

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0568

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

FIRST ALLIANCE BANK



PLAINTIFF

AND

BASE PROPERTY
(Sued as Customer)

1ST RESPONDENT

ALFRED CHEWE
(Sued as Mortgagor and Guarantor)

2ND RESPONDENT

NAKWETI MBOMA
(Sued as Guarantor)

3RD RESPONDENT

Before the Hon Lady Justice Irene Zeko Mbewe

For the Applicant : *Mr M.K Hachumi of Messrs M K Hachuni and Associates*

For the 1st Respondent : *Mr E K Mwitwa of Messrs Mwenye and Mwitwa Advocates*

J U D G M E N T

Cases referred to:

1. *Wilson Masauso Zulu v Avondale Housing Project* [1982] ZR 172
2. *Mohamed v Attorney-General* [1982] ZR 49
3. *Reeves Malambo v Patco Agro Industries Limited* SCJ No 20 of 2007

Legislation Referred To:

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

Other Works Referred To:

1. *Halsbury Laws of England, Volume 3 (1), 4th Edition*

The Applicant on 14th December 2016 commenced an action by way of an Originating Summons pursuant to **Order 30 Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia**. The Applicant is claiming for the following reliefs against the Respondents:

- (a) *Payment of all monies contractually agreed and interest due and owing to the applicant under an overdraft facility which amount now stands at K5,864,301.02*
- (b) *That the Third Party Legal Mortgage be enforced by foreclosure on and sale of the aforesaid mortgaged property.*
- (c) *The 2nd and 3rd Respondents as Guarantor be ordered to honour their guarantees*
- (d) *Contractually agreed interest*
- (e) *Any other relief that the Court may deem fit.*
- (f) *Costs.*

There is an affidavit in support of the Originating Summons sworn by Steven Zulu the Credit Manager in the Applicant Bank. It is deposed that by way of a facility letter dated 28th February 2011 the Applicant advanced the sum of US\$200,000 to the 1st Respondent which was duly executed by both the Applicant and the 1st Respondent herein (**Exhibit "SZ-2"**). The 1st Respondent's duly executed a Board Resolution authorising the borrowing. The affidavit evidence shows that the said borrowing was secured by a Third Party Mortgage over Stand 36998, Lusaka (**Exhibit "SZ3-4"**), a Further Charge of US\$150,000 (**Exhibit "SZ-6"**) and a personal guarantee executed by the 2nd and 3rd Respondent (**Exhibit "SZ-7"**).

The affidavit shows that interest was chargeable on the credit facilities. That the credit facilities was on diver dates converted to an overdraft facility which expired and has not been serviced to date and continues to accrue interest and that the facility as at 23rd November 2016 now stands at K5,864,301.02 as shown on the statement of account (**Exhibit "SZ-8"**). That despite several reminders, the 1st Respondent neglected to liquidate the amount

owing whilst the 2nd and 3rd Respondent failed to honour their guarantees.

There is an opposing joint affidavit deposed to by Alfred Chewe and Nakweti Mboma who are both Directors in the 1st Respondent Company filed into Court on 29th December 2016. The gist of the evidence is that the deponents deny ever applying for or having obtained any overdraft facility from the Applicant and are unaware of the terms or details of the alleged overdraft and to whom it was granted. The deponents dispute that the 1st Respondent or either of them is indebted to the Applicant in the alleged sum of K5,864,301.02 in respect of the purported overdraft.

The Applicant filed an affidavit in reply dated 26th January 2017 where it is deposed that it is inconceivable that the Respondents deny the existence of an overdraft facility and in this respect exhibited correspondence between the parties confirming the dealings between the parties (**Exhibit "SZ1-15"**). That the denials by the Respondents fly in the face of the documents exhibited by the Applicant in support of the application.

At the hearing the parties relied on the respective affidavits, skeleton arguments and made oral submission. Counsel for the Applicant submits that US\$200,000 was advanced to the 1st Respondent which was subsequently converted into an overdraft. It was argued that the 2nd Respondent as Managing Director of the 1st Respondent referred to overdraft facilities in its correspondence with the Applicant. That the overdraft facility went into debit balance and remains unpaid.

In response, Counsel for the Respondents argues that the Applicant is required to prove its claim on a balance of probabilities and has an obligation to bring before Court all relevant documents to prove the claim. That the facility extended to the 1st Respondent is denominated in United States Dollars whilst the statement of account is denominated in Zambian Kwacha. Counsel for the Respondents argues that there is no explanation from the Applicant as to how this amount was computed, the exchange rates used and how it escalated from US\$200,000 to K5,800,000. Counsel concedes that there are security documents showing a borrowing of K1,500,000 as well as US\$350,000 secured by the mortgaged

property. That the documents provided by the Applicant do not show whether these amounts were advanced to the 1st Respondent and if so when and how. Counsel for the Respondents argues that there is clearly a mix up of various transaction between the parties as there is a loan facility and overdraft facilities in Zambian Kwacha. Counsel for the Respondents submits that there is no proper explanation as to how the account held by the 1st Respondent with the Applicant escalated to K5,800,000 as at 29th November 2014 when there was a balance of K3,092,476.66 on the 1st Respondent's account. Counsel for the Respondents argues that the 2nd Respondent informed the Applicant of a deposit of US\$600,000 into his personal account to cover the facilities availed to the 1st Respondent and that that there is no evidence to show how the US\$600,000 was applied towards the overdraft facilities availed to the 1st Respondent. Counsel for the Respondents argues that the expectation that any borrower would have had is that between November 2014 and December 2015 the Applicant would have shown how the debt was growing. Counsel for the Respondents in support of the proposition that he who alleges must prove relied on the case of **Wilson Masauso Zulu v Avondale**

Housing Project Limited¹, Mohamed v Attorney-General². It is Counsel for the Respondents' contention, that the order of foreclosure and sale of the mortgaged property as well as the other reliefs should fail due to insufficient evidence.

In response, Counsel for the Applicant submits that the issues raised by the Respondents are not pleaded and cannot be introduced in submissions. Counsel for the Applicant argues that reference to the request for balances is not an issue as documents availed show transactions between the parties following the Respondents blatant denial that any business relationship existed between the parties. Counsel for the Applicant argues that it is evident from correspondence between the parties that at one point they dealt in United States Dollars and later converted to Kwacha.

I have considered the affidavit evidence and oral submissions of both Counsel and the authorities drawn to my attention.

The issues for determination are as follows:

1. Whether or not the Applicant is entitled to the reliefs claimed.
2. Whether or not there was a switch from a loan facility to an

overdraft facility and a conversion from United States Dollars to Zambian Kwacha.

It is common cause that the Applicant availed the 1st Respondent a credit facility of US\$200,000 on 28th February 2011, an additional limit of K1,000,000,000, (One Billion Kwacha un-rebased) US\$350,000 secured by a Further Charge, and the sum of US\$350,000 secured by a second Further Charge. According to the facility letter of 28th February, 2011 the expiry date of the facility was 24 months from date of loading. The repayment of the loan facility was expected from business receipts together with interest at 16% calculated on a daily outstanding balances and debited to the account monthly on a compounded basis.

It is common cause that a Third Party Mortgage was created over Stand 36998 Lusaka, and a Further Charge registered at Lands and Deeds on 11th July 2012 for an additional amount of K1,500,000 (One Billion Five Hundred Kwacha un-rebased) in addition to US\$350,000 with interest charged at 18% calculated on daily outstanding balances and debited to the 1st Respondent's accounts monthly on a compounded basis. It is not in dispute that the 2nd

and 3rd Respondent guaranteed the loans up to the sum of US\$200,000 by way of a guarantee dated 4th March 2011.

The Applicant's claim is predicated on **Order 30 Rule 14 High Court Rules Cap 27 of the Laws of Zambia**. Counsel for the Respondents argues that the Applicant is not entitled to any of the reliefs sought.

The Respondents feign ignorance as to the existence of any overdraft facilities. Paragraph 6 in the Applicant's affidavit in support of the Originating Summons states as follows:

"6. That the credit facility was on diver debts converted to an overdraft facility which has since expired and has not been serviced to date and the same has continued to accrue interest with the amount outstanding now being K5,864,301.02. Now produced and marked "SZ 8" is the current statement of outstanding amount as at 23rd November 2016".

In response to this averment, the Respondents in paragraph 5 of the Respondents joint affidavit in opposition to the Originating Summons states that:

“5. That we dispute the contents of paragraph 6 of the affidavit in support and assert that neither the 1st Respondent/company nor any of us ever applied for or obtained any overdraft facility from the applicant and accordingly are unaware of the terms or details of the alleged overdraft facility and to whom it was granted”.

As to whether there 1st Respondent was availed overdraft facilities, by the Applicant, I have meticulously studied all the documents on record. It is curiously noteworthy that in the affidavit in reply, there is an undated handwritten letter addressed to the Manager of the Applicant Bank and signed by the 2nd Respondent received on 25th August, 2014 wherein reference is made to an overdraft facility by the 2nd Respondent (**Exhibit "SZ-9"**). The relevant part of the letter is reproduced as follows:

"With the view to pay the overdraft facility we intend to sell the said property"

I find that on 20th March 2014, a temporary overdraft facility was availed to the 1st Respondent with a limit of K2,000,000.00 for a period of up to 20th June 2014, and interest rate of 9% above BOZ policy Rate of 10.25% effectively translating to 19.25% per annum. On 12th August, 2014 a temporary overdraft facility of K2,400,000 (un rebased) for a period up to 4th December 2014 was availed with an interest rate of 12% above BOZ Policy Rate of 12% effectively translating to 24% per annum.

In the overdraft facility letters dated 20th March 2014 and 12th August, 2014, the security clause is couched in substantially identical terms as follows:

" The existing security held by the Bank for your facilities will be extended to cover the above excess, which please note."

We also require you to execute our security documents (enclosed) by authorised signatories duly supported by appropriate Board Resolution."

In both letters, there is the word "*Accepted*" handwritten with the 2nd Respondent's signature. I find that this signifies and proves that the 1st Respondent accepted the terms of the overdraft facilities.

In the Applicant's affidavit in reply, a perusal of a letter dated 24th November 2014 signed by the 2nd Respondent as Managing Director of the 1st Respondent, is addressed to the Applicant, and makes reference to an existing overdraft of K3,000,000.00 expiring on 5th December 2014 (**Exhibit "SZ 3"**). The letter is reproduced as follows:

"24th November 2014

Dear Sir,

RE: APPLICATION OF RENEWAL OF THE OVERDRAFT

FACILITY ON ACCOUNT NUMBER 0000102155009

We would like to renew our Overdraft Facility of K3,000,000.00 (Three Million Kwacha Only) which expires on the 5th December 2014.

Enclosed are management Accounts ending 30th June 2014, Cashflow Projection and copy of the Pacra printout.

Your favourable consideration of the matter will be highly appreciated.

**Yours Faithfully
BASE PROPERTIES DEVELOPERS LIMITED**

**Alfred Chewe (Signed)
MANAGING DIRECTOR**

As further proof of the existence of overdraft facilities, in the Applicant's affidavit in reply is a request from the 1st Respondent for an increase in the overdraft facility to K4,000,000 (Four Million Kwacha) dated 11th September 2015 (**Exhibit "SZ8"**). This is clearly an indication that the Applicant availed the 1st Respondent overdraft facilities on diver dates as stated in the preceding paragraphs.

It is abundantly clear that the 1st and 2nd Respondent were aware of the overdraft facilities as evidenced by the documentary evidence on record which the Respondents chose not to bring to the attention of the Court. I find that the Respondents are blatantly insincere and in this respect concur with Counsel for the Applicant that this denial flies in the face of documentary evidence on record. There is no doubt in my mind that overdraft facilities had been specifically

requested by the 1st Respondent and the correspondence cited aforesaid attests to the existence of overdraft facilities.

The next issue for determination is whether or not there was a conversion from the credit facility to an overdraft facility. In paragraph 6 of the Applicant's affidavit in support, the deponent avers that:

"The credit facility was on divers debts converted to an overdraft facility which has since expired and has not been serviced to date and the same has continued to accrue interest with the amount outstanding being K5,864,301.02. Now produced and shown to me marked "SZ8" is the current statement of outstanding amount as at 23rd November 2016."

According to **Halsbury Laws of England, Volume 3 (1), 4th Edition** paragraph 298:

"a customer may borrow from a banker by way of a loan or by way of overdraft. A loan is a matter of special agreement. in the absence of agreement express or implied

from a course of business a banker is not bound to allow his customer to overdraw. An agreement for an overdraft must be supported by good consideration and it may be express or implied. Drawing a cheque or accepting a bill payable at the banker's where there are no funds sufficient to meet it amounts to a request for an overdraft."

In this case, the overdraft was expressly created by the parties. In determining whether there was a switch from loan facilities to overdraft facilities, this is discernable this from the two letters dated 20th March 2014 and 12th August 2014 in the Applicant's affidavit in reply. **(Exhibit "SZ2 and SZ11")**. These letters clearly confirm that there were overdraft facilities availed independently of the loan facilities. It goes without saying that a cardinal obligation of a borrower such as the 1st Respondent is to repay the money lent by the Bank. Should the customer of the Bank fail to repay the overdraft or exceed the limit, the Bank has the right to demand payment which is what they have done.

Therefore the next question to address is, does the claimed amount of K5,864,301.02 include any amounts from the loan facilities?

Having found that overdraft facilities were availed to the 1st Respondent, the Applicant in a letter addressed to the Corporate Relationship Manager Cavmont Bank confirms the outstanding amount of the overdraft including interest as at 29th November 2014 in respect to the 1st Respondent's Account number 0102155009 as follows:

"Kindly note that the aforementioned account reflected the debit balance of K3,092,476.66 as at 29th November 2014 exclusive of interest payable with effect from 01.11.2014"

The confirmation of the said balance was at the 1st and 2nd Respondent's behest. Though the Respondents argue that they are not aware of any overdraft facilities, curiously they seek an explanation as to how the overdraft facility escalated from a balance of K3,092,476.66 as at 29th November 2014 to the claimed sum of K5,864,301.02. In this respect, the Applicant exhibited a bank statement for the period 1st September 2016 to 21st November 2016 and from 1st December 2015 to 23rd November 2016. I find that this

information gives a clear picture as to the 1st Respondent indebtedness to the Applicant at the material time.

Counsel for the Respondents canvassed the argument that the Applicant has not shown how the US\$600,000 in the 2nd Respondent personal account was applied towards reducing the 1st Respondent's indebtedness. Counsel for the Applicant objected to this argument as it was not in the affidavit in opposition. Suffice to say, by the parties course of arguments, I find that it indirectly invited this Court to decide on the issue. A perusal of the record shows that on 19th October 2015, the 2nd Respondent as Managing Director of the 1st Respondent wrote to the Applicant as follows:

Dear Sir,

Re: BASE PROPERTY DEVELOPERS BANK OVERDRAFT

I wish to inform you that I have arranged to deposit an amount of US\$600,00.00 with your bank in my personal account. I have sold the property which was mortgaged to you as security against the overdraft facility extended to Base Property Developers.

I request you to release the title deeds of the property to:

Shamwana and Company

P O Box 32369

LUSAKA

The deposit of US\$600,00.00 in my personal account will be the security for the overdraft extended to Base Property developers Ltd.

Kindly write a letter to the advocates so that funds can be transferred to the details of my personal account held with your bank.

Signed by Alfred Chewe

Managing Director

Base Property Developers

I find that there is not a shred of evidence adduced showing that the US\$600,000 was ever transferred from the 2nd Respondent's personal account to the 1st Respondent's account so as to cover the overdraft facilities. The 2nd Respondent failed to advance a credible explanation as to the status of the mortgaged property.

The Applicant seeks the relief of foreclosure, possession and power of sale over the mortgaged property being Stand No 36998, Lusaka. I find that the overdraft facilities are secured by the mortgaged property being Stand No 36998, Lusaka by virtue of the common

clause which states that the existing security held by the Bank for the other loan facilities will be extended to cover the overdraft facilities. The evidence on record shows that the 1st Respondent defaulted in its repayment of the overdraft facilities. As such, the 1st Respondent has lost their right to redeem the mortgaged property. Instructive is the case of **Reeves Malambo v Patco Agro Industries Limited**³ the Supreme Court held as follows:

"A mortgagee is at liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property; and that under a legal mortgage by demise, the mortgagee becomes an absolute owner of the mortgage term at law as soon as the fixed date of redemption has passed."

Based on the documentary evidence and the authorities cited, I find that the Applicant is entitled to the remedies available to a mortgagee under a legal mortgage of foreclosure, possession and exercise the power of sale of the mortgaged property in order to realise the amount secured plus interest as agreed between the parties.

Counsel for the Respondents argues that the 1st Respondent made a request for bank statements for the period from 2011. From the record, the 1st Respondent was availed overdraft facilities as evidenced by the letter of 20th March 2014 and 12th August 2014 and as a prudent borrower did not deem it necessary to request for bank statements for a period of five years until 9th May 2016. Suffice to say, the Applicant exhibited a statement of account up to 23rd November 2016 showing the running balance.

It is incumbent on an account holder to request for periodic bank statements which will show the amount in the account, interest charged and any other charges. The Applicant too as a prudent lender should avail monthly statements to its customers in line with banking practices. In this respect, I find that the Respondents are merely blowing both cold and hot air and are trying to escape their indebtedness. I hasten to add that there is a tendency for borrowers to make varying challenges once they have borrowed and defaulted ranging from disputing the contractually agreed interest, failure to receive statement of accounts, inadequacy of demand letters to mention a few. I opine that the Courts should not be used as a

haven for defaulters, and that parties are bound by the terms of their agreements including accrued interest. The terms of the overdraft facilities in this case are clearly stated and at the material time accepted by the 1st Respondent, including the rate of interest which continues to accrue on the overdraft facility.

The Applicant seek relief against the 2nd and 3rd Respondent as guarantors. This arises from a guarantee exhibited in the Applicant's affidavit in support as " **Exhibit SZ7**". Clause 2 of the Guarantee states as follows:

"This Guarantee is to be a continuing security for the whole amount now due or owing to you or which hereafter at any time becomes due or owing as aforesaid by the Principal (including any further advances made by you to the Principal during the three calendar months period next hereinafter referred to and all interest and bank charges on and in connection with such further advances) Provided always the total amount recoverable hereon shall not exceed the sum of USD200,000 only"

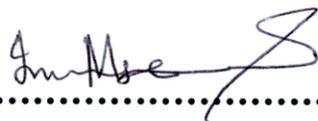
I find that from the wording of the guarantee, it is a continuing security for future amounts owing to the Applicant, and is applicable by virtue of the letter dated 20th March 2014 and 12th August 2014.

The upshot is Judgment is entered in favour of the Applicant in the sum of K5,864,301.02 plus contractually agreed interest from date of the Originating Summons to date of Judgment. Thereafter at the commercial lending rate as determined by Bank of Zambia until full payment. The 1st Respondent shall pay the claimed sum of K5,864,301.02 plus interest within sixty (60) days herein, and in default the Applicant shall foreclose, take possession and exercise the power of sale over Stand 36998, Lusaka being the mortgaged property. In the event that the sale of the mortgaged property does not extinguish the 1st Respondent's debt, the Applicant shall be at liberty to execute on the personal guarantees of the 2nd and 3rd Respondent who are liable to pay the Applicant up to US\$200,000.

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

Leave to appeal granted.

Delivered in Lusaka this 13th day of June, 2017.



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**IRENE ZEKO MBEWE
HIGH COURT JUDGE**