IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO.007/2020
HOLDEN AT KABWE

(Civil Jurisdiction)

IN THE MATTER OF: An application Order XXX Rule 14 of the High Court Act Chapter 27 of the Laws of Zambia.

IN THE MATTER OF: A Third Party Mortgage, Further Charge, Second Further Charge and Third Further Charge over Farm 246A "KAJULA" Mazabuka in the name of Constance Ann Pinkey, Ewen John Pinkey and Kathryn Jean Sherriff.

IN THE MATTER OF: Foreclosure possession and sale of mortgaged property

B E T W E E N:

POSA ESTATES LTD & 4 OTHERS **APPELLANTS**

AND

FIRST NATIONAL BANK (Z) LTD **RESPONDENT**

Coram: Chisanga JP, Mulongoti, and Siavwapa JJA
On 13th and 23rd October, 2020

For the Applicants: *Mr. M.Z. Mwandenga of Messrs M.Z. Mwandenga & Co.*

For the Respondent: *Miss N. Mayaka – Legal Manager.*

J U D G M E N T

Siavwapa JA; delivered the judgment of the Court

Cases referred to:

1. *Charles Chimumbwa v Augustine Mutale & Others – Appeal 18/2017*
2. *Brebner Changala and Another vs Zambia National Commercial Bank Appeal No. 18/2017.*

3. *Zambia Radiological and Imaging Company Limited and 5 others vs Development Bank of Zambia*

Authorities referred to:

1. *Chitty on Contracts General Principles, the Common Law Library Vol 1, 27th Ed. Sweet & Maxwell (1994).*
2. *The Banking and Financial Services Act No.7 of 2017 (BFSA)*

1. INTRODUCTION

This appeal is against the Judgment of the High Court - Commercial Division presided over by the Hon. Mr. Justice K. Chenda dated 18th November, 2019. By the said Judgment, the learned Judge found in favour of the Respondent and granted the remedies of payment of the sums owing on a facility, foreclosure, seizure and sale of mortgaged properties.

2. BACKGROUND

This was an ordinary lender-borrower arrangement between the Respondent and the Appellants by way of an overdraft and term loans advanced to the 1st Appellant by the Respondent. The facility was secured by a third party mortgage relating to Farm No. 246A, Mazabuka, in favour of the Respondent. A further charge, 2nd and 3rd further charges were created over the same property while the 2nd, 3rd, 4th and 5th Appellants executed unlimited Suretyships in favour of the Respondent.

3. THE SUIT

Upon default by the 1st Appellant, the Respondent issued letters of demand to all the Appellants on 30th April, 2019. There being no response, the Respondent issued an originating summons accompanied by an affidavit in support filed into Court on 5th September, 2019, pursuant to Order XXX rule 14 of the High Court Rules.

4. ARGUMENTS IN OPPOSITION

The Appellants, in opposition to the originating summons, pleaded Force Majeure as the reason for defaulting on the loans. They sought refuge in clause 24.1 of the Facility letter which provides as follows:

> *"if either party is prevented or delayed in performing any of its obligations under this agreement by reason of Force Majeure such as but not limited to Act of God, war, revolution, strike, riot, power or system failures or other physical disaster or other causes which are beyond the reasonable control of the party affected and which by exercise of reasonable care and diligence it is unable to prevent, such party shall without delay notify the other party in writing and the delay failure of performance shall not give rise to any claims for damages against other party."*

They also argued that the parties were engaged in negotiations for the restructuring of the loan and had agreed on extending

the repayment period to 9 years rendering the action pre-mature. The other argument advanced was that it was inequitable to order a foreclosure because the value of the mortgaged property exceeded the amount owed to the Respondent. In reply to the arguments in opposition, the Respondent stated that no proof of Force Majeure had been provided and that discussions for an ex-curia settlement did not suspend liability which arose on default followed by a demand.

5. DECISION OF THE HIGH COURT

After considering the evidence on paper the learned Judge made the following findings;

(i) **Force Majeure**

The learned Judge was of the view that the issue hinged on the interpretation of clause 24 of the Facility letter dated 6th February, 2018. After considering various authorities on rules of interpreting documents, the learned Judge came to the conclusion that clause 24 of the Facility letter only applied to actions for damages. He accordingly ruled the clause inapplicable to the action before him as the same was commenced under Order XXX rule 14 of the High Court Rules as a mortgage action and not an action for a claim in damages.

(ii) **EX-CURIA SETTLEMENT**

The learned Judge considered this argument and came to the conclusion that the acceptance of the proposal to extend the loan repayment period was conditional and therefore, devoid of any binding effect. The learned Judge further called into aid clause 15 of the Facility Letter which provides that for any addition; alteration, variation, deletion or cancellation of the Facility Letter to be in writing and signed by the parties.

(iii) **VALUE OF THE PROPERTY**

On the argument that the foreclosure Order was inequitable because the value of the mortgage property exceeded the amount owing, the learned Judge found that there was no authority to the effect that a mortgage action ought to fail on that account alone.

(iv) **JUDGMENT SUM**

There was the question whether or not the sums claimed as owing by the Respondent are not disputed and therefore payable to the Respondent. The learned Judge held the amounts inconclusive for lack of evidence of the record history and composition of the amount owed. He held that awarding the amounts would be speculative and in violation of the Banking and Financial Services Act. In order to ascertain the amounts due, the learned Judge referred the matter to the Registrar for

assessment. The learned Judge accordingly granted the requested Orders to the Respondent to the dismay of the Appellants who have decided to lodge the herein appeal.

6. THE APPEAL

Dissatisfied with the outcome, the Appellants have approached the Court with five grounds of appeal as follows:

(i) The learned Judge misdirected himself as to the non applicability of clause 24 of the Facility Letter when on the other hand he relied on clause 4.2 of the same letter.

(ii) The learned Judge erred when he held that there was no agreement to extend the loan repayment period to 9 years.

(iii) The learned Judge misdirected himself when he rejected the argument that it was not proper to order foreclosure when the value of the mortgaged property far exceeded the loan amount due.

(iv) The learned Judge erred in law when he made an Order for foreclosure absolute without first making a foreclosure nisi.

(v) The learned Judge erred in law by making Orders not backed by evidence and information contrary to the law and rules of court.

7. ARGUMENTS BY THE APPELLANTS

The thrust of the Appellants' arguments with respect to ground one is that the learned Judge, having ruled clause 24 of the Facility Letter inapplicable in one breath, went on to rely on clause 4.2 of the same Facility Letter in another breath. This assertion is based on the Appellant's view that when the learned Judge ruled that clause 24 of the Facility Letter only applied to actions for damages, he implied that the entire Facility Letter was not applicable to mortgage actions.

In the second ground, the argument is that when the Appellants sent a proposed restructuring program of the debt, the Respondent responded via an e-mail accepting the extension of the repayment period to 9 years. In the Appellant's view the acceptance was not a conditional one but one with conditions.

On that account, it is argued that the account was not in default and as such the action by the Respondent was premature and also because the negotiations were still on going at the time of the suit.

On the third ground, it is argued that the value of the mortgaged property far exceeds the sum of the outstanding debt and therefore, that foreclosing on the property would be inequitable. It was also suggested that foreclosing on the property would result in unjust enrichment to the Respondent.

In ground four it is argued that the learned Judge jumped the gun by making an order absolute of the foreclosure instead of first issuing an Order of foreclosure nisi to be made absolute after six months.

In ground five it is argued that upon finding that the owing amounts were not certain, the learned Judge ought to have dismissed the entire action. This argument is premised on the view that a mortgage action is unsustainable where the amount owing on the loan is certain.

8. ARGUMENTS BY THE RESPONDENT

On ground 1 the Respondents argue that the learned Judge did not imply that the entire Facility Letter was inapplicable to the action before Court but that only clause 24 was inapplicable and hence, the Court's reliance on clause 24.2 to determine how the owing amount ought to be ascertained. It is further argued that the defence of Force Majeure is not recognized in the Mortgage Deed and other security documents executed by the parties upon which the claims in the Court below were founded. In the alternative, the Respondent argues that the Appellants did not prove the occurrence of a Force Majeure as envisaged by the learned Authors of Chitty on Contracts:

"It is for a party relying upon a force majeure clause to prove the facts bringing the case within the clause. He must therefore prove the occurrence of one of the events referred to in the clause and that he has been prevented, hindered or delayed (as the case may be) from performing the contract by reason of that event. He must further prove;

i) That his non-performance was due to circumstances beyond his control; and
ii) That there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences."

On ground 2, the gist of the Respondent's arguments is that no binding contract was concluded regarding the extension of the repayment period to 9 years as the parties were still in negotiations. They also agreed with the learned Judge's reliance on clause 15 of the Facility Letter which requires any changes to the Facility Letter to be in writing and signed by the parties.

Grounds 3 and 4 are argued together to the effect that the Court's Order was not an Order of foreclosure absolute as the period for the exercise of the equity of redemption was pegged at 120 days. It was further argued that it was a misunderstanding by the Appellants that once the property is foreclosed then the Respondent would own it in perpetuity even though its value was more than the amount owed leading to unjust enrichment. It relied on **Section 85 of the Banking**

and Financial Services Act No.7 of 2017 which provides for sale of the property foreclosed upon by a Financial Institution. The case of ***Charles Chimumbwa v Augustine Mutale & Others,*** [1] **a** decision of the High Court was called into aid.

On ground 5 it is argued that the issue of lack of vital evidence was not raised in the Court below and should not be entertained by the Court. However, in the alternative, it is argued that there was sufficient evidence showing default on the part of the Appellants to support the granting of Judgment in favour of the Respondent. In addition, it was argued that the Appellant admitted their indebtedness in the sum of US$791,626.19.

9. ARGUMENTS IN REPLY

The Appellants argued in reply that the learned Judge in the Court below discounted clause 24 of the Facility Letter as being inapplicable to the originating summons because it sat in the Facility Letter and not in the Mortgage Deed and further charges. Mr. Mwandenga therefore, understood the learned Judge to have implied that in mortgage actions parties ought to solely rely on the documents creating the security namely Mortgage Deeds and Charges.

Consequent to the aforestated interpretation of the Judgment, it was Mr. Mwandenga's position that the learned Judge

should not have relied upon any other clause in the Facility Letter to aid his judgment.

In reply to the arguments in opposition to ground two, Mr. Mwandenga has submitted that the acceptance of the proposed extension of the repayment period from five to nine years was made by the Respondent via an e-mail not marked "*without prejudice*" and as such the Appellants are entitled to rely on its contents. It is also Mr. Mwandenga's held view that the e-mail of 7th September, 2019 upon which the Respondent seeks to rely to prove lack of agreement, was merely meant to solicit finer details of the agreement for extension. He relied on an extract from the learned authors of Trietel**; the Law of Contract 10th edition, Sweet and Maxwell 1999 London page 17.**

The passage cited is basically to the effect that business people do often continue negotiating even after reaching agreement and that it is for the Court to decide whether there was an unquantified acceptance that concluded the agreement.

In reply to grounds 3 and 4, Mr. Mwandenga argues that the learned Judge did make an Order of foreclosure absolute contrary to the guidance rendered by this Court on how to approach foreclosures in the case of ***Brebner Changala and Another v Zambia National Commercial Bank.***[2]

On the arguments that the foreclosure was inappropriate because the value of the mortgaged property exceeds the amount owing, Mr. Mwandenga reiterated his position that the foreclosure would result in unjust enrichment to the Respondent.

This position, according to Mr. Mwandenga, is enforced by what he calls, the legal effect of foreclosure as set out by the learned authors of **Megarry and Wade; The Law of Real Property, 6th edition, Charles Harpum, Thomas Sweet and Maxwell London 1999, pages 1187 – 1188 paragraph 19 – 049.**

The import of the extract is that foreclosure is an equitable remedy which intervenes once a Mortgagor loses his legal right of redemption. The learned authors further held that once the legal right of redemption is lost, the property which is the subject of the mortgage devolves upon the mortgagee. Equity however, interfered with the Mortgagee's right of conveyancing the property but an order of foreclosure removed the bar to conveyance which the Mortgagee could now exercise.

In this regard Mr. Mwandenga has submitted that an Order of foreclosure absolute makes the Mortgagee absolute owner and that even if he decides to sell the property; there is no obligation to turn over the excess amount to the mortgagor.

In ground 5, Mr. Mwandenga maintains that having found as a fact that there was no conclusive evidence that the amount claimed was the recoverable amount, the learned Judge ought to have dismissed the claim rather than refer the matter for determination by the Registrar.

10. OUR DECISION

We have carefully considered the grounds of appeal and the arguments both written and oral proffered by both parties. We have also considered the Judgment sought to be assailed by this appeal and what is clear from the five grounds of appeal advanced is that the Appellants have taken issue with the learned Judge's interpretation of the relevant provisions of the Facility Letter.

The Appellants also bring into question, the learned Judge's general appreciation of the law governing mortgages and particularly the remedy of foreclosure. We however, find certain aspects of the Appellants' held positions in their arguments, quite perplexing in light of what we find to be very clear reasoning deployed by the learned Judge and we shall demonstrate why as we address individual grounds of appeal.

10.1 GROUND 1

In this ground, the contention is that by holding that clause 24 of the Facility Letter was not applicable to the action because it was a mortgage action, the learned Judge, by

necessary implication, held that the Facility letter in its entirety was irrelevant to the action, being a mortgage action.

For ease of reference, we reproduce clause 24 of the Facility Letter hereunder:

> "24.1. *If either party is prevented from or delayed in performing any of its obligations under this Agreement by reason of force majeure such as but not limited to Act of God, war, revolution, strike, riot, power or system failures or other physical disaster or other causes which are beyond the reasonable control of the Party affected and which by exercise of reasonable care and diligence it is unable to prevent, such Party shall, without delay notify the other Party, in writing and the delay, failure or performance shall not give rise to any claims for damages against other Party."* (underlining ours for emphasis only)

In construing the above quoted clause with regard to the defence of Force Majeure pleaded by the Appellant, the learned Judge interrogated the various canons of interpretation of contractual provisions. He then settled for the application of the ordinary and natural meaning of the words used in clause 24 and stated as follows at page 18 paragraph 3.5 of the Record of Appeal:

> *"Applying the principles of interpretation of written contracts discussed above, the ordinary and natural meaning of the words used in clause 24 is that a force*

majeure event is a bar to an action for damages for non-performance of the obligations under the Facility Agreement."

In paragraph 3.6 at page 19 of the Record of Appeal, the learned Judge went further to state as follows:

"In other words, if proven that a force majeure event has occurred then the Plaintiff would be precluded from bringing a common law action for breach of contract against the defaulting First Respondent."

It is very clear from the wording of clause 24 in the opening part that the obligations referred to are those in the Facility Letter which is the Primary Agreement between the lender and the borrower.

It is also clear that failure by either party or delay in performing any of its obligations in the Facility Letter occasioned by a Force Majeure, does not give rise to a claim against the affected party by the other party. This shield against claim is however, qualified as it is limited to claims for damages.

In the manner that clause 24.1 is couched, the parties intended the defence of Force Majeure to only apply to actions in which damages are claimed. We do not find anything in the Judgment of the learned Judge in the Court below that

suggests the interpretation being imputed by the Appellants. Clause 24.1 is very specific and categorical in its applicability and the fact that its application is exclusive to claims for damages does not and cannot by any stretch of imagination imply exclusion of the applicability of the entire Facility Letter to mortgage actions.

There is nowhere in the Judgment that the learned Judge extends the non-applicability of clause 24.1 to mortgage actions to the entire Facility Letter as submitted by the Appellants.

We, therefore, find no basis upon which to interfere with the learned Judge's interpretation of clause 24.1 of the Facility Letter and having so found, we hold that his reliance on clause 4.2 of the Facility Letter in dealing with charges to be borne by the 1st Appellant is justified.

This is because the learned Judge was very clear that only clause 24 was inapplicable to mortgage actions and therefore, clause 4.2 was applicable. We, accordingly, find no merit in ground 1 of the appeal and we dismiss it accordingly.

In ground 2, the dispute is whether or not the parties had agreed to reschedule the repayment of the loan from 5 years to 9 years. The Appellants in their argument for an agreed

rescheduling relied on an email authored by the Respondent part of which read as follows:

> *"The Bank reviewed the repayment proposal provided which would see the debt being settled over a period of 9 years with no input finance being provided by the Bank. The Bank accepts the proposal with the following conditions:"*

The learned Judge formed the view that no firm agreement had been concluded as the acceptance was conditional. He also adverted to clause 15 of the Facility letter which provides as follows:

> *"No addition to or variation, deletion or agreed cancellation of all or any of the clauses or provisions of this Agreement will be of any force or effect unless in writing and signing by the parties."*

The learned Judge made short work of this issue and dismissed it because no written agreement to vary the clauses relating to the rescheduling of the debt was signed by the parties.

It is our considered view that the hair splitting difference between a conditional acceptance and an acceptance with conditions is merely semantic. We do not think that the

acceptance offered by the Respondent was unqualified in view of the conditions laid down and which were never fulfilled.

In any event, the conditional acceptance and the negotiations came after the notice of default and demand had already been issued.

The learned Judge was therefore, on firm ground when he treated the acceptance of the proposed restructuring as conditional and contrary to clause 15 of the Facility Letter which requires any alterations to the Facility Letter to be in writing and signed by the parties. This ground is dismissed accordingly.

On grounds 3 and 4 which argue that it is improper to order foreclosure where the value of the mortgaged property exceeds the debt, the learned Judge rejected the argument on the basis that the Mortgage Deed and further charges do not restrict enforcement where the debt due is less than the value of the mortgaged property.

The learned Judge placed reliance on the case of ***Zambia Radiological and Imaging Company Limited and 5 others vs Development Bank of Zambia***[3] from which he extracted the following statement:

> *"In the present case, given that the parties chose to reduce their agreement into contractual documents including the Facility letter, which clearly evidences their intention, there*

is absolutely no reason to resort to the manner of interpretation that will take the court outside the contours of the agreement of the parties."

We, however, understand Mr. Mwandenga's arguments as anchoring on the understanding of the various reliefs available in mortgage actions with a particular focus on foreclosure.
The principle is that the remedy of foreclosure acts to vest the ownership of the mortgaged property in the mortgagee absolutely thereby terminating the equity of redemption in the mortgagor.

On that account, the mortgagee does not have to account to the mortgagor the excess if he decides to sell the property and neither can he seek to recover if he sells at a loss.

According to Mr. Mwandenga, an Order of foreclosure would unjustly enrich the Respondent under the above stated principle because the value of the mortgaged property exceeds the total debt due.

In the second limb, which is ground 4, the issue is that the learned Judge made an order for a foreclosure absolute instead of an order of foreclosure nisi.

We note that clause 5 of the Third Party Charge vests the power of sale in the mortgagee to exercise the said power after a demand notice has been served on the mortgagor. This power of sale does not require an order of the Court.

In this case, however, the mortgagee did not exercise that power but instead commenced an action under Order XXX rule 14 of the High Court Rules and sought the following reliefs among others;

1. Payment of specified sums of money with interest, costs and all charges due.
2. An order of foreclosure and sale of the mortgaged properties.
3. Delivery of vacant possession of mortgaged properties.

The learned Judge then made the following Orders inter-alia;

(ii). that the 1st Respondent (1st Appellant) should pay the Applicant (Respondent) the Judgment sum and interest as aforesaid within 120 days from the date of award by the Deputy Registrar, failing which the applicant will be at liberty to enforce the Third Party Mortgage and further charges and foreclosure on, repossess and sell the mortgaged property namely; the remaining extent of Farm No. 246a 'Kajula' Mazabuka.

(iii). That should there be any unsatisfied balance of the Judgment sum after fulfilment of Order (ii) the same shall be paid by the second, third, fourth and fifth Respondents pursuant to the Suretyship Deeds.

We think that the learned Judge based his orders on the reliefs sought in so far as foreclosure and sale are concerned.

However, we agree with the Appellants that where the mortgagee decides to sell or indeed sells in accordance with section 85 (1)(b) of the Banking and Financial Services Act, after an order of foreclosure, there is no requirement to turn over any excess to the mortgagor as is the case when the mortgagee exercises the power of sale.

We also note that the case of ***Charles Chimumbwa v Augustine Mutale and Others, (2008) ZR 79*** which is a High Court Judgment which the Respondent has sought to persuade us with dealt with a mortgagee who invokes the power of sale before an order of foreclosure is made. It is in those instances that the power of sale ought to be exercised "with due regard to the mortgagor's interest in the surplus sale money"

That notwithstanding however, we note that the assertion by the Appellants that the value of the mortgaged property exceeded the amount owing was a mere assumption as no valuation report was availed to the Judge.

Further, in light of the finding of fact by the learned Judge that the amounts due had not been ascertained in view of the restrictions placed by the Banking and Financial Services Act, there is no basis upon which unjust enrichment can be imputed.

As regards whether or not the learned Judge granted a direct order of foreclosure absolute, we note that the learned Judge granted a period of 120 days within which the Appellants were to redeem the mortgage and only upon failure to do so would the order for foreclosure and sale take effect from the date of the Registrar's ascertainment of the amounts due.

It means that from the date of the Registrar's Order, until the expiry of the 120 days, the property was not foreclosed and as such ownership would not vest in the Respondent.

That period was open to the Appellants to exercise the equity of redemption and therefore, equivalent to an order of foreclosure nisi.

The learned Judge therefore, did not order a foreclosure absolute but an order of foreclosure nisi to become absolute after 120 days. We therefore find no merit in both grounds 3 and 4 and we dismiss them accordingly.

On ground 5, it is noted that the Appellant contests the learned Judge's decision not to dismiss the action after finding that the sums due were not proved.

The learned Judge's view was that since the issue was that of ascertaining the amounts owing, it was prudent to refer the matter to the Registrar to conduct an assessment.

We find the argument by the Appellants that uncertainty on the quantum should result in the dismissal of the whole claim

startling because the issue is whether or not the Appellants are in default and that question is answered in the affirmative. The lack of certainty on the amounts due is curable by an assessment. As a matter of fact, the learned Judge only wanted to ensure compliance with the law.

We therefore find no merit in this ground and we dismiss it accordingly.

10. CONCLUSION

This appeal brought out some important issues on the interpretation of Contractual Agreements as well as the principles governing actions and reliefs for foreclosure and sale in mortgage actions.

The salient points we make are as follows;

(a). The non-applicability of one clause in a facility letter or Agreement to a Mortgage action does not render the entire Agreement inapplicable or irrelevant to a mortgage action.

(b). Where a mortgagee opts to exercise the power of sale before an action for foreclosure, it is accountable to the mortgagor for any surplus of the sale money.

(c) When an Order for foreclosure is made by the Court, the same vests the ownership of the mortgaged property in the mortgagee and if the mortgagee decides to sell the

property, it is not accountable to the mortgagor for any surplus of the sale money.

(d). On making the final Order for payment of the debt money the Judge should give a reasonable period within which the mortgage shall be redeemed and such order does not amount to an order of foreclosure absolute but an order nisi as the mortgagor has the opportunity to exercise the equity of redemption during the period allowed.

All in all, we dismiss the appeal in its entirety with costs.

F.M. CHISANGA
JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE