

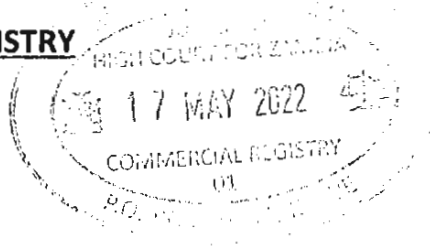
IN THE HIGH COURT FOR ZAMBIA

2021/HKC/019

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



**IN THE MATTER OF: ORDER 30 RULE 14 OF THE RULES OF THE HIGH COURT
CAP 27 OF THE LAWS OF ZAMBIA AND ORDER 88 OF
THE RULES OF THE SUPREME COURT PRACTICE 1999
EDITION (WHITE BOOK).**

AND

**IN THE MATTER OF: AN EQUITABLE MORTGAGE IN RESPECT OF STAND
NO. 6543 MUMANA ROAD, OLYMPIA, LUSAKA.**

BETWEEN:

BETTERNOW FINANCE COMPANY LIMITED

T/A INDE CREDIT COMPANY LIMITED

APPLICANT

AND

EMERGENCY RESPONSE ZAMBIA LIMITED

1ST RESPONDENT

ROSANNA MARY NYENDWA SAMMON

2ND RESPONDENT

CONSTANTINE MALAMA

3RD RESPONDENT

Before Hon. Lady Justice Abha Patel, S.C.

For the Applicant:

Mr. Y.S. Simukonda

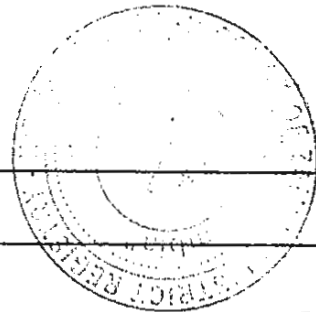
Messrs. Noel Simwanza L.P.

For the Respondents:

Ms. W. Chirwa

Messrs. J & M Advocates

JUDGMENT



Legislation referred to:

1. The High Court Act, Chapter 27 of Laws of Zambia.
2. Supreme Court Practice (White Book), 1999 Edition.

Cases referred to:

1. National Drug Company Limited and Zambia Privatization Agency vs. Mary Katongo SCZ Appeal No 79/2001.
2. Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited (1999) Z.R. 61.
3. Stanley v Wilde (1899) CA 474.
4. Courtyard Hotel Limited & others vs First National Bank Limited and Another- Appeal No. 006/2015.

1. INTRODUCTION AND BACKGROUND

1.1 By an Originating Summons dated 5th May 2021 issued out of the Commercial Registry at Kitwe, and as amended by leave of Court on 17th January 2022, the Applicant sought the following reliefs:

- i. Payment of USD111, 997.64 by the 1st, 2nd and 3rd Respondents to the Applicant being money due under an Invoice Discounting Facility;
- ii. Delivery and possession of the mortgaged property Stand No. 6543, Mumana Road, Olympia, Lusaka;
- iii. Foreclosure and sale of the mortgaged property Stand No. 6543 Mumana Road, Olympia, Lusaka;
- iv. Any other relief that the Court deems fit;
- v. Interest, and

vi. Costs.

1.2 In support of the Originating Summons, the Applicant filed its Affidavit dated 5th May 2021, Affidavit in Reply dated 17th January 2022 and Skeleton Arguments dated 21st January 2022. The Respondents filed its Affidavit in Opposition with its attendant Skeleton Arguments on 10th December 2021.

1.3 The facts revealed by the Affidavits in Support and Reply sworn by **Phillip Bwembya**, the Applicant's Credit and Risk Manager are that; on 2nd January, 2020 the Applicant availed the 1st Respondent with a Revolving Invoice discounting Facility ("the Facility Letter") which was set to expire on 1st January, 2021, collectively produced and marked "PB1"

1.4 The relevant terms in the facility letter dated 2nd January, 2020 exhibited as "PB1" in the Applicant's affidavit in support were as follows:

- The Applicant was to discount invoices issued by the 1st Respondent to a named 3rd party provided they were payable within 30 days of issuance,
- Interest was agreed at 7.5% within the first 30 days of each debt due and at 5% if the amounts were repaid within the first two weeks of being advanced,
- That the amounts advanced to the 1st Respondent would be secured, inter alia, by surrender of title to property of value not less than USD400, 000.00 and an unlimited guarantee for payment of the debt by the directors of the 1st

Respondent. Copies of respective security agreements were exhibited and collectively marked "PB2, 3 and 4"

- 1.5 Pursuant to the said set terms in PB1, the Applicant on 21st September, 2020 advanced the sum of \$103, 683.00 to the 1st Respondent, as working capital under a Restructured Financing Agreement, collectively exhibited and marked "PB5". The said amounts were secured by the surrender of Certificate of Title of property known as Stand No. 6543 Mumana Road, Olympia, Lusaka as deposited.
- 1.6 Further, the repayment of the said amounts together with compounded interest was further guaranteed by the 2nd and 3rd Respondents and was to be made from receivables from a named 3rd party.
- 1.7 Following default by the 1st Respondent, the said facility was restructured, and the 1st Respondent was given two months in which to settle the loan sum which stood at \$111,997.64, at a mutually agreed interest rate of 8% per month. A copy of the facility agreement was produced and marked "PB6". The said amounts were recoverable from the receivables from the said named 3rd party.
- 1.8 The said amounts remain unpaid despite the Applicant's several demands for repayment, the 1st, 2nd and 3rd Respondents have failed and/or neglected to pay the owed amounts under the facility much to their admittance. A copy of the letter of admission was exhibited and marked "PB7".

- 1.9 It was further averred that the Payment Restructuring Facility letters shown as **"PB 5 & 6"** in the Affidavit in Support, only served as instruments of restructure on the terms of payment and interest chargeable at the time of execution, and did not extinguish the place and effect of the parent Revolving Invoicing Discounting Facility and its terms.
- 1.10 According to the Applicant, even though the money availed to the 1st Respondent was repayable from invoices issued to First Quantum Minerals Limited, the 1st Respondent's obligation to settle the amounts borrowed was not exclusive and/or conditional on the receivables from First Quantum Minerals Limited only, but also encompassed the 1st Respondent's other sources of income as set out in the facilities shown in **"PB1"** in clause 7.1 and in **"PB 6"** under the heading "source of repayment". This was also confirmed by a letter written by the 2nd Respondent and marked **"PB7"**.
- 1.11 In the Affidavit in Opposition, sworn by the 2nd Respondent herein, on behalf of the Respondents, it was deposed that on 1st June, 2020 the 1st Respondent obtained a loan of \$ 85, 000 from the Applicant, a copy of the letter and proof of payment was exhibited and marked **"RNSI (a) and (b)"**.
- 1.12 The deponent further averred that the 1st Applicant faced financial challenges because First Quantum Minerals failed to remit the necessary funds, which funds were to settle the monies due to the Applicant. It is her averment that this was communicated to the Applicants through an email dated 15th September, 2020 now exhibited and marked **"RNS2"**.

1.13 It was also deposed that arising out of the failure to pay as explained above, the Applicant restructured the loan. The restructuring increased the loan sum to \$103,683.00. Further, in pursuance of the restructured loan, the Applicant requested the 1st Respondent to execute, among other documents, an Assignment of Receivables dated 21st September 2020. A copy of the Assignment of Receivables was exhibited and marked "RNS4". That under the heading *interpretation* in RNS4, the Parties agreed that the word "contract" meant the contract between the company and First Quantum Minerals Limited.

1.14 The Respondent denied the assertion that the loan amount was secured by the surrender of the certificate of title and was further guaranteed by the 2nd and 3rd Respondents. To the contrary, she has deposed that the restructured loan was secured against the receivables from the contract between the 1st Respondent and First Quantum Minerals Limited. It was reiterated that it was guaranteed that the 3rd party (First Quantum Minerals Limited) would remit the Receivables to the Applicants and that no demand would be made to the 2nd and 3rd Respondents.

1.15 Further, it was deposed that the 1st Respondent also executed a Facility Restructure and Letter of Guarantee. That the Restructured Facility Letter was endorsed with a clause stating that "source of repayment shall be, though not limited to, receivables due to Emergency Response Zambia Limited from First Quantum Minerals Limited".

1.16 Following the default, the 1st Respondent wrote a series of letters to the Applicant explaining its predicament as evidenced by "RNS5", "RNS6" and "RNS7". The Respondents reiterated that the amount owed

remained unpaid owing to the fact that First Quantum Minerals has not paid the 1st Respondent, and that the 1st Respondent has since sued the First Quantum Minerals Limited under Cause Number 2021/HPC/114.

- 1.17** After several adjournments occasioned in the matter, details of which are on record, and on which the Court will comment by way of a post-script, the matter came up for hearing on 31st January, 2022. Counsel for both Parties substantially relied on the contents of their respective Affidavits and Skeleton Arguments filed into Court.

2. FACTS IN CONTENTION

- 2.1** The Applicant's contention is that the repayment of the outstanding loan of \$111,997 owed by the 1st Respondent was not exclusive and or conditional to the receivables from First Quantum Minerals Limited, but also secured by the deposit of Title Deeds over Stand No. 6543 Mumana Road, Olympia, Lusaka, which created an equitable mortgage.
- 2.2** The Applicant also claims that the said loan was guaranteed by the 2nd and 3rd Respondent.
- 2.3** The Respondents' contention in response is that the loan, the subject of this suit, was secured against the receivables from First Quantum Minerals Limited, such that the performance of the contract between the Applicant and the 1st Respondent was frustrated, when First Quantum Minerals Limited failed to remit the funds to the 1st Respondent.

3. ISSUES

- 3.1** The issues for determination, as I see them are the following:-

- i. Whether the outstanding loan was secured by the security as outlined in "PB1";
- ii. If (i) is resolved in the affirmative, then was an equitable mortgage created on the property known as Stand No. 6543, Mumana Road, Olympia, Lusaka;
- iii. Whether the contract between the Applicant and the 1st Respondent was frustrated by First Quantum Minerals Limited's failure to remit funds to the 1st Respondent.

4. ANALYSIS OF THE FACTS AND LAW

- 4.1** I have carefully considered the Pleadings, the Affidavit evidence and the Skeleton Arguments for the Parties respectively. I note that the 1st Respondent has not disputed the fact that it owes the Applicant. However, it seeks to explain that the loan was secured against the receivables from the contract between the 1st Respondent and First Quantum Minerals Limited, who have not paid them.
- 4.2** According to the Respondents, the loan of \$85,000 was availed to them on 1st June, 2020 as shown by "RNS1 (a) and (b)". When the 1st Respondent failed to pay back the loan, it was restructured and the value of the loan increased to \$103, 683.00 and an Assignment of Receivables dated 21st September 2020 was executed as shown by the exhibit marked "RNS4".
- 4.3** I come to the inescapable conclusion that the total amount owed by the 1st Respondent to the Applicant is the sum of US\$111,997.64 as claimed. My finding is supported by the exhibit marked "PB7" and 'RNS6' which is a letter of admission sent to the Applicant by the 1st

Respondent under the hand of the 2nd Respondent. I have noted that the Parties have referred to different dates as to when the loan was availed to the 1st Respondent. According to the Applicant the loan was availed to the 1st Respondent on 21st September, 2020 while the Respondents in their Affidavit in Opposition indicated 1st June, 2020. I find this contradiction immaterial to the issue before me, as the Parties are agreed on the fact that the 1st Respondent owes the Applicant the sum of \$111,997.64.

4.4 It is also not in dispute that the 1st Respondent has failed to settle the said loan. The Applicant claims that on 21st September 2020 the 1st Respondent borrowed \$103,683.00 pursuant to the Restructured Financing Agreement on terms stipulated in the Facility Letter. According to the Applicant, the said amounts were not only secured by the receivables from First Quantum Mineral Limited but was also secured by the property known as Stand No. 6543 Mumana Road, Olympia, Lusaka and further guaranteed by the 2nd and 3rd Respondents. To this effect the Applicant produced a copy of the Security Agreement, a true copy of the certificate of title and Directors' letter of Guarantee collectively marked "PB2, 3 & 4".

4.5 It was upon the default by the 1st Respondent, that the facility was restructured, in order to give the 1st Respondent more time to pay the loan. As a result of the restructuring the loan amount increased to \$111,997.64.

4.6 The starting point is the determination of the legal nature of the relationship that subsists between the Applicant and the 1st Respondent. I have had an opportunity to critically analyze the

Revolving Invoice Discounting Facility and have noted that as stated above in this Judgment, the facility letter **PB1** provided that the Revolving Invoice Discounting facility would be from 2nd January 2020 to 1st January 2021. Therefore, it follows that any loan advanced within the said period was subject to the terms and conditions provided in the facility letter. The salient terms of the Revolving Invoice Discounting Facility is **clause 6** which provides under title "security" that:

- i. *Deed of Assignment of debt by Emergency Response Zambia Limited to Betternow Finance Company Limited.*
- ii. *Surrender title to property with a value of not less than \$400,000.00.*
- iii. *Unlimited guarantee by company directors*

4.7 I also note that **clause 7.1** provides that:

"The borrower shall repay the loan facility together with the commission from the proceeds of the invoices as per specific deed of assignment and order from First Quantum Minerals Limited. Should First Quantum Limited Minerals Limited became not liable to honor the order due to any reasons, the client will settle the loan repayment using other sources provided the facility is settled in full by the stipulated repayment period."

4.8 Arising from the above clauses, it is my considered opinion that the two clauses clearly shows that apart from receivables from First Quantum Mineral Limited, the funds advanced under the Revolving

Invoice Discounting Facility were also secured by Stand No. 6543

Mumana Road, Olympia with ownership vested in the 2nd

Respondent. My opinion is further supported by **PB2** (*the security agreement*) which clearly shows that the property mentioned therein was used as security for the Revolving Invoice Discounting Facility, which was the initial and main agreement between the Applicant and the 1st Respondent, and all other agreements emanated from that agreement.

4.9 Therefore, I find and hold that the Applicant and the 1st Respondent entered into a legally binding Agreement known as the Revolving Invoice Discounting Facility. I also find that the Assignment of Receivables exhibited as “**RNS4**” was also subject to the general terms and conditions as outlined in the Revolving Invoice Discounting Facility because it drew its authority from it. Consequently, I find that the outstanding loan was not only secured against receivables from First Quantum Minerals Limited but was also secured by the property known as Stand No. 6543, Mumana Road Olympia and was also guaranteed by the 1st and 2nd Respondent as shown by exhibit **PB 2, 3 & 4**. Any argument countered by the 2nd and 3rd Respondent that no demand was made against them will not be entertained by this Court, especially in the light of correspondence under the hand of the 2nd Respondent.

4.10 In their Affidavit in opposition, the Respondents referred to **PB6** under source of repayment where it states that “*The source of repayment shall be, though not limited to, receivables due to Emergency Response Zambia Limited from First Quantum Limited.*” I am not

convinced what the Respondents hoped to achieve by advancing that submission. The operative words "*though not limited*" need no further judicial interpretation and clearly liability rests with the Respondents. Any other meaning would be to turn commercial lending on its head.

- 4.11** This finding is supported by the Supreme Court of Zambia in the case of **National Drug Company Limited and Zambia Privatization Agency vs. Mary Katongo** where it stated as follows:

"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they became bound to abide by the terms of the contract and that the role of the court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract."

- 4.12** Having settled the issue and quantum of liability, I now consider whether an equitable mortgage was created on Stand No. 6543, Mumana Road, Olympia in Lusaka. The Originating Summons was issued pursuant to **Order 30 rule 14** of the High Court Act, Chapter 27 of the Laws of Zambia, and **Order 88 rules 1** of the Rules of the Supreme Court (White Book), 1999 Edition.

- 4.13** It is trite that **Order 30 rule 14** of the High Court Rules entitles a mortgagee to take out an originating summons for various types of relief, including: (i) Payment of moneys secured by the mortgage; (ii) Sale; (iii) Foreclosure; and (iv) Delivery of possession (whether before or after foreclosure) to the mortgagee.

4.14 It is also trite, and I do not intend to re-cast the law, that an equitable mortgage is created when a certificate of title is deposited as security for a debt. This position was aptly elucidated by Silomba, J in the case of **Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited** when he said that:

".....The position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan an equitable mortgage is thus created..."

4.15 Further, in **Stanley v Wilde**, Judge Lindley defines a mortgage as follows:

"A mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given".

4.16 The Applicant in its affidavit in support of the application exhibited a true copy of the certificate of title for Stand No. 6543 Mumana Road, Olympia in Lusaka, which they asserted was surrendered to them by the 2nd Respondent (director of the 1st Respondent) as security for monies advanced to the 1st Respondent under the Revolving Invoice Discounting Facility. The Respondent did not deny this fact in their affidavit in opposition. Therefore, I arrive at the finding that the certificate of title was surrendered as security for the debt. As a consequence and drawing authority from the cases above, I find and hold that the surrender of the Certificate of Title (**PB3**) for Stand No. 6543 Mumana Road, Olympia in Lusaka to the Applicant and the execution of the Security Agreement dated 5th January 2020 exhibited as "**PB2**" created an equitable mortgage on the said property.

4.17 In their skeleton arguments, the Respondent argued that the contract between the Applicant and the Respondent became frustrated when First Quantum Minerals Limited failed to remit the funds due to the 1st Respondent. They relied on the definition of frustration in **Black's Law Dictionary, 11th Edition** which states as follows:

"Frustration is the prevention or hindering of the attainment of a goal, such as a contractual performance."

4.18 Having already determined that the source of repayment was not limited to only receivables from First Quantum Limited as stipulated in **clause 7.1** above that *"....Should First Quantum Minerals Limited become not liable to honour the order due to any reasons, the client will settle the loan repayment using other sources provided the facility is settled in full the stipulated repayment period"* I hold that even if the contract between 1st Respondent and First Quantum Minerals Limited was frustrated the Applicant should not be affected as it has no agreement with First Quantum Minerals Limited. The contract between the Applicant and the 1st Respondent is not frustrated because the Respondents have a legal duty to settle the loan from other sources. This is further confirmed by the Respondent's averment that the 1st Respondent has commenced an action against the named Third Party.

4.19 Having found that there was an equitable mortgage created, I also find that since the 1st Respondent has defaulted, the Applicant is entitled to all its claims as prayed. I am fortified in my decision by the Supreme Court's guidance in the case of **Courtyard Hotel Limited and Others vs First National Bank Zambia Limited and Another**, when the Court held:

"The point to note from what we said in Kanjala Hills Lodge case is that once there is default on a condition, such as the default on a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to him. In the circumstances, the court, in exercise of its powers to afford the mortgagor the equity of redemption is duty bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of his relief....."

5. CONCLUSION AND ORDERS

- 5.1** Arising from the above, I therefore enter Judgment in favour of the Applicant against the 1st Respondent for the said sum of USD111,997.64, with interest as per the Judgment Act from the date of action to the date of full satisfaction of the Judgment debt.
- 5.2** I order that the 1st Respondent should pay the Applicant the Judgment sum together with interest within 90 days from the date of Judgment.
- 5.3** In the event that the Judgment debt and interest remains unpaid at the expiry of the said period, the 2nd Respondent shall deliver vacant possession of Stand No. 6543 Mumana Road, Olympia Lusaka to the Applicant who shall be at liberty to foreclose and exercise its right of sale.
- 5.4** Should there be any unsatisfied balance after fulfillment of 5.3 above, the same shall be paid by the 2nd and 3rd Respondents as guarantors.
- 5.5.** I order costs for the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

6. Post- Script

Before I vacate this Judgment, I take the opportunity to reflect on the conduct of counsel for the Respondents at every occasion when this matter was scheduled for hearing. The Record will reflect that the Respondent raised a preliminary application to set aside the Originating Process for Irregularity on 28th May 2021. It is also trite that the Supreme Court has settled the law on procedural irregularities that are amenable to amendments subject to costs, and those that are fundamental.

It is clear that the Respondents used every opportunity to thwart the applicant's chance at a speedy hearing, including applying for adjournments on frivolous grounds as well as applying to adjourn their own application to set aside for irregularity, using Covid as the reason. It is common cause that the Court could have proceeded to render its Ruling on the already ill-fated application, save for the forceful argument of Counsel Kaemba, standing in for Counsel seized with conduct, the Court in its inherent discretion adjourned the hearing to 8th July 2021. On the said adjourned date, it came as no surprise that there was no appearance for the Respondents and its application was struck out with liberty to apply to restore within 30 days. Predictably enough, and on 4th August 2021, the Respondents applied to restore their application citing *wrong diarizing of dates* and beseeched the Court for an order to restore their application *so as to meet the ends of justice*. This application was returnable on 18th August 2021.

On 18th August 2021, the Respondents not having served the application to restore, attempted to secure another adjournment. Again Counsel Kaemba, who was neither on record as Counsel seized with conduct, nor as Agent, continued to appear to advance the cycle of perpetuated adjournments.

It is common cause that from September to 30 November 2021, the Court was attending to Election Petitions and the Respondents application was re-scheduled for hearing to 16th December 2021, on which date, Counsel Wezi Chirwa, made her first appearance in a matter which had commenced on 5th May 2021.

Again to no surprise, Counsel seemingly graciously offered to withdraw its application and had since filed its opposing affidavit and applied to be heard on the Originating Process, which again prompted another adjournment for the Applicant to file its Reply.

The matter was finally adjourned to 26th January 2022, when again Counsel Kaemba appeared on behalf of Counsel Wezi and informed the Court that Counsel Wezi was stranded in Lusaka, the flights had failed to take off due to an act of God, and forcefully prayed for an adjournment as Counsel Wezi insisted that as Counsel with conduct, it was her clients rights to have their lawyer present in Court.

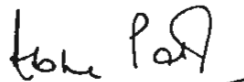
To prevent perpetuating satellite applications which would ensue if the Court had proceeded, the Court adjourned the matter to five days later, to 31st January 2022, when the same was heard and concluded save for Judgment.

However, and quite unknown to Counsel Kaemba, the Court was equally scheduled to fly to Lusaka, on the afternoon of the same day, 26th January 2022, which flight took off as scheduled the Court being casually informed by Airport staff that there had been no disruptions to flights that morning.

I caution Counsels Wezi and Kaemba and remind them that they are officers of the Court. Their collective conduct before my Court leaves a lot to be desired from Counsel of their standing. They appeared to have acted in concert, presumably with their client, and played a tag-team game of deliberately delaying and or frustrating the determination of the matter at hand. I express my disappointment at this conduct.

The Supreme Court of Zambia has time and time again admonished Counsel against such conduct.

Dated at Kitwe this 17th day of May, 2022.



.....
Mrs. Abha N. Patel, S.C.
HIGH COURT JUDGE