IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO.132/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

ANGEL MUSONDA **APPELLANT**

AND

PULSE FINANCIAL SERVICES **RESPONDENT**

Coram: Makungu, Kondolo SC & Majula, JJA
On 24th April, 2018 and 21st December, 2018

For the Appellant: *Mr. E. Khosa of Alberto Ngoi Advocates.*

For the Respondent: *Ms. M. Bwalya with Mr. A. Mumba of Mwenye and Mwitwa Advocates.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Kangwa Simpasa & Yu Huizhea vs Lackson Mwaba Mwanza Appeal No. 28 of 2012.*
2. *Jamas Milling Company Limited vs Amex International Limited (2002) ZR 79.*

3. *Savenda Management Services vs Stanbic Bank Zambia Limited (Appeal No 37/2017).*
4. *Printing Numerical Registering Company vs Simpson (1875), LR 19 Eq 462*
5. *Colgate Palmolive (Z) Inc vs Shemu & Others (Appeal 181 of 2005).*

Legislation and other works referred to:

1. *High Court Rules, Cap 27 of The Laws of Zambia.*
2. *Halsbury Laws of England, Volume 9, 4th edition (Re-issue) Sweet and Maxwell; London*
3. *Chitty on Contract, 26th Edition, Volume 1, Sweet and Maxwell; London.*

The appellant appeals against a Judgment entered in favor of the respondent for the sum of K34,642.71 together with interest and costs.

The brief facts of the matter were that the appellant and respondent executed a loan agreement on 18th September, 2018 in which the appellant was advanced a sum of K45,000.00.

It was an express term of the loan agreement that the appellant would repay the loan in equal instalments over a period of 36 months at an interest rate of 3.5 percent per month on the unpaid portion of the loan amount. It was also expressly agreed that the total amount that the appellant was expected to pay was K79,840.34. As security for the loan the appellant pledged a Mercedes Benz Atego truck bearing registration No. BT 5027.

The appellant defaulted in paying some instalments. This compelled the respondent to take possession of the security pledged and subsequently auction it in a bid to recover the debt.

Aggrieved by the steps taken by the respondent, the appellant commenced an action against the appellant in the High Court, on 7th March, 2014, claiming that the seizure of his truck was illegal and also claiming loss of business during the time that the truck was in the custody of the respondent.

The respondent counter-claimed for a declaration that it was entitled to enforce its contractual rights and sell security pledged.

Before the substantive matter could be heard, on the 8th April, 2014, the appellant took out a summons for an order for interim preservation of the truck which was in the custody of the respondent. The court below rendered it's ruling on the interlocutory application on 9th May, 2014 wherein it held that the seizure of the truck was null and void on account of the fact that there was no court order authorizing the same. The court stated that: *"there can be no distress without a court order even in the presence of an instrument indicating that the property pledged as collateral can be taken in the event of default."*

In addition, she was of the view that even if the seizure had been valid, it would not stand as the truck was a tool of trade exempted from seizure.

The truck in the meantime had already been sold by the respondent on 26th April, 2014.

Therefore, the ruling of 9th May, 2014 had been overtaken by events and the order by the court for return of the truck could therefore not be complied with.

The appellant was prompted to commence contempt proceedings against the respondent for non-compliance with the Ruling of 9th April, 2014 ordering the return of the truck. On 6th January, 2015, the lower court delivered another Ruling on the second interlocutory application and held that her earlier Ruling of 9th May, 2014 was still valid. She however declined to grant the application for leave to issue contempt proceedings.

The appellant proceeded to issue a writ of fifa against the respondent on 23rd January, 2015, notwithstanding that there was no Judgment. In reacting to the writ of fifa, the respondent applied for an order to stay execution or further execution and or the sale of the seized assets. The stay was granted by the Deputy Registrar. In her Ruling dated 13th February, 2015, the Deputy Registrar ordered the respondent to bear the costs and fees of execution of the writ of fifa.

Displeased with this Ruling the respondent appealed to another Judge of the High Court who observed that the writ of fifa was irregularly issued by the appellant which caused the respondent to incur expenses in costs and fees of execution. She ordered that the

appellant should therefore refund the respondent the sum of K35,000.00 in respect of the same.

After the interlocutory applications before the court were exhausted, the parties requested for the main matter to be heard. The parties proceeded to submit before the trial court, a statement of agreed facts containing the issues for determination by the court. The appellant's claims were for loss of business of K3,500.00 per day, costs and any other relief. The respondent counter claimed for special, general and exemplary damages, interest and costs.

On 20th April, 2017, another High Court Judge delivered her judgment which is the subject of this appeal. In a nutshell, the learned trial Judge dismissed all the appellant's claims. Considering that he defaulted in settling the loan of K79,840.34, she held that, the respondent was entitled to seize and dispose of the motor vehicle. In addition, that the motor vehicle was properly auctioned at K20,000 and the respondent was correctly paid K17,000 less commission charges. The court finally ordered the appellant to pay the balance of the loan of K34,642 plus interest and costs. The counter-claim for special and general damages was dismissed.

Dissatisfied with this decision, the appellant has appealed to this court advancing two grounds of appeal which were structured as follows:

1. The court below erred in law and in fact when it held that the appellant's motor vehicle which was pledged as collateral was

liable to be seized by the respondent and that the appellant's claims for damages failed, having already ruled on 9th May, 2014 and 6th January, 2015 that the seizure of the said truck was illegal, null and void.

2. The court below erred in law and fact when it held that the appellant was not entitled to damages for the seizure and sale of his motor vehicle as he had defaulted on the repayment of his loan.

Both parties filed written heads of argument which were augmented at the hearing of the appeal.

In support of ground one, Mr. Khosa began by highlighting the issues that had been submitted by both parties for determination in the court below. Regarding the sale of the truck, he contended that the respondent being a financial institution could only exercise the right to sell upon obtaining a court order. He went on to argue that the court below having pronounced itself on the question of the illegality of the sale of the appellant's truck, meant that the appellant had suffered damages as a result of the respondent's wrongful action of selling the truck without a court order. He contended that the trial court was therefore precluded from making a pronouncement on that aspect as it had become *functus officio*.

He forcefully argued that the only remedies available to the respondent were either to appeal or seek review of the said rulings. Counsel further submitted that the facts having been agreed, the only issue for the court below was to determine whether the appellant was

entitled to damages for the sale of the truck and the subsequent loss of business.

In relation to ground two Mr. Khosa argued that the court below failed to distinguish two pertinent issues: whether the appellant was entitled to damages for the illegal sale of the truck; and what the consequences of the default on the loan by the appellant.

He pointed out that the court could not deny the appellant, the right to compensation simply because he had defaulted on his loan. He spiritedly argued that the court ought to have granted the appellant damages for illegal sell of the truck and referred the matter to the Deputy Registrar for assessment of damages.

In response to the first ground of appeal, learned Counsel for the respondent submitted that the Judgment appealed against does not review the earlier ruling of 9th May, 2014 delivered earlier by another to the effect that the seizure of the truck was null and void. He contended that for the trial court to review its judgment there ought to be sufficient grounds and an application should be made within 14 days. To fortify his argument, he cited the cases of ***Kangwa Simpasa & Yu Huizhea vs Lackson Mwaba Mwanza[1] and Jamas Milling Company Ltd vs Ames International Limited.[2]***

According to the respondent's Counsel, the trial court was also spot on when it found that the appellant defaulted on his loan obligation and that his motor vehicle which was pledged as collateral

was liable to be sold in order to recover the outstanding balance on the loan. For this proposition he relied on the case of ***Savenda Management Services vs Stanbic Bank Zambia Limited*** [3] where it was observed by the Supreme Court that defaulting borrowers should not be allowed to make use of the court process. Counsel accordingly urged us to dismiss the appeal.

We have examined the evidence on record, as well as the authorities cited. We note that three puisne Judges had dealt with this matter. The bone of contention is that the portion of judgment dealing with the aspect of the sale of the truck amounted to a review of the ruling which was delivered earlier by a different Judge. We are heedful of the law as to when and in what circumstances the High Court can review its own decision pursuant to **Order 39 Rules 1 and 2 of the High Court Rules.**

We are fully aware of the cases of ***Kangwa Simpasa & Yu Huizhea vs Lackson Mwaba Mwanza***[2] and ***Jamas Milling Company Limited vs Amex International Limited***[3] called in aid by Counsel for the respondent. In summary, from the aforecited authorities, it is clear that in order for a trial court to review its own Judgment there ought to be sufficient grounds and the application should be made within a period of 14 days.

Having gleaned the record, we have found no such application. It is within our contemplation that the court proceeded based on the evidence before it and resolved the disputes between the parties.

That being the case, we find that the court was on firm ground in the Judgment of 20th April, 2017 in arriving at the finding based on the evidence before it that the respondent was entitled to seize the truck pledged as collateral given that the appellant had defaulted.

Pertaining to the claim for loss of business, this was not substantiated and therefore lacks merit.

In light of the foregoing, we are unable to find merit in this ground of appeal and accordingly dismiss it.

We now turn to consider ground two wherein the appellant is claiming that the court erred in law and fact when it held that he was not entitled to damages for the seizure and sale of his motor vehicle.

We have scrutinized the loan agreement particularly clauses 9, 11 and 12. Clause 9 provides as follows:

> *"Any delay of repayments is considered a serious fault liable to the following sanctions; seizure of the funded asset, seizure of the collateral and legal proceedings, the costs of which shall be met in full by the borrower."*

Clause 11 grants authority to the respondent to seize any assets pledged as security.

Clause 12 gives power to dispose of all assets provided as security. It states:

"In the case of default in payment of the installments on the loan and interest thereon or partial payment, PFSL reserves the right to.....

(b) Dispose of all collateral to pay the funds until the debt is paid including the interest, fees and monies."

The principles governing loan contracts are well articulated by the learned authors of **Halsbury's Laws of England in Volume 9 (1) at paragraph 16**, where they state as follows:

"There is no limit at common law on the types of contracts pursuant to which credit may be given. Such contracts are governed by the usual contractual principles, subject to the intervention of statute and particularly, of statutory provisions regulating dealings between consumers and businesses."

Further, the learned authors of **Chitty on Contracts 26th Edition, Volume 1 at paragraph 772** state that:

"Where the agreement of the parties has been reduced into writing and the document containing the agreement has been signed by one or both of them, it is well established that the parties signing will be bound by the terms of the written agreement whether or not he has read them or whether or not he is ignorant of their precise legal meaning."

It is abundantly clear from the foregoing authorities that when parties enter into legally binding contracts, it is for the courts to

respect the terms and conditions of those contracts and not to interfere with the terms agreed upon by the parties. That the parties who signed the agreements are bound by them and the court's role is to enforce the terms of the agreement.

The Supreme Court aptly explained this principle when they cited with approval the case of ***Printing Numerical Registering Company vs Simpson***[7] in the case of ***Colgate Palmolive (Z) Inc vs Shemu & Others***,[8] which held that:

> *"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts."*

In light of the preceding paragraphs we are duty bound to follow the terms of the written agreement between the parties. The agreement has clauses 9, 10, 11 and 12 which clearly spell out what options or courses of action are available to the respondent in the event of default by the appellant. The appellant was under an obligation to make the requisite payments for money he had borrowed. The appellant pledged a motor vehicle, the 'truck' as collateral and in line with the terms of the agreement, the respondent could sell the truck in order to recover the outstanding balance of the debt. We have come to the inescapable conclusion that having violated the loan agreement the truck could be sold. The sale of the

truck was not illegal and therefore, there are no damages due to the appellant in that regard.

Pertaining to the consequences of the default on the loan, we have expressed ourselves in the preceding paragraphs.

In sum, we have found the two grounds of appeal bereft of merit and accordingly dismiss them.

Costs to follow the event and to be taxed in default of agreement.

.....
C.K. Makungu
COURT OF APPEAL JUDGE

.....
M.M. Kondolo SC
COURT OF APPEAL JUDGE

.....
B.M. Majula
COURT OF APPEAL JUDGE