IN THE HIGH COURT FOR ZAMBIA **2021/HPC/0388**
AT THE COMMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **AN APPLICATION UNDER ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA AS READ WITH ORDER 88 OF THE RULES OF THE SUPREME COURT OF ENGLAND 1965**

IN THE MATTER OF: **AN EQUITABLE MORTGAGE RELATING TO STAND NO. 9623 SITUATED IN LUSAKA DISTRICT OF THE LUSAKA OF THE REPUBLIC OF ZAMBIA**

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

BETWEEN:

FINCA ZAMBIA LIMITED **APPLICANT**

AND

GETRUDE MATAKANI MUNDIA **FIRST RESPONDENT**
T/A TRUDY'S TAKEAWAY RESTAURANT

ALEX MASHEBE MUNDIA **SECOND RESPONDENT**

REPUBLIC OF ZAMBIA COURT OF ZAMBIA JUDICIARY 23 AUG 2021 COMMERCIAL REGISTRY 05 P.O. BOX 50067, LUSAKA

Before the Honourable Mr Justice K. Chenda on 23rd August 2021

For the Applicant : Mrs C. S Mulomba In- House Counsel
For the First Respondent : Mr. K Musaila of Chonta, Musaila and Pindani Advocates
For the Second Respondent : N/A

JUDGMENT

Legislation referred to:

(i) The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia in section 51

Case law:

(ii) *Leasing Finance Company Limited v Wade Adams Piling and Foundation Limited & 3 Ors* - Appeal No. 7/2015 at pJ10-13;

(iii) *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR1 at pages 9-10;

(iv) *Chishala Karabasis Nivel & Anr v Laston Geoffrey Mwale* - Selected Judgment No. 40 of 2018 at p. J17-18;

(v) *Thames Guaranty Limited v Campbell* (1984) 1 All ER 144 at 152;

Authoritative texts:

(vi) Chitty on Contracts 29th Edition (2004), Vol. 1 (General Principles), London: Sweet & Maxwell at page 1289 para 22-013; and

(vii) Halsbury's laws of England 5th Edition (2012) Volume 87, London: Lexis Nexis at page 163, paragraph 202 and p. 164 footnote 5.

1 INTRODUCTION AND BACKGROUND

1.1 The Applicant commenced this typical mortgage action by originating summons and in essence sought.

(i) recovery of monies secured by an equitable mortgage which as at 24th May 2021 were said to be K1,246,084.63;

(ii) interest;

(iii) foreclosure, delivery, possession and sale of Stand No. 9623 situated in Lusaka (the "**Property**");

(iv) further or other relief; and

(v) costs.

1.2 The Applicant's case was supported by an affidavit filed on 9th July 2021 and an affidavit in reply filed on 30th July 2021 following the First Respondents' affidavit in opposition dated 26th July 2021.

1.3 The Applicant also filed written arguments on 9th July 2021, whilst the First Respondent tendered her written arguments on 26th July 2021, precipitating a reply from the Applicant filed on 30th July 2021.

1.4 The case against the Second Respondent was for its part discontinued on 26th July 2021.

1.5 At the substantive hearing on 4th August 2021, the Applicant and the First Respondent substantially relied on the documents filed with brief and concise verbal additions.

2 FACTS AND EVIDENCE

2.1 The Applicant in its affidavit evidence alleges that:

i) the Applicant and Respondent entered into a facility agreement on 22nd December 2017 (the "**First Facility Agreement**") for the sum of K400,000 to be repaid within the period of 36 months;

ii) the Applicant and Respondent entered into a second facility agreement on 27th October 2018 (the "**Second Facility Agreement**) for the sum of K500, 000 to be repaid within the period of 24 months;

iii) the interest on the Facility Agreements would accrue at a daily rate of 0.15% and would continue to accrue until full payment of the facility;

iv) resultant debt was secured by an equitable mortgage over the Property; and

v) the First Respondent fell into arrears in its payment obligations to the Applicant and the debt stood at K1,246,084.63 as at 24th May, 2021.

2.2 The First Respondent however disputes the Applicant's entitlement to the sum of K1,246,084.63 as at 24th May, 2021 and to the rest of the reliefs claimed.

2.3 The basis for the First Respondent disputing the right to relief is that –

(i) clause 1 of the Second Facility Agreement required the parties to sign a security agreement as a condition precedent of clause 1 and therefore the Property was never pledged as security;

(ii) the Applicant has been charging penal interest on the Facility Agreements;

(iii) the Applicant has not produced before Court complete Facility Agreements with core annexure on the amortisation terms; and

(iv) the First Respondent has paid some amounts since 24th May 2021.

2.4 The First Respondent however concedes that she has been delinquent in her payment obligation and attributes same to the impact of Covid-19 on her business.

2.5 In its affidavit in reply the Applicant has responded that:

(i) the property subject to these proceedings was pledged as collateral for the First Facility Agreement and the executed mortgage deed was not registered with Lands and Deeds registry because of the First Respondent's failure to avail the Applicant the necessary documentation in relation to the Second Respondent who is a joint owner of the property;

(ii) the security agreement in relation to the Second Facility Agreement was not executed but the First Respondent explicitly stated her intentions to have the subject property pledged as security thereof;

(iii) the deposit of the original certificate of title with the Applicant created an equitable mortgage and the Property was in the possession of the Respondents;

(iv) effective March 2020, the Applicant had not been charging past due interest on the First Respondent's Facility agreements;

(v) it concedes that past due interest was not supposed to be charged and paid by the First Respondent at the time and therefore shall lessen its claim by the sum of K22, 951.86 monies paid by the client on the Facility Agreements for past due interest;

(vi) the sum of K6, 902.76 has been paid from 24th May 2021; and

(vii) the First Respondent's indebtedness to the Applicant was K1, 216,192.77 as at 28th July 2021.

2.6 Quite clearly the affidavit evidence converges on the fact that there is a debt and that there is default. However, owing to the points of divergence I see the issues for determination as:

(i) whether the Applicant was charging penal interest on the Facility Agreements;

(ii) what is the recoverable extent of the First Respondent's debt; and

(iii) whether there was a binding and enforceable equitable mortgage created over the Property.

3 ANALYSIS AND FINDINGS

The contention of penal interest

3.1 In ***Leasing Finance Company Limited v Wade Adams Piling and Foundation Limited & 3 Ors***[1] Hamaundu, JS gave the following authoritative exposition:

> *"We discern a lack of appreciation on the part of counsel on both on both sides, especially counsel for the appellant, of the distinction between "compound interest" and interest which is imposed as a penalty. Blacks Law Dictionary, Eighth edition explains the compounding of interest as:*
>
> > *"To compute interest on the principal and the accrued interest".*
>
> *Indeed, as we said in Southern Province Co-operative and Marketing Union v. Union Bank and also in Credit Africa Bank Limited v. John Dingani Mudenda, such computation of interest is unusual. However, it is permissible where there is express agreement by the parties or where it is a custom to do so.*
>
> *By its definition, therefore, charging of compound interest will have the effect of raising the amount of interest due from the one that is expected.*
>
> *This is because where one defaults on the principal and its ordinary interest, the next interest due will be calculated by applying the ordinary rate on the principal as well as the interest due. Onerous as it may sound, such interest is merely compounded, it is not penal.*
>
> *Regulation 10(1) of the Banking and Financial Services (Cost of Borrowing) Regulations, Chapter 387 of the Laws of Zambia provides:*

---

[1] Appeal No. 7/2015 at pJ10-13

"A bank or financial institution shall not impose on a borrower any charge or penalty as a result of the failure by the borrower to repay or pay in accordance with the contract governing the loan other than---

(a) Interest on an overdue payment,"

We believe that this provision is the source of the appellant's misunderstanding. ***The Regulation banned the imposition on a borrower of anything which is in the form of a penalty for his failure to repay the loan or for defaulting on his repayment schedule. It is immaterial whether the financial institution describes that penalty as "compound interest" or whatever other name.***

As long as it is to be imposed on account of failure or default, then it is a penalty and is illegal. On the other hand in Regulation 10(1)(a) the Act permits the interest that has been reserved by the loan agreement to continue being charged on the overdue payment. It should be borne in mind that the overdue payment will have a component comprising interest on the principal. Therefore, by continuing to charge interest on the overdue payment, the financial institution will be applying interest on the principal together with the regular interest already accrued. Hence the financial institution will be "compounding" the interest. ***It can, therefore, be said that while the above regulation banned the imposition of any penalty for failure to pay or for default in making payments, it allowed the charging of compound interest.***"
(Emphasis added)

3.2 In the case before Court, the Applicant has admitted in paragraph 13 and 14 of its affidavit in reply that it had been charging an impermissible form of extra interest until March 2020 to which the First Respondent had paid a total of K22,951.86. I reproduce the two paragraphs for ease of reference:

> *"13. That in relation to paragraph 7 of the Affidavit in Opposition,* ***effective March 2020 and following guidance from the Regulator, the Applicant has not been charging past due interest on any of its loan facilities including the Respondent's facilities*** *and as such, the past due interest reflecting on the 1st Respondent's Statement of Account being ZMW12, 389.60 and ZMW 10, 562.26 was charged and paid off by the Client prior to 2020. As can be seen from the statement, past due interest has not been charged on the facilities from December, 2019.* ***The past due interest that was charged prior to 2020*** *still reflects on the statement under the schedule for payments made by the Client as this is the set-up of the Applicant's core banking system.*
>
> *14. That further to paragraph 12,* ***the Applicant concedes that the past due interest was not supposed to be charged and paid by the Client at the material time and as such, shall lessen its claim by the sum of ZMW22, 951.86 encompassing the past due interest that was paid by the Client on the 2 facilities.***"
> (Emphasis added)

3.3 Furthermore an examination of the identically numbered and worded article 13 of the Facility Agreements shows that they expressly imposed a penalty for the First Respondent's default in payment.

3.4 I therefore find it to be a fact that there was indeed penal interest that was charged by the Applicant until March 2020 and paid by the First Respondent in the sum of K22,951.86, contrary to the authorities cited which render it impermissible.

The recoverable extent of the debt

3.5 I have already observed and found that there is a debt and default as well as that the sum of K22,951.86 is not recoverable for constituting penal interest, which is illegal.

3.6 A question then begs an answer as to what is the recoverable extent of the debt.

3.7 The affidavit evidence from the First Respondent in exhibit "GMM3" shows that the First Respondent had requested and the Applicant had agreed to grant the First Respondent a discount as follows -

"*22nd December, 2020*

Trudy's Take Away
Shop G35, Society Business Park
P.O Box 35347
Lusaka

Dear Madam,

RE: REQUEST FOR 25% DISCOUNT OF OUTSTANDING BALANCE

The above matter refers.

Further reference is made to your letter dated 15th December, 2020, receipt of which is hereby acknowledged and to which, we now tender in a response. FINCA Zambia appreciates the adverse effects that the Covid-19 pandemic has had on business in Zambia and has taken due consideration of your request.

Please be advised that as at 22nd December, 2020, your 3 loan facilities have a total outstanding balance of ZMW1,091,400.42; upon consideration of your request, the circumstances affecting your business as well the financial position of FINCA, the Institution has resolved to grant you the 25% discount on the balance due as requested and in which case, you will pay the sum of ZMW818,550.31 as full settlement of your loan.

We are aware that ZICB is willing to pay off the loan facilities and our expectation is that in view of the underperformance of the loans prior to Covid-19 pandemic and the Institution's willingness to grant your request, the settlement of the discounted amount will be effected promptly and with no further delays. Our hope is that we can finalize settlement of the loan on the terms outlined herein as soon as possible so as to avoid recourse to other means by the Institution in recovering its funds.

We look forward to your prompt feedback advising on when the funds can be received, in the meantime, acknowledge safe receipt by signing a copy of this letter.

Yours faithfully,
For and on Behalf of FINCA Zambia

Mr. Stephen Mkwananzi
/Head of Collections & Recoveries" (Emphasis added)

3.8 The Applicant in its affidavit in reply does not deny having given the said discount but simply laments in paragraph 21 that the First Respondent did not act on it.

3.9 The learned authors of the **Chitty on Contracts**[2] posit:

> *"Where a claim is asserted by one party which is disputed by the other, they may agree to compromise their dispute on terms mutually agreed between them."*

3.10 By similar reasoning I find that the Applicant and First Respondent were at liberty to enter into a compromise over the latter's debt as they did resulting in the discounted sum of K818,550.31 as at 22nd December 2020, which I uphold.

3.11 As for the issue of interest on the discounted agreed debt of K818,550.31 (as at 22nd December 2020) both Facility Agreements have an identically numbered and worded article 2 which I reproduce:

> *"Article 2: **The Borrower commits to re-paying** the principal **and interest** (as detailed in Article 4 below) **in accordance with the repayment schedule attached as annexure** (the "Annexure") and incorporated herein. The Lender reserves the sole right to restructure the repayment schedule where it is expedient to do so on such terms and conditions it may deem fit."* (Emphasis added)

---

[2] 29th Edition (2004), Vol. 1 (General Principles), London: Sweet & Maxwell at page 1289 para 22-013

3.12 In paragraphs 5 and 9 of its primary affidavit in support, the Applicant speaks of the applicable rate of interest under the Facility Agreements as 3.5 % per month.

3.13 I have combed the affidavit evidence before Court and found no record of the annexures expressed as embodying the amortisation schedule and applicable contractual interest. I have also not found any record of an agreement to charge interest at 3.5% per month as alleged.

3.14 In ***Galaunia Farms Limited v National Milling Company Limited***[3] the Supreme Court reaffirmed that the burden of proof in a civil case lies with the alleger of a fact I accordingly find that there is no proven agreement on the interest rate applicable to the First Respondent's debt of K818,550.31.

The contention of an equitable mortgage over the Property

3.15 Section 51 of the **Lands and Deeds Registry Act**[4], provides as follows-

[3] (2004) ZR1 at pages 9-10
[4] Chapter 185 of the Laws of Zambia

> *"**Any two or more persons named in any instrument under Parts III and VII, or requiring to be registered under this Act as transferees, mortgagees. Lessees or proprietors of any land or estate or interest therein, shall, unless the contrary is expressed, be deemed to be entitled as joint tenants** with the right of survivorship, and such instrument, when registered, shall take effect accordingly."* (Emphasis added)

3.16 The said legislative provision was the subject of interpretation in the case of ***Chishala Karabasis Nivel & Anr v Laston Geoffrey Mwale***[5], where the Supreme Court pronounced that when dealing with shared ownership of land where the certificate of title does not state otherwise, the persons are deemed to be joint tenants.

3.17 Therefore, in the case before Court, by operation of section 51 of the **Lands and Deeds Registry Act**, the Property is deemed to be jointly owned by the First and Second Respondents.

3.18 What then are the legal principles around the creation of an equitable mortgage over a property that is jointly owned by two or more people?

[5] Selected Judgment No. 40 of 2018 at p. J17-18

3.19 The learned authors of **Halsbury's laws of England**[6] guide that:

> *"One joint tenant may not part with the title deeds of the property without the consent of the other."*

3.20 The said learned authors go on to cite the case of ***Thames Guaranty Limited v Campbell***[7] as authority for the proposition that a deposit of title deeds by one joint tenant without the consent of the other cannot create an equitable mortgage.

3.21 Applying the above principles to the case before Court, the affidavit evidence does not show that the Second Respondent gave consent to the First Respondent to deposit the certificate of title for the Property to create collateral for the Facility Agreements between the First Respondent and the Applicant.

3.22 Further, the Applicant in paragraph 7 of the affidavit in reply to affidavit in opposition of originating summons concedes that the requisite documentation for registration of the mortgage was never produced by the First Respondent in relation to the Second Respondent as joint proprietor.

---

[6] 5th Edition (2012) Volume 87, London: Lexis Nexis at page 163, paragraph 202 and p. 164 footnote 5

[7] (1984) 1 All ER 144 at 152

3.23 I accordingly find that there was no valid equitable mortgage created over the Property to secure the First Respondent's borrowings.

4 CONCLUSION AND ORDERS

4.1 The Applicant has proven on a balance of probabilities that there is a debt due from the First Respondent and that there is default.

4.2 The evidence shows that the recoverable extent of that debt is the discounted sum of K818,550.31 as at 22nd December 2020, less the sum of K22,951.86 struck down as penal interest.

4.3 In terms of certainty, there is no evidence of consent from the Second Respondent (as joint statutory tenant) for the deposit of title and pledge of the Property by the First Respondent, which is fatal to the alleged equitable mortgage.

4.4 I accordingly enter judgment in favour of the Applicant for the sum of K795,598.45 as at 22nd December 2020.

4.5 I further order that the First Respondent must pay the judgment sum together with interest at the average of the short-term deposit rate prevailing per annum from 22nd December 2020 to date of judgment and thereafter at the current lending rate as determined by Bank of Zambia from date of judgment to payment.

4.6 The First Respondent should pay the judgment debt and interest within 120 days hereof in default of which the Applicant shall be at liberty to recover same through execution.

4.7 Lastly, the First Respondent shall bear the Applicant's costs of this action to be taxed in default agreement.

Dated at Lusaka this 23rd day of August 2021.

K. CHENDA
Judge of the High Court