***Before:***

***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff:

Mr. P. Chibundi of Messrs Mosha &  
Company.

For the Defendants: Mr. M. M Munansangu of Messrs  
Munansangu.

---

## **R U L I N G**

---

Cases referred to:

- 1. Roland Leon Norton v. Nicholas Lostrom (2010) Z.R. Vol. 1, 358 at page 372.***
- 2. Emeries v. Woodward [1990] 43 Ch.D 185.***
- 3. Barclays Bank Limited v. ERZ & Others (SCZ Appeal No. 71/2007).***

This Ruling is in respect of an application by the Defendants to essentially discharge the mortgage registered on Stand No. LUS/10445. The application was made *ex parte* and was filed on June 8, 2020. But given the nature of the application I directed that the application be heard *inter partes*.

The background to this application/case is that, the mortgage action was taken out by the Plaintiff against the Defendants on April 15, 1997. And on September 29, 1997, judgment was entered in favour of the Plaintiff against the Defendants.

On January 10, 2011, the trial Judge, G.S Phiri J, (as he then was) issued an order wherein, it was directed as follows:

***The mortgaged property shall stand discharged upon payment of the loan prescribed in the mortgage contract. Legal costs are to be settled apart, in that costs have to be agreed in default to be taxed.***

On August 7, 2013, the parties executed a Consent Order, which was approved by the learned Deputy Registrar, and the terms of the Consent Order were agreed as follows:

***The Plaintiff shall release and deliver to the Defendants' Advocates Certificate of Title relating to Stand No. LUS/10445, Lusaka. The Plaintiff shall not discharge the Mortgage registered on Stand No. LUS/10445, Lusaka, until full payment of the taxed costs in Cause 2002/HPC/0364 in the sum of K155,998,529 less what has been paid already. The Defendants shall pay the costs within ninety (90) days from the date of this Order.***

An affidavit in support was deposed to by Sonny Paul Mulenga, the third Defendant. The gravamen of his deposition was stated in paragraph 6 thus:

***That we were advised by the Chief Registrar of Lands and Deeds that in order for the Ministry of Lands to Discharge the Mortgage registered on the Property in question, the court has to Direct and Order the Chief Registrar of Lands and Deeds to Discharge the Mortgage pursuant to the Order dated 10<sup>th</sup> January, 2011.***

An Affidavit in opposition was deposed to by Mr. Phillip K. Chibundi, Counsel having conduct of the matter on behalf of the Plaintiff. He stated that the Defendants were trying to circumvent the provisions of the Consent Order by avoiding to pay costs. He also stated that the discharge of the mortgage has to take into account legal costs incurred by the Plaintiff.

In his affidavit in reply Mr. Sonny P. Mulenga rejoined that the demand for costs could not be used to block the discharge of the mortgage. He said in accordance with the Order by Judge G.S Phiri dated January 10, 2011, payment was settled in full. And as regards the Consent Order, it was alleged that the same had no blessings of the Defendants, because the previous Advocates, Milner Katolo and Associates had no express authority to execute the Consent Order.

At the hearing of the application on September 21, 2020, the parties through their respective Counsel stated that they were entirely relying on the affidavits filed. However, the following day on September 22, 2020, the Defendants' Counsel filed skeleton arguments. This was done without the leave of the Court, and since it went against the initial consensus to entirely rely on the affidavits filed, it will be procedurally unfair to consider the Defendants' skeleton arguments. Accordingly, I disregard them.

This approach safeguards equality of arms as a means to fairness in litigation.

I have carefully considered the affidavits adduced herein. Assuming a court order was by law necessary to discharge the mortgage herein that can only be granted provided the full debt was paid or if the parties by consent agree otherwise. Although the Order dated January 10, 2011 by Judge G.S Phiri was express to the extent that the discharge of the mortgage was only dependant upon payment of the mortgage debt as prescribed in the mortgage deed. In that order, costs were not treated as part of the secured debt, however, the parties later executed a Consent Order before the learned Deputy Registrar dated August 7, 2013, and agreed that the discharge of the mortgage was dependant on the Defendants paying in full taxed costs in the sum K155, 998, 529 (unrebased).

Clearly, by the said Consent Order the unpaid taxed costs became secured by mortgage, therefore, it is misconceived for the Defendants to seek to have an order discharging the mortgage before taxed costs are fully paid as agreed.

It is evident that the parties hereto expressly agreed to extend the mortgage to taxed costs, and that discharge of the mortgage was tenable provided the said costs were settled in full. The parties are legally and judicially bound by the terms of the Consent Order. Comparably, I refer to the case of **Roland Leon Norton v. Nicholas Lostrom (2010) Z.R Vol. 1 358 at page 372** the Supreme Court held:

***It is trite law that a party to a contract is bound by it even though it may not have been in the interest of that***

***party entering into contract...even a bad contract if it is valid, is binding.***

The Defendants are seeking to evade the effects of the Consent Order by alleging that, Messrs Milner Katolo & Associates who executed the Consent Order on behalf of the Defendants had no instructions to do so. This argument skewed to challenge the Consent Order is unhelpful, because the only way a consent order can be challenged or set aside is by commencing a fresh action. In the English case *Emeries v. Woodward [1990] 43 ch.D 185*, the Court held:

***An application to set aside an agreement for compromise of an action cannot be made by summons in the action, a fresh action must be sought for the purpose.***

And in *Barclays Bank Limited v. ERZ & Others (SCZ Appeal No. 71/2007)* the Supreme Court held:

***It is trite law that a party seeking to set aside a Consent judgment has to commence a fresh action.***

In view of the foregoing, attempts by the Defendants to misconstrue the orders herein in order to obtain a favourable order discharging the mortgage, or avoid paying the secured taxed costs is futile. The application is misconceived and stand dismissed with costs to be taxed in default of agreement.

**DATED THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2020.**



.....  
**THE HON. MR. JUSTICE CHARLES ZULU**