IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO.133/2015
SCZ/8/67/2015

BETWEEN:

INTERMARKET BANKING CORPORATION ZAMBIA LIMITED **Appellant**

AND

COURTYARD HOTEL LIMITED **Respondent**

AND

SCZ/8/187/2015
Appeal No. 139/2015

BETWEEN:

COURTYARD HOTEL LIMITED **Appellant**

AND

INTERMARKET BANKING CORPORATION ZAMBIA LIMITED **Respondent**

Coram: Hamaundu, Malila, and Kaoma, JJS
On the 3rd November, 2015 and 22nd March, 2017

For the Appellants : Mr L. Zulu, Messrs Tembo Ngulube & Associates
For the Respondent : Mr M. Zulu and Mr T. Zimba, Messrs Makebi Zulu & Associates

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JUDGMENT

Hamaundu, JS, delivered the Judgment of the Court:

Cases referred to:

1. **Cheltenham and Gloucester Building Society v Norgan [1966] 1 W.L.R 343,**
2. **Target Home v Clothier and Another [1994] 1 All. E.R. 349**
3. **National Provincial Building Society v Lloyd [1996] The Times, 24**
4. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited)(In Receivership) v Hyper Food Products & 2 Others [1999] ZR 124.**
5. **Sandy Kawayo, Kawayo Enterprises Limited v First Alliance Bank, SCZ, Appeal No. 155 of 1997**
6. **Zambia Consolidated Copper Mines Limited v Mutale [1993–1994] ZR 94.**

In this appeal, the parties shall be referred to by their designations in the appeal that was filed first. Hence, we shall refer to Intermarket Banking Corporation Zambia Limited as the appellant while Courtyard Hotel Limited shall be referred to as the respondent.

The appellant and the respondent have brought one appeal each, arising from the same matter. The first appeal is by the appellant against an order that permitted the respondent to pay the judgment sum in instalments. The second appeal is by the respondent against a subsequent order by the court below which struck out an interlocutory made by the respondent.

The facts leading up to these appeals are these:

In 2010, the appellant granted the respondent a loan facility in the sum of K4.5 billion (unrebased). That loan was secured by a mortgage over Lot No. 37725/M Ndola. In a period spanning two years, the respondent went back to the appellant and obtained further loan facilities on three other occasions. The third and final further facility granted to the respondent was in June, 2012 for the sum of K5,654,062,073 (unrebased). For this loan, the respondent provided security in the form of a second debenture on all its assets

and a mortgage on sub-division B of Lot No.16609/M Chibombo. The security was said to have secured a round sum of K6 billion.

The respondent defaulted in its repayments. The appellant commenced a mortgage action; claiming a re-based sum of K6,273,795.38 and the usual reliefs pertaining to enforcement of the securities created, namely; foreclosure, possession and sale. The respondent disputed the sum claimed but admitted to having borrowed a sum of K5,654,062.10 (rebased), out of which the respondent claimed to have paid back the sum of K2,705,500 (rebased). This prompted the appellant to apply for judgment on admission on the sum representing the difference between the sum of K5,654,062.10 admitted to have been borrowed and the sum of K2,705,500 said to have been paid. The difference was K2,948,562.10. The court below entered judgment in that sum.

The respondent then applied to pay the judgment sum in instalments of K20,000 (rebased) per month. The appellant vehemently opposed that application; arguing that, with such instalments, the respondent would take twelve years to re-pay a loan which should have been paid within thirty-six months.

In a ruling dated the 3rd November, 2014, the court below granted the application on the ground that the purpose of the loan

facility was to finance the respondent's project. The court went on to say that, in its view, the appellant should rather see the project to its completion than to force the respondent to fail to re-pay the loan completely.

The appellant appealed against that ruling, advancing four grounds of appeal, namely;

(i) **that the court below erred when it allowed payment of a judgment sum in instalments which would take twelve and a half years to liquidate the sum, when the loan, itself, was to be re-paid in thirty-six months;**

(ii) **that the court below erred in allowing a repayment period which was in conflict with decided cases;**

(iii) **that the court below erred in that, by allowing payment in instalments, it re-wrote the loan agreement, and;**

(iv) **that the court below erred in allowing payment in instalments over such a long period when the law and authorities stipulate what period is reasonable.**

In the meantime, the respondent continued remitting to the appellant every month the sum of K20,000. On the 8th April, 2015, the respondent took a cheque for that amount to the appellant's advocates. The advocates rejected the cheque on the ground that they had already filed into court a notice of default the previous day after having observed that the respondent had not made any payment on the 3rd April, 2015 when the instalment was due. The

notice stated that, because of the respondent's default, the whole amount had become due.

The respondent paid the sum of K20,000 into court and applied to set aside the notice of default; arguing that the 3rd April, 2015, fell on a holiday, being the beginning of the Easter holidays which ended on the 6th April, 2015. The appellant opposed the application and argued that, once there was default, the whole amount owing became due; the number of the days of the default being immaterial. On the return day for that application, that is the 26th June, 2015, the respondent and its advocates did not attend the hearing. The court, then, struck out the application and discharged the order of stay of execution which it had earlier granted pending hearing of the application. The appellant issued a writ of possession with respect to the mortgaged property and advertised them for sale.

The respondent appealed against the order striking out its application, advancing only one ground, namely; that the court below erred in law when it proceeded to dismiss the matter and discharge the order staying execution.

The court below proceeded with the main mortgage action. In the end, the court below held that the appellant was entitled to

judgment on the sum of K7,679,654.62, less the amount that comprised the judgment on admission. The court, however, went on to find that the whole loan should have been placed in a *"non-accrual"* status; meaning that, from that point, charging of interest on the loan should have been frozen. Consequently, the court below made the following order, among others;

> **"1. I order that the loan account as claimed by the applicant be reconciled to reflect the** *non-accrual* **status of the loan and a statement be provided to the respondent; together with the original instructions of electronic transfers that were done over the period 2010 to 2011, and consolidate the loan account so as to determine the balance as at the date of the originating process, clearly indicating the balance after taking into account the period the loan was in** *non-accrual* **status."**

The court below went on to enter judgment on the amount that would be found outstanding after the reconciliation. Then the court ordered the judgment sum to be paid within six months, in default of which the appellant would be at liberty to foreclose and sell the mortgaged property.

The appellant argued the first and second grounds of appeal together and, also, the third and fourth grounds together.

The arguments in the first two grounds revolved around the court's equitable jurisdiction to interfere with the contractual rights of a mortgagee. We were referred to the following cases,

(i) **Cheltenham and Gloucester Building Society v Norgan**[1]

(ii) **Target Home v Clothier and Another**[2]

(iii) **National Provincial Building Society v Lloyd**[3] and

(iv) **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited)(In Receivership) v Hyper Food Products & 2 Others**[4]

Learned counsel for the appellant relied on these cases to support his argument that, at common law, courts have only a limited jurisdiction to grant relief to a mortgagor in default against the mortgagee's right to pursue his remedies of foreclosure, sale or possession. That the court can only postpone the right for a short time to allow a mortgagee to pay in instalments if that can be done within a reasonable time and if there is a reasonable prospect of that occurring.

In the third and fourth grounds, learned counsel raised issue with the court below on two areas; first, with the court's granting to the respondent a repayment period of over four times the period that was agreed in the loan agreement. Secondly, with the lower court's holding that the long period of re-payment that it granted to the respondent was justified because the appellant had not suggested an alternative period.

On the first issue, learned counsel argued that by ordering a repayment period that exceeded the period in the loan agreement, the court below, essentially, re-wrote the agreement.

On the second issue, learned counsel argued that a judgment creditor is not required to propose an alternative period of payment in instalments: It is for the judgment debtor to make out a good case for payment in instalments which can be considered sufficient reason or special circumstances to deny the judgment creditor his right to immediate payment. For that argument, we were referred to the case of **Sandy Kawayo, Kawayo Enterprises Limited v First Alliance Bank**[5].

With those arguments, we were urged to allow the appellant's appeal.

In response, learned counsel for the respondent submitted that the instalment of K20,000 per month ordered by the court below was merely the minimum sum. There was room for the respondent to pay a higher sum.

Responding to the appellant's argument in the first two grounds of appeal, counsel for the respondent argued, in the main, that in determining the exceptional circumstances that would allow for an extension of repayment of a loan, the court should ask itself

such questions as what the purpose of the loan was. Counsel referred us to the questions raised in the case of **Cheltenham and Gloucester Building Society v Norgan**[1] which was cited by the appellant as well. It was then submitted that the court below did address its mind to those questions and its decision was guided by the answers to the questions. Counsel also relied on another of the cases cited by the appellant; **National and Provincial Building Society v Lloyd**[3] to support his argument that possession of mortgaged property may be deferred where there is evidence that the mortgagor is likely to be able to pay the sums due within a reasonable time.

Responding to the appellant's arguments in the third and fourth grounds, counsel submitted that the court below did not re-write the loan agreement but simply made findings of fact from the respondent's application to pay in instalments; and that one such finding of fact was that the respondent was able to pay. According to learned counsel, the findings were supported by the evidence and cannot, therefore, be interfered with by this court. To support that argument we were referred to the case of **Zambia Consolidated Copper Mines Limited v Mutale**[6].

It was further submitted that **Order 37 Rule 9** of the **High Court Rules, Chapter 27** of the **Laws of Zambia** empowers the High Court to make an order that a money judgment be paid in instalments. Counsel argued that, in this case, the court below quite rightly exercised the discretion it had under that Rule.

With those arguments we were urged to dismiss the appellants appeal.

We wish to deal with the appellant's appeal right away as it may affect the respondent's appeal.

In our view, the appellant's appeal goes beyond the issue as to whether or not a repayment period of over twelve years was reasonable. It questions the propriety of ordering payment in instalments of the admitted sum, as we shall demonstrate.

This was a mortgage action where the appellant alleged that the respondent owed a certain sum of money on the mortgage and wanted to enforce the security by way of foreclosure or sale. In the case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) v Hyper Food Products Limited & others**[4], two of our holdings state as follows:

"(iii) In the exercise of its equitable jurisdiction, the court has

long been entitled to interfere with the contractual rights of the mortgagee, to the extent of enlarging time even where there is foreclosure or suspending orders for possession or postponing the alternatives if there are reasonable prospect that monies due can be paid within a reasonable time.

(iv) It is not contrary to law or to the rules, for the court to exercise its equitable jurisdiction of affording relief where a judgment debtor can pay within a reasonable time, even if this results in fettering the judgment creditor's freedom of inflicting a remedy of their own choice or preference in a mortgage action"

This means that, in a mortgage action, even after the mortgagee has proved that money is owed on the mortgage, the court can still exercise its equitable jurisdiction to interfere with the mortgagee's right to enforce the securities by extending the right of redemption for a reasonable period, if there are reasonable prospects that the money owed can be paid within a reasonable time.

In this case the appellant alleged and sought to prove that the respondent owed a sum of K6,272,799.36. Even though part of it was adjudged to have been admitted by the respondent, the appellant was still desirous to prove that the respondent owed a sum of K6,272,799.36; and not just the sum that was admitted. In

the end the court was to determine whether what the respondent owed on the mortgage was only the sum it admitted or the sum claimed by the appellant or, indeed, any other sum in between. On whatever sum it would find due, the court was entitled to exercise its equitable jurisdiction to extend the respondent's right of redemption.

In this case the court below did not adopt that approach. Instead, as we have shown, the court severed the admitted sum from the rest of the claim and ordered it be paid in instalments spanning over twelve years. On the other hand, with regard to what will be found to be due on the disputed amount, the court afforded the respondent a relief of only six months before allowing the appellant to enforce the security. That was absurd because both the admitted sum and that which was disputed are one and the same money owed on the mortgage. In our view, therefore, after judgment on the admitted sum was entered, the court below should have waited for the conclusion of the mortgage action in order to ascertain the actual amount that was owed on the mortgage before deciding how much relief it would give to the respondent in exercise of the court's equitable jurisdiction. In other words, the court below should not have entertained the respondent's application to pay the

admitted sum in instalments. Doing so was error on its part. On those grounds, we allow the appellants appeal and set aside the order to pay the admitted sum in instalments. Instead, the admitted sum will paid until after the reconciliation exercise, when the actual amount owed on the mortgage will be determined.

Coming to the respondent's appeal, it is clear that had the court below not entertained the respondent's application to pay the admitted sum in instalments, the respondent's appeal would not be before us. In view of what we have said and the order that we have made in the appellant's appeal, the respondent's appeal is doomed. We, therefore, dismiss it.

All in all, the appellant will have the costs of both appeals.

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila SC.
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE