IN THE HIGH COURT FOR ZAMBIA **2009/HPC/0013**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)

BETWEEN:

INVESTRUST BANK PLC **PLAINTIFF**

AND

CHICK MASTERS LIMITED **1st DEFENDANT**
DR. MWILOLA IMAKANDO **2nd DEFENDANT**

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 29th DAY OF AUGUST, 2011

For the Plaintiff : Mr. C.C. Chonta of Lewis Nathan, Advocates
For the Defendants : Mr. M.B. Mutemwa of Mutemwa Chambers

RULING

Cases referred to:

1. ***Thynne –VS- Thynne (1955) 3 ALL ER page 129.***
2. ***Lewanika and Others –VS- Chiluba (1998) ZR page 79.***
3. ***Lisulo –VS- Lisulo (1998) ZR page 75.***
4. ***Ali –VS- Secretary for the Home Department (1984) 1 ALL ER page 100.***
5. ***Saban and Another –VS- Milan (2008) ZR at page 233.***
6. ***Attorney General –VS- Tall and Zambia Airways (1995/97) ZR at page 54.***

Other authorities referred to:

1. ***SupReme Court Practice, 1999 Volume 1.***
2. ***High Court Act, Cap 27.***

This is the Plaintiff's application to amend or review judgment of this Court delivered on 31st March, 2010. The application is made by way of summons supported by an affidavit and further affidavit filed on 5th May, 2011, and 8th July, 2011, respectively. It is made pursuant to Orders 20 rule 11 of the ***SupReme Court Practice (1999) (whitebook)*** and Order 39 rules 1 and 2 of the ***High Court Act***. The Defendants did not file an affidavit in opposition.

The affidavits were sworn by one Charles Chileshe Chonta and Esau Mtonga. The evidence revealed that the Plaintiff commenced this action on 12th January, 2010, and that it was claiming, *inter alia,* for an order of possession and sale of the mortgaged properties, subdivision 78 of farm number 396a Lusaka and stand number 441/ Rem, Roma, Lusaka. By clause 8.2 of the facility letter, exhibit "CC1" the Second Defendant agreed to mortgage stand number 441/Rem, Roma, Lusaka. In pursuance of this, on 14th December, 2009, the Plaintiff conducted a search on the said stand number 441/Rem, Roma, Lusaka, and only managed to get a print out for Farm number 441a, as the Lands Register had no record of stand number 441/Rem, Roma, Lusaka. The reference by the Applicant and Second Defendant in the facility letter to stand number 441/Rem was a mutual error because the correct reference should have been to subdivision "A" of stand number 441a Lusaka. As a result of this, the Second Defendant executed a memorandum of deposit of title deeds in respect of subdivision "A" of subdivision number 180 (see exhibit CC3). Following from this, the Plaintiff registered a mortgage on the said property, which mortgage despite a deligent search, it has failed to locate. There is however a copy of the Land Register produced as "CCC4' which evidences the mortgage transaction. Notwithstanding the foregoing, when the Court entered judgment in this matter, it made an order for possession and sale only in respect of subdivision 78 of farm number 396a Lusaka. By accidental error, the Court did not extend the order of possession and sale to the property erroneously described as stand number 441/Rem, Roma, Lusaka. The Plaintiff had since found the certificate of title for subdivision A of subdivision 180 of

Farm 441a which it could not locate at the time of commencing the action despite a diligent search. The reason for the Plaintiff's failure to locate the certificate of title was that it changed offices after the transaction was entered into which resulted in misplacement of a number of security documents in its custody.

The affidavit also revealed that the facility letter "MM1" provided for the facility to be secured, *inter alia*, by guarantees of one Mate Musokotwane and Peter Gilbert Sinyayngwe. As a result of this, following default, the Plaintiff did write letters of demand to the guarantors as was evidenced by "CCC5" and "CCC6". The Plaintiff decided not to pursue them further, after the Second Defendant assured it that the security in the two properties was sufficient to cover the Plaintiff's exposure. It was also alleged that the sell of subdivision number 78 of farm number 396a, Lusaka only attracted offers of less than K2,000,000,000.00, whilst the Plaintiff's exposure was K5,008,038,174.52 as at 16th March, 2011.

The matter came up for hearing on 13th July, 2011. At the hearing counsel for the parties made verbal submissions in which they restated the contents of their respective skeleton arguments.

For the Plaintiff, Mr. C.C. Chonta advanced his arguments on two limbs. The first limb related to the application for amendment of the judgment. In advancing the said argument he highlighted the Court's inherent jurisdiction to amend its judgment as enshired in order 20 rule 11 of the ***white book*** and the case of ***Thynne –VS- Thynne (1***). He went on to highlight the background that led to the misdescription of subdivision A of subdivision 180 of Farm 441a, and also the omission by the Court to include it in the judgment. Counsel, also restated the evidence by reference to documents executed by the Plaintiff and Second Defendant which he argued reflected the true intentions of the two being to mortgage subdivision A of subdivision 180 of farm 441a as well.

Counsel argued further that the pleadings on the record clearly show that stand number 441/Rem, Roma, Lusaka, was mortgaged to the Plaintiff and therefore, subject to the proceedings. By omitting it from the judgment without giving reasons, the Court therefore, made an accidental error. It was argued further that the misdiscription of the property as reflected in the affidavit in support arose out of a mutual mistake by the parties with respect to its correct description. This, it was argued, warranted the Court admitting fresh evidence for purposes of review. My attention in this respect was drawn to the cases of ***Lisulo –VS- Lisulo (3)*** and ***Ali –VS- Secretary for the Home Department (4)***.

Mr. C.C. Chonta then proceeded to advance the second limb of his arguments. He argued, in this respect, with reference to Order 39 of the ***High Court Act*** that a Court may review its decision where sufficient grounds exist for doing so. He went on to set out the grounds upon which a Court can review its decision with reference to the ***Lewanika & Others –VS- Frederick T. Chiluba (2)*** case quoting from ***Thynne –VS- Thynne (1).*** This case, it was argued, is a case deserving the review of the judgment to include property known as subdivision A of subdivision 180 of farm number 441a, Lusaka.

In the skeleton arguments, counsel for the Defendants Mr. M.B. Mutemwa, began by highlighting the principles laid down in the case of ***Saban & Another –VS- Milan (5), Lisulo –VS- Lisulo (3)*** and ***Lewanika & Others –VS- Chiluba (2)***. He went on to argue that the Court did not make a mistake in omitting the Roma property from the possession and sale order. It was argued that by paragraph 6 of the originating summons, the only evidence adduced to the Court tending to show that the Roma property was offered as collateral was the facility letter. The said letter it was argued had no effect as it was not signed. There was no mortgage deed, certificate of title or consent to offer the property as security tendered in evidence. There was therefore insufficient evidence upon which the Court could have granted the order for foreclosure and sale of the property.

Counsel went on to argue that the Plaintiff can not adduce evidence at this stage of the memorandum of deposit of title deeds, copy of the Lands Register for the property and a copy of the title deeds because it is not fresh evidence in accordance with the authorities on review. He went on to argue that the said documents had been in the possession of the Plaintiff at the time of commencement of this matter, but were simply not produced in the affidavit in support of the originating summons. If indeed the documents could not be found at the time, this fact should have been disclosed in the affidavit in support of the originating summons. By producing them now, the Plaintiff sought to have a second bite at the cherry, so as to make good that which was not done, in order to achieve the desired result.

The second limb of Mr. M. B. Mutemwa's arguments was in response to the allegation by the Plaintiff that the sale of subdivision 78 of farm number 396a, Lusaka has only attracted offers of less than K2,000,000,000.00. Counsel urged me to dismiss the argument as being unmeritorious for lack of evidence. He concluded by arguing that the guarantors, Mate Musokotwane and Peter Gilbert Sinyangwe could not be joined to the proceedings on the basis of exhibits "CCC5" and "CCC6" of the affidavit in support of summons for review. The said exhibits, it was argued, are not fresh evidence in line with the authorities cited because they were in existence at the time the action was commenced. The Plaintiff therefore made a conscious decision not to join the other guarantors apart from the Second Defendant.

I have considered the affidavit evidence, and arguments by counsel for the parties. By this application, counsel for the Plaintiff seeks to have the judgment of this Court dated 31st March, 2010, either amended or reviewed to incorporate property known as stand number 441/Rem Roma, Lusaka, in the order for possession and sale. It has been argued, in this respect, that this Court made an accidental ship or omission by failing to include the said

property in the order. The application also seeks to have the said property, properly described as subdivisions A of subdivision 180 of farm number 441a, Lusaka.

The starting point in determining this matter is a perusal of the originating process issued out by the Plaintiff. The said process, that is the originating summons is endorsed, *inter alia,* as follows;

> *"For the determination of the following questions: #I)*
>
> *(1) Payment of all monies which as at 30th day of November, 2009 stood at ZMK2,499,999,999 and ZMK629,517,573.50 interest and other charges due and owing to the Plaintiff bank by the 1st Defendant by virtue of loan and overdraft facilities granted to the said 1st Defendant by the mortgage over Subdivision 78 of Farm No. 396a, Lusaka and Stand No. 441/REM Roma Lusaka.*
>
> *(2) Foreclosure*
>
> *(3) Delivery up by the Defendants to the Plaintiff of the mortgaged property.*
>
> *(4) Sale of the Mortgaged property."*

It is clear from the said endorsement that the Plaintiff did claim for foreclosure, delivery up and sale of, not only, property known as subdivision 78 of Farm number 396a, Lusaka but also stand number 441/Rem, Roma, Lusaka. Further by paragraph 6 of the affidavit in support of originating summons, the said property is indicated as being part of the properties to be secured by way of mortgage as was evidenced by the facility letter being exhibit "MM1" to said affidavit. The Plaintiff's claim was therefore, *inter alia*, for possession and sale of the said two properties and not just one property. However, the judgment of the Court did not reflect this as it just direct possession and sale of subdivision 78 of Farm 396a Lusaka. This was clearly an error on the part of this Court especially that no reasons were given for not including stand number 441/Rem Roma, Lusaka, as prayed in the originating summons. Further, there was no

affidavit in opposition by the Defendants to signify their opposition to the repossession and sale of the two properties, as such they conceded the claim as endorsed by the Plaintiff. This Court was therefore duty bound, barring any illegality in the endorsement, to grant the relief as prayed by the Plaintiff. This was not done and as such, there was an error made on the part of this Court which must be corrected.

In correcting the said error I will be exercising my inherent jurisdiction to review as enshrined in Order 39 of the ***High Court Act***. Further, I will be applying the principle laid down in the ***Lewanika and Others –VS- Chiluba (2)*** case which states at page 81 as follows;

> ***"Review under Order 39 is a two stage process. First, showing or finding a ground or grounds considered to be sufficient, which then opens the way to the actual review. Review enables a Court to put matters right."***

The said case goes further and states at page 163, and quoting from the case of ***Thynne –VS- Thynne (1)*** that a Court can vary or review its own decision;

> ***"... if there is some error in a judgment or order which arises from any accidental slip or omission."***

There is no doubt that the circumstances in this case as highlighted above, satisfy the test as laid in the two authorities I have quoted. I therefore review my decision to the extent that the order for possession and sale granted in the judgment of 31st March, 2010, be extended to property known as Stand number 441/Rem Roma, Lusaka. In making this order, I am merely correcting an error in my judgment. The review is therefore not on account of the fresh evidence produced.

In arriving at the conclusion in the preceding paragraph, I have considered and dismissed the argument by counsel for the Defendants that the Second

Defendant did not agree to mortgage stand number 441/Rem, Roma Lusaka, because he did not sign the facility letter, exhibit "MM1" to the affidavit in support of originating summons. This is because, although the Second Defendant did not sign "MM1", his intention to mortgage the said property is expressed in exhibit "MM2" to the affidavit in support of originating summons. The said exhibit states as follows at page 2;

> *"The departure of Dr. PG Sinyangwe and Mrs. Mate Musokotwane does not significantly affect the loan security as the loan is first secured by Chick Masters' Title Deed and Dr. Mwilola Imakando's property in Roma."*

I find that the reference to *"Dr Mwilola Imakando's property in Roma"* is to the property in issue.

As regards the application to amend the description of stand number 441/Rem Roma, Lusaka, to subdivision A of subdivision 180 of farm number 441a Lusaka, it is evident from exhibits "CCC2" and exhibit "CCC4" to the affidavit in support of this application that the property that the Plaintiff and Second Defendant intended to, and did transact on was subdivision A of subdivision 180 of farm 441a, Lusaka. This is because exhibit "CCC2" indicates that stand number 441/Rem, Roma, Lusaka is owned by someone else other than the Second Defendant. Further, there is no mortgage on it. In view of the foregoing facts I find that this is a proper case for me to grant leave to the Plaintiff to amend its pleadings to reflect the second property as subdivision A of subdivision 180 of farm 441a Lusaka. The fact that the application comes late in the day does not mean that I cannot entertain it as Order 20 rule 8 subrule 9 of the ***white book*** permits amendment of pleadings even after judgment. The said order states in this respect as follows;

> ***"Rules 5 and 8, expressly state that an amendment may be allowed "at any stage of the proceedings" (Roe v. Davies (1876) 2 Ch. D. 729 at 733) and amendments may be allowed before, or at, or after the trial, or even after judgment or on appeal (The Duke of Buccleuch***

> ***[1892] P. 201; G.L. Baker Ltd v. Medway Building & Suppliers Ltd [1958] 1 W.L.R. 1216; [1958] 3 ALL E.R. 540, CA). As a general rule, however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise."***

Order 20 rule 8 subrule 14 of the white book also permits amendment after judgment and it states as follows;

> ***"There is no reason in principle, particularly having regard to the width of O.2, r. 1, which precludes the Court in appropriate cases from amending the pleadings and proceedings even after final judgment ."***

I accordingly grant leave to the Plaintiff to amend its pleading by the deletion of stand number 441/Rem Roma, Lusaka, therefrom and substitution with, subdivision A of subdivision 180 of farm number 441a, Lusaka. The amended pleadings should be filed in Court within 14 days of the date hereof, consequent upon which the judgment of this Court dated 31st March, 2011, and my order on review in the earlier part of this ruling, will be taken to include and also refer to, property known as subdivision A of subdivision 180 of farm number 441a, Lusaka.

In arriving at the decision in the preceding paragraph I am of the opinion that no prejudice will be occasioned to the Second Defendant because in any event he did mortgage the property in issue and its misdiscription in the pleadings was as a result of mutual mistake by himself and the Plaintiff. Further, in making the order to amend, I have not relied upon Order 20 rule 11 of the ***white book*** but rather rule 8 subrule 9, because the former applies where a Court seeks to amend its judgment arising from an error or omission on its part, whilst the latter applies, as in this case, where a party made an error in

its pleadings. The error in the misdescription of the property emanates from the pleadings therefore, it must be corrected from there.

The last issue raised was that of joinder of Mate Musokotwane and Peter Gilbert Sinyangwa. I find no merit in the application firstly because it was not specifically pleaded by the Plaintiff in this application nor was the relevant order and authorities cited in support of the argument. There is just a casual reference to it under paragraphs 9, 10 and 11 of the affidavit in support of this application. Secondly, joinder of a party can only be made before judgment. The case of ***Attorney General –VS- Tall and Zambia Airways (5)*** states in this respect as follows;

> ***"The words 'at or before the hearing of a suit' in order 14 rule 5 of the High Court Act Cap 50 mean 'before delivery of a judgment in a suit' and joinder can validity occur before judgment has been delivered."***

There is judgment entered already in this matter, and as such, it is too late in the day to seek to join other parties.

By way of conclusion, the Plaintiff's application succeeds to the extent I have highlighted above, and I accordingly grant the relief sought.

I also award costs to the Plaintiff.

Leave to appeal is granted.

Delivered on the 29th day of August, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE