

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPLE REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



2017/HP/1098

BETWEEN:

PULSE FINANCIAL SERVICES LIMITED

APPLICANT

AND

THOMSON PHIRI

1ST RESPONDENT

ALUFU PHIRI

2ND RESPONDENT

**Before Honourable Mrs. Justice S. M. Wanjelani on the 7th
day of May, 2018.**

*For the Applicant: Ms. S. Kalima, Messrs J & M Advocates
For the Respondents: No appearance*

JUDGMENT

Cases referred to:

1. *S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) V Hyper Food Products Limited and Two Others (1999) ZR 124*
2. *Reeves Malambo V Patco Agro Industries Limited (SCZ Judgment No. 20 of 2007)*

Legislation and Materials referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

2. *The Housing(Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia*
3. *The Rules of the Supreme Court, 1999 Edition*
4. *Halsbury's Laws of England, 4th Edition Volume 20*
5. *Snell's Equity*

This matter was commenced on 11th July, 2017 by way of Originating summons pursuant to **Order 30 Rule 14 of the High Court Rules** as read together with **Order 88 of the Rules of the Supreme Court, 1999**.

In the Originating summons, the Applicant seeks the following:

- i. *Payment of the sum of K40, 603.64 due and owing from the 1st Respondent to the Applicant on account of a loan facility secured by an Agreement dated 30th May 2014;*
- ii. *An Order that under and by virtue of several agreements, the Applicant is entitled to be considered as the Mortgagee of the property described in the said Agreement, and to exercise all the rights of a Mortgagee including the power of sale, foreclosure and possession;*
- iii. *An Order for foreclosure and possession of the mortgaged property;*
- iv. *An Order for the sale of the aforesaid mortgaged property;*
- v. *As against the 2nd Respondent, jointly and severally as guarantor pursuant to specific Guarantor Agreement dated 30th May 2014, an Order that the 2nd Respondent does forthwith pay the Applicant, the sum of K40,603.64 due and owing to the Applicant plus interest thereon at facility interest by reason of the 1st Respondent default in meeting its payment obligations to the Applicant;*

- vi. *Any other Order that the Court may deem fit and just in the circumstance; and*
- vii. *Costs of and indicated to this action.*

The Originating Summons were accompanied by an Affidavit in Support sworn by **Martha Msoni Mwondela**, a Legal Officer in the employ of the Applicant in which she averred that on 29th May 2014 the Respondent and the Applicant entered into an agreement for a sum of K40,000 to be repaid in 36 months installments with interest at 3.5% per month. It was averred that to this effect, the Parties executed various documents which include:

- i. *Individual Loan Agreement (Immovable);*
- ii. *Individual Loan Agreement (Movable);*
- iii. *Assignment and Transfer of specific Assets (Immovable);*
- iv. *Assignment and Transfer of specific Assets (Movable);*
- v. *Pledge on overall Assets (Movable);*
- vi. *Pledge on overall Assets (Immovable);*
- vii. *Power of Attorney; and*
- viii. *Consent Form.*

The deponent averred that the 1st Respondent further pledged various chattels which included a Home Theatre, a 21 Inch Television, a Sofa Set and Deep Freezer, as collateral, as well as by way of Mortgagee as security or property known as Holding **M.H 59 Chigaga Section, Katete** and submitted the Land Record Card for the property.

It was contended that the Applicant and the Respondent entered into an agreement to create a Further Mortgage Charge and the

Respondent deposited a Land Record Card as per exhibits **“MMM2a”** and **“MMM2b”**. The Deponent averred that there is an outstanding amount of a loan in the sum of K40,603.64, comprising K32,674.19 as Principal and K7929.45 as balance of the interest as exhibited in the exhibit marked **“MMM3a”** and **“MMM3b”** being the Payment Schedule and Account Statement respectively.

Further, the Deponent averred that the 2nd Respondent guaranteed payment on 30th May 2014 as per the Specific Guarantor Agreement exhibited and marked **“MMM4”** as well as a Guarantor Assignment and Transfer of Specific Assets for various chattels including a 21 Inch Television, a Sofa set, a Deep Freezer, an Entertainment Unit, a Decoder and DVD Player as per the exhibited agreements marked **“MMM5”**. In addition it was averred that the 2nd Respondent executed a Power of Attorney and Pledge on overall assets as per exhibits **“MMM 6a”** and **“MMM6b.”**

In conclusion, it was averred that the Respondents did not have a plausible defence to the claims.

The Respondents did not file an Affidavit in Opposition or appear at the hearing despite having been served by substitute service as per Affidavit of service filed on 6th February, 2018.

During the hearing, the Applicants' Counsel relied on the Affidavit in Support of the Originating Summons and further filed submissions.

It was submitted that an equitable Mortgagee was created to serve as security for the loan obtained by the 1st Respondent, as defined by the learned authors of *Snell's Equity* that:

“a mortgage is a conveyance of some interest in kind or other property as a security for the payment of a debt or the discharge of some other obligation for which it is given on satisfying the obligation in respect of which the mortgage was given, the Mortgagor has the right to redeem that is to recover full ownership in the property.”

It was contended that **Order 88 of the Rules of the Supreme Court** which is anchored in similar terms as **Order 30 Rule 14 of the High Court Rules** highlights the various rights which include payment of the monies secured by the Mortgagee, sale of the mortgaged property, foreclosure, delivery of possession to the Mortgagee, redemption, reconveyance of the property and delivery of possession by the Mortgagee.

Reference was made to the case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) (In Receivership) V Hyper Food Products Limited and Two Others⁽¹⁾** where the Supreme Court held that a Mortgagee's remedies are cumulative and also alternative to each other.

It was further submitted that a direction be given by the Court for Mortgagor to convey the assets pledged as security to the Mortgagee as guided in the case of **Reeves Malambo V Patco Agro Industries Limited⁽²⁾**.

As regards the 2nd Respondent, reference was made to **Halsbury's Law of England**, that a surety/guarantor is liable to a creditor as if he had made the pledge for his own debt. It was contended that as the loan is still outstanding, both the Respondents are liable and the Applicant is entitled to the reliefs in the Originating Summons.

I have considered the matter, the Affidavit in Support as well as the submissions by Counsel on behalf of the Applicant. This matter was commenced pursuant to **Order 30 Rule 14 of the High Court Rules** which provide as follows:

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-

Payment of moneys secured by the mortgage or charge;

Sale;

Foreclosure;

Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property

subject to the charge or by any other person in, or alleged to be in possession of the property;

Redemption;

Reconveyance;

Delivery of possession by the mortgagee.

The evidence shows that the Applicant and the 1st Respondent executed a Loan Agreement on 29th May, 2014 in which the Applicant lent the 1st Respondent a sum of **K40,000.00** for a period of 36 months, with interest at 3.5% as per exhibit **“MMM1a”**. In addition, the 1st Respondent pledged various assets as security including some household goods and **Plot H59, Chigaga Section Katete** as per exhibits **“MMM1a”** – **“MMM1f”**, as well as a further Mortgage Charge and Land Record Card exhibited as **“MMM2a”** and **“MMM2b”**.

A perusal of the *“Payment Schedule”* marked **“MMM3a”** and the *“Account Statement”* marked **“MMM3b”** shows that the last payment was made on 5th May 2015, indicating that the 1st Respondent has not been servicing the loan as agreed and I therefore, find that the 1st Respondent is indebted to the Applicant.

As regards whether the Applicant can be considered a Mortgagee, exhibit **“MMM2a”** is a *“Further Charge Mortgage Land Record Card”* with respect to **Holding No. H59, Chigaga Section, Katete**, which was registered pursuant to **Housing (Statutory and Improvement Areas) Act 1974**.

Sections 23 and **24** of the said **Act** provides for the creation of Mortgages in relation to the land held under that Act and state:

“23 Every mortgage or transfer of mortgage executed in respect of any land to which this Act applies shall be in prescribed form.

24(1) A mortgage in respect of any land to which this Act applies may be created by the deposit of a document of title and such mortgage shall be evidenced by a document in the prescribed form.

(2) In this Section, “documents of title” means a grant, a certificate of title, a lease or a Sub-lease”

In addition the regulation enacted pursuant to the said Act in **Regulation 13** provides:

“A mortgage of any estate or interest in land shall have effect as security and shall not operate as a transfer or lease of the estate or interest thereby mortgaged, but the mortgagee shall have and shall be deemed always to have had the same protection, powers and remedies (including a power of sale, the right to take proceedings to take possession from the occupiers and the persons in receipt of rents and profits or any of them ...”

While **Regulation 14** goes further to state:

(1) A power of sale of the whole or any part or parts of any property subject to a mortgage shall become exercisable by a mortgagee if any mortgage is made in the Form 4 set out in the First Schedule and the

mortgage money payable thereunder has become due and the mortgage is not redeemed before sale, and every such power of sale shall be subject to the powers and obligations and other provisions relating to sales by mortgagees contained in the Conveyancing and Law of Property Act, 1881, of the United Kingdom, or any statutory modification thereof applicable in Zambia, but neither the council registrar nor any person purchasing for value from such a mortgagee shall be bound or concerned to see whether all or any of the provisions of that Act have been complied with or whether any money remains due under the mortgage."

A perusal of the exhibit "**MMM2a**" shows that it was registered pursuant to the **Housing(Statutory and Improvement Areas)Act** thereby creating a legal mortgage. In view of the fact that the 1st Respondent has breached the terms of payment of the Loan Agreement and has been in arrears from 5th may 2015, the Applicant, as a Mortgagee is entitled to the reliefs as prayed and further provided for under **Order 30(14) of the High Court Rules**.

As alluded to by the Applicant's Counsel in the submissions and defined in the **Halsbury's Laws of England**, the 2nd Respondent executed the Guarantor documents exhibited as "**MMM5**" and "**MMM6a**" "**MMM6b**" and consequently is equally liable for the debt in view of the 1st Respondent's default.

In the premise, the Applicant succeeds in its claims and is accordingly granted the reliefs as prayed. The Respondents shall

pay the amounts due within Thirty (30) days from the date hereof, failing which the Applicant shall be at liberty to take possession of and sale the pledged items including **Holding No. H59, Chigaga Section Katete**. The Applicant is further awarded costs of these proceedings.

Delivered at Lusaka this 7th day of May, 2018.



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S.M.WANJELANI
JUDGE