N THE SUPREME COURT OF ZAMBIA **APPEAL No. 006/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

COURTYARD HOTEL LIMITED	**1ST APPELLANT**
AYUB FAKIR MULLA	**2ND APPELLANT**
ZABUNISSA ISMAIL	**3RD APPELLANT**
LINK PHARMACY LIMITED	**4TH APPELLANT**

AND

FIRST NATIONAL BANK ZAMBIA LIMITED	**1ST RESPONDENT**
FIRSTRAND BANK LIMITED	**2ND RESPONDENT**

Coram: Chibomba, Hamaundu and Kaoma, JJS

On the 15th April, 2015 and the 22nd August, 2016

FOR THE APPELLANTS:	Mr. N. Nchito, SC., Messrs Nchito and Nchito
FOR THE RESPONDENTS:	Mr S. Chisenga, Messrs Corpus Legal Practitioners and Ms G. Musiani, Legal Counsel

JUDGMENT

Hamaundu, JS, delivered the Judgment of the Court

Cases referred to:

1. **Kanjala Hills Lodge Limited & Another v Stanbic Bank Zambia Limited [2012] 2 ZR, 285**
2. **Wilson Masauso Zulu v Avondale Housing Project [1982] ZR 172**
3. **Cheall vs Associations of Professional, Executive, Clerical and Computer Staff[3] (1982) All E. R. 884**
4. **Achiume v Attorney General [1983] ZR 1**

Legislation Referred to:

1. **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia**
2. **High Court Rules, Cap 27 of the Laws of Zambia, Order 30 R.14**

Works Referred to:

Cheshire, Fifoot and Furmston, The Law of Contract, 16th edition, page 694

This is an appeal against a judgment of the High Court which upheld the respondents action for payment of monies under a loan agreement and foreclosure, in default.

The background to this appeal is thus:

In September, 2011, the 1st appellant obtained a loan from the 1st respondent in the sum of US$8,000,000.00. The loan was secured by various securities, including mortgages and guarantees by the 2nd, 3rd and 4th appellants. The 1st appellant having defaulted on its repayments, the two respondents commenced a mortgage action, seeking; (i) payments of monies outstanding in the sum of US$8,405,788.69; and (ii) vacant possession of the mortgaged properties for the purpose of foreclosure and sale of the same.

According to the affidavit filed by the respondents in support of the action, the composition of the credit facility was thus: first, there was an overdraft facility in the sum of US$1,000,000.00 for the purpose of financing the working capital. Secondly, there was a loan facility in the sum of US$6,000,000.00 for the purpose of funding development, equipment, fixtures and fittings for hotels in Livingstone, Lusaka and Kabangwe. The loan was repayable over one hundred and twenty (120) months. There was to be a moratorium on repayment with regard to working capital for six months. The final draw down on the loan was to be on the 5th March, 2012. With the six months moratorium, the commencement of the repayments was on the 5th October, 2012. On the 6th June, 2012, the 1st respondent assigned its rights to the 2nd respondent. During the subsistence of the facilities, the 1st appellant defaulted on its repayment obligations, both on the loan and overdraft. The net result was that as at the 22nd of July, 2013 there was

outstanding in respect of the loan a sum of US$6,073,093.34. In respect of the overdraft, there was outstanding a sum of US$2,332,695.35. This brought the total outstanding to the sum of US$8,405,768.69. That prompted the respondents to bring this action.

According to the affidavit in opposition that was filed by the appellants, the 1st appellant had been on the verge of obtaining a loan facility in the sum of K30 billion from Barclays Bank for the completion of its projects when the 1st respondent came on the scene and represented to the 1st appellant that it could offer better loan terms. To that effect, the 1st respondent offered the 1st appellant a loan facility of US$7,000,000.00. It was an express or implied term that the loan would be disbursed within a reasonable time. Consequently, the 1st appellant turned down the offer from Barclays Bank. However, after the inducement, the 1st respondent took fifteen months to disburse the loan. That delay cost the 1st appellant dearly in terms of escalating construction and labour costs. Pleas by the 1st appellant for the loan repayments to be restructured to enable it complete construction of the remaining two hotels fell on deaf ears. Subsequently, the 1st appellant came to learn that, in fact, the **Banking and Financial Services Act, Chapter 387** of the **Laws of Zambia** did not permit the 1st appellant to lend that amount of money. Had the 1st appellant been aware of that fact, it would not have turned down the offer from Barclays Bank. Because of that misrepresentation, the 1st appellant sued the 1st respondent for damages in Cause No. 2013/HP/1080.

Instead of defending that action, the respondents commenced this action.

The 1st respondent did respond to the allegations raised by the appellants in their affidavit in opposition. According to the affidavit in reply filed by the 1st respondent, it was, in fact the 1st appellant that applied for the loan on its own volition. Because of the technical nature of the application, specialists had to be sent from South Africa to Zambia in order to clarify certain issues that the Credit Committee had raised. Consequently, it took eight weeks to assess the application.

It was further averred in the affidavit in reply that the 1st respondent did not breach the **Banking and Financial Services Act** because on the 26th September, 2011 it did apply to the Bank of Zambia for approval to grant a credit facility which was in excess of 25% of its regulatory capital. The approval was given.

The court below found the following facts as undisputed:

(i) That the 1st appellant obtained the two facilities; that is, an overdraft facility of US$1,000,000 and a loan facility of US$6,000,000.

(ii) That the appellants did not make any payment towards the two facilities: and

(iii) That the appellants had admitted default on their part.

The court below was of view that the appellants' allegations of misrepresentation and delay in disbursement of the loan were an afterthought.

The court nevertheless considered the evidence adduced on those allegations. With regard to misrepresentation, the court pointed out that the appellants, especially the 1st and 2nd appellants, had both offers from Barclays Bank and the respondent in writing and that the appellants, nevertheless, opted for the offer from the respondent. Hence, according to the court, there was no misrepresentation. On the allegation of late disbursement of the loan, the court observed that there were requirements that securities should be perfected and that these were not issues that could be achieved overnight. The court also pointed out that the loan facilities did not provide for a lump sum payment and that the disbursement of the loan in tranches over a period of eight months was, in the court's view, not unreasonable considering that this was a development loan in which the 1st appellant had to meet certain criteria in the construction phases. Alternatively, the court held that even assuming that there was delay in disbursing the funds, that was compensated by the fact that the parties re-structured the facilities on 19th March, 2012; this gave the appellants an additional moratorium of six months. The court went on to hold that on the authority of **Kanjala Hills Lodge Limited & Another v Stanbic Bank Zambia Limited**[1], the two issues raised by the appellants could never be a defence to the action. Therefore, the court below granted the respondents the relief which they sought. Hence this appeal.

Before us the appellants have advanced four grounds of appeal as set out hereunder:

(1)The court below erred in law and in fact when it found that delay in the disbursement of the loan was not a defence to the action when there was evidence that timing was of the essence in the agreement between the parties and the transaction as a whole.

(2)The court below erred in law and in fact when it found that the facilities availed by the respondents to the appellants did not provide for payment of the loan in a lump sum but for draw-down of the loan amount in tranches, which finding was not supported by the evidence on record.

(3)The court below erred in law and in fact when it found that the disbursement of the loan amount over a period of eight months was not unreasonable when the transaction was of a commercial nature and time was of the essence.

(4)In the alternative, the court below erred in law and in fact when it ordered that the judgment sum be paid within sixty (60) days when the loan availed to the appellant was meant to run for 120 months and it was clear that the respondent had induced the default of the appellant and as such could not benefit from their own default.

On behalf of the appellants, learned State Counsel, Mr. Nchito, pointed out in the first ground of appeal that the witness statement of the 2nd appellant's witness had disclosed that the witness had

told the representative of the 1st respondent that the 1st appellant could no longer sustain the project as its wage bill alone was K450,000.00 and that the 1st appellant was considering suspending the project and declaring the workers redundant until finances were available. Counsel pointed out that the witness statement did further disclose that the witness informed the 1st respondent's representative that the 1st appellant would decline the offer from Barclays Bank if the 1st respondent's representative would deliver urgently. That the representative did promise to expedite the approval and make the funding available within weeks. It was further pointed out that the witness in his statement said that the disbursement took eight months and that, as a result; the 1st appellant could not buy materials; the workers were idle and could not be paid. That the statement revealed that the witness informed the 1st respondent that the 1st appellant was having difficulties in making payments because of the delay in completion of the project.

Learned state counsel argued that the statement and its contents was evidence which was on record and showed that time was of the essence in the contract between the parties and that the delay in the disbursement of funds was a material breach of the contract which resulted in loss to the appellants. In support of that argument, learned counsel referred us to a passage in **Cheshire, Fifoot and Furmston, The Law of Contract,** where the editors state:

> **"In short, time is of the essence of the contract if such is the real intention of the parties and an intention to this**

effect may be stated or inferred from the nature of the contract or from its attendant circumstances."

State counsel argued that with the evidence that was disclosed in the witness statement,the appellants could properly plead delay in the disbursement of the funds as a defence to the action against them. State counsel further submitted that the case of **Kanjala Hills lodge and Another v Stanbic Bank Zambia Limited**[1] which the court below had relied on to dismiss the defence put forward by the appellants can be distinguished from this case. According to learned counsel, the Supreme Court in that case did not fully pronounce itself on the question of delay in disbursement of funds in that the appellants in that matter had raised that issue as a point of law in the High Court but did not appeal against the ruling that dismissed the point.

Mr. Nchito argued the second and third grounds together.

Learned state counsel submitted that the trial court's finding that the facilities did not provide for payment of the loan in one lump sum but on a draw-down basis, in tranches, was not supported by the evidence on record. To demonstrate that submission, learned state counsel pointed out that none of the loan agreements which were placed on the record provided that the disbursement of the loan would be in tranches but that what they provided was that the loan would be disbursed upon the fulfilment of certain conditions.

Learned state counsel submitted that once the 1st appellant had fulfilled the conditions, the obligation of the 1st respondent was to advance to the 1st appellant the entire loan of US$6,000,000.00. State counsel argued that, consequently, the trial judge misapprehended the facts. Relying on our holding in the case of **Wilson Masauso Zulu v Avondale Housing Project**[2] which states:

> **"The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts."**

learned state counsel urged us to set aside the trial court's finding.

Learned state counsel, further, argued that the view by the trial court that the disbursement of the loan over a period of eight months was reasonable was not correct. In support of that argument, learned counsel urged us to take judicial notice of the fact that time in business has a cost attached to it. State counsel pointed out that, in this instance, the 1st respondent's failure to advance the loan on time and in one payment resulted in the inability of the appellant to complete its construction project and begin to generate income to make the loan repayments.

In the fourth ground of appeal, learned state counsel reiterated the argument that the 1st respondent was in breach of the loan agreement by not availing the loan in one payment. State

counsel submitted that, because of that breach, the 1st respondent induced the default by the 1st appellant and cannot be permitted to benefit from its breach. For that submission learned state counsel referred us to the case of **Cheall vs Associations of Professional, Executive, Clerical and Computer Staff**[3] in which it was held:

> **"It is a basic principle of the law that no man may rely on his own wrong."**

With those submissions, learned state counsel prayed that this appeal be allowed.

In response, Mr. Chisenga, learned counsel for the respondents submitted, in the first ground of appeal that, in arguing that this court did not fully pronounce itself on the question whether delay in disbursement of a loan can be a defence, the appellants selectively quoted the case of **Kanjala Hills Lodge and Another vs Stanbic Bank Zambia Limited**[1]. Counsel cited a passage from our judgment in that case and pointed out that what we particularly said was that since that was a mortgage action brought under **Order 30 Rule 14** of the **High Court Rules, Chapter 27** of the **Laws of Zambia**, the late release of funds was not a valid excuse for the default or failure to make timely repayments.

Learned counsel argued that in any event, it was agreed by the parties that the loan had to be paid and was paid in controlled tranches given the quantum involved, the very technical nature of

the application, the perfection of security and other conditions precedent to the draw-down.

In response to the arguments in the second and third grounds of appeal, learned counsel submitted that, in fact, there was evidence that supported the finding of fact by the trial court that the disbursement was not to be made at once but in tranches, upon the fulfilment of certain conditions. According to learned counsel, that evidence was in the form of an admission by the 2nd appellant that the securities pledged were never perfected on the same day. Learned counsel agreed with the holding in the case of **Wilson Masauso Zulu v Avondale Housing Project**[2] cited by the appellants and also cited a further authority on the same subject, namely: **Achiume v Attorney General**[4] . Counsel argued, however, that the trial court's finding was supported by the evidence on record.

In the alternative, learned counsel reiterated his argument that, in any event, late disbursement of funds is not a defence to a mortgage action brought under **Order 30 Rule 14** of the **High Court Act**.

In response to the arguments in the fourth ground of appeal, learned counsel cited a passage from our judgment in the **Kanjala Hills Lodge**[1] case; particularly where we stated:

"We do not expect a prudent business person to sit back and make no payment simply because the loan has a long term repayment period." and also where we stated:

> **"The appellants having defaulted in their repayment obligation cannot hide behind the right of redemption."**

Learned counsel argued that the above pronouncements notwithstanding, there was evidence that the appellants were given more than sufficient time to take repayments. According to counsel, this was evident by the fact that the appellants even proposed a repayment plan which the respondents agreed but the appellants defaulted on their own repayment plan.

On the strength of those arguments, learned counsel urged us to dismiss the appeal.

We have considered the arguments advanced by either side in this appeal.

This appeal falls to be resolved entirely on the pronouncements we made in the **Kanjala Hills Lodge**[1] case. In that case there were arguments on behalf of the appellants that the trial court had erred when it heard and determined the action by affidavit evidence when there had been serious contentious issues. One of the contentious issues that the appellants had pointed out was their contention that the respondent had delayed in releasing the funds and that, therefore, the respondent should not have rushed to apply for foreclosure before the date for payment of the final instalment was due.

Dealing with that argument, we made the pronouncement which learned counsel for the respondent has quoted in his submissions. The following is what we said:

> **"We note that the appellants raised the issue of late disbursement of funds and the issue of the redemption date in their application to have the matter determined on a point of law. This application was dismissed on the 18th November, 2009. A perusal of the record shows that the appellants did not appeal against the said ruling. Therefore, the appellants cannot have another bite at the cherry and since this was a mortgage action brought under Order 30, Rule 14, late release of funds is not a valid excuse for default or failure to make timely payments."**(page 296)

It is clear from the above passage that we were saying that the appellants had failed to bring the issue on appeal so that it could be properly dealt with. It is clear also that we were saying that even assuming that the issue had been properly brought on appeal, we would still have held that the late release of funds is not a valid excuse for default or failure to make timely repayments. We would like to add that the foregoing pronouncement is not peculiar only to mortgage actions brought under **Order 30 Rule 14** of our **High Court Act**. It applies to mortgage actions generally.

Therefore, we agree with learned counsel for the respondents that we did pronounce ourselves fully on that principle in the **Kanjala Hills Lodge**[1] case. In view of that principle, therefore, the

first ground of appeal by the appellants is without merit and must fail.

Again, in view of the foregoing principle, the trial court's finding that the facilities provided for a drawn down of the loan in tranches is immaterial. And so is the trial court's view that disbursement of the loan over a period of eight months was reasonable. Such considerations are precluded by the principle that late disbursement of the loan is not an excuse for failure to make scheduled repayment instalments as agreed. Consequently, the third and fourth grounds of appeal must fall away on the ground that they have no effect on the appeal.

We now turn to the fourth ground of appeal.

The ground faults the trial court for giving the appellants only sixty days to pay the amounts due when the loan facility was meant to run for one hundred and twenty (120) months and it was clear that the default was induced by the respondents.

We shall deal with the second limb of the ground first. The inducement which the appellants refer to is the fact that the loan was not disbursed in one lump sum but was given in tranches. We have already dealt with that argument in the first ground of appeal where we have said that the delay in the disbursement of the loan is not an excuse for default in repayments.

The contention raised in the first limb of the ground also arose in the **Kanjala**[1] case. The following is what we said on the issue:

"We totally agree with the trial judge. The fact that the agreement between the parties provided for a default clause is clear indication that the respondent was entitled to invoke it on default. And the appellants cannot claim that they were not aware of the contents of the agreement. To argue that the default was a result of the appellant having a long business plan and their belief that they had a long repayment period is not being sincere. We do not expect a prudent business person to sit back and make no payment simply because the loan has a long term repayment period. This is tantamount to burying one's head in the sand. In our view, it is irrelevant that at the time of commencement of these proceedings, the due date was way off. The appellants having defaulted in their repayment obligation cannot hide behind the right of redemption. This view is buttressed in Atkins Court Forms Vol. 28, where the learned authors have stated at page 8 that:

'When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies'."(page 298 - 299)

We also said the following within the same judgment:

"Further, the learned authors of Megarry's Manual of the Law of Real Property, have also stated that once there is a breach of a condition which had to be complied with to keep alive the legal right of redemption, the mortgagee may commence foreclosure proceedings."(page 299)

The point to note from what we said in the **Kanjala Hills Lodge**[1] case is that once there is default on a condition, such as the default on a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to him. In those circumstances, the court, in exercise of its powers to afford the mortgagor the equity of redemption is duty-bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of his relief. The court cannot go back to the period prescribed in the agreement, whose term or terms have been abrogated.

Therefore, in this case the trial court was on firm ground when it ordered the appellants to pay the sums due within sixty days failing which the respondents were to foreclose. The fourth ground, therefore, is without merit as well.

All in all, the appeal has no merit. We dismiss it. Costs of this appeal are awarded to the respondents and shall be taxed in default of agreement.

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H. Chibomba
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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R.M.C. Kaoma
SUPREME COURT JUDGE