IN THE HIGH COURT FOR ZAMBIA **2013/HP/0810**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

EDWARD MWEWA	**1st PLAINTIFF**
EMMANUEL MWEWA	**2nd PLAINTIFF**
AND	
PULSE FINANCIAL SERVICES	**DEFENDANT**

Before Honorable Mrs. Justice M. Mapani-Kawimbe on 24th November, 2016

For the Plaintiff	:	*Dr. O.M. Banda, Messrs O.M. Banda & Company*
For the Defendant	:	*Ms. L. Shula Messrs J & M Advocates*

JUDGMENT

Case Authority Referred To:

1. *Zambian Breweries Plc V Lameck Sakala SCZ Appeal No. 173 of 2009*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court (1999) Edition*
3. *Judgments Act, Chapter, 81*
4. *Banking and Financial Services Act, Chapter 387*

I was approached in this matter by an amended writ of summons dated 29th January, 2016, endorsed with the following claims:

i) *Declaration that the seizure and disposal of the motor vehicle as collateral was irregular.*

ii) *Loss of business since the said motor vehicle was on hire to a client.*

iii) *Replacement of Toyota Prado or payment of its current market value.*

iv) *Declaration that interest charged on the loan was unreasonable and ultra-vires therefore illegal.*

v) *Reconciliation of the loan amount to determine what is owed to the Defendant if any.*

vi) *Damages*

vii) *Interest and any other relief the Court may deem fit.*

viii) *Costs*

The Plaintiff's statement of claim discloses that sometime in 2010, the Plaintiffs applied for a loan facility of K60,000.00

(rebased) from the Defendant, a lending institution under the Banking and Financial Services Act. The loan was to be repaid in monthly installments of K5,000.00. In 2012, the Plaintiffs experienced a slump in their business and asked the Defendant to vary their monthly installments from K5,000.00 to K2,500.00. The Defendant allowed the variation and granted a new loan facility. In December, 2012 the Plaintiffs delayed to service the said loan, and in April 2013, the Defendant seized the motor vehicle, which they pledged as collateral, to recover the balance on the loan.

The Plaintiffs claim that they were not served the notice of seizure. However, following the seizure of their motor vehicle, the Plaintiffs paid the Defendant K 2,500.00 on the loan, with an undertaking that they would pay the balance on 29th April, 2013. The Plaintiffs also claim that they paid the Defendant a total sum of K 90,000.00 leaving a balance of K39,500.00. The statement of claim further discloses that the Plaintiffs were set to pay the Defendant K 2,500.00 on 29th April, 2013, but did not do so. They discovered that the Defendant had sold their motor vehicle. The Plaintiffs contend that the motor vehicle registration no. ABZ 6434,

which was seized by the Defendant was valued at K70,000.00. However, the Defendant sold the said vehicle below the market value.

The Plaintiffs further contend that at the time their motor vehicle was sold, there was no order of Court or notice given to them, thus making the sale irregular. Further, that the Defendant has not accounted for the proceeds of sale. The Plaintiffs also claim that the money owed to the Defendant was settled by the sale of their motor vehicle. Thus, there is no need for the Defendant to further seize the Plaintiff's household goods. The Plaintiffs allege negligence in the manner in which the Defendant acted, giving the following particulars:

1. *The Defendants ignored the Plaintiff's undertaking to pay the balance which they in fact went to pay only to discover that the vehicle had been sold already.*

2. *The Defendants caused the vehicle to be bided without an order of the Court and without any notice to the Plaintiffs.*

3. *As a result of the sale, the Plaintiffs have suffered loss of income derived from it since the vehicle was used in the car hire business.*

The Defendant filed an amended defence dated 29th February, 2016, wherein it states that it granted the Plaintiffs a loan of K60,000.00 on 23rd February, 2011, with interest at 5.5 percent. The actual money disbursed to the Plaintiff's was K55,476.15 after the loan analysis fee, RTSA endorsement fee, comprehensive insurance cover and the mandatory life insurance cover fees were deducted. The Plaintiffs were required to pay back the loan in monthly installments of K5,000.00. As at 31st October, 2012, the Plaintiffs repaid K89,466.73, of which K30,000.00 went towards the principal, while K59,466.67 was remitted to interest.

The Defendant states that the Plaintiffs applied for their loan to be varied on 31st October, 2012, because they were experiencing financial difficulties. The Defendant approved the variation and it thereafter disbursed K37,564.00 to the Plaintiffs loan account. The new loan was to be repaid in sixty months at monthly installment

repayments of K2,435.83. The Defendant also states that the Plaintiffs were required to make their first repayment on the loan on 23rd December, 2012, but failed to do so. The Defendant avers that the Plaintiffs made a partial payment of K2,500.00 on 14th January 2013, leaving a balance of K 3,798.58.

On 31st January, 2013, the Plaintiffs made another payment of K1,500.00. This did not satisfy the amount outstanding on the loan, which had accumulated areas. The Defendant states that as a result of the Plaintiffs' erratic payments, it decided to call the loan in order to recover its money. It also decided to seize the motor vehicle, which the Plaintiffs pledged as security. Further, it sold the said motor vehicle at an auction to recover the monies it was owed by the Plaintiffs. The Defendant further contends that it had authority to dispose of the personal chattels of the Plaintiffs under the loan variation agreement.

The Defendant also states that the 2nd Plaintiff voluntarily handed over the motor vehicle to its employees under the Defendant's asset seizure form. The Defendant states that before it

sold off the motor vehicle, the Plaintiffs were entitled to redeem it within three days of seizure. The motor vehicle was not redeemed. Thus, the Defendant contracted Adaris Consultants to sell the motor vehicle. It was sold at an auction sale to the highest bidder at K30,000.00. The Defendant avers that it did not act negligently and denied that the Plaintiffs suffered business losses.

The Defendant counterclaimed the following:

i) *The payment of the sum of K73,385.25 from the Plaintiffs, the same being the outstanding loan amount granted to the Plaintiffs upon the varied loan amount to the Plaintiffs' behest.*

ii) *Interest on all and/or any sums found due.*

iii) *Cost of and incidental to this action.*

iv) *Any other relief that the Court may deem fit.*

At the hearing of the matter on 26th September, 2016, the Plaintiffs called three witnesses. **Edward Mwewa** testified as **PW1**. He told the Court that sometime in 2011, the Plaintiffs applied for a loan of K60,000.00 (rebased) from the Defendant. The loan was to

be repaid in monthly installments of K5,000.00. In 2012, the Plaintiffs experienced a slump in their business and applied to the Defendant to vary their monthly loan repayments from K5,000.00 to K2,500.00. In December, 2012 the Plaintiffs were supposed to start servicing the loan but did not do so.

In April, 2013 the Defendant seized the motor vehicle that the Plaintiffs pledged as collateral in order to liquidate the outstanding balance of K29, 999.94. PW1 also told the Court that after the Defendant seized the motor vehicle, the Plaintiffs were given three days in which to settle the balance on the loan, after which their vehicle would be sold. Upon that information, the Plaintiffs made a part payment of K2,500.00 on the loan and undertook to pay the balance of K2,500.00 on 29th April, 2013. On that commitment the Defendant also undertook to release the motor vehicle to the Plaintiffs. The Plaintiffs further undertook to pay the Defendant K5,000.00, which had accumulated as the outstanding balance on the loan.

PW1 told the Court that the Plaintiffs did not pay the Defendant as agreed on 29th April, 2013, because they were told by one of its employees that their motor vehicle had been sold to recover the loan. Aggrieved by the Defendant's action, the Plaintiffs decided to take out this action. PW1 prayed to the Court to help the Plaintiffs recover their motor vehicle or to be paid the current market price for it. He also prayed for damages and costs and an order that the interest, which the Plaintiffs were paying on the loan was outrageous.

In cross-examination, PW1 stated that the Plaintiffs borrowed K60,000.00 and were supposed to pay back K178,000.00. Further, that the loan attracted interest at 5.5 percent when it was not being serviced. PW1 told the Court that the principal outstanding balance on the second loan was K29,999.00, while interest was about K59,333.33 (rebased). PW1 also told the Court that the Plaintiffs delayed to service the second loan of K39,500.00 by two months, that is, from 31st October, 2012. The monthly loan repayment installments were K2,500.00.

PWI also stated that by 23rd December, 2012 the Plaintiffs had only paid K1,800.00 out of K2,500.00 on the loan. The Plaintiffs still owed the Defendant a balance. PW1 also stated that the Plaintiffs made another partial payment in February, 2013. Further, that the Defendant was authorized to seize the collateral as provided at page 5 of the Agreed bundle under the pledge on overall assets undertaking form.

PW1 stated that even if he signed the said form, he had hoped to be formally notified of the seizure, given that the Plaintiffs were in the car hire business. In addition, PW1 told the Court that the Plaintiffs did not receive the final notice of default, even though his brother Emmanuel Mwewa was present when the vehicle was seized on 16th April, 2013. PW1 stated that when he went to pay the Defendant on 18th April, 2013, he discovered that the Plaintiffs motor vehicle had been sold.

The witness was not re-examined.

Emmanuel Mwewa testified as **PW2**. His testimony was no different from PW1. He confirmed PW1's testimony that the

Plaintiffs borrowed money from the Defendant sometime in 2011. Further, that the Plaintiffs had been servicing the loan until they experienced a slouch in business in 2012. He confirmed PW1's testimony that the loan repayments were rearranged from K5,000.00 to K2,500.00 with the approval of the Defendant. He also validated PW1's testimony that the outstanding balance on the loan was K29,999.00. PW2 told the Court that the Plaintiffs made the first repayment of K2,500.00 on the second loan in January, 2013. By April, 2013 the balance on the loan had accumulated to K5,000.00.

PW2 also told the Court that the Defendant seized the motor vehicle, which the Plaintiffs pledged as security, without giving them notice. He repeated PW1's testimony on the agreement that the Plaintiffs and Defendant reached on the release of their motor vehicle. His testimony was no different from PW1 on the events of 29th April, 2013. PW2 amplified that a Mr. Elijah Mwamba, the Defendant's employee told the Plaintiffs that they owed it K13,500.00. He added that when the loan was varied, the Plaintiff's

did not receive the K39,500.00, which the Defendant disbursed onto their loan account. PW2 concluded his testimony by reiterating PW1's prayer to the Court.

In cross-examination, PW2 stated that the Defendant had a right to sell the Plaintiffs motor vehicle if they failed completely to service the loan. He told the Court that the Plaintiffs serviced the loan although payments were not made on time. He further stated that in January, 2013 the Plaintiffs made a partial payment on the loan. Further, that the Defendant seized their motor vehicle in April, 2013. He stated in reference to page 42 of the Agreed bundle that the Plaintiffs did not receive the final notice of default, dated 15th February, 2013. If they had been served the notice, there was always someone at the Plaintiffs residence who would have received it.

PW2 further told the Court that after the Defendant seized their motor vehicle, the Plaintiffs immediately paid the Defendant K2,500.00. He testified that the Defendant did not give him the loan reconciliation schedule showing the balance of K13,500.00 even

after he requested for it. Accorging to PW2 he only collected the statement of account after the vehicle was sold. He stated that the monthly repayments on the second loan were supposed to take effect on 23rd December, 2012.

In re-examination, PW2 told the Court that the document at page 35 of the Agreed bundle was signed by him.

Kelvin Mwewa testified as **PW3**. His testimony was that he gave out a Toyota Land Cruiser Prado registration no. ABZ 6334 as collateral to the Defendant, after the Plaintiffs as Ngwerere Motors and Company obtained a loan. He told the Court that the Plaintiffs owned the said Company and that he was their business partner. He told the Court that the Defendant sold the said motor vehicle.

The witness was not cross examined.

Evans Chifwembe testified as **DW1**. He told the Court that in February, 2011, the Plaintiffs applied for a loan of K60,000.00, which was granted by the Defendant. The loan was for a period of three years and was to be serviced in monthly repayment

installments of K5,000.00 at an interest rate of 5.5 percent per month. The Plaintiffs were expected to pay back a total amount of K170,000.00. The actual money disbursed on the loan by the Defendant was K55,000.00 after the costs of the loan were subtracted. The Plaintiffs serviced the loan until October, 2012 when they wrote the Defendant informing it that they were experiencing problems in their business.

The Plaintiffs requested the Defendant to vary the monthly loan repayments from K5,000.00 to K2,500.00, which it approved. DW1 further told the Court that the loan variation culminated into a new loan agreement. Consequently, a pledge on overall assets was executed by the parties. The Defendant disbursed K39,500.00 onto the Plaintiffs account so as to close off the balance on the first loan. The Plaintiffs were not supposed to receive more money on their account.

DW1 testified that the Plaintiffs chose to make their first repayment on the second loan on 23rd December, 2012, but failed to make a payment till 14th January, 2013. Because of the delay, the

Plaintiffs were supposed to pay the Defendant K3,700.00 but only paid K2,500.00. As such they immediately fell into arrears of two months at the time that they made the next partial payment of K1,500.00 on 31st January, 2013. He stated that the Plaintiffs did not make further payments until 2nd April, 2013.

DW1 told the Court that the Defendant wrote the Plaintiffs two letters demanding the arrears before the final notice at page 42 of the Agreed bundle. There was no response from the Plaintiffs. This prompted the Defendant to call the loan, which was in arrears and not earning interest. DW1 also told the Court that the Defendant recalled the loan under the pledge on overall assets for assignment and transfer of specific assets form. The form was delivered to the Plaintiffs, where PW2 signed on it. The form authorized the Defendant to sale the Plaintiffs motor vehicle if they did not redeem it within three days.

According to DW1 the vehicle was not redeemed. The Defendant advertised its bid in the newspaper. It was sold by Adaris Consultants who were contracted by the Defendant at an auction

sale to the highest bidder at K30,000.00. The proceeds of sale were applied to the Plaintiffs loan account to liquidate the arrears. Adaris Consultants was paid K1,500.00. The Defendant also made an exceptional payment of K5,300.00 on the Plaintiffs account to reduce their indebtedness. At page 71 of the Agreed bundle, DW1 pointed out the Plaintiffs' statement of account and how the various payments were made by the Defendant. As at 27th December, 2013 the principal outstanding balance on the loan was K13,305.75. In February, 2016 the principal outstanding balance and interest rose to K73,000.00 due to the non service of the loan by the Plaintiffs, after the exceptional payment.

DW1 also told the Court that the Plaintiffs action caused the Defendant to suffer losses, because as a Micro Finance Company, it was unable to generate more income. DW1 also told the Court that the Defendant was claiming K73,000.00 from the Plaintiffs, which was calculated from the date that the Plaintiffs last serviced the loan. The Plaintiffs statement of account dated 21st April, 2016 at page 64 of the Agreed bundle showed the principal balance on the loan as K13,305.75, while interest was K36,972.00. DW1 further

told the Court that the Defendant continued charging the Plaintiffs interest even after they commenced their action in Court on 10th June, 2013.

In cross-examination, DW1 stated that he had no proof to show that the notices of default were served on the Plaintiffs, except that the person who served the letter signed a copy. He stated that the Plaintiffs statement of account at page 71 of the Agreed bundle, showed a zero balance on the Plaintiffs account.

In re-examination, DW1 testified that he did not know what the zero balance on the Plaintiffs statement of account meant.

DW2 was **Micheal Chibelenga**. He told the Court that his responsibility as a Debt Recoveries Officer in the Defendant Company was to follow up on unpaid loans. He was tasked to recover the unpaid amount of K10,000.00 on the Plaintiffs account, which represented accrued arrears. Verbal and written demand notices were sent out to the Plaintiffs, which they never responded to. DW2 testified that when he went to the Plaintiffs' residence on 16th April, 2013, he demanded the payment of arrears on the loan

and explained the consequences of nonpayment to both Plaintiffs. The consequence was that the Defendant would recover the collateral on the loan, in this case, the motor vehicle which was pledged as collateral.

DW2 also told the Court that Emmanuel Mwewa (PW2) willingly signed the seizure form and handed him the keys of the motor vehicle. The motor vehicle which was in running condition was driven to Defendant Company premises. He stated that after three days, the sale of the motor vehicle was advertised in the Daily Mail as shown at page 47 of the Agreed bundle. It was sold by Adaris Consultants to the highest bidder at K30,000.00. The sale was conducted ten days after the motor vehicle was seized.

In cross-examination, DW2 stated that the Plaintiffs were issued a final notice as shown in the Agreed bundle. The proof of service was that the bearer of the notice signed a copy of the letter after he attempted to serve the Plaintiffs. DW2 also stated that although he had no proof to show that the bid was advertised in the Zambia Daily Mail, it was indeed the case. He also told the Court

that he led the team that went to seize the Plaintiffs' motor vehicle even though he signed the document at page 43 of the Agreed bundle as a witness.

In re-examination, DW2 told the Court that the document at page 47 of the Agreed bundle was a newspaper cutting and not the actual newspaper. Further, he worked with Mr. Mubanga and either of them could sign the seizure form on any of the positions. He insisted that the notice of default was delivered to the client and if he the client was not at home, and the persons found there refused to acknowledge receipt of the notice, then the copy letter, which was by signed by the Defendant's employee was sufficient proof of service.

Learned Counsels for the Plaintiff and Defendant were given an opportunity to file written submissions. Only Learned Counsel for the Plaintiff filed his submissions on 17th October, 2016. I am grateful for his submissions. The gist of his arguments was that the relationship between the parties was governed by mortgage rules.

Thus, the Defendant was bound to comply with Order 88 Rule 1 of the Rules of the Supreme Court which states thus:-

> **"This order applies to any action (whether begun by writ of origination summons) by a mortgage or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely:-**
>
> **(a) .....**
>
> **(b) sale of the mortgaged property"**

Learned Counsel contended that the Defendant should have sought leave from the Court before disposing of the motor vehicle. He indulged me to a ruling made by my sister Hon. Mrs. Justice A. Bobo-Banda J, in the case of **Angel Musonda And Pulse Financial Service Limited - 2014/HP/0370** where she found that the Defendant's seizure of a truck was not valid as there was no Court Order authorizing its seizure. Learned Counsel contended that on the basis of the Order quoted from the Rules of the Supreme Court, the disposal of the Plaintiff's motor vehicle was illegal, null and void. As such the Plaintiffs were entitled to the reliefs sought.

Learned Counsel submitted that the Defendant had applied interest rates on the loan that were contrary to the rates set by the Bank of Zambia, and were as a result, illegal, null and void. On that score, he entreated me to exercise my discretion on the determination of interest rates. Learned Counsel dismissed the Defendant's counterclaim against the Plaintiff's, submitting that the documentary evidence on record revealed that the Plaintiffs loan account had a zero balance. The zero balance meant that the Plaintiffs did not owe the Defendant anything. He urged the Court to dismiss the Defendant's counterclaim as it had no merit, and to award costs to the Plaintiff.

I have seriously considered the pleadings, the evidence adduced before Court and the submissions of Learned Counsel for the Plaintiff. The common cause facts are that on 23rd February, 2011, the Defendant granted the Plaintiff K60,000.00, at an interest rate of 5.5 percent. The loan was for thirty-six months and was to be serviced in monthly repayment installments of K5,000.00.

The Plaintiffs experienced a slouch in their business and were unable to service the loan as per their agreement with the

Defendant. They consequently applied to the Defendant to vary their loan so that the monthly repayment installments could be revised downwards to K2,500.00. The loan variation agreement between the parties was executed on 31st October, 2012, and the Plaintiffs were expected to make their first monthly repayment on the loan on 23rd December, 2012. The Plaintiffs delayed to service the loan on the due date. As a result of several delays, the Defendant decided to call the loan in April, 2013. It seized the motor vehicle which was pledged as security by the Plaintiffs, namely a Toyota Land Cruiser Prado, registration no. ABZ 6434. Following the seizure of the motor vehicle, the Plaintiffs decided to take out this action, where they contested the Defendant's actions towards them.

In my considered view, the issue that arises for determination is whether the Plaintiffs have performed their obligations under the loan agreement? From the evidence led before Court, it is not in dispute that the Defendant loaned the Plaintiffs K60,000.00 for the purpose of funding their business. The contract was definite on the rate of monthly installment repayments and the period of

performance. The Plaintiffs were supposed to repay the Defendant a total amount of K178,000.00.

The other pertinent terms in the loan agreement were as follows: the Defendant was authorized to deduct the loan arrangement fees before it disbursed the loan to the Plaintiffs. In clause 3 of the loan agreement, the Plaintiffs (borrowers) committed themselves to repaying the borrowed capital and interest in thirty-six installments as provided in the loan repayment schedule. Further, in clause 5, the Plaintiffs pledged collateral that had estimate values. The pledged items were chairs (sofas), television, DVD player, television stand, four plate cooker, deep freezer, upright fridge, motor vehicle Prado, registration no. ABZ 6434, HP computer and office equipment, all with an estimate value of K131,725,000.00 (unrebased).

The loan agreement was executed between the Plaintiffs in their individual capacities and the Defendant. As a result PW1 and PW2 were personally responsible for the obligations in the loan agreement. The purpose of the loan was to fund the Plaintiffs' business; however, without an explanation on the type of business.

PW1, PW2 and DW1 all testified that after the loan was varied, the Plaintiffs made their first monthly repayment on 14th January, 2013. The Plaintiffs only paid K2,500.00, an amount, which was below the balance. The money was paid way after the agreed date of 23rd December, 2012. The said witnesses also testified that the Plaintiffs made another partial payment of K1,500.00 on 31st January, 2013. The said witnesses were all in agreement that the loan had accrued arrears.

For the sake of clarity, I find it necessary to reproduce clause 9 of the loan agreement, which states thus:-

"9. 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." (underlining my own)

My reading of clause 9 is that it imposes on the Defendant three options of mandatory sanction in the case of a borrower's default. These are: the Defendant can seize the asset that it is funding; or it can seize an asset that has been pledged as collateral; or it can institute legal proceedings. It is incontestable that the Plaintiffs did not service their obligations on the loan agreement as

expected on 23rd December, 2012. As result, their non service of the loan agreement gave rise to serious default in under clause 9 of the agreement.

I find that the ramification of clause 9, therefore entitled the Defendant to seize the collateral that was pledged as security by the Plaintiffs. The evidence of PW3 that the Plaintiffs borrowed the money as Ngwerere Motors and Company, while confusing, was of no value to the Court. The loan agreement documents did not make any reference to a relationship between Ngwerere Motors and Company and the Defendant. The default on the loan was as a result of the Plaintiffs inability to service the loan. Thus, they are bound to deliver the collateral that they pledged as security to the Defendant. It is immaterial that the Plaintiffs did not receive the letters of demand on the loan arrears. In my view, a lender is under no obligation to remind a borrower of his obligations. This defies logic. Where a person has borrowed money and enjoyed the benefit thereof, that person should also be bound to pay back the borrowed money. As such the Plaintiffs cannot be shielded by this Court from the obligations that are due on the loan. I find no merit in the

Plaintiff's claim that their motor vehicle was on hire to a client at the time that it was seized. As a result, the Plaintiffs claim that they suffered loss of business has no merit. I further, find that Order 88 Sub rule 1 of the Rules of the Supreme Court is inapplicable to the circumstances of this case. I also find that the Defendant is further entitled to seize the other items that were pledged as security in order to clear the Plaintiffs outstanding loan obligations.

The Plaintiffs contended that the Defendant sold their Toyota Prado Land Cruiser motor vehicle below the market value. The evidence of PW1 and PW2 was that their vehicle which was valued at K70,000.00 was sold at K30,000.00. The Defendant argued that the said motor vehicle was sold to the highest bidder at an auction sale. In resolving the issue, I find it necessary to reproduce the contents of clause 5 of the loan agreement which *inter alia* provides thus:

"5. The borrower commits himself or herself to give physical collateral, titled or invoiced assets.....Vehicle Prado ABZ 6434.....estimate of the collateral value K60,000,000 (unrebased)"

According to the loan agreement, the said motor vehicle had an estimate value of K60,000.00 (rebased). PW1 and PW2 testified that their motor vehicle was valued at K70,000.00. Two values were given on the value of the motor vehicle that is, in the loan agreement and the evidence of PW1 and PW2 in Court. I note that the value of K70,000.00 given by the Plaintiffs is not supported by any document. There is also the evidence of DW1 that the motor vehicle was sold at an auction sale to the highest bidder at K30,000.00.

Let me for a moment indulge myself to the evidence given by the Plaintiffs on the value of K70,000.00. The question that arises is whether that value is enough to exonerate the Plaintiffs from their indebtedness to the Defendant? My response is that, it does not in the least. I find that the Plaintiffs owe the Defendant more than what was pledged as security. I also find that in the absence of any documentary evidence, I cannot rely on the estimated value of K70,000.00 alleged by the Plaintiffs. As a consequence, I find that there was nothing irregular in the Defendant's seizure and sell of the said motor vehicle through an auction and at the price of

K30,000.00. Needless to say, that the said motor vehicle was pledged as collateral.

Since the Plaintiffs have not fully repaid the loan, I hold that the Defendant's sale and seizure of motor vehicle was regular and within its entitlement. I also hold that the Defendant is entitled to seize the other items that were pledged as security in order to fully recover the balance on the Plaintiffs loan account.

Moving on, section 47 of the Banking and Financial Services Act, provides thus:

"....47 (2) A financial service provider that agrees to make a loan or credit available to a person shall, at the same time, disclose the cost of borrowing to the person in writing.

(3) The Bank of Zambia, may prescribe the form, content, method of calculation and of disclosure, and the means and frequency of publishing, any information or change of information required by this section to be disclosed..."

Other than, this provision there is nothing in the said Act, which prohibits financial institutions from setting interest rates. The only restriction is placed in section 47 subsection 3 of that Act, to the extent that the Bank of Zambia will prescribe the form, content, method of calculation and of disclosure.

The Plaintiffs contended that the interest charged by the Defendant on the loan was outrageous. They did not call any evidence to show that the Defendant was not entitled to charge the interest that it applied in the loan agreement. The loan agreement, however, states the rate of interest much to the satisfaction of section 47 subsections 2 of the Banking and Financial Services Act. There is nothing in the Banking and Financial Services Act that proscribes the Defendant's rate of interest of 5.5 percent. The view I take is that, the Defendant was well within its mandate to charge the said interest. I cannot therefore, declare that the interest charged on the loan was unreasonable, *ultra vires* and illegal.

According to PW2 the Defendant gave the Plaintiffs a copy of their statement of account when they went to make a payment on 29th April, 2013. However, if the Plaintiffs have encountered difficulties in securing their latest statements of account from the Defendant, I order the Defendant to provide the same without further ado.

All in all I hold that the Plaintiffs have failed to prove any of its claims to the required standard. Accordingly, I dismiss the Plaintiffs action for lack of merit.

The Defendant counterclaimed the payment of K73,385.25 as the balance on the Plaintiff's loan amount. The evidence of DW1 was that the principal amount outstanding was K13,305,75. DW2 also testified that from the time the Plaintiffs took out writ of summons, they never made a payment on the loan account. This evidence was not been gainsaid by the Plaintiffs, although during cross-examination of DW1, there was an attempt to demonstrate that the zero balance on the Plaintiffs account meant that Plaintiffs did not owe the Defendant any money. Notwithstanding, PW1 and PW2 all gave testified that they had not paid the Defendant in full and still owe it money.

I have no hesitation in holding that the Plaintiffs owe the Defendant K13,305.75, which they were liable to pay forthwith. I wish to make it clear that the interest rate of 5.5 percent on the Defendant's loan is due to the Defendant from the time of the Plaintiffs default to a day before they commenced this action in

Court, that is 18th June, 2013. As for the balance of the claim on interest, I am guided by Order 36, sub rule 8 of the High Court which provides that:-

> ***"Where a judgment or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgment".***

Further, section 2 of the Judgments Act states thus:

> ***"Every judgment, order, or decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree".***

I am further guided by the case of **Zambian Breweries Plc v Lameck Sakala**[1] where the Supreme Court reiterated itself on the principles on interest as follows:

> ***"...As to the rate of interest, and the effective date, the standard practice on debts, is to award interest on the sum owing, at the average short term bank deposit rate, from the date of issue of the***

writ of summons to the date of Judgment. This is pursuant to Order 36, Rule 8 of the High Court Rules. Thereafter up to the date of settlement, interest is awarded at the current lending rate, as determined by the Bank of Zambia. This is pursuant to Section 2 of the Judgments Act, CAP 81..."

I therefore award the Defendant interest from the date of writ of summons to the date of payment at the short term deposit rate. I also award the Defendant interest from the date of judgment to the date of full payment at the rate determined by the Bank of Zambia.

The Defendant being the successful party is awarded costs to be taxed in default of agreement.

Leave to appeal to granted.

Dated this 24th day of November, 2016.

MMapani

M. Mapani-Kawimbe

HIGH COURT JUDGE