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

2019/HPC/0384



BETWEEN:

FIRST CAPITAL BANK LIMITED

APPLICANT

AND

**UNITED CHEMOLIDE INDUSTRIES
ZAMBIA LIMITED**

1ST RESPONDENT

ASHOK B. PATEL

2ND RESPONDENT

**CORAM: Before Mr. Justice Bonaventure C. Mbewe in
Chambers on the 12th day of June, 2020.**

For the Applicant : Ms. T. Banda of Messrs. A B and David

*For the Respondents : Mr. K. Kombe with Mr. C Bwalya of
Messrs. Andrew and Partners*

RULING

Cases and Authorities Referred to:

1. *Zambia Telecommunications Company Limited v. Aaron Mweene Mulwanda, Paul Ngandwe SCZ Judgment No. 7 of 2012*
2. *Walusiku Lisulo v. Patricia Anne Lisulo (1998) Z.R 75*

3. *Huddersfield Banking Company Limited v. Henry Lister & Sons Limited* (1895) 2 CH 273
4. *Match Corporation Limited v. Development Bank of Zambia and the Attorney General* SCZ Judgment No. 3 of 1999
5. *Charles Kabwita and Others v. NFC Mining Plc* (2012) Vol 2 Z.R. 103
6. *Attorney General v. Tomline* (1877) 7 CH.388
7. *The High Court Act, Chapter 27 of the Laws of Zambia*
8. *Rules of the Supreme Court of England 1999 Edition Volume 2*
9. *Halsbury's Laws of England, Volume 23 Third Edition*
10. *Zambian Civil procedure, Commentary and Cases, by Hon. Dr. Justice P. Matibini, Volume 2, Lexis Nexis, 2017 at Page 1138*

INTRODUCTION

Following the hearing of an Originating Summons application, I handed down Judgment on 26th November, 2019 in favour of the Applicant herein in the sum of US\$894,629.00 and further relief of foreclosure, possession and sale of the mortgaged properties being Stand No. 8179, Lusaka and Stand 7154, Lusaka in the event the 1st Respondent failed to exercise its equity of redemption within 120 days from the date of the Judgment as well as a right to recover on the 2nd Respondent's guarantees in the event of a shortfall after the sale of the mortgaged properties.

The parties filed a Consent Order to settle the Judgment Debt in Instalments on 31st January, 2020 giving the 1st Respondent a

chance to pay the debt in installments commencing 31st January, 2020 and ending on 31st December, 2020.

On 30th April, 2020, the Respondent filed this application by way of summons seeking special leave to vary the consent order to settle the Judgment Debt in installments pursuant to **Order 3, Rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia**, accompanied by a certificate of urgency, an affidavit in support and skeleton arguments and list of authorities. The Respondents also obtained an order for stay of execution of the consent order ex-parte from this Court dated 6th May, 2020.

ARGUMENTS AND EVIDENCE

The affidavit in support of the Respondents' application is sworn by one Lloyd H. Mweene, Chief Executive Officer of the Respondent Company who attests that the 1st Respondent is unable to meet the installment for the month of April, 2020 as the 1st Respondent ceased to carry out its operations and trade in the wake of the Corona Virus (COVID-19) Pandemic which affected the Respondent's international supply chains that suspended operations as their countries are all under total lock down leading to the cancellation and scaling back of local outlets and contracts.

The 1st Respondent assures this Court that it is fully committed to settling its indebtedness in full to the Applicant and has since requested the Applicant to consider restructuring the settlement

of its indebtedness. The 1st Respondent proposes settlement of the Judgment Debt by varying the Consent Order to allow for a moratorium of 6 months and thereafter payment over a period of 5 years.

The Respondents also filed an affidavit in reply to the Applicant's affidavit in opposition on 11th June, 2020 wherein it is deposed that the Covid-19 Pandemic has presented special circumstances that render it inexpedient to enforce the Consent Order to settle the Judgment Debt in installments and the 1st Respondent is unable to pay the installments in accordance with the Consent Order due to the hampering of its operations. The affidavit exhibits correspondence and bank statements to back the assertions of the 1st Respondent's inability to comply with the Consent Order. The 1st Respondent prays that it be allowed to pay \$20,000.00 per month over a period of 5 years until the whole Judgment Debt is liquidated.

The skeleton arguments in support of the application cite the law under **Order 39, Rule 1** and **Order 36, Rule 9 of the High Court Act, Chapter 27 of the Laws of Zambia** as well as the cases of **Zambia Telecommunications Company Limited v. Aaron Mweene Mulwanda, Paul Ngandwe (1)** and **Walusiku Lisulo v. Patricia Anne Lisulo (2)**, *inter alia*.

Order 39, Rule 1 of the High Court Act, Chapter 27 of the Laws of Zambia provides;

“1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and reverse, vary or confirm his previous judgment or decision:

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.

2. Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just.”

Order 36, Rule 9 of the High Court Act, Chapter 27 of the Laws of Zambia provides;

“Where any Judgment or Order directs the payment of money, the Court, or a Judge, may for sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving Judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any

time. The order shall state that upon the failure of any installment, the whole amount remaining unpaid shall for this will become due”.

The 1st Respondent prays to this Court to exercise its discretion under the law to grant it special leave to vary the Consent Order based upon the law and facts set out therein.

The Applicant filed an affidavit in opposition on 5th June, 2020 sworn by one Twaambo Chaze Chiwala, a Credit Underwriter in the Applicant Bank who deposes that under the Consent Order, the Respondents were allowed an extended period of 12 months within which to repay the Judgment Debt and that the deponent has been advised that a consent order cannot be varied by the application before the Court. The affidavit deposes that being alive to the challenges posed by the Covid-19 Pandemic, the Applicant is agreeable to availing the Respondents a six month moratorium of non-payment of the installments due for these months and would effectively be agreeable to extending the payment period by 6 months, with installment payments to commence in January, 2021 and end in June 2021. The affidavit deposes that the proposed period of a 5 year extension sought by the Respondents is tantamount to a availing a new credit facility. The current facility which the 1st Respondent defaulted on is secured by mortgage and guarantee and the purpose of holding the collateral is so that the Applicant can recover its moneys in the event of default as has happened herein.

The Applicant filed skeleton arguments in opposition to the application which argue that the Respondent's application is improperly before this Court having been made under **Order 39** which they contend applies to Judgments delivered by the Court and not consent judgments or orders. The Applicant posits that **Paragraph 17A – 23 of the Rules of the Supreme Court of England, 1999 Edition, Volume 2** and **Paragraph 1672 of Halsbury's Laws of England, Volume 23, Third Edition** all state the law regarding a Court's power to set aside a consent judgment which may be set aside on a fresh action brought for the purpose. The Applicant also relies on the case of **Huddersfield Banking Company Limited v. Henry Lister & Sons Limited (3)** wherein it was stated;

“A court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties.”

The Applicant submits that a period of 5 years is not reasonable for the Respondents to pay the Judgment Debt and relies on the case of **Match Corporation Limited v. Development Bank of Zambia and the Attorney General (4)** in which it was stated:

“The relief which equity affords requires that a reasonable balance 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 prays that even if this Court is of the view that the Consent Order may be varied, the 5 year repayment period is excessive as prior to the Covid-19 Pandemic the 1st Respondent failed to repay its credit facility to the Applicant and repeats its position postulated in its affidavit in opposition, that it can agree to a 6 month moratorium which is a more equitable position.

RULING

I thank the parties for their submissions which I have duly taken into account together with the affidavit evidence filed herein.

This is a novel application by the Respondents which has been brought pursuant to **Order 39, Rule 1 of the High Court Act, Chapter 27 of the Laws of Zambia**. This Order clearly relates to judgments or decisions handed down by the Judge and not a consent order as can be seen from the words “....any judgment or decision given by him.....confirm his previous judgment or decision...”. The Consent Order herein was arrived at and agreed by the parties after the decision of this Court of 26th November, 2019. The Court is in the matter *in casu* not being asked to review or vary its own decision but that which was negotiated and agreed by the parties and filed into Court for this Court to give effect to.

The decision in **Charles Kabwita and Others v. NFC Mining Plc (5)** is instructive where the Court held that it is trite law that consent orders are prepared by the Parties setting out the terms and are brought only for approval of the Court. In **Zambian Civil procedure, Commentary and Cases, Volume 2, Lexis Nexis, 2017 at Page 1138**, the learned author Hon. Dr. Justice Matibini states that a consent judgment or order derives its legitimacy of effect from the agreement of the parties and is identified as a true contract. It must be stressed that a Consent Order once entered is binding on both parties and has the same force as a Judgment rendered by the Court.

Order 36, Rule 9 of the High Court Act, Chapter 27 of the Laws of Zambia could have argued to allow a court set aside a consent order, but for the clear guidance given by **Halsburys' Laws of England** which states that;

“A judgment given or an order made by consent may on fresh action brought for the purpose be set aside on any ground that would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation or non-disclosure of a material fact which there was an obligation to disclose or by duress or was concluded under a mutual mistake of fact, ignorance of a material fact or without authority.”

The English cases of **Huddersfield Banking Company Limited v. Henry Lister & Sons Limited (3)** and that of **Attorney General v. Tomline (6)** cited by the Applicant which authorities all clearly held that a court can set aside a consent order on any grounds that would invalidate an agreement or contract between parties supports the principle in **Halsbury's Laws** and supports the submission that this Court cannot tamper with the Consent Order signed by the parties herein based on the application currently before it.

The inclusion of the wording from **Order 36, Rule 9** regarding the whole amount remaining unpaid becoming due upon failure to pay any installment as set out in the Consent Order signed between the parties does not make this Consent Order a "decision given by this Court" within the meaning of Order 39, Rule 1. That is a term agreed to by the parties who were fully alive to the consequences of failure to pay any installment. It therefore does not give his Court the power to vary the terms of the installment payment unless consent to by both parties who negotiated and agreed to it.

I therefore agree with the submission by the Applicant that this matter has been improperly laid before this Court. The Respondents should have commenced a fresh action for the purpose.

Much as the Covid-19 Pandemic has wreaked havoc on businesses, supply chains and brought untold misery of a type not

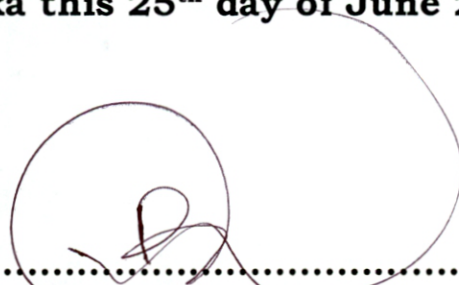
foreseen at the time that the parties signed the consent order, the Respondents should know that the Court's decision was restricted to granting the Applicant the relief it sought, upon proving its case which is the repayment of the balance on the credit facility by the 1st Respondent. The Court's equitable jurisdiction enabled it grant the 1st Respondent the right to exercise its equity of redemption which is what allowed the Court to grant them a 120 day period within which to repay the facility or face foreclosure in default thereof. It is not in the Court's power to review, vary or rewrite the terms of credit facilities or impose new ones on the parties. The Court does not have the power to grant moratoriums or extend repayment periods in the matter *in casu* and is indebted to the Applicant which has consented to give the Respondents the moratorium and extend the repayment period for 6 months to June 2021. The Court can only endorse this variation of the Consent Order as consented to by the Applicant and not re-write the terms of the Consent Order.

In this matter, the Applicant has pointed out that it holds security for the 1st Respondent's loan obligations which it should have recourse to, if the said Respondent is unable to repay its obligations. The 1st Respondent already defaulted on its obligations to the Applicant and if it cannot repay in the extend period consented to by the Applicant, then it is only fitting that the Applicant should be given the right to recover from the security and guarantees it holds. It is trite law that a successful litigant should only be denied the enjoyment of his judgment on good and sufficient ground. Linking the Covid-19 Pandemic to a proposal to

pay the Judgment Debt over an extended period of 5 years cannot be said to be good and sufficient ground as the Applicant has granted a moratorium for 6 months and wishes to recover the sums under the Judgment Debt by June 2021. The 1st Respondent has only provided financial projections for one year and has no basis for arguing for an extended repayment period of 5 years. I do not find sufficient reason to tamper with, amend or vary the Consent Order except as agreed by the parties.

I therefore endorse the variation of the Consent Order dated 21st January, 2020 to the extent agreed or consented to by the Applicant namely that the Respondents are hereby granted a moratorium that extends the repayment period for 6 months to June, 2021 meaning that the repayments will recommence in January, 2021 and end in June 2021.

Delivered at Lusaka this 25th day of June 2020.

A handwritten signature in dark ink, consisting of a large, circular flourish that encloses a smaller, more complex scribble. The signature is positioned above a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**