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



2019/HPC/0514

**IN THE MATTER OF : ORDER 30 RULE 14 OF THE
HIGH COURT RULES, CHAPTER
27 OF THE LAWS OF ZAMBIA AS
READ WITH ORDER 88 OF THE
RULES OF THE SUPREME
COURT OF ENGLAND 1999
EDITION, VOLUME 1**

**IN THE MATTER OF : A THIRD PARTY MORTGAGE
RELATING TO STAND NO.
507/01 CHIKOLA "B",
CHINGOLA**

BETWEEN:

INDO ZAMBIA BANK LIMITED

APPLICANT

AND

CHIYENA INVESTMENTS LIMITED

1ST RESPONDENT

DAVID SEULU

2ND RESPONDENT

HARRISON MAFWO SEULU

3RD RESPONDENT

**Before Hon. Mr. Justice Bonaventure C. Mbewe in Chambers
on the 23rd day of January, 2020.**

Research Advocate : **Mwiche Ntinda**

Marshal : **Esther Ng'uni**

For the Applicant : *Mr. G Pindani of
Messrs. Chonta Musaila,
Pindani Advocates*

For the 1st, 2nd & 3rd Respondents : *Ms. K. Kaunda of Mmes.
K. N. Kaunda Advocates*

JUDGMENT

CASES REFERRED TO:

1. *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v. Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1999) ZR 124/SCZ Judgment No. 16 of 1999/Appeal No. 18 of 1999;*
2. *Courtyard Hotels Limited and 3 Others v. First National Bank Zambia Limited and Another - SCZ Appeal No. 006/2015;*
3. *Investrust Merchant Bank v. Lilyvale Limited (2000) ZLR 115 SC;*
4. *Credit Africa Bank Limited v. George K. Kalunga – SCZ Appeal No. 144/1997;*
5. *Indo Zambia Bank Limited v. Leonard Mwelwa Witika (T/A LMW General Supplies and Transport) and 2 Others SCZ Selected Judgments No. 16 of 2018;*

6. *Ani Engineering Enterprises Limited v. New Capital Bank Plc* SCZ Judgment No. 10 of 2001;
7. *Victor Namakando Zaza v. Zambia Electricity Supply Corporation Limited* SCZ Judgment No. 18 of 2001;
8. *Nkongolo Farms Limited v. Zambia National Commercial Bank Limited and Others* (2005) ZR 78;
9. *Credit Africa Bank Limited v. John Dingani Mudenda* SCZ No. 10 of 2003;
10. *Reeves Malambo v. Patco Agro Industries Limited* – SCZ Judgment No. 20 of 2007;
11. *Kanjala Hills Lodge Limited and Jayetileke v. Stanbic Bank Zambia Limited*- SCZ Judgment No. 17 of 2012;
12. *Natwest v. Ashe* (2008) EWCA CIV 55.

AUTHORITIES REFERRED TO:

1. *The High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia;*
2. *The Law of Real Property, R E Megarry and H W Wade, 4th Ed, Page 921;*
3. *Principles of Corporate Finance Law, Ferran Elis, 2008, 316, 317 Oxford University;*
4. *Statutory Instrument 142 of 1996, The Banking and Financial Services Act (Classification and Provisioning of Loans Regulation);*
5. *Halsbury's Laws of England, 4th Edition (re-issue) Vol. 3(1) ;*
6. *The Limitations Act, 1939.*

INTRODUCTION

The Originating Summons herein was taken out by the Applicant against the 1st, 2nd and 3rd Respondents claiming to be the mortgagee, for the determination of the following questions;

1. *Payment of all monies which as at 22nd October, 2019 stood at a total sum of ZMW131,285.11 being overdraft and/or loan facilities availed on or around 8th June, 2009 and subsequently restructured by the Applicant Bank to the 1st Respondent and secured by a Third Party Mortgage over Stand No. 5073/01 Chikola "B" Chingola owned by the 2nd Respondent and a personal guarantee by the 3rd Respondent;*
2. *Interest thereon at the agreed rate of 28% per annum due and owing to the Applicant Bank by the Respondents;*
3. *Foreclosure, possession and sale of the said mortgaged property being Stand No. 507/01 Chikola "B" Chingola;*
4. *An Order that the 3rd Respondent honours his personal guarantee in the event that the proceeds of the sale of the mortgaged property are not adequate to pay of the entire debt plus interest and costs;*
5. *Any further Legal Costs of and incidental to this action.*

THE APPLICANTS EVIDENCE AND ARGUMENTS

The application is supported by an Affidavit in Support of the Originating Summons dated 18th November. 2019 deposed to by one Wendy Mwanza who deposes that the Applicant Bank availed

the 1st Respondent credit facilities of ZMW60,000.00 on 8th June, 2009, being a demand loan of ZMW45,000.00 to purchase a second hand bus repayable in 36 equal monthly instalments between June, 2009 and May, 2012; and an overdraft of ZMW15,000.00 for working capital to be repaid or cleared within 6 months all at an agree interest rate charged per annum.

The affidavit further deposes that the 1st Respondent secured its borrowing with a third party mortgage over property namely Stand No. 5073/01, Chikola "B", Chingola owned by the 2nd Respondent.

It is deposed that following the 1st Respondent's failure to service his overdraft, the Applicant demanded that the overdraft be normalized and in response, the 1st Respondent requested a conversion of the overdraft facility into a term loan which request, upon approval, resulted in a new facility letter being issued on 25th June, 2014 for the sum of ZMW70,000.00 for which the third Party mortgage continued being security and a personal guarantee for ZMW70,000.00 was added. The converted term loan was to be repaid in 12 monthly installments from 30th June, 2014 to 30th June, 2015 at an interest rate of 28% per annum.

The 1st Respondent defaulted on the loan repayments leading to the Applicant demanding settlement of the loan through Messrs. Kitwe Chambers which resulted in the 1st Respondent paying ZMW40,000.00 towards its indebtedness and declining to pay the

balance arguing that the interest on non-performing loans is unrecoverable by lenders under the law.

It is attested that the outstanding balance on the loan stood at ZMW131,285.11 plus interest at the agreed rate of 28% per annum as at 22nd October, 2019 inclusive of other charges. The Applicant exhibited documentary evidence in its affidavit in support of the facts set out therein and asserts that the Respondents have no defence to the Applicant's claim.

The application is also supported by Skeleton Arguments also filed on 18th November, 2019. The Applicant in its skeleton arguments posits that the case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v. Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1)** among other authorities supports the Applicant's right to the reliefs sought which right is cumulative.

The Applicant cites the case of **Courtyard Hotels Limited and 3 Others v. First National Bank Zambia Limited and Another (2)** in which it was held that a breach of contract occasioned by failure to repay a debt according to an agreed instalments entitles the aggrieved lender to call in the debt in full including accrued interest following classification of the debt as non-performing or a non-accrual account and even after such classification i.e. Up to and after 19th October, 2015. **Investrust Merchant Bank v.**

Lilyvale Limited (3) is cited to advance the holding that interest to be applied to an overdrawn account must be based on the amount utilized by the account holder.

The Applicant has quoted extensively from the case of **Credit Africa Bank Limited v. George K. Kalunga (4)** and that of **Indo Zambia Bank Limited v. Leonard Mwelwa Witika (T/A LMW General Supplies and Transport) and 2 Others (5)** which address **Statutory Instrument 142 of 1996, The Banking and Financial Services Act (Classification and Provisioning of Loans Regulation)** dealing with the requirement for banks to place loans on non-accrual or classify them, and submits that the Supreme Court held in that case that the regulation in **Statutory Instrument No. 142 of 1996** does not regulate the relationship between banks and their borrowers but is meant to regulate the conduct between banks and the Central Bank. The Court held that this Regulation does not in any way suspend the obligations under the loan agreement post classification and that interest on the loan is still payable and has to be repaid on the agreed terms and conditions.

At the hearing the Applicants relied on all the evidence and pleadings filed Court outlined above.

THE RESPONDENTS EVIDENCE AND ARGUMENTS

The Respondents filed an affidavit in opposition sworn by one Mafwo Harrison Seulu who is a director in the 1st Respondent Company and also the 3rd Respondent in this action. The affidavit deposes, that the Respondents deny owing the Applicant on the date of the application, and no demands for payment were subsisting. The affidavit goes on to depose that on 15th June, 2015 (I believe that the deponent meant 15th June, 2009 which is the date of the disbursement as shown by his exhibit "MSH4", a statement of account for Chiyena Investments Limited) ZMW45,000.00 was disbursed to the account of the 1st Respondent and not the seller of the motor vehicle that was being bought contrary to the terms of the facility letter exhibited as "MHS2". The deponent attests that the Applicant deducted some charges and commenced deductions of the loan on the 1st Respondent's account until 3rd March, 2011. The deponent further alleges that the Applicant stopped deductions and continued charging a processing fees on the overdraft after the expiry of 6 months whilst the 1st Respondent continued transacting on the account. The Deponent also alleges that the 1st Defendant maintained a fixed deposit to secure recoveries of installments for the loan which fixed deposit was released on 5th December, 2013 and its account was active on 25th June, 2014 with accredit of ZMW2,500.00.

The Deponent admits that the 1st Respondent's loan was converted into a term loan albeit for 24 months exhibiting "MHS8-9" therefor. The deponent avers that the overdraft facility was not in existence at 25th June, 2014 when the conversion of took place as the

overdraft facility expired on 15th December, 2010 or 30th /31st May 2010. The Deponent alleges in Paragraphs 22, 32 and 44 that the overdraft conversion was done by mistake. The Deponent goes on to attest to certain specific transactions and dealing with the Applicant averring, that it at one time left a balance of ZMW6,152.95 and the Applicant in 2016 and 2019 made demands of ZMW41,694.00 and ZMW33,499.62 and alleges that the Applicant has mishandled the 1st Respondent's account and acted unreasonably as it has not shown how the indebtedness had risen to ZMW131,285.11 which is contrary to the demand by its advocates for ZMW33,499.62.

The Deponent deposes that the security given of personal guarantees and a mortgage are null and void for mistake or caught by the law on limitation of actions and the Applicant therefore has no claim against the Respondent.

The Respondents, also filed skeleton arguments and list of authorities in opposition to the originating summons wherein the Respondents cite acts of commission and omission by the Applicant in not following the terms and conditions of the facility namely disbursing proceeds of the loan of ZMW45,000.00 directly to the 1st Respondent and not the seller of the vehicle being bought, not registering itself as loss payee with the insurers of the vehicle and not registering itself as absolute owner of the vehicle. The Respondents cite the following cases **Ani Engineering Enterprises Limited v. New Capital Bank Plc (7)** and **Victor**

Namakando Zaza v. Zambia Electricity Supply Corporation Limited (8) as well as **Halsbury's Laws of England, 4th Edition (re-issue) Vol. 3(1) Paragraph 204** to argue that where a bank credits a customer by mistake and the customer alters his position in reliance on the bank's action, the bank cannot recover or debit the customer with the amount credited by mistake. The Respondents submit that the Applicant cannot recover the ZMW45,000.00 which should not have been paid into the 1st Respondent's account except for the Applicant's negligence and cites the case of **Nkongolo Farms Limited v. Zambia National Commercial Bank Limited and Others (9)**.

The Respondents go on to argue that there was no overdraft of ZMW15,000.00 on the Respondents account to run for 6 months and submits that the disbursement of the ZMW45,000.00 into the 1st Respondent's account was wrongly treated as an overdraft by the Applicant.

The Respondents go on to argue that the Applicant never made any recoveries of the loan in 36 equal monthly installments as agreed in the facility letter and posits that the Applicant ignored the expiry of the contract and its going beyond the agreement repayment period was calculated to continue to accrue interest well beyond the contractual period thereby making more money off the Respondents and foreclose on the mortgaged property.

The Respondents have argued that the mortgaged property was only intended to secure the loan of ZMW45,000.00 and did not extend to the overdraft. It is also argued that the said overdraft was only meant to run for 6 months from 15th June, 2009 expiring on 15th December, 2009 and was extended to 31st May, 2010 in error and therefore not in existence at the time of conversion into a term loan on 25th June, 2015.

The Respondents argue that the Applicants action is statute barred as the overdraft expired on 15th December, 2009 or 31st May, 2010. The Applicant's letter of 26th June, 2010 communicating default is before the time that the cause of action accrued to the Applicant and according to **Section 18 (1) (i) of the Limitations Act, 1939** the Applicant cannot bring the current action.

The Respondents argue mistake of fact alleging that the loan conversion was wrongly done and money paid after the conversion of the loan was paid under mistake and misrepresentation of facts and as such submits that the whole transaction, including the taking of security for the loan, was null and void as the subject matter of the transaction did not exist as the ZMW45,000.00 was never disbursed.

The Respondents argue that the restructure of the loan by letter dated 6th December, 2014 in the sum of ZMW71,194.18 was a

unilateral action done without the 1st Respondent's consent, by the Applicant which was instead of enforcing the security it held done to increase the Respondents' balance. It is also argued that a bank does not continue charging interest from the date when it instructs lawyers to recover a loan.

The Respondents have raised concern with the changing amounts demanded by the Applicant being an amount of ZMW41,694.00 on 6th July, 2016; ZMW33,499.62 on 14th March, 2019 and an amount of ZMW131,285.11 on 22nd October, 2019 and relies on the case of **Credit Africa Bank Limited v. John Dingani Mudenda (10)** where the Court held that;

“A customer must be made aware of the intention of the bank to charge an unusual rate of interest such as compound interest.”

At the hearing of the action, the Respondent relied on the affidavit evidence and pleadings filed in the matter to oppose the Applicants claims.

DECISION OF THE COURT

I thank both Counsel for the submissions made to guide the Court in arriving at its decision.

The action is brought by the Applicant under **Order 30, Rule 14 of the High Court Act Chapter 27 of the Laws of Zambia** following a loan transaction between the Applicant and the 1st Respondent secured by a third party mortgage and personal guarantees given 2nd and 3rd Respondents in 2009.

This Court therefore has the jurisdiction to hear and determine the matter. The issues to be determined herein are;

1. whether the Applicant is entitled to the reliefs it claims in the Originating Summons;
2. whether the failure by the Applicant to adhere strictly to the terms and conditions of the loan regarding disbursement, insurance and endorsement of the vehicle that was being bought as absolute owner do not entitle the Applicant to recover the loan;
3. whether the Applicant is entitled to charge interest after 15th December, 2009 and 31st May, 2010 when the overdraft facility expired and the loan should have been repaid;
4. whether the conversion of the initial demand loan into a term loan was done under mistake of fact and misrepresentation of facts by the Applicant;
5. whether the action is statute barred under the **Limitations Act, 1939**.

I shall address the different issues to be determined hereunder. Firstly I shall reproduce in full, the 1st Respondent's loan application exhibited as "WM1a" and the loan agreement or facility letter exhibited as "WM1b", and shall highlight certain parts of these documents for emphasis, as I shall refer to them from time to time in my decision.

"WM1a" reads:

ON CHIYENA INVESTMENTS LETTERHEAD

3rd June, 2009

The Chief Manager

Indo-Zambia Bank

Chingola

RE: APPLICATION FOR A LOAN/TOD

We write to your office **requesting for a loan of Sixty Million Kwacha (K60,000,000.00)** to be **Forty Five Million Kwacha (K45,000,000.00)** for us to be able to purchase a bus for extra income to the company. **A Total of K15,000,000.00 for six months** to help with the daily business needs.

Our director Mr. Mwafwo H, Seulu holder of A/C number 2167001 has had three loans so far with your bank and he has successfully paid back all of them. The motor vehicle to be bought will cost K50,000,000.00 and K5,000,000.00 will be debited from the Chiyena Investments Account. **As Security for the above loan we therefore offer house No. 1 Luapula Road Chikola "B" Chingola** whose title deeds are already in your possession. **We plan to pay back the loan in 36 months.**

Yours faithfully,

Seulu Mafwo

MANAGING DIRECTOR

“WM1b” reads:

ON INDO-ZAMBIA BANK LTD LETTERHEAD

8th June 2009

Mr. Seulu H, Mafwo (Managing Director)

Chiyena Investments Ltd

House No. 1, Luapula Road

Chikola “B” Chingola

Dear Sir

RE: YOUR LOAN APPLICATION DATED 30.06.09

We are pleased to convey approval of the loan as under:-

Loan Amount	:	K60.00 Million (Demand Loan 45 Million + OD K15.00 Mn)
Rate of Interest	:	31% p.a. (Base Rate + 10%)
Processing Fee	:	2.5% upfront
Purpose Of Loan	:	Demand loan for purchase of Second Hand Bus and OD for Working Capital.
Repayment Period	:	Demand Loan in 36 Equal Monthly Installments from June 09 to May 2012 and OD for 6 months.
Security	:	1. Legal Mortgage of House No. 1 Luapula Road, Chikola B in name of Mr. David Seulu 2. Guarantee of Mr. David Seulu 3. Beatrice Kahala 4. Duncan Chikomba Seulu 5. Harrison Seulu 6. Absolute Ownership of Bus

OTHER TERMS AND CONDITIONS:-

- 1. The payment if the vehicle will be made by the Bank directly to the seller**
- 2. You will have to arrange for registering Bank's name immediately after payment**
3. Default of any installment on due date (last date of each month) will attract additional interest applicable from time to time (15% at present)
- 4. Failure to pay 3 continuous installments may cause Bank to recall, the loan and to start recovery process by seizing attaching vehicle/property for sale.**
5. Default for more than 5 months, Bank would also be free to circulate your name amongst all other Bank/Financial Institutions.
6. You are liable to maintain the vehicle in good condition and produce the same to the Bank for inspection if Bank advises you to do so.
- 7. Comprehensive insurance for vehicle to be obtained with Bank's Name as Loss payee**
8. House property should be insured against all risks as with Bank's Name as Loss payee
9. The Bank reserves the right to obtain/disclose and use information.....

Please sign a copy of this sanction as your acceptance of Terms and Conditions.

Yours faithfully

For/Indo-Zambia Bank Ltd

O P KHOKHER

CHIEF MANAGER

1. Whether the Applicant is entitled to the reliefs it claims in the Originating Summons;

The law on mortgage actions is well settled that a mortgagee is entitled to all the reliefs provided under **Order 30, rule 14 of the Rules of the High Court, Chapter 27 of the Laws of Zambia.**

The cases of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1); Courtyard Hotels Limited and 3 Others V First National Bank Zambia Limited and Another (2)** as well as those of **Reeves Malambo V Patco Agro Industries Limited (11)** and **Kanjala Hills Lodge Limited and Jayetileke V Stanbic Bank Zambia Limited (12)** all affirm the above principle.

The Applicant has to prove default by the 1st Respondent herein of the terms of the loan to be entitled to the claimed reliefs from this Court.

The Applicant on the basis of the authorities and **Order 30 Rule 14 of the High Court Rules** is entitled to all the reliefs claimed in the Originating Summons if it proves its case.

2. Whether the failure by the Applicant to adhere strictly to the terms and conditions of the loan regarding disbursement, insurance and endorsement of the vehicle that was being bought as absolute owner do not entitle the Applicant to recover the loan;

The Respondents produced a statement of account for Chiyena Investments Limited as exhibit "MSH4" to their affidavit in opposition, showing that on 15th June, 2009 ZMW45, 000 was disbursed to the account of the 1st Respondent and argue that the facility letter exhibited as "MHS2" has as a term and condition that the funds would be disbursed to the seller of the motor vehicle that was being bought. They further argue that the Applicant did not register itself as loss payee with the insurers of the vehicle and also did not register itself as absolute owner of the vehicle all in disregard or breach of the terms and conditions of the facility letter.

The terms and condition referred to by the Respondents are numbered 1, 2 and 7 in "WM1b" above.

It is not in dispute that the ZMW45,000.00 was disbursed to the 1st Respondent's account as attested to by the 1st Respondent's Managing Director. It is therefore not in dispute that the 1st Respondent had the benefit of the loan and it was still within its power to pay the seller of the vehicle as it was to top up an amount of ZMW15,000.00 to meet the purchase price as stated in its letter to the Applicant "WM1a".

Is the disbursement of the loan proceeds to the 1st Respondent's account a breach that goes to the root of the loan agreement? I find that it does not, as the funds were not disbursed to a 3rd party or a wrong account thereby putting the funds out of reach of the 1st Respondent there by denying it the benefit of using the

said funds for the intended purposes being to "Purchase a Second Hand Bus".

The Respondents have not adduced evidence on when they bought the said motor vehicle which was the subject of that part of the loan for ZMW45,000.00 or when they surrendered the registration papers or "white book" to the Applicant if they did so.

Condition 2 of the agreement states "**2. You will have to arrange for registering Bank's name immediately after payment.**" As read with "**6. Absolute ownership of Bus**" under the sub-heading **Security** clearly places responsibility for registering the Bank's name on the 1st Respondent. "**You**" refers to the 1st Respondent and I am at a loss why the Respondents allege that the Applicant failed to register itself as absolute owner.

Condition 7 reads "**7. Comprehensive insurance for vehicle to be obtained with Bank's Name as Loss payee**". The condition does not clearly state which party between the Applicant and the 1st Respondent was responsible for obtaining the insurance with the Bank's name as loss payee. In the absence of other evidence being led to establish who was responsible for this activity, I will not speculate on it.

I find that the Respondents have not outlined and explained their own breach in not obtaining guarantees from other

persons listed in the loan agreement namely, 3, Beatrice Kahala, 4. Duncan Chikomba Seulu and 5. Harrison M. Seulu. This was a condition of the facility that they did not fulfill and are silent on it.

The Respondents cited the cases of **Ani Engineering Enterprises Limited v. New Capital Bank Plc (7)** and **Victor Namakando Zaza v. Zambia Electricity Supply Corporation Limited (8)** as well as **Halsbury's Laws of England, 4th Edition (re-issue) Vol. 3(1) Paragraph 204** to argue that where a bank credits a customer by mistake and the customer alters his position in reliance on the bank's action, the bank cannot recover or debit the customer with the amount credited by mistake. I wish to contrast the decisions cited and the type of mistake that is envisaged therein. The Applicant in the case *in casu* did not credit the 1st Respondent with funds that were not meant for it by mistake as it had applied for a loan which was duly approved and would have been paid to a seller of a bus for its benefit. The 1st Respondent was credited with the proceeds of its loan which is to be contrasted with where the 1st Respondent had not applied for a loan but was credited with funds any way. The Bank would have the right to recover the said funds through legal action as opposed to debiting the 1st Respondent.

I hereby find that the only breach complained of by the Respondents is the failure to disburse the loan proceeds directly

to the Seller. The disbursement of the funds directly to the 1st Respondent put the funds at the Respondent's disposal entitling the Applicant to recover the same from the 1st Respondent and enforce any security given in the event of breach by the 1st Respondent in repaying the loan.

3. Whether the Applicant is entitled to charge interest after 15th December, 2009 and 31st May, 2010 when the overdraft facility expired and the loan should have been repaid;

The question of when the overdraft facility expired or the loan terminated is factual. The question I ask myself is "was the overdraft facility fully repaid as at 15th December, 2009 and the Loan fully repaid by 31st May 2010? If the answer regarding both facilities is that the overdraft and the loan were fully repaid is "yes", then the Applicant is not entitled to claim or charge interest after the said dates. However, if the answer is "no", then the Applicant is entitled to charge interest as contracted until the said facilities are fully repaid. The statement for the 1st Respondents account produced by both parties show a negative number as being the balance on the account. This clearly denotes that the overdraft was not fully repaid and the balance outstanding as at 15th December, 2009 was ZMW17,105.00. The account went into credit on 21 December, 2009 following a credit of a KCM Cheque of ZMW19,384.00 leaving a positive balance of ZMW2,279.00.

A reading of the statement in the following days and months shows that the 1st Respondent continued to transact and overdraw the account beyond the credit limit of monies he had deposited and/or were transferred into the account meaning that the Applicant appears not to have terminated the overdraft facility availed to the 1st Respondent. The account oscillates between debit and credit balances and the debit balances this time rise to much higher amounts than were previously recorded during the term of the overdraft.

On 16th May, 2014, the 1st Respondent applied to the Applicant, to convert the 1st Respondent's overdraft of ZMW85,783.69 into a demand loan citing loss of business from its main clients. The loan is proposed to be paid off in 24 months. The Applicant approves the 1st Respondent's loan of ZMW70,000.00 on 25th June, 2014 converting the 1st Respondent's overdraft into a loan for 12 months from 30th July, 2014 to 30th June 2015. The security for the loan is the mortgaged property and personal guarantees of David Seulu and Harrison Mafwo Seulu.

From the evidence on record and the conduct of the parties, I find that the overdraft continued beyond the agreed 6 months by the conduct of the parties in the period 16th December, 2010 to 26th June, 2014. The Applicant is entitled to charge interest only for the amounts utilized by the 1st Respondent at an interest rate of 31% per annum.

4. Whether the conversion of the initial loan into a demand loan was done under mistake of fact and misrepresentation of facts by the Applicant;

The Respondents argue forcefully in relation to the “wrong disbursement of the ZMW45,000.00” as well as the “unilateral” conversion of the overdraft facility into a term loan which overdraft it is posited that the Applicant should have proceeded with recovery action at the time it was due to expire.

I have not found any wrong doing on the part of the Applicant in disbursing the loan to the 1st Respondent’s account. I find that the conversion of the Respondents overdraft into a term loan was preceded by a letter “WM4a” from the 1st Respondent to the Applicant.

I find that the 1st Respondent did not have the full amount of the overdraft on its account to allow the Applicant recover the overdraft amount and close the overdraft. Further, the Respondents have not shown this court the clause in the contractual arrangements that obliged the Applicant to commence legal or recovery proceedings at the end of the initial 6 month period when the overdraft was due to expire.

It has therefore been open to the Applicant to commence legal action when it saw it fit.

5. Whether the action is statute barred under the **Limitations Act, 1939.**

In paragraphs 51 et seq, the Respondents argue that according to **Section 18 (1) (i) of the Limitations Act of 1939 and also paragraph 803 of Halsbury's Laws of England, 4th Edition Re Issue**, no action for recovery of interest covered by a mortgage or other charge can be brought after six (6) years from the date on which interest became due.

The Respondents contend that the overdraft was not renewed after expiry and did not exist the time of conversion into a term loan on 25th June, 2014. I have already addressed the question of whether the overdraft was in existence after 31st May 2010. The 1st Respondent has not adduced evidence to show that it repaid the facility when it expired in 2010 or that it did not continue enjoying the facility until the renewal in June 2014 which was preceded by an application written by the 1st Respondent Company exhibited as "WM4" and "MHS8". The exhibit "WM3" which the Respondents refer to is *inter alia* asking the Respondent to comply with certain requirements, which it was not done, would force the Applicant to recall the facility and start its recovery process. The 1st Respondent has not adduced evidence to show that the Overdraft facility mentioned in its letter exhibited as "WM4a" is a different one from that granted to it in June 2009 exhibited in "MHS2".

Section 4(3) Limitation Act 1939 clearly pronounces itself on actions and when time begins to run: “...*from the date on which the right of action accrued to him...*”

The aim of the legislation with regard to limitation periods was well stated in the English case of **Natwest v Ashe [2008] EWCA civ 55 (13)** as:

“First, the aim of the statutes of limitation is to prevent citizens from being oppressed by stale claims, to protect settled interests from being disturbed and to bring certainty and finality to disputes and so on.”

From the totality of the evidence adduced, I am of the firm belief that time stopped running when the overdraft facility was converted to a term loan on 25th June, 2014. New obligations were created under the term loan and the Applicant has brought this action within the six (6) year period prescribed by the **Limitations Act**. There was no loan created by the letter from Messrs. Kitwe Chambers of 15th October, 2015 “MHS13”. The submission by the Respondents that the action by the Applicant is statute barred therefore fails and is hereby dismissed

I find that the Applicant is entitled to recover the amount disbursed directly to the 1st Respondent, from the 1st Respondent

and enforce any security given in the event of breach by the 1st Respondent in repaying the loan

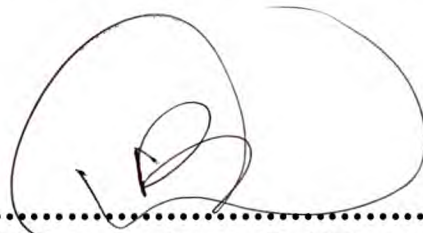
Having found as set out hereinabove, the Applicant has proved its case on a balance of probabilities and I find that the law supports that this is a proper case for me to enter Judgment in favour of the Applicant, which I hereby do, as prayed by the Applicant as follows;

- I. Judgment is entered in favour of the Applicant by reason of the Respondents' default in fulfilling their repayment obligations under the overdraft which was converted to a term loan under facility letter of 25th June, 2014 and secured by a third party mortgage over Stand No. 5073/01, Chikola B Chingola owned by the 2nd Respondent and a personal guarantee by the 3rd Respondent. The amount due shall be assessed by the Registrar.
- II. Interest on the assessed amount at the contractual rate from the date of the loan to the date of the Originating Summons and thereafter at the Judgment Act, Chapter 81 rate until date of full repayment.
- III. The 1st Respondent shall settle the Debt within Sixty (60) days from the date of the assessment of the Judgment sum. In default, the Applicant shall be at liberty to foreclose on

the mortgaged property, being Stand No. 507/01, Chikola B Chingola, take possession thereof and exercise its right to sale over the same.

- IV. The Applicant shall be at liberty to enforce the personal guarantee by the 3rd Respondent, in the event that the proceeds of sale of the mortgaged property are not sufficient to extinguish the entire Judgment Sum.
- V. I award costs of and incidental to this action to the Applicant, to be taxed in default of agreement.

Delivered at Lusaka this 14th day of July, 2020.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**