

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HPC/0353**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)



**IN THE MATTER OF:**

**ORDER 30 RULE 14 OF THE HIGH  
COURT RULES AND ORDER 88  
RULE 1 OF THE RULES OF THE  
SUPREME COURT OF ENGLAND  
1999 EDITION**

**IN THE MATTER OF:**

**THE MORTGAGE OVER  
SUBDIVISION NO. 1023 OF FARM  
378a AVONDALE LUSAKA**

**B E T W E E N:**

**STANDARD CHARTERED BANK PLC**

**PLAINTIFF**

**AND**

**GIFT MULAMBO MOONGA**

**DEFENDANT**

**Before the Hon. Lady Justice Irene Zeko Mbewe**

*For the Plaintiff:*

*Mr. R. Mwala of Messrs A.M. Wood &  
Company*

*For the Defendant:*

*Mr. L. Mwanabo and Mr. A. Banda of  
Messrs LM Chambers*

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# J U D G M E N T

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## Cases Referred To:

1. *Santley v Wilde (1899) Ch 474*
2. *Reeves Malambo v PATCO Agro Industries Ltd SC Judgment No 7 of 2007*
3. *Birch v Wright (1786) 1 Term Rep 378*

## Legislation Referred to:

1. *Banking & Financial Services Act No. 7 of 2017*
2. *High Court Rules, Cap 27 of the Laws of Zambia*
3. *Rules of the Supreme Court, 1999 Edition*

## Works Referred To:

1. *Fisher & Lightwood's Law of Mortgages, 13<sup>th</sup> Edition*
2. *Black's Dictionary, 9<sup>th</sup> Edition, Thomson Reuters*
3. *Atkins Court Forms, Volume 28*

The Plaintiff commenced an action by way of Originating Summons pursuant to **Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia** and **Order 88 Rule 1 Rules of the Supreme Court, 1999 Edition**. The Plaintiff's claim against the Defendant is for the following reliefs:

- (1) *Payment of all sums due and owing by the Defendant under the Mortgage which as at 14<sup>th</sup> July 2017 stands at*

*ZMW1,677,042.02 and all accruing interest until final payment as per banking facility.*

- (2) Payment of all sums due to the Plaintiff for valuation of the mortgaged property as per banking facility letter.*
- (3) Payment of all other fees and charges incurred by the Plaintiff in enforcing the security therein.*
- (4) An Order that the mortgage may be enforced by foreclosure and sale.*
- (5) Delivery by the Defendant to the Plaintiff of possession of the mortgaged property.*
- (6) An Order pursuant to Order 88/5/17 Rules of the Supreme Court 1999 Edition.*
- (7) Costs of execution.*
- (8) Further or other relief that the Court may deem fit.*

The application is supported by an affidavit filed into Court on 1<sup>st</sup> September 2017 and deposed to by Mwansa Kapeya the Head of Collections in the Plaintiff Bank. The salient facts are that the Plaintiff Bank advanced to the Defendant the sum of ZMW1,582,789 by way of a facility letter dated 20<sup>th</sup> July 2015

(Exhibit “MK 1”). That the banking facility was secured by a mortgage dated 7<sup>th</sup> September 2015 over Subdivision 1023 of Subdivision A of Farm 378a Lusaka (Exhibit “MK 2”). That the mortgage was duly registered (Exhibit “MK 3”). According to the Plaintiff, the Defendant has defaulted and despite a letter of demand, the Defendant has not made good his indebtedness to the Plaintiff (Exhibit “MK 4”). It is deposed that the Defendant’s account is as follows:

- i. Total amount of advance - ZMW1,582,789
- ii. Interest accrued as at 31<sup>st</sup> May 2017 - ZMW182,639.25
- iii. Payment made by Defendant - ZMW351,286.61
- iv. Total amount due at the date hereof - ZMW1,677,042.02.

That these amounts are contained in the statement of accounts (Exhibit “MK 5”). That the Plaintiff has not received any sum owing which is due under the mortgage and that the Defendant is liable to the Plaintiff for the reliefs claimed in the Originating Summons.

The Defendant filed an opposing affidavit on 30<sup>th</sup> October 2017. The salient facts are that the Defendant was availed a banking facility on 20<sup>th</sup> July 2017 whilst in the employ of the Plaintiff and

the staff loan conditions applied. That the mortgage was also executed and the applicable interest rates was that pertaining under staff conditions of the bank's employee. That by a letter dated 21<sup>st</sup> December 2015, the Defendant was declared redundant (Exhibit "GMM1"). According to the Defendant, the parties were supposed to agree on a settlement plan for the loan balances but that the Plaintiff made unilateral decision to change the repayment by converting the loan from a staff loan to a commercial loan and increased the interest astronomically (Exhibit GMM2"). It is deposed that the Defendant continued making monthly repayments which could not match the interest being charged by the Plaintiff which the Defendant finds to be unreasonable and inconsiderable (Exhibit "GMM 3"). According to the Defendant, the decision to declare him redundant was initiated by the Plaintiff knowing fully well that he was still indebted. The Defendant deposes that he is willing and able to continue servicing the loan on an affordable repayment plan and not on the unilateral rate of interest imposed by the Plaintiff. That the current interest rates and monthly repayment amounts being applied are beyond the Defendant's

capacity and were never agreed upon nor notified to the Defendant before implementation.

In its affidavit in reply dated 27<sup>th</sup> November 2017 deposed to by Helen Zulu the Manager Specialised Collections in the Plaintiff Bank, it is deposed that the staff loan was subject to the terms and conditions of the banking facility. That by a letter dated 13<sup>th</sup> May 2015 signed by the Defendant, it was an express term that upon cessation of employment, the loan outstanding would attract commercial interest from the date thereof (Exhibit "HZ 1"). That the Plaintiff under the banking facility reserved the right to adjust the interest rate from time to time without prior notice to the Defendant and that the Plaintiff exercised this right. That the Plaintiff notified the Defendant of the effective interest rate after the Defendant's termination of employment (Exhibit "HZ 2"). That the Defendant continued servicing the loan at the adjusted interest rate prior to the default. That contrary to an undertaking dated 24<sup>th</sup> December 2015, the Defendant admits being in default and that he is incapable of servicing the loan (Exhibit "HZ 3"). It is deposed that

the Defendant is liable to the Plaintiff for the reliefs claimed and for the costs of valuing the property (Exhibit “HZ 4”).

The Plaintiff filed skeleton arguments on 27<sup>th</sup> November 2017 which more or less are a repetition of the affidavits filed herein. The case of **Santley v Wilde [1899] C.A 474**<sup>1</sup> was cited in support of the principles and definition of a mortgage. The Court's attention was drawn to the case of **Reeves Malambo v Patco Agro Industries Limited SCZ Judgment No 20 of 2007**<sup>2</sup> in respect to the law on mortgages. Counsel for the Plaintiff argues that the Defendant having failed to redeem the mortgaged property at the date of redemption, the Plaintiff became the absolute owner of the mortgaged property. The learned authors of **Fisher and Lightwood's Law of Mortgages 13<sup>th</sup> Edition** were cited in support of the proposition that where a mortgagor's fails to pay on the due date, the mortgagee is entitled to bring the claim for foreclosure. Counsel cited the case of **Birch v Wright (1786) 1 Term Rep 278**<sup>3</sup> where it was held that a mortgagee is entitled to possession without notice or demand.

The Defendant filed skeleton arguments on 5<sup>th</sup> December 2017 wherein Section 106(1), section 107 and 108 of the **Banking and Financial Services Act No 7 of 2017**. It is argued that the Plaintiff did not communicate with the Defendant on the change of the interest rate or the amount to be paid monthly as required by law. The Defendant contends that there is no periodic payment details as to how the Defendant has been defaulting and how much has been paid so far. Counsel for the Defendant cites **Order 88 Rule 5(10) Rules of the Supreme Court, 1999 Edition** and contends that the requirements of this Order have not been met owing to the Plaintiff's failure to conclusively show the statement of account. Counsel for the Defendant further argues that the Defendant has not neglected or failed to service the loan to the Plaintiff. That the law as espoused in Section 106 (1) of the **Banking and Financial Services Act No 7 of 2017** requires any change in the interest rate or charges to be communicated in writing which was not done whilst Section 107 provides for the notification to the borrower of the increase in service charges and section 108 provides for responsible lending. That the Plaintiff's



application lacks merit for failure to comply with the requirements of the law.

I have considered the affidavit evidence on record, skeleton arguments, list of authorities as well as both oral and written submissions. Having done so, I take the following view of the matter.

The issues for determination are as follows:

1. Whether the Plaintiff acted within its rights to convert the Defendant's staff loan into a commercial loan following the termination of his employment with the Plaintiff
2. Whether the Defendant was notified of the variation in the commercial interest
3. Whether the Plaintiff failed to avail the Defendant with periodic statement of accounts
4. Whether the Plaintiff is entitled to the reliefs claimed.

I will begin with the issue of the variation in the interest rate as it is not in dispute that the Defendant was availed a banking facility whilst in the employ of the Plaintiff. The Defendant's position is

that the Plaintiff has been applying an undisclosed interest rate which he was not notified on and did not agree to. I find that the issue of interest is addressed in the facility letter dated 20<sup>th</sup> July 2015 (Exhibit “MK 1” in the Plaintiff’s affidavit in support) where it reads as follows:

*“Interest: GIFT M. MOONGA shall pay interest to the Bank at the prevailing Bank of Zambia (BOZ) policy rate plus a margin calculated on the daily overdrawn balances and payable monthly in arrears by debit to the operating account or recovery from payroll if facility is obtained under a Deduction At Source Agreement. The BOZ policy rate is published by Bank of Zambia on a monthly basis. Both the policy rate and the margin may be varied from time to time. Your effective interest rate is currently 7% per annum and charges to your effective interest rate will be communicated to you in writing.”*

Under the terms and conditions attached to the facility letter, Clause 3 reads as follows:

*“3. Interest:*

*Interest on all credit facilities will be charged on daily outstanding balance and will be calculated using the loan amortisation concept on a reducing balance basis. Interest shall be at the prevailing Bank of Zambia (BOZ policy rate plus a margin for all mortgage loans). The BOZ policy rate is published by the Bank of Zambia. Interest will be charged on all overdue principal and interest amounts during the tenure of the loan. Where preferential pricing has been offered to existing or prospective priority or preferred banking customers, the bank reserves the right to re-price such mortgages in the event that the customer...”*

In the Mortgage Deed dated 7<sup>th</sup> September 2015 the rate of interest clause reads as follows:

*“Rate of Interest: Currently seven per centum per annum (7%). Interest shall be calculated on daily overdrawn balances and payable monthly by debit to the operating account at the prevailing Bank of Zambia (BOZ) policy rate plus a margin. Both the BOZ policy rate and margin may be varied from time to time.”*

The stated terms and conditions were duly accepted by the Defendant on 23<sup>rd</sup> July 2015. A perusal of the record shows that the Defendant in its letter dated 13<sup>th</sup> May 2015 acknowledged the change in the interest rate from the applicable staff interest rate to a commercial interest rate. The relevant part of the letter reads as follows:

*“...When I leave the employment of Standard Chartered Bank, I agree that the outstanding loans will become payable on my last working day (to include set off...) and that commercial interest rates will immediately apply on loans upon resignation if they are not paid off in full. The Bank at its discretion may allow me to avail the option to convert the outstanding staff loan to commercial terms, which is subject to the assessment and approval by the bank in its own rights, if I qualify for commercial terms.”*

The Defendant contends that this assessment and approval of converting the staff loan into a commercial loan was never done by the Bank as the parties never reached an agreement. From a reading of the Defendant's letter, the Defendant was more or less

requesting the Plaintiff to use its discretion in opting whether to convert the loan into a commercial loan. It is evident from the record that the Defendant in fact accepted the commercialisation of his loan as can be discerned from the Defendant's email dated 29<sup>th</sup> March 2016 (Exhibit "HZ 2" in the Plaintiff's affidavit in reply) which reads as follows:

*"Helen,*

*As discussed, my effective date of separation with the Bank is 31<sup>st</sup> March as such the commercialization should be that date. I am fine with the new repayment amount after this date. Please ensure that this is properly handled and there should be no arrears showing on my loans."*

The Plaintiff's response is through an email dated 1<sup>st</sup> March 2016 and sent by Helen Zulu to the Defendant stating as follows:

*"Please note that funds transferred for the loan are not sufficient as the mortgage facility has been commercialized as at February due date. The new instalment is ZMW17,805.01 from ZMW15,862.06."*

The Defendant alleges that the Plaintiff has been charging astronomical interest and unilaterally changing the interest rate. In terms of the adjustment to the commercial interest rates, I take judicial notice that a number of parameters are taken into account including the prevailing Bank of Zambia Policy Rate as published by the Bank of Zambia on a monthly basis. It is folly for the Defendant to now allege that the variation in commercial rates was done unilaterally by the Plaintiff as that was not a negotiable term of the banking facility. This can be discerned from Clause 1 of the Plaintiff's terms and conditions for loans which states as follows:

*"1. The Bank reserves the right to adjust the rate of interest from time to time without prior notice to you".*

Clause 14 of the terms and conditions attached to the facility letter of 20<sup>th</sup> July 2015 reads as follows:

*"The Bank will advise the applicant of any change in the effective interest, charges or fees by publication of a notice in a local or national newspaper, or by notice at its branches in Zambia, or by notes in customer statements. The Applicant will be deemed to have received notification of change thirty days*

*after publication of notice at its branches. The applicant understands and agrees that the Bank is not obliged to obtain the applicant's signature for receipt of such communication."*

I opine that the Defendant cannot be heard to contest the variation of the interest rates as he appended his signature to the various letters providing for the variation of interest rate arising from the change of a staff loan to a commercial loan. In my considered view, the Plaintiff must show that at the time it made adjustments to the interest rates, this adjustment was brought to the attention of the Defendant as the borrower. Clause 14 cited aforesaid clearly provides for the mode of notification which is through the bank branches or national newspapers, which I opine is a sufficient mode of communication. I find that Clause 14 places an obligation on the Defendant to check on the applicable interest rates as adjusted by the Bank from time to time. This variation of interest rates is further alluded to by the Defendant in his email to the Plaintiff dated 5<sup>th</sup> December 2016 which reads as follows:

*"In addition to the above, I did advise at the time the arrears were communicated that moving the applicable rate from 9% to*

*24.5% is not realistic nor reasonable and that it was not just a commercial rate but a reflection of a broken economy.”*

In my settled mind, this correspondence is indicative that the Defendant was aware of the commercial interest rate applicable on his loan account. I find that the Defendant did not dispute the interest rate but merely found it to be unrealistic and unreasonable. In fact the Defendant made instalment payments based on the commercial interest rates.

Another bone of contention by Counsel for the Defendant is that the statement of account is not conclusive contrary to **Order 88 Rule 5 (10) Rules of the Supreme Court, 1999 Edition**. I have perused the statement of account and find that no interest rate is indicated. The statement of accounts shows the agreement details and runs from 30<sup>th</sup> April 2017 to 31<sup>st</sup> August 2027 (Exhibit “MK 5”). It shows a fluctuation of the interest payable as calculated by the Plaintiff. I opine that in terms of the customer-banker relationship, it is an implied term to provide clear information of the customer's account and how it works. It is also incumbent upon the Plaintiff to show that at the time the interest was being varied, it was brought to the



attention of the Defendant as a borrower. I find that this was done pursuant to clause 14 cited in the preceding paragraph.

Counsel for the Defendant cites sections 106-108 of the **Banking and Financial Services Act, No. 7 of 2017**. The Court weighed in on these sections and found that these provisions cannot be applied retrospectively as the Defendant's banking facility was availed in July 2015. Notwithstanding, the Plaintiff complied with section 47 of the **Banking and Financial Services Act, Cap 387 of the Laws of Zambia** in terms of the disclosure of interest rate and charges, the notification thereof, including the disclosure of the cost of borrowings in writing as evidenced by the facility letter dated 20<sup>th</sup> July 2015 to the Defendant which covers these aspects.

I shall now deal with the issue of the mortgage and attendant remedies. The Plaintiff's application is anchored on **Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia** and similarly **Order 88 Rule 1 Rules of the Supreme Court, 1999 Edition**. It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure and delivery up of possession of the mortgaged property, and sell of the mortgaged

property which remedies are cumulative and come into play where there is default on the part of the borrower. Instructive is the case of **Reeves Malambo v PATCO Agro Industries Limited**<sup>2</sup> where the Supreme Court held as follows:

**"A mortgagee is at liberty to exercise his right to foreclosure 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 day fixed for redemption has passed."**

I am further fortified by the learned authors of **Atkins Court Forms, Volume 28** at page 8 where it states:

**"When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies."**

It is not in dispute that the Defendant has defaulted in his payment obligations. It is not in dispute that the Defendant admits his indebtedness to the Plaintiff as stated in paragraph 10 of the opposing affidavit which states as follows:

*" That I am willing and able to continue servicing the loan as I have done on a repayment plan affordable to me in light of my income unlike the astronomical and unilateral rate of interest imposed by the plaintiff herein."*

It is further not in dispute that a legal mortgage was created over Subdivision No 1023 of Subdivision A of Farm No 378a Avondale, Lusaka.

In light of the above stated, I hereby enter Judgment in favour of the Plaintiff against the Defendant in the sum of ZMW1,677,042.02 with interest at the short term deposit interest rate from date of the Originating Summons to date of Judgment and thereafter at the commercial lending rate until full payment.

The Defendant is to settle the Judgment debt with interest within ninety (90) days of the date of Judgment. In default the Plaintiff shall foreclose, take possession and exercise the power of sale over Subdivision No.1023 of Subdivision A of Farm 378a Avondale, Lusaka without further recourse to this Court. In default, the Deed of Transfer shall be executed by the Registrar of the High Court

pursuant to Section 14 of the **High Court Act, Cap 27 of the Laws of Zambia.**

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Delivered in Lusaka this 23<sup>rd</sup> day of January 2018.



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**HON. JUSTICE IRENE Z. MBEWE**  
**HIGH COURT JUDGE**