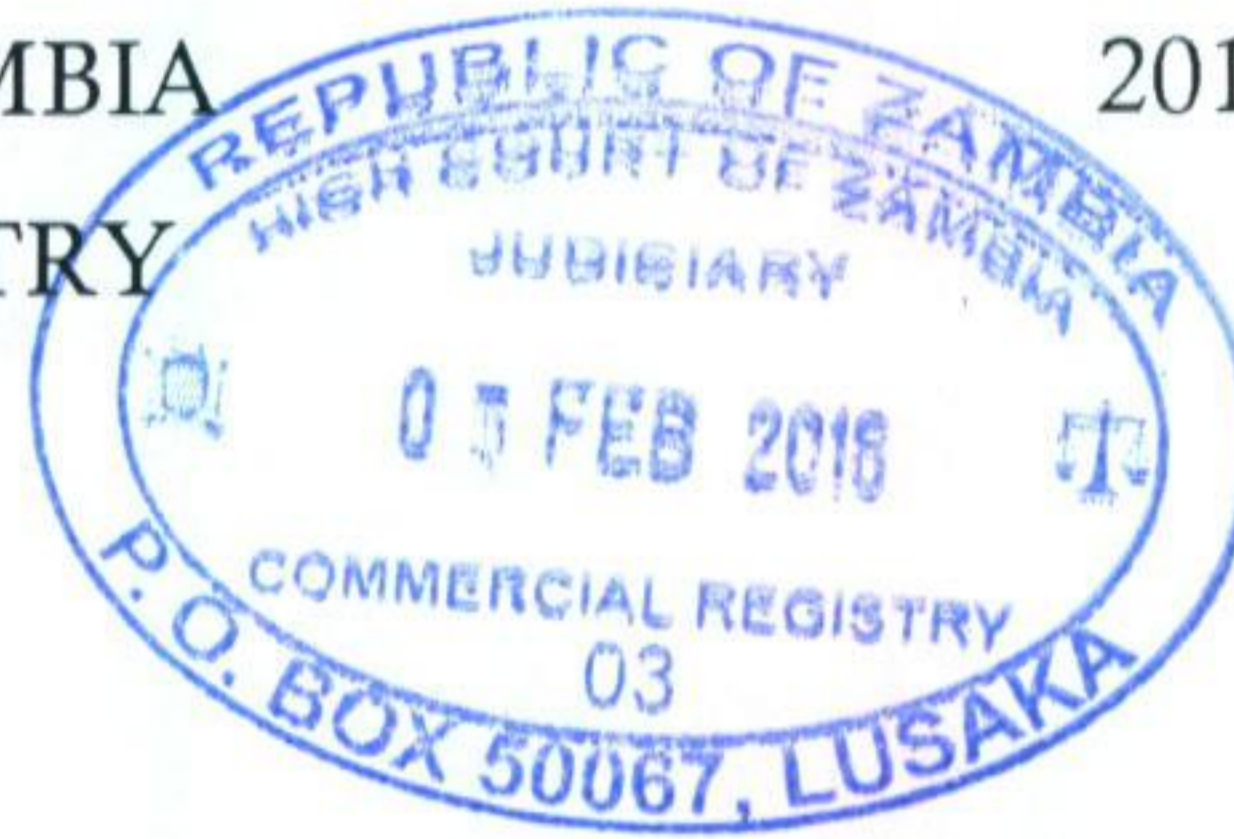


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HPC/0172



In the matter of:

Third Party Legal Mortgage relating to Stand No. 25543,
Woodlands Chalala, Lusaka and Lot No. 5690/M, Market
Lusaka in the Lusaka Province of the Republic of Zambia

BETWEEN:

INTERMARKET BANKING CORPORATION (Z) LTD

APPLICANT

AND

STRATEGIC SERVICES LIMITED
EVANS CHICHELEKO MWEEMBA

1ST RESPONDENT
2ND RESPONDENT

**BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC
AT LUSAKA IN CHAMBERS**

For the Applicant: Mr. Kalikiti
MSK Advocates

For the Respondents: Mr. Hamwela
Nchito and Nchito

JUDGMENT

Legislation referred to:

1. Order 30 Rule 14 of the High Court Rules Cap 27 of the Laws of Zambia
2. Order 88 Rules of the Supreme Court of England 1999 Edition
3. Section 4 of the Law Reform (Miscellaneous Provision) Act, Cap 74 of the Laws of Zambia

Cases referred to:

1. Union Bank (Zambia) Ltd Vs Southern Province Markets Cooperative Union, SCJ 7 of 1997 (1995/1997) ZR 207
2. Dunlop Pneumatic Tyre Company Vs New Garage and Motor Company (1815) AC. 79

This is a Mortgage action commenced by the Applicant pursuant to **Order 30 Rule 14 of the High Court Rules Cap 27 of the Laws of Zambia** as read with **Order 88 Rules of the Supreme Court of England 1999 Edition** seeking the following reliefs:-

1. Payment of K2,464,743.75, amount due under the Third Party Legal Mortgages relating to Stand No. 25543, Lusaka and Lot No. 5690/M, Lusaka.
2. Delivery up and possession of Stand No. 25543, Lusaka and Lot No. 5690/M, Lusaka.
3. Foreclosure and Sale.
4. Interest on all monies found due.
5. Further or other relief.
6. Costs.

The application was supported by an affidavit with supporting Exhibits marked "BM1" to "BM7".

The Respondents filed an affidavit in opposition sworn by the 2nd Respondent. In the said affidavit 1st Respondent admitted that the Applicant advanced him and the 2nd Respondent an Overdraft Facility in October 2014 in the total sum

of K1,600,000.00, and that the 1st Respondent was in the process of sourcing alternative funds to refinance the loan. He requested the Court to grant the Respondents time within which to finalize sourcing alternative funds to repay the loan.

In his submissions **Mr. Hamwela** for the Respondents submitted that the action was commenced five months before the expiry date of the period within which the loan was to be repaid. This was before the Cause of action arose. For this reason he requested the Court to dismiss the action for being commenced prematurely.

In reply **Mr. Katikiti** for the Applicant, submitted that notwithstanding the fact that the action was commenced prematurely, the Applicant was entitled to recover the amount due and outstanding since the Respondents were and continue to be in default of their repayment obligations. Moreover he stated that the Respondents had not made any repayments since the action was commenced, and that the Respondents were in breach of **Clause 3** of the Mortgage Deed and therefore in default. Therefore the Applicant is entitled to demand payment. He submitted that the Applicant is willing to grant the Respondents up to six (06) months within which to liquidate the amount outstanding.

In reply **Mr. Hamwela** requested the Court to exceptionally grant the Respondents a longer period within which to repay the outstanding amount as the 1st Respondent has buyers willing to purchase some of his properties. He

would be in a position to apply the proceeds from the sale of these properties to liquidate the amount outstanding and redeem the Mortgaged Properties.

Considering the submissions made by both Counsel, taking into account the affidavits filed herein, the Respondents are truly indebted to the Applicant, and the Respondents having admitted the claim have no defence. The Respondents have merely requested for time within which to source funds to liquidate the outstanding amount.

In the event, and in principle the Applicant is entitled to Judgment on the amounts outstanding.

However I have perused Exhibit "BM1" to the affidavit in support of the Originating Summons and note in **Paragraph 7:3** that, "*Interest on the Overdraft Facility will be accruing on a daily basis on the principal position of the account and becomes due and payable at the end of each month. Unsettled interest will be capitalized and interest calculated on the capitalized account balance (i.e. compounded)*".

As I stated in Cause No. 2015/HPC/0142 at page J7, the charging of compound interest flies in the teeth of the provisions of **Section 4 of the Law Reform (Miscellaneous Provisions) Act Chap. 74 of the Laws of Zambia** which prohibits the award of interest upon interest. Interest upon interest, is in effect compound interest. **Black's Law Dictionary, Seventh Edition**, defines compound interest as "*interest paid on both the principal and interest previously*

accumulated". Further the word Compound is defined as: "*putting together*", "*Combine*", "*to compute interest on the principal and accrued interest; to aggregate*", "*to make more serious*". Therefore by virtue of the above quoted provisions of the law compound interest is prohibited and therefore illegal.

Moreover in the case of **Union Bank (Zambia) Ltd Vs Southern Province Co-operative Marketing Union SCJ No. 7 of 1997 (1995/1997) ZRL 207** the Supreme Court has ruled in no uncertain terms that penal interest is certainly not part of the banking practice and custom in Zambia, and that even if there had been an agreement to pay penal interest such would be liable to be struck down for being a penalty objectionable at common law. The Supreme Court also alluded with approval to the case of **Dunlop Pneumatic Tyre Company Vs New Garage and Motor Company (1815) AC. 79** to the effect that in relation to a sum stipulated which is extravagant and unconscionable, such a sum is "*in terrorem of the other party rather than a genuine pre-estimate loss*".

A perusal of Exhibit "*BM7*" to the Applicant's affidavit in support of the Originating Summons demonstrates in glaring terms the extravagant and unconscionable nature of compounding of interest. The Statement of Account, indicates that despite the Respondents making regular payments, the account was overdrawn from 31st May 2012 to 31st March 2015. These repayments are not small amounts. What escalated the loan despite regular repayments was the practice by the Applicant to compound interest.

With the above in view I struck down **Clause 7:3** in the Overdraft Facility as it is prohibited by **Section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap 74 of the Laws of Zambia**¹; and in addition for being a penalty objectionable at common law and clearly unconscionable.

With the above in view I make the following Orders:-

1. I enter Judgment in favour of the Applicant in principle on the amount to be found due and outstanding with interest at 24% per annum as indicated in Clause 7:2 of the Facility Letter from the date of cause of action until final payment.
2. I order a recalculation of the amount of compound interest charged. The compound interest found to have been charged shall be knocked out from the amount claimed herein and liable to be refunded to the Respondents.
3. The Respondents shall liquidate the Judgment Debt with interest as above within twelve (12) months from the date of this Judgment. In default the Applicant shall be at liberty to Foreclose/Sale any of the Mortgaged Properties to satisfy the Judgment Debt aforesaid without further Court Order.

¹ **Section 4:**

"In any proceedings tried on any Court of record for the recovery of any debt or damages, the Court may, if it thinks fit, order that these shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the Cause of action arose and the date of Judgment".

4. Costs shall follow the Cause to be taxed in default of agreement.

Right to appeal granted.

Dated this.....^{5th}.....day of February.....2016



.....
Prisca M. Nyambe, SC
JUDGE