

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

**2017/HPC/0218**

*(Civil Jurisdiction)*

**IN THE MATTER OF: AN APPLICATION UNDER ORDER 30 RULE 14  
OF THE HIGH COURT RULES, CHAPTER 27 OF  
THE LAWS OF ZAMBIA**

**IN THE MATTER OF: THE PROPERTY COMPRISED IN A LEGAL  
MORTGAGE RELATING TO STAND NO. 2400  
LUSAKA**

**IN THE MATTER OF: FORECLOSURE, POSSESSION AND SALE OF  
THE MORTGAGED PROPERTY**

**BETWEEN:**

**ZAMBIA NATIONAL COMMERCIAL BANK PLC**

**APPLICANT**

**AND**

**FELOPATER ZAMBIA LIMITED**

**1<sup>ST</sup> RESPONDENT**

**WILLIAM NAGIB REZK**

**2<sup>ND</sup> RESPONDENT**

**WILLIAM ANTONEY REZK**

**3<sup>RD</sup> RESPONDENT**



***Before the Honourable Mr Justice W.S Mweemba in Chambers at Lusaka.***

***For the Applicant:*** Mrs. K. Musana – In House Counsel Zambia National Commercial Bank PLC.

***For the Respondent*** Mr. K. Mambwe – Messrs Fred Jere & Company

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**R U L I N G**

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LEGISLATION REFERRED TO:

- 1. Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
- 2. Order 88 Rule 5/13 of the Rules of the Supreme Court of England (White Book) 1999 Edition.***

CASES REFERRED TO:

1. *Zambia Export and Import Bank Limited V Mkuyu Farms Limited and Ellias Andrew Spyron and Mary A.L. Spyron (1993-1994) ZR 36.*
2. *S. Brian Musonda (Receiver of First Merchant Bank (in Receivership) V Hyper Food Products Limited and Two Others (1999) ZR 124.*
3. *Citibank Trust Ltd V Ayivor and another (1987) 3 ALL E.R.241.*
4. *Southern Cross Motors Limited V Nonc System Technology Limited (2012) Vol 3 ZR 524.*
5. *Sunday Kawayya & Another V First Alliance Bank Zambia Limited SCZ/8/208 of 1997.*
6. *Michael Chilufya Sata V. Chanda Chiimba III and Others 2010/HP/1282.*
7. *Lisulo V Lisulo (1998) ZR 75.*

This is a Ruling on an application by the Respondent for stay of execution of Judgment and for payment of the Judgment sum in instalments pursuant to **Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

The application is supported by affidavits sworn by **WILLIAM ANTONEY REZK** the 3<sup>rd</sup> Respondent and Director in the 1<sup>st</sup> Respondent Company and Skeleton Arguments filed into Court on 19<sup>th</sup> December, 2018.

It is deposed that on 27<sup>th</sup> July, 2017 the Applicant obtained Judgment in the sum of **K2,629,880.36** and **K6,558,582.32** and the Court directed that the Judgment sums be liquidated within 90 days. That the Judgment sums have not been liquidated because same cannot be liquidated in one lump sum payment. That the 1<sup>st</sup> Respondents business had been generally affected by the economic downturn that Zambia had undergone in 2015 and 2016 but was stabilizing and thus capable of liquidating the Judgment Sum in instalments as proposed thereunder. It was proposed that the debt be paid in instalments as follows:



- (a) A minimum monthly sum of K500,000.00 starting on or before 30<sup>th</sup> December, 2017; and
- (b) That the monthly instalment is subject to the settlement of the full judgment within 12 months of payment of the first instalment.

It is further deposed that in the alternative the proposal is premised on the anticipated sale of the subject property as there is a purchaser who intends to acquire the property at the sum of USD \$2.2 Million which is yet to be liquidated. Exhibited marked "WAR3" was a letter from A Plus Management Service dated 27<sup>th</sup> November, 2017 showing that a contract of sale was signed on 20<sup>th</sup> October, 2017 and payment would be made by 27<sup>th</sup> December, 2017.

It is stated that upon failure on the part of the 1<sup>st</sup> Respondent, to pay the Judgment sums in instalments as proposed the whole amount remaining unpaid shall forthwith become due. That in the premise, this is a proper case for the Court to exercise its equitable discretion and grant an Order to liquidate the Judgment sums in instalments as aforesaid.

The Affidavit in support of Summons to Stay Execution of Judgment sworn by the said **William Antony Rezk** and filed on 29<sup>th</sup> November, 2017 repeated the assertions in the Affidavit in Support of Summons to Liquidate Judgment Debt in instalments. It is stated that if the Court refuses to grant the 1<sup>st</sup> Respondent a Stay of Execution of Judgment pending determination of application to liquidate Judgment sums in instalments the latter application will be rendered a mere academic exercise.

There is also a combined Affidavit in Opposition to summons to liquidate Judgment sum in instalments and for an order for stay filed into Court on 15<sup>th</sup> December, 2017 sworn by **Jerry Muchimba** a Relationship Manager in the Portfolio Workout Department of the Applicant Bank.

It is deposed that despite the Court having given the Respondents 90- days within which to pay the Judgment Debts, no payment has been received and

indeed no evidence of any payment has been produced before the Court by the Respondents.

It is stated that there is no indication of any positive cash flows before Court which would justify the Respondents' proposal to liquidate the debt by paying monthly instalments of **K500,000.00**. That the Respondents have not disclosed any capacity to liquidate the judgment debt as proposed. That as regards the alleged anticipated sale of the property which the Respondents have admitted is yet to be liquidated the Applicant is able to drive any sale process which does not have to affect the fact that the foreclosure order granted herein became absolute in October, 2017.

It is further deposed that the Applicant is able to work with the Respondents in identifying buyers for the property and to subsequently account for sale proceeds in line with the Judgment delivered herein. That the Respondents have shown that they are willing to sell the property to pay the debt and this is the same course of action the Applicant is desirous of taking. That the Applicant does not see why the foreclosure should be halted. It is stated that the applications before the Court are merely delaying the Applicant from enjoying the fruits of its Judgment. That the Respondents are thriving on the application for stay filed before the Court despite the fact that the Court has not granted any orders following the Judgment for foreclosure which became absolute in October, 2017.

It is stated that on 11<sup>th</sup> December, 2017, the Respondents wrote to the Applicant demanding that it retracts its notice as mortgagee in possession issued to the tenants on the mortgaged property as the 1<sup>st</sup> Respondent is purportedly still the owner of the said property. Exhibited to the Affidavit marked "JM1" is copy of letter from Messrs Ferd Jere and Company dated 11<sup>th</sup> December, 2017. That the Applicant was unable to file a Writ of Possession herein as they were advised by the Registry Staff that the Writ could not issue owing to the ex-parte application for stay still pending to that date before the



Court. That despite Judgment having been delivered in the Applicants favour in July 2017 its hands had been tied and it was prejudicially unable to take any steps to recover the Judgment debt therein.

It is stated that the Applicant at all material times sought only to recover monies due to it and would not be opposing the applications before the Court had the Respondents demonstrated sufficient capacity to make reasonable payments towards liquidating the Judgment Debt.

That the mortgaged property is situated in a prime location but the delay occasioned by the stay will prejudice the Applicant's right to sell the mortgaged property in light of fluctuation market prices especially in the likely event that the Respondents fail to pay the instalments. It is lastly deposed that the Respondents were at all times aware of the consequence of mortgaging the property if they failed to make repayments and should not be allowed to frustrate the foreclosure process.

Counsel for the Respondents filed Skeleton Arguments in support of the application. Counsel stated that the application is predicated on the provisions of **Order 36 Rule 9 of the High Court Rules, Chapter 27 of the Laws of Zambia** as read with **Order 88 of the Supreme Court Rules 1965 (White Book) 1999 Edition. Order 36 Rule 9** provides that:

**“Where any Judgment or Order directs the payment of money”**

Counsel submitted that the Court has inherent jurisdiction to suspend the foreclosure on the basis that the Mortgagor has reasonable prospects of paying the judgment sum in instalments within a reasonable time. Reference was made to the case of **ZAMBIA EXPORT AND IMPORT BANK LIMITED V MKUYU FARMS LIMITED AND ELIAS ANDREW SPYRON AND MARY ANN LANGLEY SPYRON (1)** in which the Supreme Court of Zambia held that an Order for payment of the Judgment debt in instalments can only be granted upon sufficient cause being shown by the Judgment debtor.

Reference was also made to the case of **S.BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS AND TWO OTHERS (2)** in which it was held that:

**“It is not contrary to law or to rules of Court to exercise its equitable jurisdiction of affording relief where a judgment debtor can pay within a reasonable time even if this results in fettering the judgment creditors’ freedom of inflicting a remedy of their own choice or preference in a mortgage action.”**

Counsel also relied on the case of **CITIBANK TRUST LTD V AYIVOR AND ANOTHER (3)** in which it was held that the Court could exercise discretion to postpone possession if it appeared that the mortgagor was likely to pay any sums due under the mortgage within a reasonable time.

Counsel for the Respondents further relied on the case of **S.BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK (IN LIQUIDATION) V HYPER FOOD PRODUCTS AND TWO OTHERS (2)** in which the Supreme Court stated that:

**“...the Respondents were asking for a reasonable time within which to pay the mortgage Debt in instalments which application the High Court granted. The Respondents also began to make monthly instalment payments as directed by the Court. In that case, we exercised our discretion to postpone the mortgagee’s right to possession because the Respondent had demonstrated that they were able to repay the mortgage debt within the time given by the Court.”**

The Respondents also relied on ***Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*** which provides that:

**“Subject to any particular rules, the Court or Judge may, in all causes and matters make any interlocutory order which it or he considers necessary for doing justice, whether such order has**



**been expressly asked by the person entitled to the benefit of the order or not”**

In was submitted that the application for stay of execution of the Judgment pending the application to pay the judgement debt in instalment was made in the interest of justice and the Court has the discretion to make any interlocutory order in that regard.

The Applicant also filed Skeleton Arguments opposing the application to stay execution of the Judgment and liquidate the Judgment debt in instalments.

According to learned Counsel for the Applicant, the Respondents application for payment in instalments should be dismissed because the Respondents have not demonstrated sufficient cause or special circumstances which would justify the orders sought. It is submitted that this is not a money Judgment but a mortgage action wherein the property can lawfully be resorted to for payment of the debt.

Counsel further submitted that paragraph 88/5/13 erroneously cited as **Order 88 Rule 5 (9) of the Rules of the Supreme Court of England 1999 Edition** in the Respondents' Arguments does not come to their aid as the Judgment for an Order for possession was already delivered herein with a moratorium or suspension to allow the Respondents to redeem the mortgage and they failed to do so.

That therefore, they cannot have a second bite at the Cherry by seeking to employ this provision of law after they blatantly failed to obey the suspended order.

It is submitted that the cases of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS AND TWO OTHERS (2) AND CITIBANK TRUST LIMITED V AYIYOR AND ANOTHER (3)** cited in the Respondents Arguments do not render any assistance to them as firstly the Respondents failed to pay the debt within the reasonable time of 90 days

directed by the Court and secondly, there is no evidence adduced herein of the Respondents' capacity to pay the Judgment debt within a reasonable time should the Court indulge them again.

It is further argued that other than the proposed payment plan being speculative, the Respondents have failed to show that they will be in receipt from imminent proceeds of sale of the property from a legally binding transaction and which sale proceeds will be capable of liquidating the debt in a lump sum.

That what remains of the Respondents proposed payment plan is a speculative deal, which will further delay the Applicant from obtaining the fruits of its Judgment. The case of **MICHAEL CHILUFYA SATA V CHANDA CHIIMBA III AND OTHERS (6)** was relied upon in which the High Court held that:

**“The rationale for the stringent conditions or criteria in exercising the discretion to grant a stay is that a successful party should not be deprived immediate enjoyment of the fruits of Judgment or ruling, unless good and sufficient grounds are advanced or shown.”**

Reference was also made to the case of **LISULO V LISULO (7)** in which the Supreme Court held that:

**“Litigation must come to an end and successful parties must enjoy the fruits of their Judgment.”**

Learned Counsel submitted that upon perusal of the evidence before Court, a sale of the mortgaged property is inevitable and any order staying execution herein will only serve to delay what the parties already know is inevitable. That the Applicant will suffer prejudice by the delay occasioned by any such order if granted in light of the fluctuating market prices of property which the Court was asked to take judicial notice of. It was submitted that the need of the Applicant to obtain due and prompt satisfaction of its judgment outweighs by far the need of the Respondents to obtain a Stay of Execution.



In conclusion it was submitted that the applications before Court ought to be dismissed forthwith with costs so that the Applicant may be allowed to proceed with the sale of the property and recover its monies.

During the hearing on 13<sup>th</sup> April, 2018 counsel for both parties were before Court and each of them relied on their respective Affidavits and Skeleton Arguments.

Learned Counsel for the Respondents submitted that in March 2018 the Respondents made total payments of **K530,000.00** to the Applicant. That this is a demonstration that there are higher prospects of the Respondents paying the Judgment sum if given time.

Learned Counsel for the Applicant pointed out that the Respondents have only paid K530,000.00 when the Judgment debt is abbot **K9.1 Million**. That the Respondents proposed a minimum payment of **K500,000.00** per month from 30<sup>th</sup> December, 2017 but only paid **K530,000.00** over 3 months. That the Respondents have not demonstrated that they have the means to liquidate the debt within a reasonable time as required by **Order 36 Rule 9 of the High Court Rules**.

The main issue for this Court to determine is whether or not the Respondents have made out a case with sufficient reason for the 1<sup>st</sup> Respondent to be allowed to liquidate the Judgment sums of **K2,629,830.36** and **K6,558,582.32** and interest thereon in instalments.

This application was made pursuant to Order 36 Rule 9 of the High Court Rules which has been cited above. This provision gives this Court the discretion to allow a Respondent(s) with sufficient reason to liquidate a Judgment sum in instalments.

The 1<sup>st</sup> Respondent has not presented any evidence of its income and means of settlement of the Judgement debt. As deposed in the combined Affidavit in Opposition by Mr. Jerry Muchimba the financial records produced in the

Respondents' Affidavit in support of summons to pay judgment debt in instalments merely disclose that the 1<sup>st</sup> Respondent closed at a loss in 2014, 2015 and 2016. There is no indication of any positive cash flow before Court which would justify the Respondents proposal to liquidate the debt by paying monthly instalments of **K500,000.00**.

The Respondents ought to have exhibited the 1<sup>st</sup> Respondents financial statements for the year 2017 and bank account statements to enable me make an assessment of its periodic income and expenses so as to determine whether or not it has capacity to settle the outstanding judgment debt in instalments within a reasonable time.

As submitted by Counsel for the Applicant the proposed payment of K500,000.00 per month meant that the Respondents would require 21 months and not 12 months to settle the Judgment sum.

It is now 27 months since Judgment was entered by this Court in favour of the Applicant bank but the record shows that only **K530,000.00** has been paid by the Respondents in March 2018. Clearly the Respondents have failed to show that they have capacity to liquidate the debt by paying the sum of **K500,000.00** per month.

The end result is that the Applicant bank has not had an opportunity of enjoying the fruits of its Judgment herein.

In the circumstances the Respondents who have had ample time to settle the judgment sum herein cannot be accorded an opportunity to settle the Judgment debt by instalments as the same will be unjust to the Applicant. I have found that there are no special circumstances that would make it reasonable for me to allow this application.

For the foregoing reasons, I find no merit in the application of the Respondents for payment of the Judgment Debt by instalments and dismiss it.



The Judgment sums plus interest must be paid forthwith failing which the Applicant is at liberty to execute the Judgment by sale of the mortgaged property.

It is trite that the order to Stay Execution is made generally in the exercise of the Court's discretionary jurisdiction and, at any rate in the exercise of its inherent jurisdiction. An order for the Stay of Execution is made only in special or exceptional circumstances. There are no special or exceptional circumstances in this case to persuade me to make an order in favour of the Respondents. This application is nothing but an attempt to delay the Applicant enjoying the fruits of its Judgment. I accordingly dismiss this application with costs.

It has been asserted by the Applicants new Advocates Messrs Simeza Sangwa and Associates that I granted the Respondents an ex-parte order to Stay Execution of the Judgment herein. In this respect the Respondents on 29<sup>th</sup> July, 2020 filed Summons to Discharge Ex-parte Order Staying Execution of Judgment due to changed circumstances. The assertion has non-plussed me because as the record will show I never granted the Respondents an Ex-parte Order to stay execution of the Judgment although they applied for one. There is therefore no Order Staying Execution of the Judgment to be discharged.

**DELIVERED IN CHAMBERS AT LUSAKA THIS 10<sup>TH</sup> DAY OF SEPTEMBER 2020.**



**WILLIAM S. MWEEMBA  
HIGH COURT JUDGE**

