

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

2014/HPC/0209

In the matter of:

A Legal Mortgage over Sub Division No. 27 of Farm No. 298A,
Lusaka

BETWEEN:

RAINBOW TOURSIM GROUP (ZAMBIA) LIMITED

APPLICANT

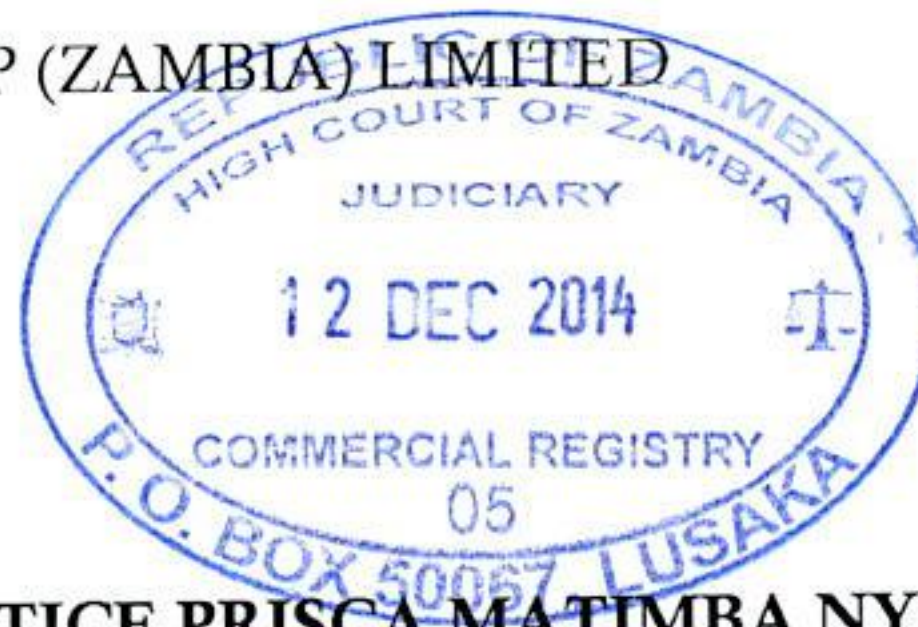
AND

SAVOY HOTEL LIMITED

1ST RESPONDENT

CHRISTY CHITALU LUMPA

2ND RESPONDENT



BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC AT
LUSAKA IN CHAMBERS

For the Applicant:

Mr. M Chiteba

Messrs Mulenga Mundashi & Kasonde Legal Practitioners

For the Respondents:

Mr. N Ng'andu

Messrs Shamwana & Company

JUDGMENT

List of authorities referred to:

1. Order 30 Rule 14 of the High Court Rules Cap 27 of the Laws of Zambia
2. Documents Act, Chapter 75 of the Laws of Zambia
3. Lumus Agricultural Services Company Limited & Others Vs Gwembe Valley Development Company Limited (In receivership) (1999) ZR 1
4. Aruj Kumar Rathi Krishnan Vs The People
5. Section 3 of the Authentication Act
6. Documents Act, Chapter 75 of the Laws of Zambia

This action was commenced by the Applicant by Originating Summons Pursuant to **Order 30 Rule 14 of the High Court Rules Cap 27 of the Laws of Zambia** seeking the following reliefs:-

- i. Payment of the sum of US \$1,480,461.40. secured by a First Legal Mortgage and/or in the Alternative;
- ii. An Order for sale of the property subject to the Legal Mortgage;
- iii. Interest on the sums received under (i) and (ii) above;
- iv. Foreclosure;
- v. Further or other relief;
- vi. Costs.

The Application was supported by an affidavit. In addition Counsel for the Applicant **Mr. Chiteba** also filed written Submissions on behalf of the Applicant dated 20th October 2014.

The affidavit in support was deposed to by one **Napoleon Kudakwashe Mtukwa**, a Zimbabwean national of 3084 Mapereke Road, New Malborough, Harare, Zimbabwe.

According to the said affidavit the Applicant entered into two separate agreements with the 1st Respondent namely, a Management Contract dated 1st September 2008 and a Preferential Share Subscription Agreement (PSS Agreement) dated 31st December 2009, as evidenced by Exhibits "NMK1" and "NMK2", the Preferential Share Subscription Agreement (PSS Agreement) and Management Agreement respectively. Under the terms of the Management Contract, the 1st Respondent engaged the Applicant to provide management

services with respect to the Management and operations of the 1st Respondent for a fixed term of ten (10) years.

As part of the Management Contract the Applicant was to receive basic management fee of 3% of adjusted gross revenue of the 1st Respondent.

Under the terms of the PSS Agreement the Applicant was to subscribe for 900,000 preference shares in the 1st Respondent valued at US \$1 per share. By the said PSS Agreement the 900,000 preference shares were to be redeemable at the expiry of a thirty (30) month period from the date of commencement of the PSS Agreement.

The Applicant did subscribe and pay for the said preference shares and at the expiry of thirty (30) month period which fell on 1st November 2011, as per the PSS Agreement, the preference shares became due for redemption. The preference shares having fallen due for redemption, the Applicant demanded payment for the preference shares from the 1st Respondent, which demand the 1st Respondent refused, failed, neglected or ignored to fulfill contrary to the terms of the PSS Agreement.

According to paragraph 10 of the Affidavit in support of the Originating Summons, the outstanding debt due to the Applicant from the 1st Respondent under both the PSS Agreement and the Management Contract as at 8th February 2013, stood at US \$1,480,461.00 (the outstanding Debt).

Taking into consideration the said outstanding Debt, the Applicant, the 1st Respondent and the 2nd Respondent executed a Memorandum of a Settlement

Agreement (“MSA”) to set out the terms upon which the Outstanding Debt would be settled. Exhibit “NMK3” being a copy of the MSA dated 8th February 2012.

Under the terms of the MSA the 2nd Respondent agreed to act as surety and co-principal debtor with the 1st Respondent in respect of the Debt Owed to the Applicant which was to be settled by way of a first installment of US \$750,000.00 on or before 31st January 2013 and the balance on or before 29th March 2013. It was further agreed that as security for the due performance of the Respondents’ obligations under the MSA, the Applicant would register a Legal Mortgage over Subdivision No. 27 of Farm 298a held by the 2nd Respondent. Consequently on 28th August 2013 a First Legal Mortgage was duly registered in respect of Subdivision 27 of Farm No. 298a, Lusaka in favour of the Plaintiff; as evidenced by Exhibits “KM4” and “KM5”, copies of the Mortgage Deed and the Certificate of Title for Subdivision No. 27 of Farm 298a, Lusaka confirming due registration of the Mortgage. Up to this point the facts are not in dispute.

The Applicant stated that the Respondents have neglected or failed to settle the Outstanding Debt due to the Applicant contrary to the provisions of the MSA. In the event the Applicant requested the Court to grant an Order directing the Respondents to pay the sum owed plus interest or in the alternative to grant an Order for Foreclosure and/or sale of the Mortgaged property to the Applicant to enable the Applicant realize the sum owed.

On 16th July 2014 the Respondents filed an affidavit in opposition to the Originating Summons sworn by one **Christy Chitalu Sampa**, the 2nd

Respondent herein. He does not dispute the facts as stated above. In addition to the facts as above he stated that the said PSS Agreement was entered into between the Applicant and the 1st Respondent was executed in Harare, and that to the best of his knowledge the same was not authenticated for use in Zambia. That in order to settle the accrued debt of US \$1,480,461.00, the Applicant, 1st Respondent and 2nd Respondent executed the MSA dated 8th February 2012 exhibited as "NKM3" in the affidavit in support. In terms of Clause 18 of the MSA, the terms of the Management Contract PSS Agreement and the MSA were to be construed collectively. The MSA like the PSS Agreement was executed in Harare, Zimbabwe and that to the best of his knowledge was not authenticated for use in Zambia.

Pursuant to the Management Contract, PSS Agreement and the MSA, the Applicant proceeded to register a First Legal Mortgage on Subdivision 27 of Farm No. 298, Lusaka as evidenced by exhibits "NKM4" and "NKM5" in the affidavit in support.

It is the 2nd Respondents, contention that due to the non authentication of the PSS Agreement and the MSA, the First Legal Mortgage cannot be enforced against the Respondents and therefore the Court ought not to grant the reliefs sought by the Applicant.

On 17th September 2014 one **Napoleon Kudakwashe Mtukwa** filed another affidavit in reply to affidavit in opposition to the Originating Summons the sum total of which was to the effect that since the 2nd Respondent acknowledged the outstanding debt and covenanted with the Applicant to pay the outstanding debt and interest within the times stipulated in the Mortgage

Deed on account of the Respondents' Default the Court should order the Respondents to pay the sum owed plus interest thereon and in the alternative to grant an order to Foreclosure and/or sale of the Mortgaged Property to enable the Applicant to realize the sum owed.

Counsel for the Respondents also filed written final submissions, list of authorities which I have noted.

It is not in dispute that the Applicant and the 1st Respondent entered into a Management Contract dated 1st September 2008 and a PSS Agreement dated 31st December 2009, as a result of which the 1st Respondent accrued a debt of US \$1,450,461.00.

It is also not in dispute that in order to settle the accrued debt as above, the Applicant, 1st Respondent and 2nd Respondent executed the MSA dated 8th February 2013, whereby a repayment schedule was agreed upon in terms of ... the 2nd Respondent would execute a First Legal Mortgage in favour of the Applicant over Subdivision No. 27 of farm 298a, Lusaka to secure the outstanding debt.

The Respondents fell into default and as a consequence the Applicant seeks payment of the US \$1, 480,461.00 secured by the First Legal Mortgage.

It is not in dispute that the said PSS Agreement and the MSA were executed outside Zambia i.e. in Harare, Zimbabwe.

The Respondents' contention is that due to the non authentication of the PSS Agreement and the MSA, the First Legal Mortgage cannot be enforced against the Respondents arguing that the Applicant should have had the agreements executed in Harare authenticated for use in Zambia prior to the execution and registration of the Mortgage Deed. Since no authentication was undertaken, the monies due to the Applicant do not arise from the Mortgage Deed.

The Applicant's contention is that the clear admissions and acknowledgement of the Debt by the 2nd Respondent, who executed both agreements both in his personal capacity and on behalf of the 1st Respondent, validate the agreements in issue and render the requirement for authentication redundant. **Mr. Chiteba**, for the Applicant argued that to the extent that all parties confirm having executed the agreements there is no further requirement for authentication or verification of the signatures thereon. He submitted further that it would be wholly unfair and unconscionable to permit the 2nd Respondent to rely on the statutory requirement for authentication as a means to escape liability in the face of his admission that he did execute the agreements.

He contended that it would be fraud on the Applicant for the 2nd Respondent to seek to rely on the statutory requirement for verification of a signature on a document in a foreign country as basis for disputing the Applicant's claim.

The Authentication of **Documents Act, Chapter 75 of the Laws of Zambia** provides that all documents executed outside Zambia, save for affidavits sworn

before and attested by a Commissioner of High Court beyond the confines of Zambia which shall require no further authentication.

Section 2 of the Act defines the word authentication thus:-

“In this Act, unless the context otherwise requires, - “authentication” when applied to a document, means the verification of any signature thereon”.

As regards when a document should be or is required to be authenticated, how it should be authenticated and who should authenticate the document, **Section 3 (c)**of the Act provides as follows:-

“Any document executed outside Zambia shall be deemed to be sufficiently authenticated for purpose of use in Zambia, if –

(d) In case of a document executed in any place outside Her Britannic Majesty’s dominion (herein referred to as a “foreign place) it be authenticated by signature and Seal of Office –

- (i) Of a British Consul – General Consul or Vice Consul in such foreign place; or*
- (ii) Of any Secretary of State, Under – Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be sworn by the Certificate of Counsel or Vice – Counsel*

of such foreign place in Zambia to be duly authorized under the Law of such foreign place to authenticate such documents”.

In the case of **Lumus Agricultural Services Company Limited & Others Vs Gwembe Valley Development Company Limited (In receivership) (1999) ZR 1**, the meaning and effect of **Section 3** of the Act was stated as follows:-

*“It is quite clear from **Section 3** that if a document executed outside Zambia is authenticated as provided, then it shall be deemed or presumed to be valid for use in the country and if it is not authenticated then the converse is true that **it is deemed not to be valid and cannot be used in this country**”.*
(My emphasis).

In the case of **Aruj Kumar Rathi Krishnan Vs The People HPA/11/2010** in referring to **Section 3** of the said Act, it was stated that:-

*“This Section demonstrates **the need for a document executed outside Zambia to be notarized for it to be valid for use in Zambia** (My emphasis)since the said documents were deposed to outside Zambia they should have been authenticated in accordance with **Section 3 of the Authentication Act, for purpose of validating them, for use in Zambia.** (My emphasis). In view of the fact that the documents were not so authenticated the trial Court erred at law in admitting the evidence”.*

The sum total of the authorities cited above is to the effect that a document executed outside Zambia, and not authenticated as provided for in the

Authentication of Documents Act, Chapter 75 of the Laws of Zambia, cannot be used in this country for any purpose at all.

I am therefore not persuaded by **Mr. Chiteba's** argument that the impugned agreements though not authenticated should be admissible for purposes of the recovery of the accrued debt. The Act is couched in mandatory terms and has provided no exceptions under which an unauthenticated document can be admissible in evidence. Moreover as stated in the **Lumu Case** above, a document is not valid for use in Zambia if it is not authenticated in the manner required under the Act, and further that a document can only be authenticated at the time of its execution and, cannot be authenticated after the act. I am not persuaded by **Mr. Chiteba's** submission that admission and acknowledgement by the 2nd Respondent that he executed the agreement in Harare validate the impugned agreements and render the requirements for authentication under the Act redundant. The requirement for authentication is mandatory, and failure to do so renders the documents in issue null and void for use in Zambia.

Equally I am not persuaded by **Mr. Chiteba's** argument that it would be wholly unfair and unconscionable to permit the 2nd Respondent to rely on the statutory requirements for authentication as a means to escape liability in the face of his admission that he executed the agreements.

Firstly as stated above the requirement for authentication is couched in mandatory terms and the Act has not provided any exceptions. The 2nd Respondent's reliance on the Act is on firm legal ground. The 2nd Respondent

merely invoked the law as it relates to the need for the authentication of documents executed outside Zambia before they can be valid for use in Zambia. There is no issue here of the 2nd Respondent using the statutory requirements as a means to escape liability or it being wholly unfair and unconscionable. It is just the law.

Further, on the basis of the documents filed herein I find no evidence of fraud on the part of the 2nd Respondent. The 2nd Respondent merely invoked the Law as it relates to the need for the authentication of documents executed outside before they can be valid for use in Zambia. The issue of fraud does not arise.

The Respondent has not tried to shield himself from liability. It is only that the remedy sought for Foreclosure and/or Sale of the purported Mortgaged Property is not available, as the monies payable to the Applicant do not arise from the Mortgage Deed.

As observed by the Learned authors of **Land Law Text and Materials, 3rd Edition, 2004**,:-

“Where one person lends money to another he may be content to rely on the personal obligation of the borrower to repay the loan. If the borrower fails to pay the loan in accordance with the Agreement between the parties, the lender can sue the borrower to recover what is due, and provided that the borrower remains solvent and has assets at least in equal value to the amount of the loan (and his other liabilities), this right to sue is sufficient protection for the Lender”.

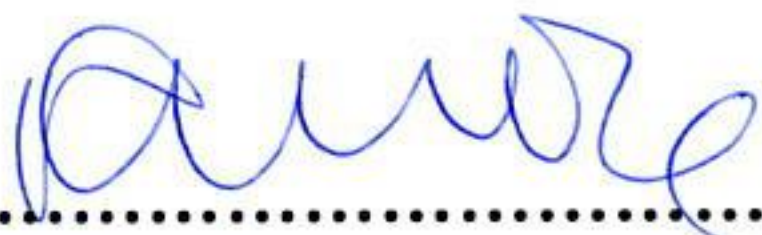
Therefore the mere fact that the Applicant cannot recover the US \$1,480,461.00 as a result of the non authentication of the subject agreements does not prevent the Applicant from suing the Respondents for the recovery of the monies owed.

This right to sue is sufficient protection for the Applicant if it so wishes to prosecute the matter further.

For all the above reasons the reliefs sought by the Applicant as endorsed in the Originating Summons are hereby declined.

Costs shall follow the Cause, to be taxed in default of agreement.

Dated this....12th.....day of December.....2014


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Prisca M. Nyambe, SC
JUDGE