



**IN THE HIGH COURT FOR ZAMBIA** **2017/HPC/0541**  
**IN THE COMMERCIAL DIVISION**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**In the matter of: Order 30, rule 14 of the High Court Rules  
and Order 6, rule 2 of the High Court Rules,  
High Court Act, Chapter 27 of the Laws of  
Zambia**

**BETWEEN:**

**DEVELOPMENT BANK OF ZAMBIA**

**APPLICANT**

**AND**

**KAMBASA FARMS LIMITED  
NINNO NANYANGWE  
GEORGE MAMBWE**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT**

**CORAM: Hon. Lady Justice Dr. W.S. Mwenda at Lusaka this 5<sup>th</sup>  
day of February, 2020**

For the Applicant: Ms. N. Mumba, In-house Counsel

For the Respondents: Mr. S. Mwiinde of M.K. Achiume and  
Associates

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## **JUDGMENT**

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**Cases cited:**

- 1) *Chazya Silwamba v. Lamba Simpito* (2010) Z.R. 475.
- 2) *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation)) v. Hyper Food Products Limited and Two Others* (1999) Z.R. 124.
- 3) *Citibank Trust v. Ayivor and Another* (1987) 3 All E.R. 241.

- 4) *Match Corporation Limited and Development Bank of Zambia and the Attorney General (1999) Z.R.13.*
- 5) *John Paul Mwila Kasengele and Others v. Zambia National Commercial Bank Limited (2000) Z.R. 72.*

**Legislation cited:**

- 1) *Order 30, rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
- 2) *Order 6, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

The Applicant herein commenced legal action against the Respondents by way of Originating Summons on 26<sup>th</sup> December, 2017, for the following relief:

1. *Payment by the 1<sup>st</sup> Respondent of the full mount due and owing to the Applicant under the Facility Letter dated 16<sup>th</sup> December, 2015, which amount stood at Four Million Three Hundred and Thirty-Seven Thousand Two Hundred and Eighteen Kwacha and Eleven Ngwee (ZMW4, 337,218.11) as at December, 2017;*
2. *Interest thereon;*
3. *Delivery up by the 1<sup>st</sup> Respondent of the mortgaged property, namely, Farm No. 31293, Masaiti;*
4. *Delivery up by the 2<sup>nd</sup> Respondent of the mortgaged property, namely, Lot 20592/M, Lusaka;*
5. *Foreclosure of the Mortgaged properties;*
6. *Sale of all the Mortgaged properties;*
7. *As further relief, an order against the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent as Guarantors for payment of the said sum of Four Million Three Hundred and Thirty-Seven Thousand Two Hundred and*



*Eighteen Kwacha and Eleven Ngwee (ZMW4, 337,218.11) and interest thereon;*

*8. Any other relief the Court may deem just and equitable.*

The Originating Summons was accompanied by an Affidavit in Support and Skeleton Arguments of even date. The Affidavit in Support was sworn by one Charity Choongo Ngulube, an employee of the Applicant duly authorised to depose to the contents of the said affidavit.

It was the deponent's testimony that the Applicant and 1<sup>st</sup> Respondent entered into a loan agreement by Facility letter dated 16<sup>th</sup> December, 2015 ("the Facility letter") by virtue of which agreement the Applicant agreed to advance to the 1<sup>st</sup> Respondent a Long-Term Loan (the Loan") in the sum of Two Million Eight Hundred and Five Thousand Kwacha (ZMW2,805,000.00). A copy of the said Facility letter was produced as exhibit "CCN1". The purpose of the Loan was to finance the acquisition of a dairy and pig farm in the Mpongwe area of the Copperbelt Province. That, the Facility letter stated in clause 4 thereof, that the principal sum was subject to a grace period of nine months and the interest accruing in the first six months following the first drawdown would be capitalised. The deponent

further asserted that the parties agreed under clause 5 of the Facility letter that the Loan would be repayable in sixty-three monthly instalments, effective from the expiry of the nine months grace period and that interest on the principal would be repaid in sixty-six monthly instalments commencing after the period of capitalisation. That, the interest on the Loan was agreed at the Bank of Zambia Policy rate plus a margin of 9% per annum and the same was to be calculated daily on a 365 days year with monthly rests on a compounding basis. Further, that the interest rate was a floating rate which was subject to change in line with market conditions, upon fluctuation of the reference rate or if in the Bank's opinion the 1<sup>st</sup> Respondent's conduct increased the Applicant's risk.

The deponent testified that part of the terms and conditions to which the Loan was subject, was the creation of the following security as provided under clause 8 of the Facility letter:

- a. Legal Mortgage over Farm No. 31293, Mpongwe;*
- b. Debenture over all fixed and floating assets of the 1<sup>st</sup> Respondent;*
- c. Agricultural Charge;*
- d. Guarantee.*



That, the security documents enumerated above, were duly executed and registered. Copies of the said documents were produced as exhibits "CCN2", "CCN3", "CCN4" and "CCN5", respectively. Further, that even though it was not provided for in the Facility letter, the 2<sup>nd</sup> Respondent, who is a shareholder in the 1<sup>st</sup> Respondent company, pledged her property known as Lot No. 20592/M, Lusaka as collateral for the Loan and for this purpose, provided the Applicant with written consent for the same property to be charged in favour of the Applicant. As evidence of this assertion, a copy of the 2<sup>nd</sup> Respondent's written consent was produced as exhibit "CCN6".

The deponent averred further, that on the strength of the 2<sup>nd</sup> Respondent's written consent, a Third-Party Legal Mortgage was created over Lot 20592/M. Lusaka and the same was duly registered by the Applicant. A copy of the Mortgage was produced as exhibit "CCN7".

The deponent contended that the grace period under the Facility letter expired and the 1<sup>st</sup> Respondent had failed or neglected to service the Loan in line with the terms of repayment as agreed under the Facility letter. That, the Applicant had not received any payments

from the 1<sup>st</sup> Respondent since August, 2016, even though the principal and interest were payable monthly under the Facility letter. Further, that the Applicant attempted to engage the 1<sup>st</sup> Respondent on the delayed payments and the accrued arrears, but the 1<sup>st</sup> Respondent was not forthcoming.

The deponent asserted that under clause 12 of the Facility letter, it was agreed that in the event of failure by the 1<sup>st</sup> Respondent to make payment by the due date of any amount due, the full amount of the Loan then outstanding and all charges accrued thereon, including interest, would immediately become due and payable and, in addition, the Applicant would have the right to exercise all other remedies available at law. That, consequent upon the 1<sup>st</sup> Respondent's failure or neglect to make timely payments as contractually mandated, the Applicant did by letters of 20<sup>th</sup> April, 2017, 13<sup>th</sup> June, 2017 and 7<sup>th</sup> July, 2017, demand payment of what was outstanding on the Loan from the 1<sup>st</sup> Respondent. Copies of the demand notices were produced as exhibits "CCN8", "CCN9" and "CCN10", respectively.



It was the deponent's further testimony that under the Guarantee exhibited as "CCN5", the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents covenanted that they would pay to the Applicant on demand, all money which would be due and owing to the Applicant from or by the 1<sup>st</sup> Respondent in the event of default. That, pursuant to the Guarantee, the Applicant also made a written demand for payment on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for payment of what was outstanding under the Facility letter. Copies of the letters were produced as exhibits "CCN11" and "CCN12", respectively.

The deponent contends that the demands for payments made on the Respondents have to date not been honoured and that the Respondents are truly and justly indebted to the Applicant. Consequently, the Applicant seeks to invoke its rights under clause 12 of the Facility letter and under the various security documents. That, a computation of the outstanding amount, including interest as at 19<sup>th</sup> December, 2017 stood at Four Million Three Hundred and Thirty-Seven Thousand Two Hundred and Eighteen Kwacha and Eleven Ngwee (ZMW4,337,218.11) as evidenced by the loan statement produced as exhibit "CCN13".

The Originating Summons is opposed and to that end, the Respondents filed an Affidavit in Opposition to Originating Summons deposed to by George Mambwe, the 3<sup>rd</sup> Respondent herein, wherein the Respondents did not deny being availed a loan facility and in fact, in paragraph 13 thereof, admitted to being indebted to the Applicant. The only bone of contention by the Respondents was the amount of ZMW4,337,218.11 being claimed by the Applicant. The deponent to the Affidavit in Opposition also stated that the delay in paying the Applicant was not meant to prejudice the Applicant's interest but was due to the fact that they had been facing some financial constraints, as the Respondent's projects could not start as planned due to the lapse in time in which the Applicant financed the project. That, this position was communicated to the Applicant. The deponent further averred that in order to avoid defaulting on repayments, an attempt was made to try and restructure making payments to the Applicant. He contended that the Applicant suppressed material facts and information that would greatly affect the outcome of the matter and was therefore, misleading and inaccurate.



The Applicant filed an Affidavit in Reply on 28<sup>th</sup> February, 2018, also sworn by Charity Choongo Ngulube where it was averred that the Respondents' assertions on the cause of the delay in payment were only excuses that would prejudice the Applicant's rights herein. That, the Respondents had admitted their indebtedness to the Applicant and the Applicant had placed before the Court all material facts, information and evidence upon which its right to the relief sought herein could be determined. Further, that the amount claimed by the Applicant was based on the terms of the Facility letter which the 1<sup>st</sup> Respondent agreed to be bound by and that the loan statement marked as exhibit "CCN13" showed how the sum of ZMW4,337,218.00 was arrived at. The Deponent further contended that although the Respondents had raised issue with the sum being claimed, they have not specified their reason for doing so. That, the Applicant had always expressed its willingness to engage the 1<sup>st</sup> Respondent over the performance of the loan Facility, but the 1<sup>st</sup> Respondent was not forthcoming. That, even after service of the several demand notices following consistent default in making payments, the Applicant did not receive any communication from the 1<sup>st</sup> Respondent regarding the subject of the demand notices.

With leave of Court, the Respondent's filed a Further Affidavit in Opposition to Affidavit in Support of Originating Summons, also deposed to by George Mambwe, wherein he contended that paragraph 4 of the Affidavit in Support of Originating Summons which referred to the loan herein as a Long-Term Loan and exhibit "CCN10", being the Final Demand Notice dated 7<sup>th</sup> July, 2017, were contradictory and that the true position was that the facility was a long-term one and not medium-term, to run for sixty three months. Further, that by the terms of the Facility, the loan was to be levied on the interest rate of Bank of Zambia and was to take into account the fluctuation aspect dictated by economic indicators. That, the Applicant had not demonstrated, put into account or reflected in their client loan statement that interest rate in the first half of 2017 was at 12.5%. Copies of the Bank of Zambia Monetary Statement was produced and exhibited as "GM1a" and "GM1b". That, in view of the information provided above, the computation exhibited by the Applicant and the subsequent amount demanded was therefore, not reflecting the true status. That, the Applicant fell short of deposing to correct and true facts, which are the raw materials to help this



Court reach a factual conclusion, but had simply summarised, without tabulating the figures and computation as required by the law.

The deponent averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents live on the 1<sup>st</sup> Respondent's farm and are both directors; thus, it would be in the interest of justice for the Court to grant the Respondents the right to redeem the property as they are still desirous and agreeable to extinguish the debt.

With leave of Court, the Applicant filed an Affidavit in Reply to Further Affidavit in Opposition sworn by Charity Choongo Ngulube in which she contended that the contradiction in the Final Demand Notice dated 7<sup>th</sup> July, 2017 and the Applicant's Affidavit in Support of Originating Summons was a typographical error which did not prejudice the Respondents. That, contrary to the Respondents' averment in the Further Affidavit in Opposition, the Applicant did take into account the Bank of Zambia interest rate and the same was evidenced in the Armotisation schedule produced as exhibit "CCN14". That, the computation of the outstanding amount including interest as at 25<sup>th</sup> December, 2017, stood at

ZMW4,281,334.48 as evidenced in the Armotisation schedule exhibited as “CCN14”. She contended that the Armotisation schedule referred to above, clearly showed the fluctuations in the interest rate in line with changes in the Bank of Zambia Policy rate. That, the Respondents had not demonstrated their capability to extinguish the outstanding debt despite several demand notices following consistent default in making payments.

The matter came up for hearing on 16<sup>th</sup> October, 2018 and Counsel on both sides submitted that they would rely on the Affidavits and Skeleton Arguments filed in support of their respective cases. Let it be noted that the parties by their Counsel had agreed to file a Consent Order amending the Originating Summons and an agreed Loan Statement. They had not done so by the time of writing this Judgment.

I have considered the Affidavits filed in support of and against the Originating Summons and the Skeleton Arguments. Since the Respondents have admitted to being indebted to the Applicant, that is no longer in issue as per the holding in *Chazya Silwamba v. Lamba Simpito*<sup>1</sup>. What is in issue is the amount due, including interest.



The Respondents have argued, correctly, that the interest rate in the Facility in issue was governed by clause 6.1 of the Facility letter, which clause provided that the interest rate would be charged at the Bank of Zambia Policy Rate, which at the time of the agreement stood at 15.5%, plus a margin of 9.0% per annum, bringing the total to 24.5%. The said rate was subject to fluctuation factors of the reference rate. The Respondents have exhibited the Bank of Zambia Monetary Policy Statement which shows that in the first half of 2017, the Bank of Zambia Policy Rate was reduced from 15.5% to 12.5% (refer to exhibits "GM1a" and "GM1b" of the Further Affidavit in Opposition). That, taking the words used under clause 6.1 of the Facility letter in their ordinary sense, "...currently at 15.5%..." made the Applicant's rate amenable to the fluctuation rate of the Bank of Zambia Policy Rate; meaning that the interest rate of 12.5% for the first half of 2017 must be taken into account when calculating interest and must be reflected in the calculation. On the other hand, the Respondents have argued that the outstanding amount is correct as it was arrived at using the interest rate that was agreed upon in the Facility letter, as shown by the client loan statement on record as

exhibit "CCN13". Further, that the computation of the outstanding amount including interest as at 25<sup>th</sup> December, 2017, stood at ZMW4,281,334.48 as evidenced in the Armotisation schedule exhibited as "CCN14". She contended that the Armotisation schedule referred to above, clearly shows the fluctuations in the interest rate in line with changes in the Bank of Zambia Policy rate.

It is clear from the Bank of Zambia Monetary Policy Statement exhibited by the Respondents, that the Bank of Zambia Policy Rate for the first half of 2017 was 12.5%. From exhibit "CCN14" in the Applicant's Affidavit in Reply to Further Affidavit in Opposition, it is evident that the rate used by the Applicant for the first half of 2017 fluctuated between 29.22% and 27.72%. The Applicant has not demonstrated how it came up with the interest rate of 29.22% per annum to start with. Indeed clause 6.1 of the Facility letter gives the Bank the right to alter the rate of interest at any time in line with market conditions, or upon fluctuation of the reference rate or if in the Bank's opinion, the borrower's account conduct increases the Bank's risk. However, and as correctly submitted by the Respondents, if during the period of calculating the redemption figure



the Applicant altered the rate due to their right to assess risks pursuant to clause 6.1, paragraph 2, and that is how they arrived at the 29.22%, they should have communicated the same to the 1<sup>st</sup> Respondent as required by the same paragraph that empowers them to do so. No evidence of such notification to the 1<sup>st</sup> Respondent has been adduced by the Applicant. For that reason, I am of the view that the correct rate for the first half of 2017 is 12.5% (plus a margin of 9.0% per annum as per the provision of clause 6.1 thereof), and not 29.22%.

Coming to the Respondents' prayer that this Court allows them the opportunity to exercise their equitable right of redemption, and to consider all the elements and avenues available to the borrower who is willing and capable of liquidating both the principal and interest repayment amounts within a reasonable period, the Respondents have cited the cases of *S. Brian Musonda (Receiver of First Merchant Bank (In Liquidation) v. Hyper Food Products Limited and Two Others*<sup>2</sup>, and *Citibank Trust v. Ayivor and Another*<sup>3</sup>, for the argument that the Court has equitable jurisdiction to delay foreclosure or postpone possession where there are reasonable prospects of the mortgagor

paying off the debt within a reasonable time. It is the Respondents' view that reasonable time takes into account the amount being demanded, the economic factors and the duration of the Facility.

Reacting to the Respondents' prayer to the Court to exercise its equitable jurisdiction and grant them their request to exercise the equitable right of redemption, the Applicant has argued that as guided by the Supreme Court in the case of *Match Corporation Limited and Development Bank of Zambia and the Attorney General*<sup>4</sup>, the relief which equity affords requires a reasonable balance to 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.

The Applicant has argued that given the history of the 1<sup>st</sup> Respondent's payments as evidenced by the loan statement (exhibit "CCN13"), which shows that the 1<sup>st</sup> Respondent only made two payments in the month of August, 2016, it begs the question as to whether in this case there is a reasonable prospect that the loan



would be redeemed if the Respondents were allowed a further period for payment. The Applicant argued that there are no reasonable prospects that the Respondents would repay the full loan if given the opportunity to do so, in light of the history of default in payments by the 1<sup>st</sup> Respondent. That, granting the Respondents an extension for repayments would only serve to delay the exercise by the Applicant of its rights under the mortgage and could potentially lower the prospects of full recovery by the Applicant as the outstanding amount could exceed the value of the security on account of the continued accrual of interest. I agree with the Applicant's submission that there are no reasonable prospects that the 1<sup>st</sup> Respondent would pay the full loan if given the opportunity to do so given the history of non-payment by the 1<sup>st</sup> Respondent. With regard to the excuse given by the Respondents for the delay in paying the Applicant, as the Supreme Court guided in the case of *John Paul Mwila Kasengele and Others v. Zambia National Commercial Bank Limited*<sup>5</sup>, inability to pay has never been and is not a defence to a claim, and neither is it a bar to entering judgment in favour of a successful litigant.

In view of the foregoing, I enter judgment for the Applicant for the sum of ZMW2,805,000.00 being the initial amount advanced by the Applicant to the 1<sup>st</sup> Respondent under the Long-Term Loan. The two payments made towards the loan by the 1<sup>st</sup> Respondent shall be deducted from the judgment sum and the net sum shall attract interest at the Bank of Zambia Policy Rate of 12.5% plus a margin of 9.0% per annum, in accordance with the provisions of clause 6.1 of the Facility letter, from the date of the agreement to the date of Judgment; thereafter, at current lending rate as determined by the Bank of Zambia until full payment, failure to which the Respondents shall surrender vacant possession of Farm No. 31293, Masaiti, in the Copperbelt Province and Lot 20592/M, Lusaka in the Lusaka Province, to the Applicant who shall exercise its right to foreclose on, take possession of and sell the said properties.

In the event that the judgment debt herein is not fully satisfied after the sale of the aforementioned properties, the Applicant shall be at liberty to enforce the guarantees against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for full payment of the judgment debt.



Costs of and incidental to the action herein are awarded to the Applicant, to be agreed upon or taxed in default of agreement.

Leave to appeal is denied.

**Delivered at Lusaka this 5<sup>th</sup> day of February, 2020.**

  

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**DR. W. S. MWENDA**  
**HIGH COURT JUDGE**