**IN THE HIGH COURT FOR ZAMBIA** **2015/HPC/265**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(CIVIL JURISDICTION)**



**IN THE MATTER OF : The property comprised in Equitable Mortgages over Stand Number 11189 situate in the Lusaka Province of Zambia in the name of BREBNER CHANGALA and over Stand Number 12778 Lusaka aforesaid in the name of BREBNER CHANGALA INVESTMENTS LIMITED.**

**AND**

**IN THE MATTER OF FORECLOSURE AND POSSESSION**

**BETWEEN:**

**ZAMBIA NATIONAL COMMERCIAL BANK PLC** **APPLICANT**

**AND**

**BREBNER CHANGALA INVESTMENTS LIMITED** **1ST RESPONDENT**

**BREBNER CHANGALA** **2ND RESPONDENT**
**(Sued as Guarantor and Mortgagor)**

*Before the Honourable Mr. W.S. Mweemba in Chambers at Lusaka.*

*For the Applicant* : *Mrs. A. Mwalula- Legal Manager ZANACO.*

*For the Respondents* : *Mr J. Zimba and Mrs M.K. Tembo – Messrs Makebi Zulu Advocates.*

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# J U D G M E N T

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**LEGISLATION & WORKS REFERRED TO:**

1. ***ORDER 30 RULE 14 OF THE HIGH COURT RULES, CAP 27 OF THE LAWS OF ZAMBIA.***
2. ***THE BANKING AND FINANCIAL SERVICES ACT, CAP 387 OF THE LAWS OF ZAMBIA.***

3. ***THE LIMITATION ACT OF 1939.***

4. ***HALSBURY'S LAWS OF ENGLAND 3RD EDITION, BUTTERWORTHS AND CO. PUBLISHERS VOL. 27, 1955.***

**CASES REFERRED TO:**

1. ***UNION BANK ZAMBIA LIMITED VS SOUTHERN PROVINCE COOPERATIVE MARKETING UNION (1997) SJ 30 (SC).***

2. ***GALAUNIA FARMS LIMITED V NATIONAL MILLING COMPANY LTD (2002) ZR 135.***

3. ***MAGIC CARPET, TRAVEL AND TOURS VS ZAMBIA NATIONAL COMMERCIAL BANK LIMITED (1999) Z.R 61.***

4. ***CREDIT AFRICA BANK LIMITED VS KALUNGA & TERRY SIMWANZA (SCZ APPEAL NO. 144/ 1997.***

5. ***PRUDENCE BANK LIMITED VS NODA INVESTMENTS LIMITED 1996/HP/2798.***

6. ***S. BRIAN MUSONDA (RECEIVER OF 1ST MERCHANT BANK LIMITED (IN LIQUIDATION)) VS HYPER FOOD PRODUCTS LIMITED AND TWO OTHERS (1999) ZR 124.***

7. ***KASABI INDUSTRIES LIMITED VS INTERMARKET BANKING CORPORATION LIMITED APPEAL NO. 168/2009.***

By Originating Summons taken out on 16th June, 2015, the Applicant is claiming the following:-

1. *Payment of all monies and all interest due and owing to the Applicant under Mortgages over Stand Number 11189 Lusaka in the name of the 2nd Respondent and Stand Number 12778 Lusaka in the name of the 1st Respondent, which monies stand at K685 318.15 as at 7th June, 2015.*

2. *An order to foreclose on the Mortgaged properties.*

3. *Delivery of vacant possession of the Mortgaged properties by the 1st and 2nd Respondents to the Applicant.*

4. *An order of Sale of the Mortgaged properties by the Applicant.*

5. *An order that the 2nd Respondent being Guarantor of the 1st Respondent be ordered to honour his guarantee.*

6. *Any other relief the Court shall deem fit.*

7. *Costs.*

This matter proceeded by way of Affidavit Evidence and cross examination of the Deponents. There is an Affidavit in Support of the Originating Summons deposed to by Mr George Mubanga Kashoki the Assistant Manager in the Special Assets Management Department of the Applicant Bank filed into Court on 16th June, 2015.

He deposed that the 1st Respondent was availed a re- structured medium term loan in the sum of K191,535, 135.13 (unrebased) on 1st April, 2008. Further that it was an agreed term of the facilities offered that interest would be calculated daily on the daily debit balances and charged monthly in arrears at the margin of 10% above the banks base rate which at that time when the facility was granted was 15% per annum.

It was also agreed that any interest not covered monthly would be compounded at the aforesaid rate. Another term was that security would be Mortgages over Stand Number 11189 Lusaka in the name of the 2nd Respondent and Stand Number 12778 Lusaka in the name of the 1st Respondent.

It is also deposed that the 1st and 2nd Respondents voluntarily surrendered their certificates of title to the Applicant for purposes of securing equitable mortgages on them. Moreover, that further security for the restructured medium term loan were Guarantees by the 1st and 2nd Respondents in the sum of K60million and K15 million each respectively.

It is also stated that the medium term loan was to be repaid by 31st March 2010 but the Respondents failed to settle it by that date inspite of reminders to do so.

It is also deposed that to date, the loan facility remain unpaid and stood at K685, 318.15 as at 7th June, 2015.

The 2nd Respondent filed an Affidavit in Opposition to the Originating Summons. It was sworn by Brebner Changala the Chief Executive Officer of the 1st Respondent.

He deposed that a facility was offered to the 1st Respondent and it was paid off in 2010 for the period 2008 to 2010. Further that the loan account under which this amount was to sit was 0550950000001199 in the name of Brebner Changala Investments Limited.

The 2nd Respondent then stated that there was no surrender of titles for the purpose of securing the loan referred to. That the loan facility that was secured by the properties referred to herein was for the year 2004 and not for the facility in issue herein.

Further that the said 2004 facility was paid off a long time ago as the 2004 loan which was a subject of the properties had been liquidated.

He went on to aver that at the time of liquidating the 2004 loan, he requested by letter that the titles be returned to him as the loan was fully liquidated and that the Applicant did not return the titles but wrote stating that they had been lost.

Moreover that at the time of the purported loan agreement secured by the properties on stand number 11189 and Stand number 12778 Lusaka, the Respondents did not have the titles relating to the properties as the applicant had lost them hence there was no way the Respondent could have given the said titles as security

According to the Deponent the Respondents had not failed to liquidate any loan as it was non existent and the Respondents had on several occasions written to the Applicant requesting for proof of the debt owed to it to no avail.

That the exhibits marked "GMK 10" and "GMK 11" in the Applicant's Affidavit did not paint a clear picture on how the transactions were happening on the said account.

It is stated that when the Applicant was requested to give further and better particulars they produced statement of accounts for three different accounts these being ; account number 0538080000000739, 0550940000161 and 0349118000222 which they claimed belonged to Brebner Changala and Brebner Changala Investments.

Moreover that these account numbers all showed an opening balance of 0.0 ngwee except for account number 0538080000000739 which showed a balance of K191, 535,135.00 which account has never belonged to any of the Respondents. Thereafter it was deposed that a careful look at the Affidavit in support of the Applicant's Application will show that it did not inform the Respondent of the indebtedness that they now claim until sometime in August, 2014 which was 6 years after the loan was claimed to have been contracted.

It is also stated that the claim by the Applicant that they wrote to the Respondents was untrue. Further that the Applicant started claiming amounts from nowhere and this was done by email. After this the 2nd Respondent challenged the Bank on the amounts owing and they wrote back claiming that he owed the bank K351,535.14 as at 21st September, 2010 which he never borrowed. He then wrote to the Applicant Bank to query on the amounts claimed and they had to this date not responded to his letter of 16th September, 2014.

That based on his query, the Bank decided to sue 10 months later when the claim by the Applicant had no basis and even assuming it had would mean it were out of time. He also stated that he had been advised that the Applicant's claim clearly contravened the Banking Guidelines on loans as they were supposed to call it back within a space of 90 days upon seeing that it was not being paid.

Lastly, that the claim by the Applicant was done in bad faith as it had never existed at all.

There is also an Affidavit in Reply filed into Court on the 28th April, 2016 and sworn by Arnold Chinyama a Senior Manager in the Special Assets Management Department of the Applicant.

He deposed that contrary to the assertions as much as he deposited the sum of K166, 000.00 on a connected loan there remained a credit balance of K960, 088.79 on this account number 0550950000001199 which was transferred to account number 0550940000000161 on 8th June, 2011 in order to reduce the outstanding debt on the said account in issue.

Further that the loan was restructured and disbursed on 31st May, 2008 to account number 0538080000000739 in the name of the 2nd Respondent. Moreover that the Credit Facility Agreement entered into between the parties and executed by the 2nd Respondent himself and marked "GMK1" in the Affidavit in support of Originating Summons provided under clause 5 that the properties in issue were pledged as security for the loan.

That the loan was not fully paid and by his own admission exhibited as "AC3" he had a balance outstanding with the Applicant even at the date he requested the release of the title deeds. Moreover, that the Applicant was under no obligation to release the certificates of title in question as they

were pledged as security in exhibit "GMK1"for a loan which had not been liquidated by the Respondents.

It was also deposed that the Respondents had failed to liquidate the debt and were truly indebted to the Applicant and had engaged on numerous occasions in repayment proposals as shown by "AC4" which is collectively correspondence between the parties in which the Respondents acknowledged having a bad debt and asked for a restructure of the debt.

After this acceptance the Respondent made a payment of K10, 000.00 towards the said loan in 2011. Further that account number 0538080000000789 is the account to which the loan was disbursed as shown by "AC2." This account held in the Applicant's Kwacha Branch was closed on 28th April, 2011 upon the Respondent's request to restructure the loan and the balance of K333,622,789.00 (unrebased) was transferred to another account number 0550940000000161 held at the Applicant's Debt Recovery Department on 5th May, 2011 and marked "GMK11" in the Applicant's Reply to Summons for Further and Better particulars.

Mr. Chinyama stated that he had been advised by his Counsel that the claim was not out of time as this was a mortgage action and no banking guidelines had been contravened by the Applicant. Moreover, that the Respondent had no plausible defence to the Applicant's claim and had in fact admitted indebtedness to the Applicant as exhibited.

On the date of hearing the Originating Summons (trial), the Affidavits of the witnesses were treated as their evidence in chief.

In cross examination, George M. Kashoki (PW1) told the Court that exhibit "GMK12" did not show any payment from the 1st Respondent or 2nd Respondent but it showed 18 entries of interest added over a period of 19

months. That the offer letter states that interest was to be paid monthly as shown in exhibit "GMK1".

Further that "BC1" is a bank deposit slip for K166,000,000.00 deposited into Account number 0550950000001199 and that it had been brought to his attention that the Respondents had disputed holding any other account apart from this one.

Mr. Kashoki also stated that they had not brought any mandate file to Court but that exhibit "BC4" was an email dated 11th June, 2014 and it showed the amounts borrowed. Whilst exhibit "BC5" showed the amount outstanding to be K556, 924.85 as at 31st May, 2014. Further that repayment ought to have been on 31st March, 2010 but the amount was in default for three years 2 months.

That Exhibit GMK 10 shows that the amount outstanding as at 31st March 2010 was K260, 887,428.00 and as at 11th June, 2014 the Bank had added interest in excess of K200,000.00. Further that in the letter dated 16th September, 2014 the Respondent was disputing the amount outstanding and their position was that the money was not borrowed.

There was no re examination.

The second witness of the Applicant was Arnold Chinyama (PW2) and his Affidavit in Reply was treated as his evidence in chief. In cross examination he told the Court that the account number 0538080000000739 was closed on the Respondent's request to restructure.

Further that exhibit "BC3" showed that the Bank did not hold the title deeds. Whilst BC6 was a letter that raised a dispute which was addressed in a meeting held at the Bank.

In Re examination PW2 told the Court that exhibit AC4 was a letter dated 8th April, 2011 by which the 2nd Respondent acknowledged that as at 31st March, 2011 the 1st Respondent had a non performing facility with an outstanding balance at K327, 862, 681.20 with the Applicant.

The Respondents also had one witness before Court and his Affidavit in Opposition to the Originating Summons was treated as his evidence in chief. This was Mr Brebner Changala (DW1). He told the Court in cross examination that the 1st Respondent borrowed K40, 000.00 from the Applicant on 1st April, 2008.

Further that they borrowed about K191, 535,135.13 and that there was no information that the amount should sit on Account No. 0550950000001199 except that this was the account the company was using. That the facility letter dated 1st April, 2008 showed that the properties mentioned were pledged as security. That he signed the facility letter "GK1" dated 1st April, 2008.

Moreover, that although he was demanding his title deeds he was still owing the Applicant 60 million Kwacha at the time and that exhibit "AC4" was his letter where he acknowledged the amount that was outstanding (of about K300,000,000.00). Further that in the letter of 8th April, 2011 he was being advised by ZANACO on the amount he was owing which was K327,862,681.20 and that he acknowledged the repayment terms on 18th April, 2011.

In addition that he never raised any questions regarding the transfer of his account from Cairo Road Business Centre to Head Office Special Assets Management.

In Re-examination, DW1 told the Court that he had no problem with the transfer as it was the same Bank as shown in the letter dated 8th April, 2011. Further that he signed and accepted the terms because he believed that he owed between K200,000.00 and K300,000.00 which he wished to pay and close the chapter.

The Respondents filed their Skeleton Arguments into Court first on the 22nd of March, 2016. It was contended that the loan facility which was the subject of these proceedings was disputed by the Respondents and was unknown to them as no account number to which this loan was paid had been exhibited and that three different accounts which the Respondent never had were shown.

Further that the Applicant had lost the Respondent's Certificates of Title for the aforementioned properties and the Respondents had no title deeds to offer as security.

Moreover that no mortgage had ever been registered against the said properties and that the Applicant could not claim what was not given out and secured by any property in form of a mortgage.

Counsel also raised the issue why the Applicant had only now decided to demand a loan six years from the date it became due. It was contended that in this case there was a dispute on whether the Mortgage Deed was registered as was required by law and as such the same was therefore by law a nullity. Section 4 and Section 6 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia were cited for this contention.

Moreover that the Applicant had produced a statement for three different accounts and according to the evidence on record, these had never been held by the Respondents.

It is further argued that even assuming that this amount was borrowed, the Applicant had a duty to recall the loan within 90 days of it becoming non-performing according to Regulation 7 (1) (a) and (d) of the Banking and Financial Services Act, Cap 387 of the Laws of Zambia. In addition that Regulations 8 and 10 of the same Act also set out guidelines on how loans ought to be treated by the bank in the case of default which the Applicant Bank had lamentably failed to comply with.

The Record will show that the Applicant filed in its Skeleton Arguments into Court on 28th April, 2016 where it was stated that this action was not out of time contrary to the Respondents assertions as the Limitation Act of 1939 provides that:

> ***"4.(3) No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person".***

Moreover, that according to Halsbury's Laws of England, Vol 28, Paragraph 622, page 277 the period of limitation in general under the Limitation Act of 1939 begins to run when the cause of action accrues.

On this basis Counsel for the Applicant contended that the Applicants cause of action arose when the Respondents went into default and that the Applicant had not exhausted the 12 year period within which to make its claim on the secured properties.

Furthermore that the Applicant had clearly demonstrated the Respondent's indebtedness as shown by the Credit Facility Letter executed by the 2nd Respondent and the 2nd Respondents various proposals to repay the debt.

Moreover that Halsbury's Laws of England Volume 32 at paragraph 402 states that a Mortgage consists of two things, namely a personal contract of a debt and a disposition or charge of the Mortgagor's estate or interest as security for the repayment of the debt.

That the 2nd Respondent as Director of the 1st Respondent appended his signature to the Credit Facility Letter under which the properties in issue were pledged as security. The Applicant has further exhibited the memorandum of deposit of title deeds in which the Respondents pledged the secured properties with intent to create equitable mortgages for securing the payment and discharge on demand of all monies and liabilities both at the time of deposit of the title deeds and thereafter due from or incurred by the Respondents.

It was also Counsel's submission that the delivery to the Bank of deeds with intent to create a security thereon by the Respondents constituted an equitable mortgage which was a contract that operated as a security and was still enforceable under the equitable jurisdiction of this Court. Thus the argument by the Respondents that the Title Deeds were lost and could not be pledged as security was irrelevant as the pledged titles could not be discharged in any event due to the Respondent's indebtedness.

It was also contended by the Applicant that under the Facility Letter between the parties any interest not covered monthly would be compounded at the rate of 10% + 15% per annum and that since the Respondents had failed to honour their repayments according to the Credit Facility Letter they could not be shielded by the regulations of the Banking and Financial Services Act.

According to Counsel for the Applicant Bank the said provisions did not oust the agreement between the parties and she relied on the case of **Union Bank Zambia Limited v Southern Province Cooperative Marketing Union (1)**

where the Supreme Court held that a bank had the right to charge interest at a reasonable rate on overdraft but unusual rates such as compound interest require an agreement. That as evidenced in the exhibited credit facility letter on record, all terms were agreed to by the parties inclusive of interest, despite the Respondents futile demands.

Due to this the Applicant submitted that the Respondents were clearly indebted and had no plausible defence to the Applicants Originating Summons.

The Applicant then filed written submissions into Court on 20th June, 2016. It was contended that the application before Court was made pursuant to Order 30 Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia which provides that:

> ***"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 the right to foreclosure 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 of 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".***

In addition, Counsel argued that an equitable mortgage was a contract that operated as a security and was enforceable under the equitable jurisdiction of the Court. Moreover, that whether a particular transaction gave rise to an equitable mortgage was dependant on the intention of the parties ascertained from what they had done in the then existing circumstances. According to Counsel, a good security in equity was created by the deposit of title deeds by the Respondents. "GMK4" and "GMK5" are exhibits to that effect.

It was also submitted that the mortgagees rights to custody of title deeds was an important means of protecting his rights under the security for as long as the debt remained unpaid as was the case here. That the 2nd Respondent also acknowledged during cross examination owing the Applicant money as at the date that he demanded release of title deeds in exhibit "AC3".

It was further submitted that the Applicant clearly demonstrated the Respondent's indebtedness as evidenced by the Credit Facility Letter executed by the 2nd Respondent and the 2nd Respondents various proposals to repay the debt exhibited and marked "AC4." During cross examination the 2nd Respondent stated that he was aware that the Respondents owed some money and that he wanted to see the matter come to a close as he had been banking with ZANACO for a long time. Counsel then submitted that the Respondents had no plausible defence to this claim and were truly indebted to the Applicant. It was also contended that the Respondents could not plead ignorance of the account numbers relating to their accounts held with the Applicant when they had clearly been advised by the Applicant. That the 2nd Respondent even referred to the 2 accounts in his letter marked "AC5".

The Respondents also filed in written submissions on 8th July, 2016. It was contended by counsel for the Respondents that the Facility Letter dated 1st April, 2008 involving an amount of K199,000,000.00 was the reason the parties were before Court although the Applicant failed to acknowledge the K166,000,000.00 deposited in their account as shown by exhibit "BC1".

Further that the amount in issue was contested and the Respondents held no account with the Applicant because as far as they were concerned they did not owe the Applicant any money.

The Respondents also contended that from the Affidavits deposed to on behalf of the Applicant it was clear that the Respondents only had one account number 055095000000199. Further that the Applicant had on their records other account numbers like 05509400000161 and account number 03491160000222 which the Respondents did not know about. The Applicant did not bring any mandate for any of the accounts they reflected on the statement despite them being aware that the issue of the mandate file was an issue in Court and the Respondent had raised it.

Further that from the day they closed the old account to open the new unmandated account, they never sent statements of account opened at their behest, which was a duty of a Banker under regulation 2 (1) (k) of the Banking and Financial services Act, Cap 387 which reads as follows:

> ***"2.(1) A bank or financial institution shall, by means of a written statement, disclose to its customers and to the public all charges on deposit accounts with the bank or financial institution for any of the following services in respect of such deposit accounts, namely***
>
> ***(k) supplying of account statements".***

In this case it was contended that the Applicant did not furnish these statements of account in order to facilitate fraudulent accounting.

Moreover that a Bank also had a duty under the same Act to bring to the notice of the loanee, payments towards the Principal and interest and this position was further fortified by Regulation 7 of the Banking and Financial Services Act, Cap 387 of the Laws of Zambia which provides as follows:

> ***"Where a Bank or Financial Institution renews a fixed term deposit account, it shall disclose the rate of interest and the manner of calculating the amount of interest on the deposit in accordance with sub- regulation (1) of regulation (5) and clauses (1) and (ii) of paragraph (b) of sub- regulation 2 of regulation 5".***

According to Counsel for the Respondent it was the duty of the Bank to notify and disclose to the Respondent the rate of interest and the method to be used to calculate it but in this case the bank did not do so and it amounted to an illegality.

Further that the Applicant had a claim against the Respondent of K711, 884.49 and there was no explanation from the Applicants side on how this amount reduced to the current K 685,318.15. It was also contended that the statement also shows that there were over 18 entries under the subject interest. Further that the amount in question at the time which was K595, 000.00 was disputed by the Respondents and resolved before the matter was brought to Court.

The witness of the Applicant also mentioned that the account which was run by the Respondents was closed but in 2008 the 1st Respondent borrowed K40,000,000.00 and the facility was later restructured to K191,535,153.13. (unrebased).

The account number used for these transactions was 0550950000001199 and the 2nd Respondent also stated that he did not execute any mortgage deed and that his Titles at the time of this Mortgage claimed by the Bank were lost. Further that since the Bank claimed to have lost them but instead used them to secure a Mortgage it was not only fraudulent but also amounted to bad faith. The Applicant was therefore estopped from relying on the said Titles as security for the alleged loan or mortgage.

To buttress this argument Counsel cited the case of **GALAUNIA FARMS LIMITED V NATIONAL MILLING COMPANY LTD (2)** where it was held that:

> ***"The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct".***

He also stated that the Respondents never had access to the accounts in question not even the only one known to them and that there had been no statement given to the Respondents.

Further that a letter had been written to the Bank to pay K200,000.00 or K300,000.00 just to close the matter as he had noticed that they were not getting anywhere in their discussions.

It is contended that from the evidence on record, it is clear that the purported loan was obtained in about 2008 and from the Applicant's evidence it had remained unpaid from that time.

Further that the law on non-performing loans was clear in Zambia. It is that once a loan becomes non-performing it must be recalled within a period of

three months or 90 days and no interest shall accrue on the said account. It was also stated that Regulation 7 (1) (a) and (d), Regulation 8 and 10 of the Banking and Financial Services Act under which the Applicants were licensed to conduct their business and are regulated are clear. Regulation 7 (1) (a) and (d) states that:

> ***"(1) A Bank or Financial institution shall place a loan in non accrual status if:***
>
> ***(a) There is reasonable doubt about the ultimate collectability of the principle or the interest."***
>
> ***(b) ...***
>
> ***(c) ...***
>
> ***(d) The principle or the interest had been in default for a period of 90 days or more or the account had been inactive for a period of ninety days and deposits were insufficient to cover the interest capitalized during the period".***

Counsel then argued that the loan herein had not been re called and the Applicant's conduct therefore flew in the teeth of the law.

Moreover that the Applicant had added interest to the principle amount which was in excess of K300,000.00 as shown by the 18 entries reflecting interest and according to the Respondent this was penal interest which was not allowed at law following the decision in **UNION BANK ZAMBIA LIMITED V SOUTHERN PROVINCE COOPERATIVE MARKETING UNION LIMITED (1).**

Counsel also urged this Court to note that the documents which the Applicant wished to rely on as security documents were lodged in 2003 as shown by "GMK1." According to Counsel the question that begged an answer was how did they give a loan or mortgage in light of the lost deeds as

security which were lost in 2007 which was even stated in a letter dated 20th April 2007 written by the Applicant after a request to release them.

Counsel then argued that this should lead the Court to an inference that they were ready to give him the title because he had cleared the loan if not they would have said so in writing. Securitizing a non existent loan with lost title deeds was a dishonest act by the Applicant Bank and undoubtedly amounted to unjust enrichment.

Thus considering that the purported loan was contracted in 2008 and the claim was only made in 2015 shows that the claim was ill- fated and made in bad faith.

Further that lenders and all parties to contracts were required to perform their parts of the obligations without question and in good faith.

In summary Counsel stated that the transaction before Court had been covered by a lot of failure to perform obligations on the part of the Applicant which included, no statements being given to the Respondents, failure to deliver documents when requested and indeed opening of an unmandated account. Further that the claim of the Applicant was higher at first until the Respondents wrote to them to dispute it.

Having considered the affidavit and viva voce evidence I have made the following findings of fact:

It is not in dispute that the Applicant gave the Respondents a re-structured loan in the sum of K191,535.135 on 1st April, 2008.

The main dispute between them is whether the said loan was paid off by the Respondents and whether there was an equitable mortgage (or equitable mortgages) created to secure the debt.

I will discuss the other issues that the Respondents raised before dealing with the main issue of the equitable mortgage and its effects.

Counsel for the Respondents advanced the argument in the Respondents Skeleton Arguments that since the mortgage herein had not been registered at Lands and Deeds Registry it was therefore a nullity.

I disagree with this argument because the Applicant clearly stated that the mortgages herein were equitable and due to there nature they could not be registered at Lands and Deeds Registry as was shown in the case of **MAGIC CARPET, TRAVEL AND TOURS V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED (3)** where it was stated that one of the shortcomings of an equitable mortgage is that it is not registered in the Lands and Deeds Registry as an encumbrance against the land. S. Silomba J as he then was held inter alia that:

> ***"As regards an equitable mortgage the position at common law is that when a borrower surrenders his Title Deeds to the land as security for the repayment of a loan, an equitable mortgage is created".***

Another issue raised by Respondents in their Skeleton Arguments was that this matter had been commenced out of time by the Applicant. To rebut this Counsel for the Applicant stated that this action was not out of time as the Limitation Act of 1939 provides that:

> ***"4.(3) No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person".***

Moreover, that according to the Halsbury's Laws of England, Vol 28, Paragraph 622, page 277 the period of limitation in general under the Limitation Act of 1939 begins to run when the cause of action accrues.

On this basis Counsel for the Applicant contended that the Applicants cause of action arose when the Respondents went into default and that the Applicant had not exhausted the 12 year period within which to make its claim on the secured properties.

I agree with Counsel for the Applicant on this issue of the period of limitation. Paragraph 705, page 319 of Halsbury's Laws of England provides that:

> ***"The Limitation Act 1939 prescribes a normal limitation period of twelve years from the date on which the right of action accrued for actions for the recovery of land, with longer periods in a number of special cases. An action to recover land is an action to obtain any land by Judgment of a Court and is not limited to actions which claim possession. Foreclosure action by a mortgagee is treated as an action to recover land...".***

Paragraph 707, page 321 of Halsbury's Laws of England further provides that the Limitation Act 1939 applies to equitable interests in land... in like manner as it applies to legal estates. The Applicant Bank's action herein is a foreclosure action under Order 30 Rule 14 of the High Court Rules and as such the cause of action arose on or about 1st April, 2010 and the limitation period will expire on or about 31st March, 2022.

Another issue had to do with the assertion in the Affidavit in Opposition sworn by the 2nd Respondent that the Applicant Bank started claiming

amounts from nowhere and that this was done by email and that after this the 2nd Respondent challenged the Bank on the amounts owing and they wrote back claiming that he owed the Bank K351,535.14 as at 21st September, 2010 which he never borrowed. He then wrote to the Bank to query on the amounts claimed and they had to this date not responded to his letter of 16th September, 2014.

I do not accept this assertion by the 2nd Respondent. The record shows that the Respondents were at all times fully aware of the 1st Respondents indebtedness to the Applicant Bank. The Affidavit in Reply to the Affidavit in Opposition to Originating Summons filed on 28th April, 2016 has exhibits which evidence this. Exhibit "AC3" is a letter from Brebner School Chalk Limited dated 5th January, 2007 acknowledging that a debt of K160 million had reduced to K100 million. Exhibit "AC4" is a letter from the 2nd Respondent to the Applicant Bank dated 21st February, 2011 stating that the debt due to the Applicant from the Respondents was then "somewhere near K300,000,000.00". Part of exhibit "AC4" is another letter from the Applicant Bank to the 2nd Respondent dated 18th April 2011 advising that the outstanding balance as at 31st March, 2011 was K327,862,681.20. Further, Exhibit "AC1" is a statement of Account relating to the 1st Respondent's Account No. 0550950001199 covering the period 20th January, 2006 to 8th June, 2011. The balance of K960,088.79 was transferred to Account No. 055094000161 on 8th June, 2011. Exhibit "C2" is a Statement of Account relating to the 2nd Respondent's Account No. 0538080000000739 covering the period 13th May, 2008 to 28th April, 2011. Further between 1st June 2014 and 5th August, 2014 there was exchange of correspondence between the parties regarding the outstanding debt.

In view of the foregoing the issue of the lack of issuance of the bank statements does not arise and in any event the lack of bank statements would not entail that the equitable mortgage if any which is the essential issue in this matter would no longer be in existence.

In their written submissions the Respondents contended that from the day that the Applicant Bank closed the old account to open the new unmandated account, they never sent statements of account as required under Regulation 2 (1) (K) of the Banking and Financial Services Act. Further that the Applicant Bank did not furnish these statements of account in order to facilitate fraudulent accounting.

The Respondents also contended that the Applicant Bank failed to notify and disclose to the Respondents the rate of interest and the method to be used to calculate it pursuant to Regulation 7 of the Banking and Financial Services Act.

In my view, Regulation 2 (1) (K) and Regulation 7 are wrongly cited merely as Regulations of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia by the Respondents. The said Regulations are in fact part of Statutory Instrument No. 183 of 1995 namely **the Banking and Financial Services (Disclosure of Deposit Charges and Interest) Regulations**. This Statutory Instrument was made pursuant to Section 47 of the Banking and Financial Services Act, which provides for the disclosure of interest rate and charges. I note that Regulation 2 (1) (K) relates to deposit accounts while Regulation 7 relates to renewal of fixed term deposit accounts. Both Regulations do not therefore apply to the mortgage action herein which relates to loan accounts. The Respondents contentions on the statements of account required under Regulation 2 (1) (K) and under Regulation 7 of the Banking and Financial Services (Disclosure of Deposit Charges and Interest) Regulations are therefore misplaced and irrelevant.

I have also found that the Respondents did not adduce any evidence to prove the alleged fraudulent accounting by the Applicant Bank and as such these allegations are without merit.

The Respondents also claimed that they were unaware of the other 3 accounts that were being used by the Applicant Bank in the name of Brebner Changala and Brebner Changala Investments. I note that this issue was settled in the Affidavit in Reply of the Applicant where they explained that as much as the 2nd Respondent deposited K166,000.00 on a connected loan, there remained a credit balance of K960,088.79 on account number 0550950000001199 which was transferred to account number 0550940000000161 on 8th June, 2011 in order to reduce the outstanding debt in the said account in issue.

It was further clarified that account number 0538080000000789 is the account held at Kwacha Branch to which the loan was disbursed and that it was closed on 28th April, 2011 upon the Respondents request to restructure the loan and its balance was transferred to account number 0550940000000161 held at the Debt Recovery Department on 5th May, 2011. During cross examination the 2nd Respondent testified that he did not raise any questions regarding the transfer of the loan account from the Applicant Bank's Cairo Road Business Centre to Head Office Special Assets Management. In re-examination he stated that he had no problems with the transfer as it was made within the same bank. I therefore find and hold that the number of accounts held by the 1st Respondent with the Applicant Bank is a non – issue.

The Respondents further claimed that the Applicant Bank had lost their certificates of title and that is why they failed to give them back to them when they requested for them. I have found no evidence on the record to justify this assertion. The only evidence relating to this issue is Exhibit "BC3" annexed to the Affidavit in Opposition to Affidavit in Support of Originating Summons. This is a letter from the Manager of the Applicant Bank's Kwacha Branch dated 20th April, 2007. It does not say that the Title Deeds had been lost, but that they were not held in the books of Kwacha Branch. In other words the Title Deeds could in fact be held by another

branch of the Bank or indeed the Banks Head Office. I do not therefore find it surprising that the Applicant Bank was unable to give them back to the Respondents who still owed it money and withholding the Certificates of Title was a form of security that the debt would be paid eventually.

I also note that the 2nd Respondent in cross examination admitted that at the time that he was requesting for these Certificates of Title, the Respondents were still indebted to the Applicant.

Counsel for the Respondents also raised an argument that once a loan becomes non performing, it must be placed into non-accrual status as set out in Regulation 7(1) (a) and (d) of the Banking and Financial Services Act, Cap 387 of the Laws of Zambia and that the Applicant did not place the loan in non-accrual status despite it being non performing which conduct flew in the face of the law.

Flowing from this Counsel further argued that the Applicant had added interest to the principal amount in excess of K300,000,000.00 and that about 18 entries reflecting interest existed. According to Counsel this interest was penal.

The issue raised by Counsel for the Respondents relates to whether or not interest on non – accrual loans is chargeable. It is unfortunate that although the law which provides for the determination and treatment of non – accrual loans and related accounts was annexed to the List of Authorities and Skeleton Arguments filed on behalf of the Respondents on 22nd March, 2016 the same is not properly cited in both the said Skeleton Arguments and the Respondents Final submissions filed on 28th July, 2016.

The law regulating loans placed on non – accrual status is found in Statutory Instrument No. 142 of 1996 namely, **the Banking and Financial Services (Classification and Provisioning of Loans) Regulations, 1996.**

The Statutory Instrument is made pursuant to Sections 58 and 124 of the Banking and Financial Services Act, 1994. It follows that the Regulations which require interpretation are specifically Regulations of the Statutory Instrument and not generally Regulations of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.

The question whether bank interest is chargeable on non – accrual loans was settled by the Supreme Court in the case of **CREDIT AFRICA BANK LIMITED V KALUNGA & ANOTHER (4)** where the Supreme Court held that the placing of a loan in non-accrual status, does not suspend the obligations under the loan agreement; interest on the loan is still payable until the loan has been repaid on the agreed terms.

Moreover, I am of the view that the promulgators of the law in the Banking and Financial Services Act could not have envisaged a situation where the law would benefit defaulting borrowers who could actually deliberately default for over 90 days and claim that since this was the case the bank should no longer charge them interest as this would have created an absurdity.

In **PRUDENCE BANK LIMITED V NODA INVESTMENTS LIMITED (5),** Counsel for the borrower raised the same issues as were raised in **CREDIT AFRICA BANK V KALUNGA AND ANOTHER (4)** and have been raised herein. Honourable Justice P. Chitengi then sitting as a High Court Judge and without the knowledge of and without reference to the **CREDIT AFRICA BANK V KALUNGA AND ANOTHER** Supreme Court Judgment, after running through the law had this to say:

> ***"Bad and doubtful debts, for obvious reasons, must be brought to the attention of the central bank. And the way a bank is to treat bad and doubtful debts in its dealing with the Central Bank is the subject of the Regulations in Statutory Instrument***

***No. 142 of 1996. I do not think that Statutory Instrument No. 142 of 1996 was designed to reprieve defaulting bank debtors from paying interest. Taken to its logical conclusion, it would mean that one can borrow money from a bank, default for three months and then one is free from paying interest. Indeed a proper construction of Regulation 10 of the Statutory Instrument No. 142 of 1996 clearly indicates that the mere fact that a loan has been classified as a non – accrual loan does not in itself, without more, absolve the debtor of his liability to pay interest. The non – accrual of interest on the loan is for the purpose of accountability by the bank to the Central bank. To uphold the position taken and contended by Counsel for the borrower, will be to make the law relating to interest stand on its head".***

I cannot agree more with the observations of Honourable Justice P. Chitengi. Bank interest is still chargeable on non – accrual loans as the placing of a loan on non – accrual status does not abrogate the borrowers obligations under the loan agreement to pay interest. However, accrued but uncollected interest cannot be shown by the bank in its financial statements to the shareholders and to the Central bank as income. For the foregoing reasons I find and hold that the Applicant Bank was well within its rights to add interest agreed under the Facility Letter dated 1st April, 2008 to the amount due and owing by the Respondents.

Aside from the foregoing and turning to the main issue, the law on Mortgages is clear under Order 30 Rule 14 of the High Court Act, Cap 27 of the Laws of Zambia. It states that:

***"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 the right to foreclosure***

***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 of 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".***

On the facts of this case, I agree with Mrs. Mwalula Counsel for the Applicant who stated that a good security was created by the deposit of title deeds by the Respondents as shown by exhibits "GMK4" and "GMK5" which are the memoranda of deposit of title deeds.

As stated in the case of **MAGIC CARPET TRAVEL AND TOURS V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED (3)** an equitable mortgage is created at common law by the mere deposit of title deeds. The position is confirmed by the learned authors of Halsbury's Laws of England 3rd Edition Vol. 27, 1955, p.168, Para 263 who observed thus:-

***"A mere deposit of title deeds upon an advance, with intent to create a security thereon but without a word passing gives an equitable lien so that as between a debtor and creditor, the fact of possession of the title deeds raises the presumption that they were deposited by way of security".***

This was done by the Respondents when they executed the documents Exhibited as "GMK4" and "GMK5" at the time of deposit of the title deeds. The Memoranda of Deposit of title deeds in which the Respondents pledge the secured properties with intent to create equitable mortgages for securing the payment and discharge on demand of all monies and liabilities clearly states that the monies and liabilities secured are those due at the time of deposit of title deeds and those due from or incurred by the Respondents thereafter. I therefore find and declare that the Applicant Bank is the Equitable Mortgagee of Stand No. 11189, Lusaka in the name of the 2nd Respondent pursuant to a Memorandum of Deposit executed by the 2nd Respondent on 20th January, 2003. The Applicant Bank is also the Equitable Mortgagee of Stand No. 12778 Lusaka in the name of the 1st Respondent pursuant to a Memorandum of Deposit executed by the 2nd Respondent as Director on 4th March, 2004.

That the Equitable Mortgages created by the Respondents in 2003 and 2004 continued to be security for the restructured Medium Term Loan of K191,535,135.13 granted by the Applicant Bank to the 1st Respondent is evidenced by exhibit "AC4" to the Affidavit in Reply by which the 2nd Respondent agreed that upon payment of K100,000,000.00 one title deed would be released.

I have also considered the further security in form of Guarantees "GMK6" and "GMK7" that were given by the 2nd Respondent who gave an assurance that should the 1st Respondent default, he would pay the sums of K60,000.00 and K15,000.00. The Guarantees are valid and legally enforceable.

In this case the Facility Letter dated 1st April, 2008 and the Memoranda of Deposit of Title Deeds dated 20th January, 2003 and 4th March, 2004 are written contractual documents which were signed by the respective parties and were intended to be legally binding.

The Facility Letter sets out further conditions pertaining to the loan such as any interest not covered monthly being compounded at the rate of 10% above the base rate then 15% per annum. As the 1st Respondent agreed to compound interest being charged, the Applicant Bank was well within its rights to charge compound interest in accordance with the case of **UNION BANK ZAMBIA LIMITED V SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED (1).**

I find that the Applicant has shown the 1st Respondents indebtedness as evidenced by the 2nd Respondents various proposals to repay the debt as exhibited in "AC4" to the Affidavit in Reply to the Affidavit in Opposition to the Originating Summons. The 2nd Respondent acknowledged the terms of the Applicant Bank's letter dated 18th April, 2011 by which it was agreed inter alia that the 1st Respondent had a non – performing facility with an outstanding balance of K327,862,681.20 as at 31st March, 2011. During cross examination the 2nd Respondent stated that he was aware that the Respondents owed some money and that he wanted to see the matter come to a close. In re – examination he testified that he signed the Applicants Letter of 18th April, 2011 because he believed that he owed between K200,000,000.00 and K300,000,000.00 which he wished to pay and close the chapter.

The Applicant Bank has also shown that despite several reminders the Respondents still owe it the sum of K685,318.15 being the principle and interest as at 7th June, 2015.

The Respondents have failed to show that they cleared the loan and that they can redeem their properties over which equitable mortgages were validly created.

From the evidence adduced by the parties, I am satisfied that the Applicant has proved its case on the balance of probabilities. The 1st Respondent is truly indebted to the Applicant Bank in the sum of K685,318.15 together with interest as agreed between the parties.

Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia provides for foreclosure, possession and sale in the event of default. The case of **S. BRIAN MUSONDA (RECEIVER OF 1ST MERCHANT BANK LIMITED (IN RECEIVESHIP)) V HYPER FOOD PRODUCTS LIMITED AND TWO OTHERS (6)** held that a Mortgagee has several remedies available namely, foreclosure, possession and sale which are cumulative.

That is the position with respect to a Legal Mortgage. When it comes to remedies available to a Mortgagee to enforce an equitable mortgage the issue was settled by the Supreme Court in the case of **KASABI INDUSTRIES LIMITED V INTERMARKET BANKING CORPORATION LIMITED (7)** where it was held that:

> ***"...it is clear that an equitable mortgagee does not have the power to sell the Mortgaged Property as a way of enforcing the Mortgage. He however, has the right to obtain an Order of Court for foreclosure and once the property is foreclosed, the Mortgagor's right of redemption is completely extinguished and the property must be conveyed to the Mortgagee by the Mortgagor unconditionally".***

In the circumstances, it is ordered that the Judgment sum of K685,318.15 as at 7th June, 2015 with interest as contractually agreed shall be paid by the 1st Respondent to the Applicant Bank within sixty (60) days from date hereof. In default, the Applicant Bank shall be at liberty to foreclose on the Mortgaged Properties and the Respondents must then convey the Mortgaged Properties

namely Stand No. 11189 Lusaka and Stand No. 12778 Lusaka to the Applicant Bank unconditionally.

In default, the Deeds of Transfer shall be executed by the Registrar of the High Court in terms of Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia.

It is further ordered that once the Mortgaged Properties are foreclosed the 1st Respondent must deliver up possession of Stand No. 12778 Lusaka to the Applicant Bank and the 2nd Respondent must deliver up possession of Stand No. 11189 Lusaka to the Applicant Bank.

I further order that should the proceeds realised from the sale of the Mortgaged Properties not be sufficient to settle the debt owing, the Applicant Bank shall be at liberty to execute on the personal Guarantees of the 2nd Respondent to the amounts guaranteed.

Costs to the Applicant Bank to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 30th day of November, 2016.

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**WILLIAM S. MWEEMBA**
**HIGH COURT JUDGE**