

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA

2015/HPC/0521

(Civil Jurisdiction)

IN THE MATTER OF: The Property comprises in Certificate of Title
Relation to Subdivision 4506 of Lot No.
1052/M Lusaka and Lot No. 2701/M Eastern
Province respectively

BETWEEN:

STANBIC ZAMBIA LIMITED

AND

RACHAEL MUDIYO BANDA

LYALIWE BANDA KALAWA

OPTIUM TRAVEL LIMITED



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Before the Hon Madam Mrs. Justice Irene Zeko Mbewe

Appearances

<i>For the Applicant</i>	:	<i>Mr. A Chileshe of Messrs Mambwe Siwila Lisimba & Company</i>
<i>For the 1st Respondent</i>	:	<i>Mr. L Yeta of Messrs Central Chambers</i>
<i>For the 2nd Respondent:</i>	:	<i>N/A</i>
<i>For the 3rd Respondent:</i>	:	<i>N/A</i>

J U D G M E N T

Cases referred to:

1. *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership v Hyper Food Products [1999] ZR 124 SC*
2. *R v Baskerville [1916] 2 K B 658*
3. *Sithole v State Lotteries Board [1975] ZR 106*

4. *Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Choice (In Receivership) and Another* [
5. *Pulse v Eliane Munga and Another Appeal No 133 of 2019 CA*
6. *Khalid Mohammed v Attorney-General [1982] ZR*
7. *Anthony Mbewe and Another v Investrust Bank Appeal No 112 of 2010 CA*
8. *Thomas Sinkala v Engen Petroleum Zambia Limited Appeal No 208 of 2019*
9. *ABC v Plinth Technical Works Limited Selected Judgment No 28 of 2015*
10. *Santley v Wilde [1899] 2 Ch 474*
11. *Malambo v Patco Agro Industries Limited [2007] ZR 177*
12. *Kanjala Hills Lodge Limited v Stanbic [2012] ZMSC 33*

Legislation and other works referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Misrepresentation Act, Cap 69 of the laws of Zambia*
3. *Megarry and Wade, The Law of Real Property, by Charles Harpum*
4. *Atkins Court Forms Vol.28*
5. *Chitty on Contract, 25th Edition Sweet and Maxwell*
6. *Black's Law Dictionary, 8th Edition Thomas Reuters*

By way of originating summons the Applicant claims against the Respondents for the following reliefs:

1. *Payment of the sum of K2,218,483.35 plus interest due under third party mortgage, further charge, third party mortgage.*
2. *Delivery up and possession of subdivision 4506 of Lot 1052/M, Lusaka and Lot No. 27017/M Eastern Province respectively.*
3. *Foreclosure and sale.*
4. *Further or other relief.*

5. *Costs.*

The originating summons is supported by an affidavit sworn by Reuben Matala Malindi the Credit Risk Team Leader Specialised Recoveries in the Applicant bank. The case for the Applicant as deposed in the supporting affidavit is that by a facility letter dated 27th June 2013 the Applicant availed a loan facility of ZMK1,532,000.00 to the 3rd Respondent (Exhibit “RMM1”). The facility was secured by Subdivision 4506 of Lot 1052/M Lusaka belonging to the 1st Respondent and a third party mortgage was created on 22nd July 2013 and as additional security for the credit facility the 1st Respondent executed a deed of guarantee (Exhibit “RMM2 and 4”).

On 11th November 2013, the Applicant availed the 3rd Respondent a further credit facility of K550,000.00 and the 1st Respondent executed a further charge (Exhibit “RMM5-6”). According to the Applicant, a third facility dated 23rd April 2014 of ZMW950,000.00 was availed to the 3rd Respondent secured by Lot No. 27018/M Eastern Province and a third party mortgage was duly created and registered and the 2nd Respondent executed an unlimited deed of guarantee (Exhibit “RMM7-10”).

On 16th June 2014, the Bank availed the 3rd Respondent a further credit facility of ZMW300,000.00 and the 2nd Respondent executed a further charge (Exhibit “RMM11-12”). It is further stated that the credit facilities have not been serviced by the 3rd Respondent resulting in an outstanding balance of ZMW2,218,483.35 plus interest and charges (Exhibit “RMM13”).

The 1st Respondent filed her opposing affidavit basically stating she is proprietor of Subdivision 4506 of Lot 1052/M Lusaka. Further, that the 2nd Respondent is

the managing director and majority shareholder in the 3rd Respondent Company who also happens to be her niece.

According to the 1st Respondent, in June 2013 she was approached by the 2nd Respondent who had a proposal of redeeming the 1st Respondent's property from EFC a lending institution where the 1st Respondent had a debt of ZMW62,234.00. In exchange, the 2nd Respondent would use the same property to obtain a bank guarantee required for her ticketing business. It was agreed between the 1st and 2nd Respondent that the certificate of title would only be used for one year in line with the validity period of the bank guarantee which was an IATA requirement for all ticketing agents in Zambia.

On 13th June 2018, the 1st Respondent signed a Memorandum of Understanding (MOU) with the 2nd Respondent wherein the 1st Respondent authorised the use of her certificate of title in exchange for payment of her debt by the 2nd Respondent (Exhibit "RB 1" which was not attached). Following, the 1st Respondent executed a third party mortgage with the Applicant (Exhibit "RMM 3" in Applicant's supporting affidavit). According to the 1st Respondent's understanding, the 3rd Respondent was obtaining a bank guarantee and not a cash advance and it is on that basis she alleges there was misrepresentation by the 2nd Respondent resulting in her executing the third party mortgage.

The 1st Respondent alleged that on execution, the Applicant never availed her with a copy of the third party mortgage nor did she read or understand the content thereof and her belief remained that the property was used for purposes of giving a bank guarantee to IATA.

Further, the 1st Respondent denied signing the deed of guarantee or further charge as alleged by the Applicant nor did she authorize the creation of a third party

mortgage (“Exhibit RMM6”). She stated that the 2nd Respondent fraudulently procured her signature and title to obtain money from the Applicant. It is her belief that the Applicant and 2nd Respondent acted in bad faith as both parties should have fully explained the transaction to her. According to the 1st Respondent she made an attempt to retrieve her certificate of title from the Applicant which proved futile (Exhibit “RMB 2”).

The 1st Respondent made an application for leave to file a further opposing affidavit which Order was granted. In the further affidavit dated 4th February 2019, the 1st Respondent disclosed she filed a complaint on 12th December 2015 to the investigative wings for suspected forgery activities by the 2nd and 3rd Respondent relating to the disputed third-party mortgage, further charge and consent to execute third party mortgage (Exhibit “RMB1” in further opposing affidavit). She then gave the disputed documents and signatories which included six (6) A4 papers containing 6 signatories on each sheet where she signed as Rachel Banda and on the other sheets where she signed as Rachel Banda Mudiyo (Exhibit “RBM2”).

She provided random signatories to the expert witness, a handwriting expert Chief Inspector Phiri who compared and contrasted the various specimens. According to the 1st Respondent, the findings revealed that the third party mortgage dated 22nd July 2013 had genuine signatories whilst the further charge and consent to execute a third party mortgage were forgeries (Exhibit “RMB4”). She alleged that through the misrepresentation exercised by the 2nd Respondent, it led her to execute the third party mortgage dated 22nd July 2013.

On 27th April 2019, following an application for leave to cross-examine the deponent, the 1st Respondent called her witness Chief Inspector Thomas Phiri a

forensic expert with 19 years' experience. His witness statement was filed into Court on 4th May 2019.

He told the Court he received a complaint letter from the Drug Enforcement Commission and Messrs Central Chambers in which the 1st Respondent disputed signing certain documents and considered them to be forgeries from acts perpetuated by Lyaliwe Banda the 2nd Respondent herein. He arrived at his findings by examining the third party mortgage dated 22nd July 2013, further charge relating to Subdivision 4506 of Lot 1052/M Lusaka dated 19th December 2013, consent to execute a third party mortgage and related further charge over Subdivision 4506 of Lot No. 1052/M Kafue Road Lusaka dated 13th June 2014 all bearing disputed writing and signatories, and a request and random signature samples of the 1st and 2nd Respondent. He visually examined the documents and under microscope effected a side by side comparison between the disputed writings/signatories and provided specimen samples of the 1st and 2nd Respondent in all aspects of the subject documents.

It was his finding that the disputed signatories alleged to have been signed by the 1st Respondent (Rachel Banda) and the 2nd Respondent (Lyaliwe Banda) in the third-party mortgage dated 22nd July 2013 were genuine signatories and also matched the writing by the 2nd Respondent in the same document. In terms of the disputed signature alleged to have been signed by the 1st Respondent in the further charge relating to Subdivision 4506 of Lot No. 105 Lusaka, he found it did not match her sample signatories but the disputed signature purported to have been signed by the 2nd Respondent matched her specimen signature samples.

He concluded that the disputed signature purported to have been signed by the 2nd Respondent in the consent to execute a third-party mortgage and related further charge over Subdivision 4506 of Lot 1052/M Kafue Road Lusaka matched the

2nd Respondent's specimen samples but the disputed signatures alleged to have been signed by the 1st Respondent did not match her specimen signature samples.

In cross-examination, the expert witness confirmed he had 4 years' experience in handwriting analysis. When questioned as to whether the 2nd Respondent was treated as a suspect who forged the 1st Respondent's signature, he responded in the negative. He however conceded that specimen samples from the 2nd Respondent were not submitted to his office nor did she personally give specimen samples in his presence. He reiterated his findings were based on expert opinion and not assumptions.

In further cross-examination, the expert witness denied the proposition that there was any room for errors and maintained the signatures alleged to have been signed by the 1st Respondent were forgeries though he did not know the person who signed them. He told the Court that unless someone was an expert it would be difficult to tell the forged signatories. He maintained he never called persons who witnessed the signature of the 1st Respondent on the document marked exhibit "RMM4".

In re-examination, the expert witness maintained that interviewing the 2nd Respondent was not his duty as it was that of the dealing officer as his duty was to only receive and examine documents availed to him. He reiterated his findings that the 1st Respondent did not append her signature on the documents availed to him namely the further charge and the second third party mortgage.

On 24th April 2019, the 1st Respondent applied for leave to re-open its case and file a second further affidavit in opposition to the originating summons on January 2020 and the Order was duly granted. The purpose of filing the second further affidavit was to lay a foundation for the expert's witness certificates.

The expert produced his certificates which were admitted as evidence. He testified that the machine shown on the certificate related to passport readings. He informed the Court that though his certificate showed a one month training he had the competencies as a handwriting expert.

The expert witness clarified that the passport reader was used to examine passports and equally all handwriting and signatures including counterfeit notes of all currencies. He further explained that the machine was not manufactured in Zambia but was installed at the forensic laboratory in Lusaka, Zambia.

The Applicant filed its written submissions on 18th April 2019 whilst the 2nd Respondent filed their final submissions on 1st April 2020 after leave was granted for an extension to time within which to file.

Applicant's submissions

Counsel for the Applicant submitted it is not in dispute the two properties were used as security for the credit facility availed to the 3rd Respondent namely Subdivision 4506 of Lot 1052/M Lusaka and Lot No 27017/M Petauke. Counsel cited a passage from the learned authors of *Chitty on Contract, 25th Edition Sweet and Maxwell* which referred to the consequence of parties having reduced their agreement in writing, are bound by the terms whether or not it was read and this was applicable herein as the 1st Respondent did not deny executing the third party mortgage of 22nd July 2013.

Counsel submitted there has been default and the Applicant is entitled to the cumulative remedies available to a mortgagee as espoused in the case of *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited) In Receivership v Hyper Food Production Limited and Another* [1990] ZR 124 ⁽¹⁾.

Counsel submitted that there were serious flaws in the handwriting expert's findings as he never interviewed the two persons who indicated as having witnessed the signature of Rachael Banda on the further charge dated 19th December 2013 and relied on the case of *R v Baskerville* [1916] 2 K B 658⁽²⁾ where it was held that evidence in corroboration must be independent testimony. Further, reference was made to the case of *Sithole v State Lotteries Board* [1975] ZR 106⁽³⁾ in support of the proposition that the Court does not blindly accept what the handwriting expert has said as it is a mere opinion.

It was Counsel's contention that the evidence of forgery is inconsequential and does not relieve the 1st Respondent from liability as she did not dispute executing the third party mortgage of 22nd July 2013.

In concluding, Counsel submitted that the 3rd Respondent was a beneficiary of the credit facilities and it does not absolve the 1st and 2nd Respondent from liability. The Court was implored to grant the reliefs.

1st Respondent's submission

In the 1st Respondent's submission filed into Court on 1st April 2020, the primary contestation is whether the 1st Respondent is indebted to the Applicant in the sum of ZMW1,532,000.00 pursuant to the third party mortgage. It is argued that the Applicant failed to traverse the allegation of the serious elements of misrepresentation on the part of the Applicant, 2nd and 3rd Respondent. Counsel argued that the Applicant had misrepresented the effect of the third party mortgage executed by the 1st Respondent was to secure a bank guarantee in relation to security for the tickets the 3rd Respondent would obtain from IATA members and yet it turned out to be a cash advance.

Counsel submitted that the Applicant, 2nd and 3rd Respondent were guilty of misrepresentation and cited the case of *Nkongolo Farms Limited v Zambia National Commercial Bank and Others* [2007] ZR 149 ⁽⁴⁾ where the Court held inter alia that misrepresentation is a vitiating factor of setting aside a third-party mortgage.

It is submitted that an order for foreclosure should not be granted as the credit facility was only signed by the 2nd Respondent and the subsequent signature on the third party mortgage was acquired by misrepresentation making it unenforceable.

An alternative argument was proffered of non-performance by the Applicant and in breach of implied terms and conditions on the basis that the Applicant went ahead to avail the 2nd and 3rd Respondent a cash advance which was not the purpose the 1st Respondent signed the documents for. Counsel then reproduced resolution 812 Passenger Sales Agency Rules promulgated by IATA which shows the procedure for the release of money where an agent such as the 3rd Respondent defaults in payment towards IATA. Counsel set out the procedure when a bank guarantee becomes enforceable which he argued was not traversed by the Applicant.

Counsel submitted that the 1st Respondent was not liable under the further charge and deed of guarantee for the further sum of ZMW550,000.00. The Court was referred to the evidence of the handwriting expert who found that the further charge and deed of guarantee were not signed by the 1st Respondent.

Counsel further argued that the Applicant had a duty to explain the nature of documents the 1st Respondent was signing and relied on the case of *Pulse Financial Services Limited T/A Entrepreneurs Financial Centre v Eliane Munga*

and *Another Appeal No 133 of 2019*⁽⁵⁾ where the Court of Appeal held that the Bank was in breach of this duty and therefore the securities could not be enforced.

Analysis of evidence

I have considered the affidavit evidence both in support and opposition, oral evidence of the expert witness, written submissions and the authorities relied upon. The dispute for determination will be considered sufficiently from the material before Court. The issues for determination are as follows:

- (1) Whether the third-party mortgage dated 22nd July 2013 relating to Subdivision 4506 of Lot No. 1052/M Kafue Road, Lusaka is valid and enforceable by the Applicant against the 1st and 3rd Respondent as there was a misrepresentation by the 2nd Respondent.
- (2) Whether the further charge and third party mortgage dated 22nd July 2015 relating to Subdivision 4506 of Lot No. 1052/M Kafue Road, Lusaka is valid and enforceable against the 1st and 3rd Respondent.
- (3) Whether there was misrepresentation by the Applicant and 2nd Respondent to the 1st Respondent.
- (5) Whether the Applicant had a duty to advise the 1st Respondent to seek independent legal advice before executing the third party mortgage of 22nd July 2013.
- (6) Whether the Applicant is entitled to the reliefs claimed.

The Applicant's application is anchored on *Order 30 Rule 14 High Court Rules, Chapter 27 of the Laws of Zambia* which provides:

"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 present claim arises from the alleged facility dated 27th June 2013 availed by the Applicant to the 3rd Respondent in the limit sum of ZMW1,532,000.00 and repayable strictly on demand.

It is not in dispute that the 3rd Respondent was availed credit facilities on 11th November 2013 in the sum of ZMW550,000, on 23rd April 2014 in the sum of ZMW950,000.00; and on 16th June 2014 in the sum of ZMW300,000.00.

It is not in dispute that security for the credit facility of ZMW950,000.00 dated 23rd April 2014 was Lot No 27017/M Eastern Province (Exhibit "RMM7"). It is not in dispute that the 2nd Respondent executed a further charge in respect to the credit facility of 16th June 2014 for the sum of ZMW300,000.00 (Exhibit "RMM12").

The 2nd and 3rd Respondent did not file any opposing affidavit nor did they appear at any hearing. I proceeded to determine the matter in their absence as there was evidence of substituted service and no explanation for their non-attendance.

Misrepresentation by the Applicant, 2nd and 3rd Respondent

Counsel for the 1st Respondent forcefully argues there were serious elements of misrepresentation on the part of the Applicant, 2nd and 3rd Respondent resulting in the 1st Respondent executing a third party mortgage. Secondly, that the guarantee documents and third party mortgage were not for the purposes of security for IATA to be paid by the Applicant directly to IATA members on demand, but in fact it was for obtaining cash advances by the 2nd and 3rd Respondent which was contrary to the purpose for which the 1st Respondent signed the document.

These assertions were refuted by the Applicant who drew the Court's attention to paragraph 11 of the 1st Respondent's opposing affidavit dated 16th December 2015 where she stated that following the execution of the MOU, the 2nd Respondent and her went to the Applicant's office where she signed a document which she later came to learn was a third party mortgage.

According to *Black's Law Dictionary 8th Edition, Thomson Reuters* at page 1022 misrepresentation is defined as follows:

"The act of making a false or misleading assertion about something with intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to false assertion. A misrepresentation, being a false assertion of fact commonly takes the form

of spoken or written words.....Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness as when the word 'not' is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences unless it is material."

Section 3 (1) of the *Misrepresentation Act Cap 69 of the laws of Zambia* provides that:

"(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he has reasonable grounds to believe and did believe up to the time the contract was made that the facts as represented were true."

My understanding of a misrepresentation is that it is a false statement of fact or law which induces the representee to enter into a contract. There must be a false statement. Once it has been established that a false statement has been made, the representee has to demonstrate that the false statement induced them to enter into the contract.

Misrepresentation by the Applicant

It is trite law that he who alleges must prove as laid down in *Khalid Mohammed v Attorney General SCZ Judgment No 26 of 1982 ZR* ⁽⁶⁾.

The main contention is that the Applicant represented that the bank guarantee was in relation to security for the tickets the 3rd Respondent would obtain from IATA members and that the Applicant did not traverse the allegation of misrepresentation.

The 1st Respondent argued that at the material time she believed the third party mortgage was security for a bank guarantee availed by the Applicant to the 3rd Respondent as opposed to a cash advance. Counsel for the 1st Respondent submits that the Applicant through its agents recklessly misrepresented that the effect of the third party mortgage was to provide security for the 2nd and 3rd Respondent obtaining a bank guarantee towards IATA.

I have carefully examined the evidence put before me and find the 1st Respondent's allegations untruthful. I say so based on the facility letter of 27th June 2013 addressed to the 3rd Respondent although admittedly the 1st Respondent had no sight of it. The purpose of the facility is clearly stated as follows:

"This is to facilitate the enhancement of the existing Bank Guarantee from USD36,000.00 to ZMW1,532,000.00 (Zambian Kwacha one million five hundred and thirty-two thousand) in favour of IATA.

The 1st Respondent's allegation of misrepresentation is thwarted by the terms of the facility letter which is consistent with what the 1st Respondent told the Court that it was for a bank guarantee. There is no evidence that the Applicant made a false or misleading assertion on the bank guarantee with intent to deceive. I opine that the line of defence is an afterthought meant to distance the 1st Respondent from the unenviable position she finds herself in. This contention if anything is wholly unrealistic and inconsistent with the history of the business dealings

between the 1st and 2nd Respondent which was a precursor to the credit facility availed to the 3rd Respondent. I find no supporting evidence of undue influence or any misrepresentation on the part of the Applicant as the 1st Respondent would like this Court to believe.

In respect to the argument on the validity of the third party mortgage deed being one year, I have perused the third party mortgage of 22nd July 2013 and find no time limit indicated in the said deed.

Counsel for the 1st Respondent relied on the case of *Pulse Financial Services Limited T/A Entrepreneurs Financial Centre v Eliane Munga and Another Appeal No 133 of 2019⁽⁵⁾* where the securities were set aside due to misrepresentation by the borrower which was proved. In that case the borrower set out to deceive both the lender and the third party mortgagor and clearly misrepresented facts. I find that case distinguishable to the present case as the 1st Respondent was fully aware as to what she was doing as she had an MOU with the 2nd Respondent relating to the use of her certificate of title, gained a pecuniary benefit and eventually went to the Applicant and confirmed signing a third party mortgage.

This position is supported by the averments in paragraphs 6 -14 of the 1st Respondent's opposing affidavit where the 1st Respondent states the chronology of events as to how she surrendered her certificate of title pursuant to the MOU with the 2nd Respondent, followed by the execution of the third party mortgage of 22nd July 2013. This all points to the direction that the 1st Respondent went into the transaction with the 2nd Respondent with eyes wide open. These prior arrangements between the two cannot be used against the Applicant. In my view, the 1st Respondent has failed to show any misrepresentation by the Applicant as a basis to vitiate the third party mortgage of 22nd July 2013.

Misrepresentation by 2nd Respondent

Counsel for the 1st Respondent argued there was misrepresentation on the part of the 2nd and 3rd Respondent as they misrepresented the effect of the documents executed. The 1st Respondent conceded she had an MOU with the 2nd Respondent for the benefit of the 3rd Respondent. The 1st Respondent stated the 2nd Respondent was her niece and managing director of the 3rd Respondent. Did this create a relationship of trust and confidence which was this breached? From the facts on record, I opine that this did not arise as the 1st Respondent voluntarily surrendered her certificate of title to the Applicant for credit facilities.

Importantly, I find no supporting evidence showing any false statement that induced the 1st Respondent to surrender her certificate of title to the Applicant for the credit facility availed to the 3rd Respondent leading to the third party mortgage of 22nd July 2013. After all the 1st and 2nd Respondent had a prior agreement on what the 1st Respondent's certificate of title would be used for.

The facility letter shows the purpose of the facility was enhancement of the existing bank guarantee in favour of IATA. As earlier stated, I find that the 1st Respondent's allegation of a cash advance instead of a bank guarantee is unfounded and not supported by any evidence.

Counsel for the 1st Respondent's submission on IATA procedures for calling in a bank guarantee is not supported by any evidence and does little to aid the 1st Respondent's case. The 1st Respondent failed to prove this aspect and I shall not proceed to determine this peripheral issue.

In concluding, and in the absence of credible evidence, the 1st Respondent has failed to demonstrate that the Applicant, 2nd and 3rd Respondent misrepresented

facts to her leading to the execution of the third party mortgage dated 22nd July 2013. It is on that basis that I decline to set aside the third party mortgage of 22nd July 2013 on account of misrepresentation.

Applicant Bank's duty to advise

I move to the issue as to whether in the circumstances of this matter the Applicant had an obligation to advise the 1st Respondent before she executed the third party mortgage and deed of guarantee and whether it breached that duty in dealing with the 1st Respondent? The 1st Respondent stated the Applicant as a lender had an obligation to advise her on the implications of a third party mortgage which they did not and that there was no rebuttal from the Applicant.

At law a third party mortgage is a secondary obligation as the mortgagor makes a contractual promise to ensure that the borrower fulfils its obligations. It is contingent on the obligation of the principal debtor to the beneficiary of the security, the Applicant herein. A third party mortgagor undertakes huge risks without necessarily obtaining any tangible financial benefit from a loan taken out by the borrower in this case the 3rd Respondent. Therefore, the law needs to protect a third party mortgagor as far as it reasonably can especially from unfair conduct of both a lender and borrower.

Of importance to a Bank as a lender is whether it owes a duty to a prospective mortgagor to explain the meaning and effect of the third party mortgage. I have garnered valuable guidance from the Supreme Court relating to the duty of a mortgagee to explain the effects and implications of a third party mortgage as adumbrated in the case of *Nkongolo Farms Limited v Zambia National Commercial Bank Limited and Kent Limited (In Receivership)* SCZ No 19 of 2007⁽⁴⁾ cited by Counsel for the 1st Respondent where it held as follows:

- “(5) *The law imposes in a creditor a duty to take steps to ensure that not only does a borrower or debtor not exercise undue influence and or make false representation to a surety, but also that the creditor has a duty to ensure that a surety has adequate understanding of the nature and effect of the transaction in question.*
- (6) *The creditor has the obligation to inform itself as to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that relationship. The Bank has the further obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor.”*

In the case of *Credit Lyonnaise Bank Nederlands NV v Burch* cited in the *Nkongolo* case and *Anthony Mbewe and Another v Investrust Bank Appeal No 112 of 2010 (unreported)*⁽⁷⁾, the Supreme Court had this to say regarding the decision in the former case:

“Now the question is whether or not the 1st Respondent shared in the wrong Doing of the 3rd Respondent. In the case of Credit Lyonnaise Bank Nederlands NV v Burch, the facts already quoted and the ruling by the Court which we have already quoted, the court placed responsibility on the Bank lending money to take reasonable steps to explain to the surety the Extent and implications of the transaction and to make sure that the surety Independently sought independent legal advice before committing itself to The transaction. In that same case, the court held that it is not sufficient For the bank lending money just to have casual contact with the guarantor. According to these English authorities, the bank has had a duty to make Sure, the surety sought independent legal advice. The ratio of this English case is that the creditor has the obligation to inform itself

as to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that relationship. The bank has an obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor. We are persuaded to follow that sound reasoning in the case before us. We hold that there was a relationship of trust and confidence between the appellant company directors as stated by PW1 and the 3rd Respondent. There was evidence that at no time did the 1st Respondent try to get in touch with the appellant company directors. The 1st Respondent ignored the anomalies that we have referred to which would have put them on alert as to whether or not the appellant company directors voluntarily signed these documents and handed them over to facilitate a loan facility for the benefit of the 3rd respondent. The 1st Respondent failed to discharge its duty to ensure that the appellant company directors sought the required legal advice before committing themselves to the transaction which ended to their disadvantage.”

The 1st Respondent alleges she had the wrong information and knowledge as to why she was signing the third party mortgage and surrendering her certificate of title. From the factual situation, the 1st Respondent has not established a relation of trust and confidence between her and the Applicant nor has she shown any abuse by the Applicant. She has not shown that the Applicant wrongly used its position of strength to obtain an advantage over her as a third party mortgagor and I find that these arguments do not assist the 1st Respondent. I am fortified in my finding by the case of *Thomas Sinkala v Engen Petroleum Zambia Limited Appeal No 208 of 2019* ⁽⁸⁾, where the Court of Appeal faced with a similar issue on the Applicant's duty to advise the 1st Respondent stated as follows:

“There is a duty imposed on creditors to explain to a surety the effects,

implications and consequences of execution of a mortgage or guarantee transactions. As well advising the surety to seek independent legal advice especially where no pecuniary benefits are being received or derived by the surety. The duties owed to a mortgagor in a third party mortgage transaction by a creditor are limited to disclosing to the prospective mortgagor any matter peculiar to the transaction, such as facts which the third party mortgagor cannot reasonably be expected to know.”

I take judicial fortitude in the case of *African Banking Corporation v Plinth Technical Works Limited Selected Judgment No 28 of 2015* ⁽⁹⁾ where the Supreme Court held that:

“From the evidence and even if there was no evidence that the Appellant had advised the 1st Respondent to seek independent advice, it is discernable that the 1st Respondent is an adult of full capacity, who is well exposed to having executed similar contracts or mortgage with the Applicant bank previously.”

I accede to Counsel for the Applicant’s submission that the 1st Respondent was no stranger to mortgages as she had previously pledged the same property to EFC. This can be discerned from the arrangement that the 1st Respondent’s had with the 2nd Respondent where she even received a pecuniary benefit as the 2nd Respondent paid off her debt with a previous lender in return for use by the 3rd Respondent of the subject certificate of title. In my view, the 1st Respondent is an adult of full capacity and knowledgeable on the effect and implications of a mortgage having executed a similar document previously with a lending institution.

Counsel for the 1st Respondent cited the case of *Anthony Mbewe and Another v Investrust Bank PLC Appeal No 112 of 2010* ⁽⁷⁾ which is distinguishable from the present facts as in that case the circumstances warranted the unenforceability of the third party mortgage unlike in the present case.

For the foregoing reasons, I decline to set aside the third party mortgage dated 22nd July 2013 on the basis that the Applicant did not advise the 1st Respondent to seek independent legal advice.

Applicant's mortgage action

The Applicant's claim is made pursuant to *Order 30 Rule 14 High Court Rules, Cap 27 of the laws of Zambia*. It is what is termed a mortgage action where there is a claim for moneys secured by a property. The features of a mortgage have been aptly summed up by *Megarry and Wade, The Law of Real Property*, by *Charles Harpum* at page 1169 as follows:

"The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property with a provision for redemption i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed."

A mortgage is a conveyance of land as security for the payment of a debt as stated by Lord Lindley in the case of *Santley v Wilde* [1899] 2 Ch D⁽¹⁰⁾, the mortgagee in a mortgage transaction takes title to the property as legal owner whereas the mortgagor becomes an equitable owner with a right of redemption. The right of redemption compels the mortgagee to re-convey title to the property back to the mortgagor upon the repayment of the loan in full.

It is trite law that a mortgagee is entitled to cumulative remedies. This view is buttressed in *Atkins Court Forms Vol.28* where the learned authors stated at page 8 that:

“When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies concurrently”

A mortgagee has several remedies available namely payment of money secured, foreclosure, delivery up of possession of mortgaged property. These remedies are cumulative as espoused in the case of *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited in Receivership v Hyper Food Product* ⁽¹⁾ cited by Counsel for the Applicant. Similarly, I am guided by the case of *Malambo v Patco Agro Industries Limited* [2007] ZR 177⁽¹¹⁾, where the Supreme Court held that:

“A mortgagee is at liberty to exercise his right to foreclose and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property.”

The Supreme Court in the case of *Kanjala Hills Lodge Limited v Stanbic* [2012] ZMSC 33 ⁽¹²⁾ held that once there is a default on a condition, such as default of a repayment instalment, the mortgagee becomes entitled to pursue all the remedies available to it. In those circumstances, the Court in exercise of its power to afford the mortgagor the equity of redemption is duty bound to prescribe a reasonable period within which the mortgagee may wait before enjoying the fruits of its relief.

1st Respondent

As to the liability of the 1st Respondent to the Applicant, the third party mortgage deed dated 22nd July 2013 clearly indicates that in the event of default the 3rd

Respondent is liable and in default and on demand the Applicant can pursue the third party mortgagor which it has done.

Counsel for the 1st Respondent contends the Applicant has not led evidence to show that the 2nd and 3rd Respondent were in breach of payment of the tickets they got from IATA nor was a letter of demand for payment of monies shown to the Court.

A perusal of paragraph 15 of the supporting affidavit states that the 3rd Respondent had not been servicing the debts regularly as a result of which the total outstanding balance is ZMW2,218,483.35 as shown in the statement of accounts (Exhibit "RMM13"). The 2nd and 3rd Respondent did not challenge the Applicant's evidence and I accordingly have no reason to question the cogency of the statement of account.

In summation, I find that the 1st Respondent cannot escape the snares of the third party mortgage of 22nd July 2013 which she executed with a limit of ZMW1,530,000.00 plus interest. The Applicant is therefore entitled to foreclose on the mortgaged property should the 3rd Respondent fail to settle the debt owed to the Applicant.

1st Respondent's further charge

The 1st Respondent asserts the further charge and resultant creation of a third party mortgage was a forgery perpetuated by the 2nd Respondent whilst the Applicant averred that the 1st Respondent executed a further charge over Subdivision 4506 of Lot No 1052/M Lusaka. Counsel for the 1st Respondent contends there was no evidence on record showing the 1st Respondent executed a

consent to issue a deed of guarantee prior to the execution of the third party mortgage.

The Court had the benefit of the expert evidence of Chief Inspector Thomas Phiri. It is trite law that a trial judge is not bound to accept the evidence of an expert as a Court must come to its own conclusions bearing in mind that expert testimony is a part of the evidence in the whole case. An expert is expected to aid the Court impartially by furnishing information that will be useful to the Court to enable it make its own independent assessment by applying the information to the facts as proved in the case. I agree with the principles espoused in the case of *Sithole v State Lotteries of Zambia*⁽³⁾ cited by Counsel for the Applicant relating to the opinion evidence of an expert witness and the Court's discretion whether or not to use it.

In testing the accuracy of the expert evidence, I have examined the report of the handwriting expert whose findings were arrived at by comparing the signatures on the third party mortgage dated 22nd July 2013 which he found were the 1st Respondent against those in the further third party mortgage and charge.

I accept the expert evidence of the handwriting expert that the 1st Respondent never signed the further charge relating to Subdivision 4506 of Lot No 1052/M Lusaka (Exhibit "RMM6"). I also accept that the 1st Respondent did not sign the guarantee dated 14th November 2013 whose enforceability was up to ZMW2,085,000.00 (Exhibit "RMM4"). This evidence is cogent and credible and supportive of the 1st Respondent's evidence that she never signed the further charge which was supplemental to the third party mortgage dated 22nd July 2013.

It follows that the said further charge is null and void and the Applicant cannot enforce it in recovering the ZMW550,000.00 plus interest advanced to the 3rd

Respondent which substituted the principal amount in the third party mortgage of 22nd July 2013. This means that the credit facility of ZMW550,000.00 is unsecured.

However, the 1st Respondent is still liable to the Applicant under the terms of the third party mortgage of 22nd July 2013 where on demand by the Applicant, the 1st Respondent is obligated to settle the 3rd Respondent's indebtedness to the Applicant in the sum of ZMW1,532,000.00 plus interest as claimed.

2nd Respondent's further charge

In respect to the 2nd Respondent, the Applicant availed the 3rd Respondent a facility for the sum of ZMW950,000.00 wherein the 2nd Respondent surrendered certificate of title relating to Lot No 27017/M Eastern Province and a legal mortgage was created and duly registered (Exhibit "RMM7-9"). The 2nd Respondent as additional security for the credit facility to the 3rd Respondent executed an unlimited deed of guarantee (Exhibit "RMM10"). These facts were not challenged by the 2nd Respondent.

The 3rd Respondent having defaulted under the facility of 23rd April 2014 and 16th June 2014, the Applicant is entitled to enforce the legal mortgage relating to Lot No 27017/M Eastern Province against the 2nd Respondent which secured the sum of ZMW600,000.00 plus interest and the further charge secured the sum of ZMW300,000.00 plus interest. As provided under clause 3 in the further charge registered on 9th November 2015, the total amount recoverable under the principal indenture and those present shall not exceed the sum of ZMW900,000 in addition to interest thereon at the rates specified in the facility letter.

3rd Respondent

The 3rd Respondent did not file any opposing affidavit. I am satisfied on the facts and material on record that the 3rd Respondent was availed a credit facility vide a facility letter dated 27th June 2013 for the sum of ZMW1,532,000.00, on 11th November 2013 for the sum of ZMW550,000.00, another facility on 23rd April 2014 for the sum of ZMW950,000.00 and a credit facility on the 16th June 2014 of ZMW300,000.00 (Exhibit “RMM5-11”).

The evidence shows that the 1st Respondent pledged S/D 4506 of Lot 1052/M Lusaka for the facility of ZMW1,532,000.00 and 2nd Respondent pledged Lot 27017 Eastern Province as security for the credit facilities availed to the 3rd Respondent by the Applicant.

It is apparent that the 3rd Respondent defaulted and failed to settle its indebtedness to the Applicant, and the Applicant having made a demand, I find in favour of the Applicant against the 3rd Respondent in the claimed sum of ZMW2,218,483.35 plus interest.

Disposal

The sum total is that Judgment is entered in favour of the Applicant against the 3rd Respondent for the sum of ZMW2,218,483.33 with interest at the short-term deposit rate from date of originating summons to date of Judgment and thereafter at the commercial lending rate as determined by Bank of Zambia until full payment.

The 3rd Respondent shall settle the Judgment debt within forty-five (45) days and in default the Applicant shall be at liberty to foreclose on the mortgaged property being Subdivision 4506 of Lot 1052/M, Lusaka registered to the 1st Respondent,

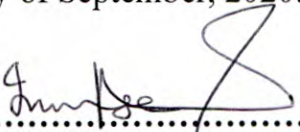
take possession and exercise its power of sale without further recourse to this Court. The amount shall be limited to ZMW1,532,000.00 plus accrued interest.

In respect of the 2nd Respondent, in the event that the 3rd Respondent defaults in payment within the forty-five (45) days, the Applicant is entitled to foreclosure, take delivery and possession and to exercise the power of sale relating to the mortgaged property being Lot No 27017/M Eastern Province and the amount to be recovered shall be limited to ZMW900,000.00 plus accrued interest.

Costs to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Delivered at Lusaka this 30th day of September, 2020.


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IRENE ZEKO MBEWE
HIGH COURT JUDGE