

IN THE HIGH COURT OF ZAMBIA

2019/HP/1166

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

SCIPION ACTIVE TRADING FUND

APPLICANT

AND

HUSSEIN SAFIEDDINE

RESPONDENT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 9TH JUNE, 2022, AT 09:00 HOURS.**

*For the Applicant: Mr. R. Petersen – Messrs. Chibesakunda &
Company.*

For the Respondent: Mr. D. Mtonga – Messrs. Paul Norah Advocates.

JUDGMENT

CASE REFERRED TO:

1. *Kanjala Hills Lodge Limited and Jayetileke v Stanbic Zambia Limited – Appeal No. 46/2010 (2012) ZMSC 33 (23rd April, 2012).*

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia*
2. *The Rules of the Supreme Court, 1999 Edition, London Sweet & Maxwell;*
3. *Halsbury's Laws of England, 4th Edition re-issue, Lord Mackay of Clashfern, Volume 20 (1), 2004, LexisNexis UK; and*
4. *The Corporate Insolvency Act, No. 9 of 2017.*

1 INTRODUCTION

1.1 This Judgment is in respect of a guarantee for a loan facility agreement executed between the Applicant, Scipion Active Trading Fund and Zalco Limited, in which the Respondent, Hussein Safieddine, is a majority shareholder as well as Director. The collateral for the lending included a personal guarantee by the Respondent.

2 BACKGROUND

2.1 The background to this matter as gleaned from the documents on record, is that the Applicant provided Zalco Limited with a Dollar Term Loan Facility in the principal amount of Eight Hundred Thousand Dollars (US \$800,000.00). The collateral for the lending included a personal guarantee by the Respondent. Zalco Limited has defaulted on the Facility Agreement, which prompted the Applicant to launch this action to compel for a call on the guarantee from the Respondent.

2.2 The Applicant commenced this action on 25th July, 2019, by way of Originating Summons, claiming the following: -

- i. *For an Order for the repayment of the sum of US \$2,019,289.81, being the total amount due and owing in principal, interest and other charges;*

- ii. *Interest as per Facility Agreement until Judgment; and*
- iii. *Costs be borne by the Respondent.*

2.3 The record herein was first allocated to Honourable Justice Mwila Chitabo, SC., who on 1st December, 2020, directed the parties to file their respective Affidavits and Skeleton Arguments, upon which he would proceed to render his Ruling on 15th January, 2021, at 12:00 hours. Due to circumstances unknown to this Court, the Ruling was not delivered as scheduled and following Justice Chitabo's untimely demise, the record was re-allocated to this Court on 15th February, 2022, but only received by this Court on 1st March, 2022.

2.4 Upon receipt of the record, I scheduled the matter for status conference on 4th April, 2022. On the return date, at the request of the parties, the Court granted leave to the Applicant to file its Affidavit in Reply and Skeleton Arguments. Having agreed with the parties, the Court also directed that it would proceed to render its decision based on the documents on record.

3 AFFIDAVIT EVIDENCE

3.1 The Originating Summons is supported by Affidavit deposed to by one Angus MacDonald, the General Counsel of the Applicant Company. The gist of the Applicant's

Affidavit in Support is that Zalco Limited wished to fund certain upgrades and improvements to its factory machinery and building. It therefore requested financing for this purpose from the Applicant, which provided Zalco Limited with a Dollar Term Loan Facility for the amount of \$800,000.00. A Loan Facility Agreement was executed between the Applicant and Zalco Limited on 6th January, 2016, which is exhibited marked "AM 1".

3.2 The collateral for the lending included a personal guarantee by the Respondent, who is the majority shareholder and Director of Zalco Limited. A copy of the Guarantee is exhibited marked "AM 2". Under the Guarantee, the Respondent covenanted as principal obligor and surety for the debt on an all monies basis.

3.3 It is deposed that Zalco Limited has since 30th April, 2016, defaulted on the Facility Agreement and now remains in default for the total sum of US \$2,019,289.81. Zalco Limited was notified of its default and demands have been made for it to make good this outstanding amount to no avail. Copies of the letters of demand have been exhibited marked "AM 3" and "AM 4". It is in this vein that the Applicant desires for the enforcement of the Deed of Guarantee.

3.4 In response to this action, the Respondent filed herein an Affidavit in Opposition on 10th December, 2020, deposed to by Hussein Saffiedine. The gist of the Affidavit in Opposition is that the Respondent does not deny the outstanding debt but asserts that Zalco Limited has undergone Business Rescue Proceedings and that a Business Rescue Administrator has been appointed, who has approached potential investors and made arrangements for the said investors to aid the resuscitation of Zalco Limited. It is asserted by the Respondent that there is currently lead stock available at the factory and processing plants, which stock has been secured in favour of the Applicant and is yet to be processed so as to generate income to service the amounts due under the Facility Agreement. Based on the foregoing, the Respondent has beseeched this Court to exercise its discretion cautiously so as to not deprive or disadvantage other interested parties under the business rescue proceedings.

3.5 At the time of writing this Ruling, the Applicant had not filed herein its Affidavit in Reply within the time specified by this Court.

4 SUBMISSIONS

4.1 Only the Applicant filed herein its Skeleton Arguments, on 10th May, 2021. The gist of the Applicant's submissions is that it is calling upon the Respondent to pay the monies accrued under the Facility Agreement. The Applicant argues that the breach of the Facility Agreement imposes all debts of Zalco Limited on the Respondent. In support of this contention, the Court was invited to the case of ***Kanjala Hills Lodge Limited and Jayetileke v Stanbic Zambia Limited***¹, where the Court held that: -

“The fact that the agreement between the parties provided for a default clause is clear indication that the Respondent was entitled to invoke it on default.”

4.2 It is submitted that the fact that the Respondent has a lot of debtors to pay, is not presently for the determination of this Court, as the present issue is for the order to payment by the Respondent.

5 CONSIDERATION AND DECISION OF THE COURT

5.1 I have considered the Originating Summons and Affidavit evidence of both parties. I have also considered the Skeleton Arguments and List of Authorities cited by Counsel for the Applicant, for which I am grateful.

5.2 Before I consider the substantive application, I will address the preliminary issues that the Respondent

intended to raise. The record shows that on 9th August, 2019, the Respondent filed herein a Notice to Raise Preliminary Issues, which had not been considered by Justice Chitabo, now deceased. The Respondent intended to raise the preliminary issues pursuant to **Order 14A** and **Order 33** of **The Rules of the Supreme Court**². At the time of filing the said Notice, the Respondent had not given his intention to defend the matter and as such, he cannot benefit from these provisions of the law as **Order 14A** of **The Rules of the Supreme Court**², in **Order 14A/2/3** prescribes, in reasonable detail and clarity, the requirements that an applicant, such as the Respondent in this application, must meet before he can draw the benefits of this particular provision. Further, **Order 33, Rule 3 (1)** of **The Rules of the Supreme Court**² clearly provides that **Order 33** should be read with **Order 14A**. Having failed to successfully invoke the provisions cited above, this Court will not consider the preliminary issues that the Respondent intended to raise.

5.3 I will now move on to consider the application before this Court. The Applicant claims from the Respondent, *inter alia*, for an Order for the repayment of the sum of US \$2,019,289.81, being the total amount due and owing in principal, interest and other charges; and interest as per

Facility Agreement until Judgment. In support of its claims, the Applicant alleges that it provided Zalco Limited, in which the Respondent is the majority shareholder and Director, with a Dollar Term Loan Facility as shown in the Facility Agreement marked "AM 1". The collateral for the lending included a personal guarantee by the Respondent as shown by Guarantee marked "AM 2", under which the Respondent covenanted as principal obligor and surety for the debt on an all monies basis. It is further alleged that the Zalco Limited has since defaulted on the Facility Agreement, despite have been notified of its default position as shown by letter of demand marked "AM 3". It is also alleged that the Respondent has also neglected to make the full payment of the outstanding amount despite being notified by letter of demand marked "AM 4". It is on the foregoing basis that the Applicant has applied herein for enforcement of Guarantee.

5.4 The Respondent does not deny the Applicant's claims but states that Zalco Limited is undergoing Business Rescue Proceedings, with a Business Rescue Administrator having been appointed, who has approached potential investors and made arrangements for the resuscitation of Zalco Limited. It is in this vein that the Respondent has beseeched this Court not to grant the application for

Enforcement of Guarantee, as doing so will disadvantage other creditors of Zalco Limited.

5.5 It is not disputed that the Applicant herein provided Zalco Limited with a Loan Facility in the principal amount of \$800,000.00. It is further not disputed that the collateral for the lending included a personal guarantee by the Respondent herein, who is the majority shareholder and Director of Zalco Limited. Furthermore, it is not disputed that Zalco Limited defaulted on the Facility Agreement with the Applicant as from 30th April, 2016 and remains in default for the total sum of \$2,019,289.81, as at the date of launching this action. What is disputed is the attempt by the Applicant to enforce the Guarantee. The Respondent has challenged the enforcement of the Guarantee on the basis that Zalco Limited is currently undergoing Business Rescue Proceedings and enforcing the Guarantee at this stage will disadvantage other creditors of Zalco Limited. On the other hand, the Applicant has argued that the fact that Zalco Limited has other creditors who will be disadvantaged if the Guarantee is enforced has nothing to do with the application before this Court which is for the Order to payment by the Respondent. Having analysed the proceedings herein and documents placed on record, the point for determination

is whether or not the call on the guarantee from the Respondent should be enforced.

5.6 The application was made pursuant to **Order XXX** of **The High Court Rules**¹ and **Order 5, Rule 4 (2)** of **The Rules of the Supreme Court**², which provide for commencement of actions by Originating Summons where the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or in which there is unlikely to be any substantial dispute of fact. As stated above, the issue under consideration herein is the Guarantee executed by the parties herein. Accordingly, this matter is properly before this Court.

5.7 According to the learned authors of **Halsbury's Laws of England**³, a Guarantee is defined as follows: -

“A Guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose liability to the promisee must exist or be contemplated.”

5.8 Being guided by the above, I have perused the document exhibited herein as “AM 2”, which is a Guarantee in relation to the Term Loan Facility for an aggregate amount

of \$800,000.00 endorsed by Respondent as Guarantor in favour of the Applicant as the Lender, on 6th January, 2016. The documents shows that indeed the Respondent executed a personal guarantee to secure the facilities availed to Zalco Limited. As earlier stated, this document is not disputed. I therefore find and hold that the document exhibited as "AM 2" is a valid guarantee, which meets all the requirements for such an agreement.

5.9 In his quest to prevent an Order for enforcement of Guarantee being granted, the Respondent alleges that Zalco Limited is under Business Rescue Proceedings. In other words, the Respondent wants to be shielded by the consequential moratorium provided for companies under Business Rescue Proceedings. **Section 2 (1) of The Corporate Insolvency Act⁴**, defines "*business rescue proceedings*" as follows: -

"...the process of facilitating the rehabilitation of a company that is financially distressed..." (Court's emphasis)

5.10 When a company is under Business Rescue Proceedings, by law it is provided with a temporary moratorium on the rights of claimants against the company or in respect of property in its possession. The moratorium also extends

to proceedings to enforce a guarantee given by the target company in favour of a third party. In instances where a company is undergoing such proceedings, the Business Rescue Administrator puts in place a development and implementation, approved in accordance with this Act, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result if the company was to be liquidated. For a business to undergo this process, there are requirements that have to be complied with under the Act and a Business Administrator appointed by the Court.

5.11 It is trite that before a Court can uphold a plea of the moratorium anchored on the allegation that there are voluntary Business Rescue Proceedings in place, it must be shown and the Court must be satisfied that on a quick perusal of the evidence the mandatory criteria under **Section 21 (1) of *The Corporate Insolvency Act***⁴ has *prima facie* been met; a special resolution has subsequently been passed by the members of the target company; and the special resolution has been filed with

the Registrar at PACRA. Further, a determination of the merits of whether the criteria has in fact been met must be deferred to the event of an objection/application under **Section 22 (1) of The Corporate Insolvency Act⁴**.

5.12 In *casu*, the Respondent, who alleges that Zalco Limited is undergoing this process has not placed any proof to support his assertion. Accordingly, in these circumstances it cannot be said that Zalco Limited is under Business Rescue Proceedings within the meaning of **The Corporate Insolvency Act⁴** and that it deserves being shielded by the consequential moratorium under **Section 25 (1) of The Corporate Insolvency Act⁴**. The Respondent has lamentably failed to convince this Court that Zalco Limited should be considered as undergoing Business Rescue Proceedings, as provided by **The Corporate Insolvency Act⁴**. This militates against his assertion that enforcing the Guarantee will disadvantage Zalco Limited, which has a number of other creditors. In any case and significantly, the moratorium as far as it relates to enforcement of guarantees is not applicable to the Respondent as a shareholder and Director of Zalco Limited, in terms of **Section 25 (2) of The Corporate Insolvency Act⁴**. Under this law it would only have applied if Zalco Limited was the guarantor, which is not

the case here (albeit in a scenario where voluntary Business Rescue Proceedings have commenced within the meaning of the said ***The Corporate Insolvency Act***⁴). In this regard, the Respondent has not successfully raised the moratorium before this Court, which would preclude the Applicant from seeking its grievances against the Guarantor, who is the Respondent herein. Accordingly, his argument for not enforcing the Guarantee is without merit and is dismissed.

6 **CONCLUSION**

6.1 For the foregoing reasons, the application is granted as prayed in the Originating Summons and the Respondent is condemned in costs to be paid to the Applicant, to be taxed in default of agreement.

6.2 Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA THIS 9TH DAY
OF JUNE, 2022.**



**P. K. YANGAILO
HIGH COURT JUDGE**