

IN THE HIGH COURT FOR ZAMBIA

2014/HP/0404

AT PRINCIPAL REGISTRY

LUSAKA

(Civil Jurisdiction)



PULSE FINANCIAL LIMITED

APPLICANT

AND

JAQUELINE KUMWENDA

RESPONDENT

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

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

For the Respondent: No Appearance

JUDGMENT

Cases referred to:

1. S. Brien 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 2007

Legislation referred to:

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

The Applicant, by originating summons, 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 mortgage deed executed by both parties dated 25th September 2013, which monies as at February 2014, stood at K372,341.55;*
2. *Foreclosure and possession of the mortgage property being subdivision No. 1329 of Subdivision "A" Farm No. 378a;*
3. *The sale of aforesaid mortgage property;*
4. *Any other relief the court may deem fit; and*
5. *Costs of and to this action.*

In the affidavit in support of the originating summons, Martha Msoni, a Legal Officer with the Applicant, deposed that on 25th September 2013, the Respondent was given a K350,000 loan and she executed a mortgage deed in which she pledged Sub-division 1329 of Sub-division A of Farm 398a as security for the loan. The loan agreement and the deed were admitted into evidence as exhibit "MM1" and "MM2", respectively. She deposed that the Respondent also executed a individual loan agreement (immovable), assignment and transfer of specific assets (movable), a pledge on overall assets (immovable), an assignment and transfer of specific asset (immovable), a pledge on overall assets (movable), an individual loan agreement (movable) and a power of

attorney. These documents were admitted into evidence as exhibits "MM3a" to "MM3g".

She also deposed that in addition to the mortgage deed, the Respondent pledged a canter truck Registration number ABP 6148 and other house hold goods. The truck was sold and K16,999 realised when she defaulted on the loan. Further, that since she obtained the loan, the Respondent only made one monthly payment, in October 2013. She has not paid the monthly contributions and the outstanding amount was K372,341.55 as of February, 2014.

In her affidavit in opposition, the Respondent deposed that she initially obtained a loan of K200,000.00 from the Applicant on 7th August 2012. After deducting service charges, her account was only credited K173,239,000. She was meeting her monthly payments on the loan, when on 27th December 2012, the Applicant made her apply for a new loan for K280,000. She did but her account was only credited with K54,000. K235,920 was deducted and computed as processing fees, insurance, mortgage, previous loans and other unspecified charges. A copy of the statement of account and consent for the loan were admitted into evidence as exhibits "JMK2" and "JMK3", respectively.

She also deposed that on 25th September 2013, the Applicant called her again and offered her a further loan of K350,000. She refused to sign the loan form because as far as she was concerned, she had paid off the loan and did not want another loan. She deposed that the loans officer, the Analyst and the Legal Officer gave her different balances; they were admitted into evidence as exhibits "JKM4", "JKM5" and "JKM6". She said following her refusal to sign the K350,000 loan agreement, the Applicant harassed her and seized her Mitsubishi Canter truck.

In addition, the Respondent deposed that she did not sign consent form for the loan dated 17th September 2013, exhibit "MM1". She said there were two consent forms which she produced as exhibit "JKM7". She said she did not know why the Applicant created a term deposit account exhibit "JKM8" and she does not know why my deducted the amounts in it from her deposit account. She deposed that the Applicant has not given her explanations for the deductions that were made from her account. She said she has a defence because she paid all her accounts.

In the affidavit in reply, it was deposed on behalf of the Applicant that the Respondent initially obtained a loan for K200,000 on 7th August 2012. On the 26th of December 2012, she obtained another one for K280,000 to enable her complete a building project at her house. The

initial loan was settled by deducting K180,000 from the K280,000. A statement of account and a consent form dated 27th December 2012, were admitted into evidence as exhibits "FMB3" and "FMB4". It was deposed that the Respondent voluntarily signed the loan agreement and was not forced to sign it as she claims.

As regards the K350,000 loan, it was deposed that the Respondent applied for it and the application form and the consent form were produced and admitted into evidence as exhibit "FMB5" and "FMB6, respectively. It was deposed that the motor vehicle which was pledged as security for the loan was only seized following her failure to settle the loan and the dispatching of a demand notice; the demand notice was produced and admitted into evidence as "FMB8".

Coming to the term deposit account, it was deposed that the K17,500 and it was deducted on 17th December 2013 and channelled to the payment of the monthly instalment for November 2013. A copy of the Respondent's account was admitted into evidence as exhibit "FMB10".

When the matter came up on 2nd April 2015, I proceed to hear the matter even when there was no appearance on behalf of the Respondent because I was satisfied that the notice of hearing was served on the Respondent and counsel representing her was aware of the proceedings.

Counsel appearing for the Applicant relied on the affidavit in support of the originating summons and the affidavit in reply; she also filled in written submissions. She submitted that under the loan's contract terms, the Respondent was under an obligation to liquidate the loan and where she failed to do so, the Applicant has the right 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. Brien Musonda (Receiver First Merchant Bank Zambia Limited) (in Relationship) v Hyper Food Products Limited and Two other (1)** and submitted that a mortgagee's remedies are cumulative; he can employ any of the remedies available to him. 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 interest rates, counsel submitted that the Respondent entered into a contract which set the interest rate at 3.5% per month and she was bound by it.

I am indebted to counsel for her submissions which I have taken into account in arriving at my decision. I have also taken into account the affidavits filed in by both parties.

From the evidence before me, I find that it is not in dispute that on the 7th of August, 2012, the Respondent obtained a loan of K200,000 from the Applicant. It is also not in dispute that the Respondent received K173,539 because K26,461 was deducted as administrative charges. Further, on 27th December 2012, she obtained another loan from the Applicant of K280,000 and only K54,080 was credited to her account.

The Respondent disputes having applied for the K350,000 loan but admits having received K43,185. Her position is that she was urged to apply for the loan but she refused. First of all, though the Respondent claims that she paid off both the K200,000 and K280,000 loans, she has not provided any proof of such payment. Further, she disputes the amounts owned and argues that net balances submitted by the Applicant's loans officer, analyst and legal officer on her account with the Respondent are contradictory without saying or indicating what the correct figures are supposed to be. The evidence before me, exhibit "JMK2", establishes that at the time she obtained the K280,000 loan, K195,000 was outstanding on the K195,000; this money was deducted from the K280,000 and that is why she only got K54,080. On the evidence before me, I find that Respondent did not pay off in full the K200,000 and K280,000 loans as she alleges.

Coming to the question whether she obtained the K350,000 loan, though the Respondent disputes having obtained the loan and deposes to not having signed the loan agreement, I am satisfied that she obtained the loan. Exhibit "MM1", the application form for the loan bears her signature contrary to her claim that she did not sign it. She also executed a mortgage deed in which she pledged Sub-division 1329 of Sub-division A of Farm 398a as security for the loan (exhibit "MM2") on the same day; she has offered no explanation of why this was the case if she did not apply for the loan.

Further, in her affidavit in opposition, the Respondent deposed that she only received K43,185 and not K350,000. She does not say why the Applicant 'gave' her that amount of money if it was not because she applied for another loan.

It is not difficult to appreciate why the Respondent ended up receiving only K43,185 after applying for a K350,000 loan; exhibit "MM1" indicates that she did not clear the 2nd loan and part of the K350,000 was used to pay of the K259,699.98 outstanding on it. In the face of compelling evidence that the Respondent signed 3 loan agreements with the Applicant, one would have expected her to produce proof that she paid them off as she claims. Other than pointing out that the loans officer's, the analyst's and legal officer's reports

gave her different balances, she has not provided any proof of paying off the loans. I have looked at the reports and agree that they have different balances but those balances are not the final balances and the documents were produced way before she was accused of defaulting. Consequently, I find that the Respondent applied for and received the K350,000 loan.

Further, it is clear from the evidence before me that the terms of the contract, in particular, the interest rate of 3.5% per month were too onerous for the Respondent, instead of clearing the loans she refinanced them by borrowing larger amounts that she has now failed to pay. But this does not concern the court because she went into the contract fully aware of the high interest rates. I agree with the Applicant's submission that she has no defence to the K372,341.55 claim against her.

Finally, 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. This being the case, I order as follows:

1. That the Respondent the sum of K372,341.55 within 14 days from the date of this judgment, with interest at the short term deposit rate from 14th March 2014, to the date of judgment, thereafter, it will be at the current bank lending rate.

2. In the event of the Respondent not being able to pay the judgment sum in the stipulated period, the Applicant will be at liberty to foreclose and take possession of Sub-division No. 1329 of Sub-division A of Farm 378a and other movable property pledged for the loan
3. Costs to the Applicant, to be agreed, in default to be taxed.

Delivered in chambers at Lusaka this 28th day of April 2015


C. F. R. MCHENGA SC
JUDGE