

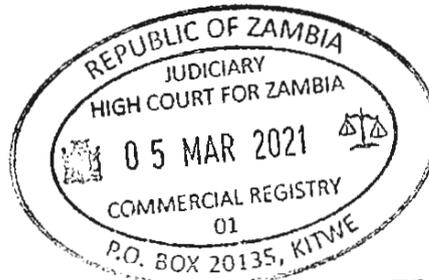
IN THE HIGH COURT FOR ZAMBIA

2019/HKC/030

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

WORKERS COMPENSATION FUND CONTROL BOARD

PLAINTIFF

AND

PAN AFRICAN BUILDING SOCIETY

DEFENDANT

**Before Hon. Lady Justice Abha Patel, S.C. on 8th February
2021**

For the Plaintiff:

The Legal Counsel

Workers Compensation Fund Control Board

For the Defendant:

The Legal Counsel

Messrs. Bank Of Zambia

JUDGMENT



List of Authorities

- 1. Section 66 of the Corporate Insolvency Act No. 9 of 2017**
- 2. Order XXX rule 14 High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia**
- 3. Banking and Financial Services Act No. 7 of 2017**

Cases Referred to:

1. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) vs Hyper Foods Products Limited and Creation One Trading (Z) Limited (1999) ZR 124;**
2. **China Copper Mines Limited vs Tikumbe Mining Limited**
3. **Finance Bank Zambia Plc vs Lamasat International Limited**
4. **Freshview Cinema's Limited vs Manda Hill Limited**

1. **INTRODUCTION AND BACKGROUND**

1. The Applicant commenced this action by way of Originating Summons filed in this Court on 8th July, 2019, claiming the following:

- a. An order for the payment of the sum of Kwacha Seven Million one hundred and twelve thousand two hundred and fiftythree and seventy eight (K7, 112,253.78);

And /or in the alternative,

- b. An Order for the sale of the mortgaged property known as Stand 1200 Ndola;

- c. Foreclosure;

- d. Costs;

- e. Any other relief the Court may deem fit;

- 1.1 Although the process refers to the Parties as Plaintiff and defendant, I will refer to them as Applicant and Respondent to align with the mode of commencement of this action.

- 1.2 The record in *casu* speaks of several interlocutory applications, two of which were applications to restore, the matter having been struck out twice, on account of the non-attendance of the Applicant.
- 1.3 In the course of the proceedings the Respondent was placed in liquidation by the Bank of Zambia in accordance with **section 128 (3) (b) of the Banking and Financial Services Act**.
- 1.4 The Court did upon being moved by the Applicant, deliver a Ruling dated 22nd July 2020 granting leave to the Applicant to proceed with the matter after the appointment of the liquidation manager.
- 1.5 On 25th August 2020, the Respondent did file its Notice of Admission pursuant to **Order XX rule 1** of the High Court Rules. (hereinafter referred to as the *Notice of Admission*).
- 1.6 Thereafter the Parties applied to adjourn the hearing of the matter to allow time to facilitate *ex curia* negotiations with a view to filing a Consent Judgment.
- 1.7 The Applicant filed its application for Judgment on Admission on 29th October 2020 with the supporting Affidavit and the attendant skeleton arguments, the subject of this Judgment. (*the application*).

- 1.8 The record will reflect further adjournments on account of late service and repeated efforts to engage in *ex curia* discussions with a view of filing a consent judgment. The Court did allow the Parties time.
- 1.9 Upon the Parties having failed to settle the matter by consent, the Applicant moved the Court to hear its application which hearing took place on 8th February 2021.
- 1.10 The Respondent did file its Affidavit in Opposition and attendant skeleton arguments on 20th January 2021.

2. The Application

- 2.1 I have given an anxious ear to the arguments made by both parties at the hearing and as contained in their affidavits and supported by their skeleton arguments. The Applicant has relied on the notice of admission filed by the Respondent as being an admission that the respondent is truly indebted to the applicant and has admitted the applicants claims.
- 2.2 The applicant has relied on **Order XXI rule 5** of the High Court Rules whose effect is that a party may apply on motion or summons for entry of judgment on admissions where admissions of facts or part of a case

are made by a party to the cause or matter either by his pleadings or otherwise.

2.3 The Respondent in opposing the application has submitted that although the respondent did file into court a notice of admission, the admission was only with reference to the Applicant's claim in the sum of K7,112,253.78. (the *admitted amount*). The respondent has further submitted that the admitted amount is payable in accordance with the provisions of **section 132 of the Banking and Financial Services Act** and as provided by the Liquidation Schedule filed into Court on 2nd July 2020.

2.4 The Respondent has denied the existence of a legal mortgage or charge on Stand 1200 Ndola and has submitted that there being no admission, the same cannot be the subject of an application for Judgment on admission. The Respondent has exhibited to its Affidavit in opposition an exhibit marked 'MM1' being a true copy of the Certificate of Title of Stand 1200 Ndola, which shows no encumbrance or endorsement thereon.

2.5 The Applicant at the hearing of its application for judgment on admission placed reliance on the supporting affidavit and the attendant skeleton arguments. The applicant did not contest the contents of the affidavit in

opposition nor seek to file a reply, thereby leaving the Court to make findings of facts as it now does.

3. The Issues

3.1 The Court has noted that there is no dispute on the admitted sum and the Court has no hesitation in entering Judgment on the admitted amount in the sum of K7,112,253.78

3.2 The only issue that needs the determination of the Court is the following:

Is the Applicant entitled to Judgment on admission for an Order for the sale of Stand 1200 Ndola and an Order for Foreclosure ?

4 The Law

4.1 It is obvious that the applicant commenced this action under **Order XXX rule 14** of the High Court Rules to seek the cumulative remedies stated in the Originating Summons wherein it claims to be owed the sum of K7,112,353.78 secured by a legal charge dated the 27th day of August 2017 on stand No. 1200 situate in Ndola.

4.2 The application before the Court and the subject of this Judgment, is by way of Judgment on admission

pursuant to **Order XXI rule 6** of the High Court Rules. It is trite law that the admission must be clear and unequivocal. I am fortified in this finding ably guided by the pronouncement of the Supreme Court as set out in the case of **Freshview Cinema's Limited vs Manda Hill Limited** when it had occasion to consider a similar application under Order 21 of the HCR and Order 27 rule 3 of the RSC, and held that

"...what is paramount, in our view is that the express or implied admission is clear."

4.3 While the Court is endowed with the discretion to enter Judgment on admission, under the enabling provisions of the cited law, the same discretion equally extends to refusing to enter Judgment on admission. I have had occasion to reflect on the words of the Court of Appeal in the case of **Finance Bank Zambia Plc vs Lamasat International Limited** wherein the Court stated:

"This power is exercised in only plain cases where the admission is clear and unequivocal. There is a plethora of decisions on the admissions and entry of Judgment. An admission has to be plain and obvious, on the face of it without requiring a magnifying glass to ascertain its meaning."

4.4 I also refer to the case of **China Copper Mines Limited vs Tikumbe Mining Limited** wherein the Court of Appeal cited with approval the holding in the Indian case of **Himani Alloys Limited vs Tata Steel**

Limited on the issue of the admissions being a discretionary remedy and the requirement that the admission should be unequivocal, when it stated as follows:

"It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. The Court on examination of facts and circumstances has to exercise its judicial discretion keeping in mind that a Judgment on Admission is a Judgment without trial which permanently denies any remedy to the defendant, by way of a trial on merits. Therefore unless an admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short, the discretion should be used only when there is a clear admission which can be acted upon."

- 4.5 However, in *casu*, what is glaringly obvious is that the Applicant's Affidavit in Support of the Originating Summons does not exhibit either the deed of mortgage over the property nor a copy of the Certificate of Title evidencing the creation of the legal mortgage. Nor does it exhibit the surrender of the Certificate of Title.

Paragraph 7 of the Applicants affidavit in support reads as follows:

"That the Parties further agreed that said rollovers shall be secured by a charge on Stand 1200 Ndola belonging to

the respondent. There is now produced and marked 'FC1' a copy of the said charge."

A close scrutiny of the Affidavit reveals no certificate of exhibit page nor the exhibit itself. Further there were no supporting skeleton arguments filed by the applicant in support of its Originating Summons.

The Court observes that the defect in its process and/or omission to exhibit the documents it placed reliance on, was brought to the attention of Counsel, during the proceedings but no steps appear to have been taken by the applicant.

- 4.6 A close scrutiny of the Notice of Admission filed on 25 August 2020, by the Respondent in *casu*, and under the provisions of Order XXI rule 1 of the HCR makes no admission of the mortgage of Stand No.1200 Ndola. The relevant part of the notice of admission reads as follows:

"The Plaintiff was a depositor in the Defendant and made several deposits and withdrawals between 1 November 2010 and January 2015. The records of the Defendant show that the Defendant is indebted to the Plaintiff as claimed."

- 4.7 The Court has already noted that the applicant has not challenged the contents of the affidavit in opposition and has not placed any other proof before the Court to substantiate an admission on its claim to be entitled to

an order of foreclosure over the property known as Stand 1200 Ndola.

5. The Findings of the Court

- 5.1 The Court therefore and on the evidence placed before it makes a finding of fact that there was no legal mortgage created nor was there a pledge or surrender of the Certificate of Title over Stand 1200 Ndola.
- 5.2 The Respondent does concede to the entry of a partial Judgment in the admitted sum of K7,112,253.78 payable as noted in *paragraph 2.3* above while opposing the entry of Judgment for an Order for the sale of Stand 1200 Ndola, order for interest, Order for foreclosure and Order for costs.
- 5.3 This is a Court of record, and the Court will rely on the record before it. To the extent that the Respondents Affidavit in opposition and skeleton arguments has denied the existence of a legal mortgage or a charge on the said property and coupled with the lack of evidence presented to the Court, the Court will accordingly enter Judgment on admission for the admitted amount of K7,112,253.78 payable in accordance with the provisions of **section 132 of the Banking and Financial Services Act.**

I do not make any order of costs which shall be in the cause.

Dated at Kitwe the 5th day of March, 2021.

Abha Patel

JUDGE ABHA N. PATEL., S.C.