

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

2019/HPC/0463



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

**IN THE MATTER OF : THE PROPERTIES COMPRISED IN
FIRST LEGAL MORTGAGES
RELATING TO PLOT 1178 KITWE,
PLOT 1179 KITWE AND STAND NO.
4885 KITWE COPPERBELT
PROVINCE OF ZAMBIA IN THE
NAME OF SPECTRUM INDUSTRIES
LIMITED**

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

BETWEEN:

FIRST NATIONAL BANK ZAMBIA LTD

APPLICANT

AND

SPECTRUM INDUSTRIES LTD

1ST RESPONDENT

GRACE WILLOMBE CHIPAMPE

2ND RESPONDENT

Before Hon. Mr. Justice Bonaventure C. Mbewe in Chambers on the 24th day of January, 2020.

For the Applicant : *Ms. G. Musyani, Head of Legal in the Applicant Bank*

For the 1st & 2nd Respondents : *Ms. M. Chibambo of Mando & Pasi, Advocates*

J U D G M E N T

CASES AND AUTHORITIES REFERRED TO:

- 1. S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v. Hyper Food Products Limited and Two Others (1999) ZR 124*
- 2. Reeves Malambo v. Patco Agro Industries Limited – SCZ Judgment No. 20 of 2007*
- 3. New Plast Industries v. The Commissioner of Lands and The Attorney General SCZ Judgment No. 8 of 2001*
- 4. Kanjala Hills Lodge Limited and Jayetileke v. Stanbic Bank Zambia Limited- SCZ Judgment No. 17 of 2012*
- 5. Courtyard Hotels Limited and 3 Others v. First National Bank Zambia Limited and Another– SCZ Appeal No. 006/2015*

6. *Chikuta v. Chipata Rural Council (1974) ZR 241*
7. *Chazyia Silwamba v. Lamba Simpito (2010) ZR Vol. 1 at page 475*
8. *Order 30, Rule 14 of the High Court Act Chapter 27 of the Laws of Zambia*
9. *Order 88, Rules of the Supreme Court of England, 1999 Edition, Vol. 1*
10. *Order 53, Rule (9) of the High Court Rules Chapter 27 of the Laws of Zambia*
11. *Order 53, Rule 6 (2) – (5) of High Court Rules, Chapter 27 of the Laws of Zambia*

The Applicant, herein brings its application by way of Originating Summons under **Order 30, Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** which application is dated 1st October, 2019, supported by Affidavit and Skeleton Arguments and List of Authorities all filed on the same date as the Originating Summons.

In the Originating Summons, the Applicant seeks the following reliefs as endorsed therein;

1. *Payment of all monies which as at 25th September, 2019 stood at ZMW4,160,009.36 plus contractual interest, costs and all other charges due and owing to the Applicant Bank by the Respondent under Credit Facilities availed to the 1st Respondent and secured*

by a First Legal Mortgage over Plot 1178 Kitwe, Plot 1179 Kitwe and Stand No. 4885 Kitwe Copperbelt Province of Zambia (Mortgaged Properties) registered in the 1st Respondent's name:

- 2. An Order to Foreclose on the Mortgaged Properties.*
- 3. Delivery of vacant possession of the Mortgaged Properties by the 1st Respondent to the Applicant;*
- 4. An Order of sale of the Mortgaged Properties by the Applicant*
- 5. An Order for the enforcement of the Suretyship offered by the 2nd Respondent*
- 6. Costs; and*
- 7. Any other relief the Court shall deem fit*

At the Hearing, Counsel for the Respondent, Ms. Chibambo applied for an adjournment on the ground that Mr. Mwitumwa who has conduct of the matter was not available for the hearing. Having been served with notice of hearing on Wednesday afternoon, he could not serve notice of adjournment owing to the limited time and that he had been given Thursday, 23rd January, 2020 as the tentative date of hearing and he therefore scheduled his diary with the 23rd January in mind.

Counsel for the Applicant, Ms. Musyani, objected to the application relying on Affidavit of Service dated 23rd January, 2020 which she

posited showed that the parties were aware of the rescheduled hearing to 24th from 21st January, 2020 and was surprised at the turn the matter was taking.

I decided to proceed with hearing the matter as I did not find the reason advanced by the Respondent's Counsel to be exceptional and/or compelling.

Ms. Musyani, relied on the Originating Summons, Affidavit in Support and the Skeleton Arguments in Support of Originating Summons and the Applicant's List of Authorities.

The Applicant's affidavit in support of its summons is deposed to by one Euphrice Kombe who at Paragraphs 5 - 9 deposes that the Applicant advanced seven credit facilities namely term loans, a business term loan, an overdraft and a term loan consolidation, to the 1st Respondent between 5th April, 2012 and 16th October, 2015 carrying various cited applicable rates of interest respectively. The deponent goes on to depose that the loans were secured by a First Legal Mortgage over Plot 1178 Kitwe, Plot 1179 Kitwe and Stand No. 4885 Kitwe Copperbelt Province of Zambia all registered in the name of the 1st Respondent (The Mortgaged Properties) as well as suretyship by the 2nd Respondent. The Affidavit deposes that the 1st Respondent's conduct of its account has not been to the Applicant's

satisfaction as the 1st Respondent has continually failed to meet its agreed periodic repayment obligations thereby being in arrears.

The deponent deposes further that despite reminders to settle its indebtedness, the 1st Respondent has failed and/or neglected to settle the outstanding debt. It is deposed that to date the Facilities remain unpaid and stand at ZMW4,160,009.36 as at 25th September, 2019. The Deponent's Affidavit exhibits various documentation relating to the loan and correspondence with the 1st Respondent in support of the facts deposed to.

The Applicant also filed an Affidavit in Reply to the Respondents' Affidavit in Opposition to the Originating Summons dated 20th January, 2020 in which it deposes that the total debt owed initially stood at ZMW6,890,016.47 as at 16th May, 2019 of which the 1st Respondent has repaid ZMW5,694,657.57 leaving a balance of ZMW1,550,661.27 as at 11th November, 2019. The Affidavit deposes that the Respondents at Paragraph 2 of their Affidavit in Opposition raise matters that cannot be matters for an affidavit as they touch on points of law are offensive to rules of evidence. The Applicant denies any forgery and submits that disbursements of the loans were done into the 1st Respondents accounts and that the execution page for the suretyship clearly advises the persons executing to seek independent legal advice.

The Applicant submits, in its skeleton arguments, that it availed the 1st Respondent credit facilities and first legal mortgages were created between it and the 1st Respondent over the Mortgaged Properties to secure the Respondent's obligations. The Applicant submits that owing to default in repaying the facilities availed to the 1st Respondent, it is entitled to all the reliefs provided in **Order 30, Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia** and cites the following authorities in support of its submissions; **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v. Hyper Food Products Limited and Two Others (1), Reeves Malambo v. Patco Agro Industries Limited (2)** among others.

At the hearing of the matter, Counsel for the Applicant augmented the submissions in the skeleton Arguments along the lines contained therein and the Affidavit in support praying for the Court to grant the relief under **Order 30, Rule 14 of the High Court Rules Chapter 27 of the Laws of Zambia**. Counsel hastened to inform the Court that the Respondent had been paying off the debt and the balance now stood at ZMW1,550,661.27 and challenged the Respondent's reliance on **Order 88 of the Rules of the Supreme Court of England when Order 30, Rule 14 of Chapter 27 of the Laws of Zambia** fully contains all the reliefs due to a mortgagee. In conclusion Counsel asked the Court to keep the doctrine of *Non est factum* cited in the **Nkongolo** case in its narrow limits.

The Respondent, in this matter filed an Affidavit in Opposition to the Originating Summons dated 7th November, 2019 and deposed to by one Grace Chipampe Willombe Pio the 2nd Respondent and a Director in the 1st Respondent Company. No skeleton arguments appear to have been filed by the Respondents herein at the time of filing the Affidavit referred to above up to the time of hearing the matter.

Reading the Affidavit in Opposition, it states at Paragraph 2 that the sum claimed by the Applicant is not owed as the 1st Respondent has fully paid back the loan and exhibits letters from Messrs. ECB Legal Practitioners to their bankers asking them to transfer certain sums from the Firm's account to the 1st Respondent's account held at the Applicant Bank. The exhibits are dated 9th and 24th July, 2019 referring to amounts of ZMW1,750,000.00 and ZMW1,250,000.00 respectively.

The deponent goes on to depose that on advice from her Counsel, the Applicant's action does not raise any cause of action and does not comply with the requirements of **Order 88 of the Rules of the Supreme Court of England, 1999 Edition**. It is alleged, by the deponent, that the documents exhibited by the Applicant all contain forged signatures as they were not signed by the shareholder, Director and Secretary in the 1st Respondent Company. She alleges that at the time of signing the suretyship, she was not properly advised by an independent legal advisor as required by the law and

was therefore not aware of the effect of signing the same. The Affidavit concludes by deposing that the Applicant is holding on to a Certificate of Title for Stand No. 50 Kabengele Avenue, Kitwe which is not one of the properties that is security for the mortgages herein and alleges that the Applicant has refused to release the same.

Counsel for the Respondent, Ms. Chibambo informed the Court that she would not augment the Respondent's position as she had no instructions.

I have considered the Applicant's Affidavit in Support of Originating Summons, Skeleton Arguments and List of Authorities, the Affidavit in Reply filed herein as well as the submissions of the Applicant's Counsel. I have also equally considered the Respondents' Affidavit in Opposition to the Originating Summons and taken note of Counsel for the Respondents' refusal to address the Court when invited to do so.

I find that this Court has jurisdiction to hear this matter under **Order 30, Rule 14 of the High Court Act Chapter 27 of the Laws of Zambia** as read with **Order 88 of the Rules of the Supreme Court of England (White Book) 1999 Edition, Volume 1.**

Order 30, Rule 14 of the High Court Rules which gives this Court the jurisdiction to entertain the Applicant's application provides as follows:-

"14. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having a right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief or the nature or kind following as may by the summons be specified and as the circumstances of the case may require that is to say-

Payment of moneys secured by the mortgage or charge; sale; foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property; Redemption; Re-conveyance; delivery of possession by the mortgagee."

This has caused the Court difficulties to appreciate and fully consider the allegations of fraud or the arguments that there is no cause of action raised in the matter as Applicant has not complied with the requirements of **Order 88 of the Rules of the Supreme Court of England, 1999 Edition**. I therefore do not know whether the Respondents wished to raise fraud as a defence or which rule exactly that they allege Applicant did not comply with in **Order 88** which does not raise a cause of action as alleged.

In this matter, I find that the Applicant is entitled to sue for all the reliefs available to it under the mortgage given to it by the 1st Respondent as held by the Supreme Court in the cases cited by the Applicant as well as those of **Kanjala Hills Lodge Limited and Jayetileke v. Stanbic Bank Zambia Limited (4), Courtyard Hotels Limited and 3 Others v. First National Bank Zambia Limited and Another (5)** which all hold that when a mortgagor defaults, the mortgagee is entitled to pursue all his remedies concurrently.

The Applicant takes issue with the Respondent's Affidavit in Opposition which it argues raises matters that cannot be matters for an affidavit as they touch on points of law and are therefore offensive to rules of evidence. Having read the said Affidavit and on the authority of Order 5 Rule 15 of the High Court Rules and **Chikuta v. Chipata Rural Council (6)** I hereby strike out the words "*and does*

not comply with the requirements of Order 88 of the Rules of the Supreme Court 1999 Edition” in Paragraph 3, as well as the words “as required by law” in Paragraph 5 of the Respondents’ Affidavit in Opposition for being legal argument.

As regards the Respondents’ arguments alleging fraud, the Respondents have not argued this with sufficient clarity backed by the law, authorities and evidence fully enough for me to consider, but was brought up in the Respondent’s affidavit in opposition to the originating summons in the absence of skeleton arguments and list of authorities in breach of **Order 53, Rule 10(9) of the High Court Rules, Chapter 27 of the Laws of Zambia.**

The Applicant denies any forgery and submits that disbursements of the loans were done into the 1st Respondent’s accounts. The Applicant submits that the Respondents, even if alleging fraud, have not at any time denied ever receiving the proceeds of the loans into their accounts and have repaid a substantial amount of the loan. I find that the 1st Respondents have repaid a substantial portion of the amount claimed. Going by the Supreme Court holding in **Sithole v. The State Lotteries Board** as held that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities. I find that the Respondents in this matter have not discharged their onus in alleging fraud to the required standard and accordingly dismiss their allegation.

I dismiss the 2nd Respondent's assertion as contained in Paragraph 5 of her Affidavit and if she did not get the advice of an independent legal advisor, she has herself to blame if she did not get such advice and should have taken time to read the document she was signing fully and properly as the execution page for the suretyship clearly advises the persons executing to seek independent legal advice in the following words;

"BY THE SURETY (WHERE THE SURETY IS A NATURAL PERSON)

*IMPORTANT: The obligations imposed upon the Surety pursuant to this suretyship may be very burdensome. **Should the surety harbor any doubts regarding the exact meaning and effect of these obligations, we advise that independent legal advice should be taken prior to signature hereof.**"*

How much more clearer could the Applicant have been?

Regarding the Respondents' Affidavit in Opposition, I find that it does not meet the requirement of **Order 53, Rule 6 (2) – (5) of High Court Rules, Chapter 27 of the Laws of Zambia** which reads;

- (2) *“The defence shall specifically traverse every allegation of fact made in the statement of claim or counter-claim, as the case may be.*
- (3) *A general or bare denial of allegations of fact or a general statement of non-admission of the allegations of fact shall not be a traverse thereof.*
- (4) *A defence that fails to meet the requirements of this rule shall be deemed to have admitted the allegations not specifically traversed.*
- (5) *Where a defence fails under sub-rule (4), the plaintiff or defendant, or the court on its own motion, may in an appropriate case, enter judgment on admission.”*

In this instance of an originating summons application, the Affidavit in opposition takes the role of a defence and must meet the requirements of this Rule.

It is not sufficient for the Respondents to merely state that they do not owe the Applicant and proceed to say *“Considering the irregular and forged loan agreements, the 1st Respondent has fully repaid back the loan. Now produced....”*

In the case of **Chazya Silwamba v. Lamba Simpito (7)** the Court had the following to say on the matter of how a defence should be framed, when it addressed judgments on admission;

3. *"An admission may be made expressly in a defence or in a defence to counterclaim.*
- 4. *An admission may also arise by virtue of the rules. For instance, where a defendant fails to traverse an allegation of fact in a statement of claim or where there is a default of defence.***
5. *If a defendant fails to address an allegation he is deemed to admit it.*
6. *The function of an admission is to ensure that the Court's time at trial is not wasted and delay is avoided. Admissions also narrow the issues to be decided.*
- 7. *A defence must not be evasive. A defence must answer all allegations at the level of detail of the underlying allegation.***
- 8. *Every allegation must be admitted frankly or denied boldly; any half admission or half denial is deemed to be evasive.*"**

The Respondents in Paragraph 2 actually admit the debt to the Applicant except that they submit that they have repaid the debt as exhibited.

It is trite law that the Courts shall not deprive the fruits of a judgment from a successful litigant unless there are very compelling

circumstances shown to warrant this. In this case, the Respondents have not shown any sufficient reason or compelling circumstances apart from denying owning the Applicant any money and in the same breath showing evidence of having caused the transfer of certain amounts to be made to the Applicant, which transfers or payments are reflected in the Applicant's exhibit marked "EK12" in the Applicant's Affidavit in Support of Origination Summons which mirror the exhibits GCWP1 and GCWP2 in the 2nd Respondent's affidavit in opposition. The Applicant acknowledges the said amounts in its Affidavit in reply and submits that there is still an outstanding balance of ZMW1,550,661.27.

From the evidence adduced by the Applicant and the Applicant Counsel's submissions, as well as taking due note that the Respondents though denying owing the debt, have produced evidence of paying the Applicant substantial sums which I take to be an admission to owing the Applicant, I find that the Respondent has no defence to the Applicant's claim on the merits and the Applicant has proved its case on a balance of probabilities.

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. I accordingly enter judgment for the Applicant, for the balance outstanding to the Applicant in the sum of ZMW1,550,661.27 due and owing to the Applicant as at 11th November, 2019 by

reason of the 1st Respondents' default in fulfilling its repayment obligations under the credit facilities availed to it by the Applicant and secured by a first legal mortgage over Plot 1178 Kitwe, Plot 1179 Kitwe and Stand No. 4885 Kitwe Copperbelt Province of Zambia all registered in the name of the 1st Respondent.

I award the Applicant interest on the Judgment Sum at the short term deposit rate, from the date of the Originating Summons to the date of the Judgment and thereafter at the short term deposit rate as determined by the Bank of Zambia until full payment.

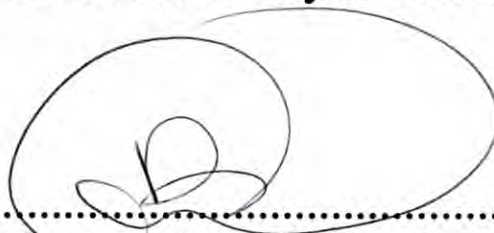
The 1st Respondent shall settle the Debt within Sixty (60) days from the date of the Judgment. In default, the Applicant shall be at liberty to foreclose on the mortgaged properties being Plot 1178 Kitwe, Plot 1179 Kitwe and Stand No. 4885 Kitwe Copperbelt Province of Zambia all registered in the name of the 1st Respondent, take possession thereof and exercise its right to sale over the same.

The Respondents have not provided evidence of depositing the certificate of title for Stand 50 Kabengele Avenue, Kitwe with the Applicant which title the Applicant denies being in possession of. I accordingly dismiss this claim by the Respondent as it has not been proved.

As regards the suretyship by the 2nd Respondent to the Applicant, the 2nd Respondent herein shall be personally liable for the obligations of the 1st Respondent in the event that the 1st Respondent fails to meet or honour its obligations under the credit facilities as adjudged herein without further need for an Order of Court.

I award costs of and incidental to this action to the Applicant, to be taxed in default of agreement.

Delivered under my hand this 5th day of February, 2020.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by 'onaventure C. Mbewe'. The signature is written over a horizontal dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**