

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT KITWE
(Civil Jurisdiction)

2017/HKC/0008

B E T W E E N :

PULSE FINANCIAL SERVICES LIMITED
T/A ENTREPRENEURS FINANCIAL CENTRE

APPLICANT

AND

ENOCK MUSAIWALE PHIRI
PETER MWANSA KATELE

RESPONDENT

Before Lady Justice B.G Lungu on 21st August, 2017 in chambers at Kitwe.

JUDGMENT

CASES REFERRED TO:

1. *S. Brian Musonda (Receiver Of First Merchant Bank Zambia Limited) vs. Hyper Foods Products Limited and Creation One Trading (Z) Limited, (1999) ZR 124;*
2. *Luke Phiri vs. David Tembo, (2011) ZLR (Vol. 3);*
3. *Informatics Limited and Others vs. Stanbic Bank Zambia Limited, (2011), ZLR (Vol. 1).*

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. *Order XXX, rule 14, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*

2. *Conveyancing and Law of Property Act, 1881*

The Applicant commenced this action against the Respondent on 20th July, 2017, by way of Originating Summons. The reliefs that the Applicant seeks are as follows:

1. Payment by the Respondent of all monies and interest due and owing to the Applicant under Loan Agreements dated 29th October, 2015 secured by a Third Party Mortgage over Subdivision 145 of Subdivision L of Farm No. 842, Kitwe which monies stood at ZMW 276, 945.51 as at 31st May, 2017;
2. An order that the Third Party Mortgage over Subdivision 145 of Subdivision L of Farm No. 842, Kitwe may be enforced by foreclosure and sale;
3. An order for delivery of vacant possession of the mortgaged property by the Respondent to the Applicant;
4. Further or other relief;
5. Costs and other charges incurred by the Applicant.

The Originating Summons was supported by an Affidavit deposed by one Huntley Ng'andu, a legal officer in the employ of the Applicant, Skeleton Arguments and List of Authorities filed on 20th July, 2017.

According to the Affidavit in Support, the Applicant, by Loan Agreements entered into on 29th October, 2015, granted the Respondent a loan in the sum of ZMW 215,000.00.

It was deposed that the loan attracted contractual interest at the rate of 4.25% per month, which interest rate would apply to the total principal and interest due at the time of default, if any.

The facility was deposed to have been secured by way of a Third Party Mortgage over Subdivision 145 of Subdivision L of Farm No. 842, Kitwe and a Specific Guarantee issued by the 2nd Respondent.

It was also deposed that the Respondents defaulted in their loan payment obligations and that notwithstanding demand having been made, the Respondents remained in default. In summation, it was attested that the Respondents' indebtedness to the Applicant, as at 31st May, 2017, stood at an outstanding balance of ZMW211, 103.19.

The Affidavit in Support exhibited several documents as evidence to fortify the Applicant's claim, including:

- i. A copy of the Loan Agreement signed by the Respondent on 29th October, 2015, exhibit marked "**HN2**";
- ii. A copy of the Specific Guarantor Agreement dated 29th October, 2015 entered between the 2nd Respondent and the Applicant, exhibit marked "**HN3**";

- iii. A copy of the Third Party Mortgage Deed in respect of S/Division 145 of S/Division L of Farm No. 842, Kitwe endorsed by the 2nd and 1st Respondent in favour of the Applicant, exhibit marked "**HN4**";
- iv. A copy of the 1st Respondent's Loan Account Statement with the Applicant dated 27th June, 2017, exhibit marked "**HN5**";
- v. A copy of the Final Notice of Default dated 9th May, 2016, exhibit "**HN6**";
- vi. A copy of the letter of demand issued to the 1st Respondent on behalf of the Applicant, dated 23rd November, 2016, exhibit "**HN7**".

The gist of the Applicant's argument, as contained in the Skeleton Arguments filed on its behalf, is that the Applicant extended a secured loan facility to the 1st Respondent, who failed or neglected to settle his indebtedness notwithstanding demand having been made.

The Applicant contends that as a mortgagee, it has a right to take out this action under **Order XXX, rule 14 of the High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia** to seek the cumulative remedies stated in the Originating Summons. The case of **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited) v Hyper Foods Products Limited and Others (1999) Z.R. 124¹** was cited as an authority for the mortgagee's entitlement to cumulative remedies.

When the matter came up for hearing, Counsel for the Applicant relied on the Summons, supporting Affidavit, List of Authorities and Skeleton Arguments on record.

As regards the Respondents' position, no documents were filed in opposition. However, the 1st Respondent was in attendance to challenge the amount claimed.

Having carefully read the Affidavit and Skeleton Arguments in Support of the Originating Summons herein, it is clear from the unopposed Affidavit evidence that this is an action for a claim of moneys secured by property, which claim is accompanied by a bouquet of other reliefs including delivery of possession of the mortgaged properties, foreclosure and sale of the said property.

Accordingly, on the authority of the cases of **Luke Phiri V David Tembo²** and **Informatics Limited and Others V Stanbic Bank Zambia Limited³**, I am of the settled view that this action falls squarely within the class of actions notoriously referred to as mortgage actions, which are taken out pursuant to Order 30 Rule 14 of the High Court Rules.

Furthermore, I have carefully examined the Affidavit evidence presented and find that the 1st Respondent was extended a credit facility by the Applicant, in the sum of ZMW 215, 000.00 pursuant to the Loan Agreement of 29th October, 2015.

I also find that as security for the facility, the 2nd Respondent guaranteed to pay the sum loaned by the Applicant to the 1st Respondent in the event of default by 1st Respondent. Additional security was supplied by the 2nd Respondent in the form of a Third Party Mortgage over S/D 145 of S/D L of Farm No. 842, Kitwe.

I have also comprehensively examined the Loan Agreement and Mortgage Deed. My examination yielded discovery of the following essential contractual terms.

Firstly, clause 2 of the Loan Agreement prescribes contractual interest at the rate of 4.25 per month. Moreover, under clause 3 of the Loan Agreement, the 1st Respondent undertook to pay the principal sum of ZMW 215, 000.00 together with interest in accordance with an agreed schedule. The schedule was not presented to Court, albeit clause 1 stipulated a loan repayment period of 60 months.

Other pertinent terms in the Loan Agreement include clause 6, wherein the 1st Respondent accepted to pay additional default interest of 51% on overdue amounts and clause 8, which prescribed events of default to include the failure by the 1st Respondent to make payment within 7 days of the due date.

This brings me to the Default Notice and Letter of Demand, exhibits **"HN 6 and 7"**. The Final Notice of Default was issued to the

1st Respondent in May, 2016, a period well in excess of one year before the Applicant took out process. Similarly, the Letter of demand of 23rd November, 2016 was issued to the 1st Respondent and copied to the 2nd Respondent no less than 6 months before proceedings were instituted. Both Notice of Default and Letter of Demand called upon the 1st Respondent to immediately pay the outstanding amounts due at those times. The record reflects that no payments were made.

I have also scrutinized, exhibit "**HN5**", the 1st Respondent's Loan Statement Account. It reveals that the loan was disbursed on 30th October, 2015. The Statement shows that loan payments were made sporadically from the date of disbursement until 28th December, 2016 when it was cancelled. The Statement also reflects a closing balance of ZMW211, 103.19 as at the date of cancellation.

There being no tangible data on record to counter the Affidavit evidence before Court, I find that the 1st Respondent is in default, having failed to service or settle the loan following demand. Accordingly, I find that the 1st Respondent is indebted to the Applicant in the sum of ZMW211, 103. 19 as at 28th December, 2016 as reflected in the Loan Statement of Account which was printed on 27th June, 2017.

I now move to consider the consequences of default and the covenants contained in the Mortgage Deed.

My first observation is that the Mortgage Deed bears a Registry of Deeds registration date stamp of 29th October, 2015. Consequently, I am satisfied that the Mortgage Deed was duly registered.

The Mortgage Deed was entered between the 2nd Respondent as Mortgagor, the 1st Respondent as Borrower and the Applicant as Mortgagee. The amount secured by the Mortgage Deed under clause 8 is the principal sum of ZMW 215, 000.00 (Two Hundred and Fifteen Thousand Kwacha).

Under clause 1 of the Mortgage Deed, the 2nd Respondent as Mortgagor covenanted to pay and discharge on demand, *inter alia*, all monies owing to the Applicant by the Mortgagor whether as principal or surety. The 2nd Respondent further undertook to pay interest on the monies due from the time of demand until full payment.

By clause 3 of the Mortgage Deed the 2nd Respondent conveyed the mortgaged property to the Applicant.

Additionally, under Clause 5(vii) of the Deed, the Applicant reserved all powers and remedies vested in it by Statute. The statutory powers that a mortgagee has under statute, and in particular ***the Conveyancing and Law of Property Act, 1881***, includes the power to sell the mortgaged property when the mortgage money becomes due. The statutory power of sale is exercisable only when the mortgagor has defaulted in making payment of the mortgage money

for a period in excess of three months from the date of the notice requiring payment thereof.

In the case at hand, the evidence shows that the position is that the 1st Respondent defaulted in making payment for a period in excess of six months after demand was made. However, for purposes of entitlement to exercise the statutory power of sale of the mortgaged property, the Court must be satisfied that notice was served on the Mortgagor in accordance with the Mortgage Deed.

At this stage, I must take pause to interpolate what constitutes service on the Mortgagor under the Mortgage Deed. In that regard, clause 7 reads as follows:

"Any notice required to be served on the Mortgagor shall be sufficiently served if sent by registered post addressed to the Mortgagor at the last known address of the Mortgagor ..."

I have examined both the Final Demand Notice and the Letter of Demand. Neither are addressed to the 2nd Respondent. Moreover, there is no evidence before Court to show that the Final Demand Notice or Letter of Demand, albeit copied to the 2nd Respondent, were sent by registered post to the 2nd Respondent. Consequently, I have no basis upon which to lay any satisfaction that the 2nd Respondent was served with a demand in accordance with the Mortgage Deed.

In the absence of any proof that the 2nd Respondent was served with a demand calling in the loan in the manner prescribed, I cannot arrive at the conclusion that the 2nd Respondent has defaulted in making payment within the statutory period of three months from the date of service of notice. Consequentially, the Applicant's right to exercise the power of sale has not matured.

Thus, I am hemmed in by the law and decline to allow the Applicant to the immediate exercise of its statutory power of sale. Nonetheless, given the default in payment by the 1st Respondent, the Applicant is entitled to enforce his securities when they mature. In facilitating that maturity, I will give the 2nd Respondent the benefit of the prescribed 90 days notice period to settle the outstanding indebtedness that he guaranteed.

In light of the above Judgment is entered in favour of the Applicant, cumulatively, as follows:

1. **Foreclosure nisi:** That the Respondents shall, within 90 days from the date of Judgment, pay the Applicant the outstanding balance of ZMW 211, 103.19 owing as at 27th June, 2017. The Judgment Debt of ZMW 211, 103.19 shall attract contractual interest up until the date of Judgment. Thereafter interest shall accrue at the Bank of Zambia Short term lending rate until date of full and final settlement.

2. **Foreclosure absolute:** In the event that the Respondent fails to liquidate the Judgment Debt within 90 days from the date of Judgment, foreclosure relating to the mortgaged property will automatically be rendered absolute, upon which the 2nd Respondent's right to redeem in equity and at law shall stand extinguished.
3. **Possession:** Since the record reflects that the 2nd Respondent is in possession of the mortgaged property, the status quo shall be preserved until foreclosure is rendered absolute. That is, the 2nd Respondent shall deliver up vacant possession of the mortgaged property to the Applicant in the event that and upon foreclosure being rendered absolute;
4. **Sale:** The Applicant may exercise its right of sale any time after foreclosure has been rendered absolute;
5. **Costs** incidental to these proceedings shall be borne by the Respondent, such costs to be taxed in default of agreement.

Leave to appeal is granted.

This 22nd Day of August 2017

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Lady Justice B.G.Lungu
HIGH COURT