

IN THE HIGH COURT FOR ZAMBIA

2014/HP/1808

AT PRINCIPAL REGISTRY

LUSAKA

(Civil Jurisdiction)



PULSE FINANCIAL LIMITED

APPLICANT

AND

PATSON MUNYAMATA

RESPONDENT

Before the Honorable Mr. Justice C.F.R. Mchenga SC

For the Applicant: L. Shula, J & M Advocates

For the Respondent: K. Wishimanga, AM Wood & Company

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## JUDGMENT

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Cases referred to:

1. S. Brian Musonda (Receiver First Merchant Bank Zambia Limited)  
(In Relationship) v Hyper Food Products Limited and Two Others  
[1999] Z.R. 124
2. Indeni Petroleum Refinery Company Limited v V.G Limited, SCZ No.  
22 of 2007

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia

The applicant, by originating summons, supported by an affidavit, seeks the following reliefs:

1. *Payment of all sums of money owed by the respondent to the applicant by virtue of a loan obtained by the respondent from the applicant and evidenced by various agreements amounting to a mortgage executed by both parties and dated 24<sup>th</sup> April, 2013, the principal amount being K189,177.67 and the interest amount being K137,310.36 hence bringing the total amount to K326,488.03 and the continuing interest up to the date of payment as per loan agreement;*
2. *Foreclosure and possession of the mortgage assets;*
3. *Sale of the aforesaid mortgage property;*
4. *Any other relieve of the court may deem fit; and*
5. *Cost of and incidental to the action.*

In the affidavit in support of the originating summons, Julius Nkuwa, a Legal Officer with the applicant, deposed that on 24<sup>th</sup> April 2013, the respondent signed a new loan agreement due to challenges he had faced meeting his obligations in a previous loan agreement. The restructured loan was for the sum of K220,000 and under that agreement, the respondent executed documents including a pledge on overall assets (movable), a power of attorney, an assignment and transfer of specific asset (movable), an individual loan agreement (movable), a pledge on overall assets, an individual loan agreement, a guarantor assignment and transfer of Specific assets and specific

guarantor agreement. These documents were admitted into evidence as exhibits "JN 1a" to "JN 1h".

He also deposed that the respondent pledged various chattels including a Mitsubishi registration number AAR 5190, an Isuzu registration number ABT 2821 and a Mitsubishi registration number ABA 5831. In addition, he deposited an occupancy licence for Stand 19/Block 222 Chawama Compound. Finally, he deposed that since he obtained the loan, the applicant has only paid K220,000 towards the principal amount of the loan and K240,924.43 towards interest. The outstanding amount on the loan is K189,177.67, while K137,310.36 is outstanding on the interest; this brings the total amount owing to K326,488.63.

In his affidavit in opposition, the respondent deposed that the restructuring of the loan was not on account on his failure to pay it off but because of the need to refinance it. He said he requested to refinance the loan after paying off the earlier loan. He also deposed that the other reason for restructuring the loan was because he had issue with the initial interest rates. A copy of his application for refinancing was admitted into evidence as exhibit "PM1".

The respondent also deposed that according to the individual loan agreement dated 24<sup>th</sup> April 2013, he was supposed to pay K457,316.20.

He deposed that going by the applicant's own evidence, in paragraph 9 of their affidavit in support, he has paid K460,924.43, which is above the amount due to the applicant. Finally, he deposed that he has not defaulted on the loan and neither has been served with a default notice.

In the affidavit in reply, it was deposed that the indication in paragraph 9 of the affidavit in support of the originating summons that the respondent was supposed to pay K457,316.20 was erroneous. Paragraph 10 of the same affidavit indicates that the correct amount, which is K460,924.43. It was also deposed that the applicant sought to refinance his loan because he was experiencing financial difficulties. The loan was restructured and they came up with a restructured loan of K220,000 whose terms of interest were 42% per annum or 3.5% per month; rates that are approved by the Bank of Zambia. It was maintained that exhibits "JN 4a" and "JN 4b" confirm that the outstanding amount on the principal and interest is K189,177.67 and K137,310.36, respectively. He also produced demand notices marked "JN2a" and "JN2g".

At the hearing both parties indicated that they were going to rely on the affidavits they had filed in. They were also given time to file in

written submissions and at the end of the prescribed period, the only submissions received were those filed by the applicant. Counsel submitted that under terms of contract terms the failure by the respondent to liquidate the loan entitles the applicant to invoke the provisions of **Order XXX Rule 14, of the High Court Rules, of the High Court Act**; they have the right to call the loan and dispose of the pledged property.

Counsel also referred to the case of **S. Brian Musonda (Receiver First Merchant Bank Zambia Limited) (in Relationship) v Hyper Food Products Limited and Two Others (1)** and submitted that a mortgagee's remedies are cumulative; they can employ any of the remedies available to them. On the applicant's claim for interest, she referred to the case of **Indeni Petroleum Refinery Company Limited v V.G Limited (2)** and submitted that the rationale for the payment of interest because the applicant was denied the use of the money. As regards the interest rate, counsel submitted that the respondent entered into a contract which set the interest rate at 3.5% per month and he was bound by it. Finally, she submitted that the respondent had no defence.


The evidence in this case is fairly straight forward and from the evidence before me, I find that it is not in dispute that on 24<sup>th</sup> April

2013, the respondent applied to have his loan with the applicant rescheduled. What is in issue is whether the application was on account of the respondent experiencing financial difficulties and whether he had paid of the loan. Though the respondent claims that he requested for refinancing because he had paid off the earlier loan, his letter, exhibit "PM1", indicates that he wanted the loan rescheduled because he "experiencing financial constraints". The question is why would one who is repaying a loan on schedule ask for it to be rescheduled or restructured? Further, the respondent has provided some receipts that were admitted into evidence as exhibit "PM2" to prove that he paid off the loan but the receipts which are for K3,400, K13,000, K2,000, K4,000 and K10,000 do not add up to the loan amount.

In addition, exhibits "JN2a-JN2g", contrary to the respondent's claims, confirm that he was notified of the default. I agree with the applicant's submission that the respondent has no defence as he has failed to lead any cogent evidence that he paid off the loan. Consequently, I find that this is an appropriate case to invoke **Order XXX Rule 14, of the High Court Rules, of the High Court Act**, in favour of the applicant. I order as follows:

1. That the respondent pays the sum of K316,488.03 (K326,488.03 claimed in the originating summons less K10,000 he paid after this action was commenced) within 14 days from the date of this judgment, with interest at the short term deposit rate from 15<sup>th</sup> of August 2014, to the date of judgment, thereafter, the interest will be at the current bank lending rate;
2. In the event of the respondent not being able to pay the judgment sum within the stipulated period, the applicant will be at liberty to foreclose and take possession of Stand No. 19/ block 222 Chawama Compound, Lusaka and other movable property pledged for the loan;and
3. Costs to the applicant, to be agreed, in default to be taxed.

Delivered in open court at Lusaka this 5<sup>th</sup> day of May, 2015

  
C. F. R. MCHENGA SC  
JUDGE