**IN THE HIGH COURT FOR ZAMBIA** **2016/HPC/0161**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
21 DEC 2016
COMMERCIAL REGISTRY
02
P O BOX 50067, LUSAKA

IN THE MATTER OF : ORDER XXX RULE 14 OF THE HIGH COURT RULES AND CAP 27 OF THE LAWS OF ZAMBIA

IN THE MATTER OF : AN APPLICATION FOR DELIVERY OF POSSESSION OF FARM NO 110A/9/2/CL/A/0/14 LUSAKA TO APPLICATION AS LEGAL MORTGAGEE WITH POWER OF SALE TO RECOVER DEFAULT AMOUNT OF LOAN AND INTEREST THEREON

BETWEEN:

BOMACH FINANCE LIMITED APPLICANT

**AND**

JEREMIAH GEORGE MULENGA RESPONDENT

**Before the Hon Lady Justice Irene Z Mbewe**

*For the Applicant:* *Mr M Sinyangwe of Messrs Willa Mutomfwe & Associates*

*For the Respondent:* *In Person*

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# J U D G M E N T

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**Cases referred to:**

1. *Union Bank Zambia Limited v Southern Province Co-operative Marketing Union [1997] SJZ 30 (SC)*
2. *Kalusha Bwalya v Chadmore Properties and Another SCZ Appeal No 222/2013*
3. *Stanbic Bank Zambia Limited v Mulukuma Sakala*
4. *Dunlop Pneumatic Tyre Co v New Garage and Motor Company [1915] AC 79*
5. *First National Bank Limited v Esther Chewe Chanda 2003/HPC/0466*
6. *Stanley v Wilde [1899] 2 Ch 474*
7. *Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank [1999] ZR 61*

8. *Kasabi Industries Limited v Intermarket Banking Corporation Appeal No 198/2009*

9. *Investrust Bank Plc v Alice Sakala T/A Matunga Enterprises SCZ/8/317/2015*

**Legislation referred to:**

1. *High Court Act, Cap 27 of the Laws of Zambia*

2. *Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia*

3. *Banking and Financial Services Act, Cap 387 of the Laws of Zambia*

**Other Works referred to:**

1. *Halsbury's Laws of England 3rd Edition, Butterworths and Company Publishers Volume 27 (1955)*

2. *Snell's Equity*

3. *Black's Law Dictionary, B Garner, 8th Edition*

The Applicant commenced an action by way of Originating Summons on the 19th April, 2016 claiming for the following relief -

(i) *The Respondent pay the accrued sum of K240,470.35 together with interest at current lending rate;*

(ii) *That the Respondents having defaulted on the paying of the principal and interest in respect of the loan granted, the*

*property known as Farm No 110a/2/CL/A/0/14 Lusaka be delivered to the Applicant with power to sell, assign, transfer or otherwise dispose of the said property.*

*(iii) That costs of these proceedings shall be borne by the Respondent.*

The application was supported by an affidavit deposed by Boniface Wataika Chirwa the Managing Director in the Applicant's Company. The evidence reveals that a loan was availed to the Respondent in the sum of ZMW30,000.00 sometime in October 2012 at an agreed rate. That the loan was secured by a legal mortgage on Stand No 110a/2/CL/A/0/14 Lusaka (Exhibit "**BWC 1**") and the Certificate of Title (Exhibit "**BWC2**") was surrendered to the Applicant.

According to the Applicant, the Respondent has defaulted in servicing his loan and despite several and repeated reminders to the Respondent, the Respondent has failed or neglected to liquidate the said loan which stands at ZMW240,470.35. It is the Applicant's prayer that judgment be entered in the sum of ZMW240,470.35 with interest at the contractually agreed rate and in default, the Applicant be at liberty to sell, assign transfer or dispose of Stand No 110a/2/CL/A/0/14 Lusaka.

In opposing the Originating Summons, the Respondent filed an affidavit into Court on 31st May, 2016 deposed by Jeremiah George Mulenga, the Respondent herein. The gist of the evidence is that on the 26th October, 2012 a loan agreement was entered into with the

Applicant for the sum of ZMW30,000.00 with interest at 18%. The loan agreement was exhibited as "**JGM1**". The evidence reveals that as collateral, the Respondent pledged Stand No 110a/2/CL/A/0/14 Lusaka.

The evidence reveals that on 19th November, 2012 the Respondent was availed a second loan (hereinafter referred to as "the second loan facility") in the sum of ZMW30,000 with interest at 18% (exhibit "**JGM2**") and according to the Respondent, he did not pledge any security for the second loan. According to the Respondent on the 25th February, 2013, the Applicant was paid the entire principal amount owed thereby extinguishing the debt and leaving the accrued interest sum of ZMW13,934.66 outstanding. The Respondent averred that it is inconceivable that interest accumulated to ZMW240,470.35 after payment of the principal amount and disputes owing the Applicant the said sum of ZMW240,470.35.

At the hearing of the Originating Summons on 12th September, 2016 both parties relied on their affidavit evidence and skeleton arguments. These were augmented by viva voce submissions.

Counsel for the Applicant argued that the Respondent had agreed to compound interest of 18% and drew my attention to the case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union (1)** where the Supreme Court held that unusual rates such as compound interest requires agreement. Counsel

argued that the duly registered legal mortgage specified that interest would be compounded. Counsel cited the case of **Kalusha Bwalya v Chadmore Properties and Another (2)**, where the Supreme Court held that:

> **"If there is one thing more than public policy requires, it is that men of full age and competence understanding shall have the utmost liberty of contracts and that the contract when entered into freely and voluntarily shall be sacred and shall be enforced by the Courts of justice."**

Counsel argued that the Respondent entered into the loan agreement freely and voluntarily. In concluding, Counsel prayed for the reliefs sought to be granted.

In opposing the Originating Summons, the Respondent relied on his affidavit filed into Court on 31st May 2016. He further made written submissions which were filed into Court on 26th September 2016. The gist of the submissions is that the charging of penal or compound interest is illegal. The Respondent quoted from the Learned Author's of **Black Law Dictionary** where compound interest has been defined to mean-

> **"interest paid on both the principal and previously accumulated interest."**

The Respondent submitted that the charging of compound interest is a common practice undertaken by financial institutions which he argued is null and void and an illegality. To support this

proposition, the Respondent relied on the **Banking and Financial (Cost of Borrowing) Regulations**, Statutory Instrument No 21 of 1994 where section 10 (1) (a) provides as follows:

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

The Respondent in advancing his argument on the charging of compound interest cited the case of **Stanbic Bank Zambia Limited v Mulukuma Sakala (3)** where the High Court considered Section 4 of the **Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia** and observed that penal or compound interest is not authorised and is contrary to the cited law, and proper banking practice and custom allows interest to accrue only on the principal regardless of how often it is paid.

The Respondent submitted he had paid over and above what he owes the Applicant and by an entry dated 14th August, 2013 contained in the statement of account, a balance of ZMW4,367.21 was outstanding on an escalated debt of ZMW43,934.66. That on 25th February 2013 after payment of the entire sum of ZMW30,000 the principal sum was extinguished and the only sum remaining to be paid was the interest on the principal sum.

The Respondent submitted that the Applicant was charging compound interest in contravention of section 4 of the **Law Reform (Miscellaneous) Act** based on a clause in the legal mortgage. In

support of his line of argument, the Respondent relied on the case of **Union Bank Zambia Limited, Dunlop Pneumatic Tyre Co v New Garage and Motor Company (4), Indo Zambia Bank Limited v Victory Plumbers Zambia Limited and Another (5).**

The Respondent submitted that contrary to the terms of the loan facility, the Applicant in the event of default was required, to give a seven (7) day notice to the Respondent, and this was never done as the Applicant sat on its rights for three years before enforcing the loan facility. The Respondent submitted that the absence of such a request or reminder to liquidate the debt amounted to the exploitation of a gullible borrower, and in this respect cited the case of **First National Bank (Z) Limited v Esther Chewe Chanda (6).**

The Respondent argued in the alternative, that the Applicant can only enforce its rights after following the laid down procedure stipulated in the loan facility. In concluding, the Respondent submitted that the Court takes into account the principal monies paid to the Applicant, and orders the recalculation of the sums due to the Applicant to exclude the charged compound and penal interest.

I have carefully considered the affidavit evidence and argument by both parties and the written submissions of the Respondent. The Applicant did not file any written submissions.

From a perusal of the evidence on record, the main issue for determination are as follows:

1. Whether the legal mortgage was premised on the facility letter of 26th October, 2012 or 19th November, 2012 and whether the second facility was unsecured.

2. Whether or not the Applicant complied with the facility letter of 19th November 2012 by giving the requisite notice of demand on default by the Respondent.

3. Whether or not the parties agreed to the charging of compound interest on the loan facility.

The above issues are best addressed by examining the facts of the case which can be discerned from the affidavit evidence. The evidence shows that the Applicant availed the Respondent the first loan facility dated 26th October, 2012 being in the sum of ZMW30,000.00 with an agreed interest rate of 18% per month, and an arrangement fee of ZMW50,000.00 or 2% whichever was higher. According to the agreed terms, the loan period was repayable in one month with interest of ZMW5400 payable at the end of the loan period. The first facility letter was duly executed by the parties and secured by a legal mortgage over Stand No 110a/2/CL/A/0/14 Lusaka (Exhibit " **BWC1**").

The Applicant in its Originating Summons only made reference to a loan facility granted to the Respondent. However, the Respondent exhibited a second loan facility (Exhibit "**JGM2**"). In determining which loan facility applies, I have examined the statement of accounts (Exhibit "**BWC3**") in the Applicant's affidavit in support

which gives the first entry of disbursement as 19th November, 2012 which coincides with date of the second loan facility dated 19th November, 2012. I therefore find that the Applicant's claim is in respect of the second loan facility.

The Respondent argued that the second loan facility was unsecured whilst the reliefs sought by the Applicant are predicated on **Order 30 Rule 14 High Court Rules,** for foreclosure, possession and power of sale of the mortgaged property. From the evidence on record, it is clear that after the first facility letter was executed by both parties, the Applicant created a legal mortgage on Stand No 110a/2/CL/A/0/14 Lusaka registered on 29th October, 2012 (Exhibit "**BWC1")** in the affidavit in support. In my considered view, this secured the first loan facility as the date of registration was before the second loan facility.

Based on the Applicant's application and reliefs sought, I now turn to determine the legal relationship between the parties, and whether it is that of a mortgagor and mortgagee. The principle of the law relating to the mortgagor/mortgagee relationship is laid down in a plethora of authorities. A person may lend money to another without any form of security for the debt, or may demand some security for the repayment of the money. In the former case, the lender has a right to sue for money if it is not duly paid, but that is all and if the borrower becomes insolvent because the lender has a claim to the security which takes precedence over other creditors.

In so determining, I have to examine what a mortgage is. As stated in the case of **Stanley v Wilde (7) -**

> **"the essential nature of a mortgage in its traditional form is that it is a conveyance of a legal or equitable interest in property with a provision for a redemption that is that upon payment of a loan or the performance of some other obligation stipulated in the mortgage, the conveyance shall become void or the interest shall be re-conveyed. The borrower is known as the "mortgagor" and the lender as the "mortgagee".**

In Snell's Equity, paragraph 34-02 a mortgage is defined as follows at page 778-

> **"A mortgage is a conveyance of some interest on land or other property as a security for the payment of a debt or the discharge of some other obligation for which it is given. Where a legal estate is transferred, whether because the mortgagor has merely an equitable interest, or because he uses a form insufficient for the transfer of a legal interest, the mortgage is called an equitable mortgage. On satisfying the obligation in respect of which the mortgage was given the mortgagor has a right to redeem, that is to recover the full ownership in the property...."**

In order to determine the status of the property as to whether it created a mortgage, **Snell's Equity** at paragraph 25-22 at page 788 states as follows:

> **"If the parties deliberately abstain from any attempt at conveying a legal estate and agree for a mortgage effectual in equity only, the resulting mortgage will be equitable. So also a purported**

**attempt to create a legal mortgage which fails for some lack of formality will be treated in equity as an agreement to create a mortgage and on the principle that equity treats as done that which ought to be done, such an agreement will ordinarily be treated as creating an equitable mortgage."**

Paragraph 35-20 at page 788 goes further to state that:

***"Where a mortgage is created but the mortgagee gets no legal estate, his mortgage is an equitable mortgage. This will occur either because the mortgagor has not only an equitable interest or because the mortgage is not created with the formalities required for a legal mortgage."***

The intention of the parties is unambiguous in Clause 1 of the second facility letter and states that:

**"The borrower shall secure the repayment of the loan herein by way of providing security to the lender."**

The condition precedent to the loan facility was to secure the repayment of the loan by providing security to the Applicant and this can be construed from the wording of both the first and second loan facilities couched in substantially identical terms.

Based on the authorities cited aforesaid, I find that the legal formalities to create a legal mortgage for the second loan facility was not effected by the parties. The question then was why did the Applicant retain possession of the title deeds, and if this in itself created an equitable mortgage? In my considered view, I find that an equitable mortgage was created. I am fortified in my finding by

the case of **Magic Carpet Travel and Tours v Zambia National Commercial Bank (8)** where it was held that an equitable mortgage is created at common law by the mere deposit of title deeds. To buttress this position, the Learned Authors of **Halsbury Laws, of England, 3rd Edition Volume 25** at page 168 stated that -

> **"A mere deposit of title deeds upon an advance, with intent to create a security hereon 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."**

The Respondent deposited the title deeds when he executed the first loan facility and there is no evidence on record to show whether the legal mortgage was discharged or not, and the continued possession of the title deeds by the Respondent after settlement of the first loan facility. I agree with the Learned Authors of **Halsbury Laws of England**, that the fact of possession of the title deeds raises the presumption that the title deeds were deposited by way of security in respect of the second loan facility.

Arising from my findings of an existence of an equitable mortgage, the remedies available under an equitable mortgage were confirmed in the case of **Kasabi Industries Limited vs Intermarket Banking Corporation Limited (8)** where the Supreme Court held that -

> **" It is clear that an equitable mortgage 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 property must be conveyed to the mortgagee by the mortgagor unconditionally."**

I am guided by the Supreme Court in **Kasabi Industries Limited vs Intermarket Banking Corporation Limited (8)** that the property must be conveyed to the mortgagee by the mortgagor unconditionally.

In determining the issue on the applicable interest rate, the relevant clause in the second facility letter states as follows -

"**1. The Lender shall charge an interest of 18% per month or part thereof on the facility;**

**2. The Borrower shall pay arrangement fee of K50,000.00 Or 2% of the credit whichever is higher."**

Counsel relied on the cases of **Union Bank v Southern Province Co-operative Marketing Union (1)** and affirmed in **Pneumatic Tyre (4)** which referred to compound interest being applicable where there is agreement, and this was based on a clause in the legal mortgage ("**BWC1**"). The Respondent argued that compound interest was not chargeable or agreed to under the second loan facility. A perusal of the statement of accounts shows that on 14th August, 2013, a balance of ZMW4,367.21 was owing which has now escalated to ZMW240,470.35 over a period of three years. Arising from my earlier finding that there is only an equitable mortgage, the issue of compound interest does not arise as the legal mortgage

contained a clause that compounded interest. In my considered view, the claimed amount is therefore unconscionable, and flies in the face of the second loan facility where the applicable interest rate is 18% per month or part thereof. I find that any other interest rate chargeable on the Respondent's account falls outside the agreed terms and conditions of the second facility letter. I therefore concur with the Respondent that compound interest cannot be charged as it was never agreed to in the second facility letter.( Exhibit **"JGM2"**).

The Respondent argued that penal interest is illegal and null and void. The Supreme Court in the case of **Investrust Bank Plc v Alice Sakala T/A Matunga Enterprises (9)** stated that-

> **"Penal interest is a more extraordinary or unusual type of interest than compound interest.**
>
> **Penal interest is what we depicted as an extravagant and unconscionable sum and is not to be entertained at law"**

Penal interest is in fact frowned upon by the law. Therefore, if any penal interest was charged on the Respondent's loan facility, this should be struck out for being unconscionable, and contrary to the terms of the second facility letter.

In addressing the issue as to whether the Applicant complied with the default notice of demand pursuant to the second facility letter, the relevant clause states as follows -

**" In the event of default, the Lender shall have the following remedies:**

**(b) place a lien on the personal assets of the borrower that have been pledged as collateral; that upon the lender giving 7 days notice to exercise his powers of sale, he shall without prejudice to any of the borrowers' rights be at liberty to sale the property pledged upon the expiry of such notice.**

From the wording of the default clause and in the absence of a legal mortgage, the Applicant does not possess the power of sale under the equitable mortgage and the stated clause is unenforceable as enunciated in the case of **Kasabi Industries Limited vs Intermarket Banking Corporation Limited**.

In view of my findings, I direct and Order as follows:

1. That the Applicant shall recalculate the interest rate at the agreed 18% per month and any compound or penal interest charged shall be struck out. The Applicant shall submit a recalculated statement of accounts to the Respondent within 10 days from the date of Judgment. The short term deposit rate shall apply from date of the Originating Summons to date of Judgment. Thereafter the lending rate as determined by Bank of Zambia shall apply until full settlement.

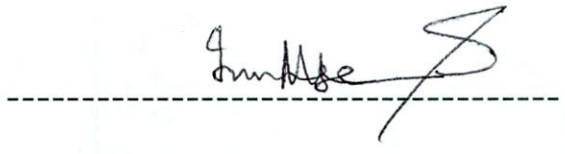
2. In default, the Applicant shall be at liberty to foreclose on the mortgaged property being Stand No 110a/2/CL/A/0/14 Lusaka and the Respondent shall convey the mortgaged

property to the Applicant unconditionally, and in default, the provisions of Section 14 of the **High Court Act, Cap 27 of the Laws of Zambia** shall be invoked wherein the Registrar shall execute the Deed of Transfer. Once foreclosed the Applicant shall take possession.

3. Costs are awarded to the Applicant and in default of agreement to be taxed.

*Leave to appeal is granted.*

Dated at Lusaka the 21st day of December, 2016



**HON JUSTICE IRENE Z MBEWE**

**HIGH COURT JUDGE**