

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 276 OF 2002

BETWEEN:

INDE FUND LIMITED.....PLAINTIFF

-VS-

M. SAONDA.....DEFENDANT

CORAM: TWEA, J

Ziyendam'manja, of Counsel for the Plaintiff

Nkhoma, of Counsel for the Defendant

Ngwale, Recording Officer

RULING

This is an expedited originating summons by the plaintiff. The plaintiff is a financial institution that lends out money to clients for business development. The monies lent out are secured by different means including charges of properties of the borrower. The defendant is such a client.

By an agreement dated 25th November, 1998, the plaintiff agreed to lend the defendant the sum of K869,400.00. This loan was lent at interest over and above the ruling bank rate. The sum lent was secured by a charge, in fact a second charge, over her property on plot No. 1/167 Chigumula. This charge had several exception clauses and specifically

excluded s.62, 78 and 68 of the Registered Land Act, from being applicable.

It is common knowledge that the defendant defaulted on repayments of the loan. The plaintiff sold the property but the defendant refuses to vacate the premises and argues that there was no sufficient notice and that the plaintiff did not comply with the requirements of the Registered Land Act. The plaintiff denied this and relies on the exclusion clauses in the charge.

It is in the affidavit evidence for the plaintiff that the defendant had twice before, in Civil Causes 2624 of 1999 and 1170 of 2001, obtained injunctions against the sale of the property which injunction the court vacated in favour of the plaintiff. It is now argued that the defendant has no cause of action and is simply abusing the court process. This has not been disputed.

I must say that the plaintiff could have presented their case better, but it is clear to my mind that the defendant defaulted and that action had been taken against her before. The defendants' only argument is on lack of notice and compliance with the statute. At no point in time did the defendant argue that they had remedied the default, or sought rescheduling or that after discharge of the said injunction there was any change of circumstances which would have altered the position as a defaulter. None at all. From the affidavit evidence. This court gets this impression that the defendant defaulted payment and sat back and now wants to plead default of the statute.

I find in my view that she has been aware of the state of debt and that she defaulted in payment. This is a financial debt secured on property which has a limited value. At the current war time and inflationary bank interest rates, the debt and interest could easily outstrip the value of the security. This court must at all time bear in mind that financial institutions have to realise their money, or, if not, the security, to stay in business. There is no prudence in the courts allowing such default as would result in the borrower losing the security without the lender realising the debt. That will only burden the borrower and increase the cost of borrowing, on the capital market: **Bishop Mkhumbwe vs National Bank of Malawi** Cause No. 2702 of 2000 (unreported) at page 26; also **Chiukepo Mhango and Grace Mhango vs IndeBank Financial Services Limited** Cause No. 269 of 2000 (unreported) at page 3. and **Royal Foods and Spice Works Limited vs Finance Corporation of Malawi Limited** Civil Cause No. 3352 of 1999 at page 4 where the court held that:

“It would be great folly for our courts to assist commercial debtors to avoid their lawful obligation by using the judicial process. Businesses by their nature have risks and the agreements have in them clauses or provisions to minimise such risks. If one cannot own up one must get out and not hold down the flow of capital. Courts are there to aid commercial entities in their lawful transactions and enhance economic growth by

ensuring that every player owns up to his or her obligations. To hold otherwise is to promote paupers living in heaven.”

Having looked at the affidavit evidence I find that the defendant has no cause. She defaulted and continues to default. She is offering no remedy to her default. She cannot have it all by claiming lack of notice where she is aware that she continues to be in default.

I order that the defendant must deliver vacant possession of title Chigumula No. 1/167/C to the plaintiff with 10 days of this order.

Costs to the Plaintiff.

Pronounced in Chambers this 22 day of February, 2002 at Blantyre.

E.B. Twea

JUDGE