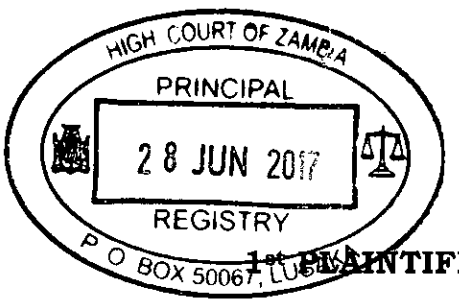
IN THE HIGH COURT OF ZAMBIA **2016/HP/0370**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

BIG WILLAS TRANSPORT AND GENERAL SUPPLIERS LIMITED **1st PLAINTIFF**

PETER MBAYA BUKASA **2nd PLAINTIFF**

AND

FIRST NATIONAL BANK ZAMBIA LIMITED **DEFENDANT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 28th DAY OF JUNE, 2017

For the Plaintiffs : Mr M. Bwalya, Ellis and Company

For the Defendant : Mr M. Moonga, Legal Manager, FNB

J U D G M E N T

CASES REFERRED TO:

1. ***Davy V Garret 1878 7 CH 473***
2. ***Sablehand Zambia Limited V Zambia Revenue Authority 2005 ZR 109***
3. ***Anderson Kambela Mazoka and others V Levy Patrick Mwanawasa and others 2005 ZR 138***
4. ***Nkolongo Farms Limited V Zambia National Commercial Bank and Others 2007 ZR 149***

LEGISLATION REFERRED TO:

1. ***The Rules of the Supreme Court, 1999 edition***

OTHER WORKS REFERRED TO:

1. ***McGregor on Damages, Harvey McGregor, 16th Edition, 1997 by Sweet and Maxwell***
2. ***Blacks Law Dictionary by Bryan A. Garner***
3. ***The Banking Code and Practice***

The Plaintiffs commenced this action by way of writ of summons claiming;

i. *The sum of USD 85, 000.00 being the value of the scania truck registration number ALB 173, which the Defendant through its agents or employees unlawfully and fraudulently sold to Sarayaan Investments Limited in June 2013, without the authority of the Plaintiffs.*

ii. *Damages for loss of business profit or income occasioned by the sale of the truck at a rate of ZMW16, 000.00 per month, from June 2013 to date.*

iii. *An account of the use of the income from the said truck prior to the unlawful and fraudulent sale aforesaid.*

iv. *Damages for loss of Stand No 873 Chilanga estates as a result of the failure to fully liquidate the mortgage sum advanced by the Defendant, which failure was occasioned by the unlawful, and fraudulent sale of the scania truck registration number ALB 173.*

v. *Punitive and exemplary damages.*

vi. *Interest on the said sums and damages at the current commercial bank lending rate.*

vii. *Any other relief that the court may deem fit.*

viii. *Costs*

The statement of claim filed shows that the 1st Plaintiff in 2010 secured a loan from the Defendant in the sum of ZMW480, 000.00, and that the loan was secured by Stand No 873, Chilanga, owned by the 2nd Plaintiff. It is stated in paragraph 6 of the statement of claim that the 1st Plaintiff defaulted on making payments, and surrendered scania truck registration number ALB 173 to the Defendant, in order that the Defendant could recover the monthly hire charges of ZMW16, 000.00 from the Plaintiffs clients, and apply it as loan repayments, until the loan was repaid.

Paragraph 7 of the statement of claim states that for that purpose only, the Plaintiffs through the Defendant authorized the Road Transport and Safety Agency (RTSA) to note that the Defendant was the absolute owner of the said

truck. However the Defendant through its agents and employees unlawfully and fraudulently sold the truck to Sarayaan Investments Limited in June 2013, at an undervalued price of ZMW85, 000.00.

The particulars of the fraud are stated as;

a) *One of the Defendant's agents or employees preparing a handwritten note purporting to have been written by the 2nd Plaintiff, when not, giving purported permission to the Defendant to sell the truck registration number ALB 173, and to utilize the proceeds towards a loan therein.*

b) *After the sale, the Plaintiffs not being informed of the same, and of the balance of the loan.*

c) *Upon being queried, the Defendant through its manager for risk offered vide letter of 14th May, 2014 to write back the sum of ZMW65, 000.00 towards the proceeds of the sale of the truck so that the purchase price would appear to be ZMW150, 000.00.*

The Plaintiff in paragraph 9 of the statement of claim states that the instructions for noting absolute ownership was not followed or effected. That the total purchase price of the truck including the costs of complying with the mandatory registration requirements was USD85, 000.00. It is alleged that the unlawful and fraudulent sale of the truck has resulted in the Plaintiffs suffering loss of business profits at ZMW16, 000.00 per month.

The Defendant filed a defence on 11th March, 2016, and in paragraph 3 of that defence, it is denied that the 1st Plaintiff obtained a loan of ZMW480, 000.00, but rather that the 1st Plaintiff was availed credit facilities by the Defendant, comprising an overdraft of ZMW80, 000.00, and a business term loan of ZMW400, 000.00.

That the Plaintiffs surrendered the certificate of title for Stand No 873, Lusaka voluntarily, and executed a third party mortgage as security for the credit facilities that were availed to the 1st Plaintiff. It is stated that the third party mortgage was registered at the Ministry of Lands.

In denying the allegation in paragraph 6 of the statement of claim that the Plaintiffs surrendered a scania truck registration number ALB 173 for the purpose of the Defendant recovering the ZMW16, 000.00 monthly rental charge for the truck, and apply it towards payment of loan, the defence in paragraph 5 states that the Plaintiffs truck was surrendered freely and voluntarily with instructions to have the Defendant noted as the absolute owner of the registration certificate for the motor vehicle.

It is averred in paragraph 6 of the defence that the 2nd Plaintiff on 1st February, 2013 acting on behalf of the 1st Plaintiff authorized the Defendant to sell the truck, and apply the proceeds of the sale towards reducing the Plaintiffs' debt. That in pursuance of the same, the Defendant proceeded to have its name noted as absolute owner of the truck, and it thereafter sold the said truck for ZMW98, 600.00, on or about 7th June, 2013, and applied the proceeds towards reducing the Plaintiffs' debt with the Defendant, from K294, 330.72 to K195, 730.72.

The Defendant denies the particulars of the alleged fraud, averring that it acted with the full authority of the 1st Plaintiff, acting through its director, repeating that it had its name noted as the absolute owner of the truck at RTSA, and proceeded to sell off the truck as absolute owner. That it thereafter applied the proceeds to the 1st Plaintiff's account. The Defendant also denies that the Plaintiffs have suffered any loss of business profits, and states that it is yet to recover the outstanding amounts due from the Plaintiffs, following default on payment of the credit facilities that were availed.

Paragraph 10 of the defence states that the Defendant commenced a mortgage action against the Plaintiffs in cause number 2014/HP/0430 where judgment was passed in favour of the Defendant, and it has enforced its rights of foreclosure, repossession, and sale over Stand No 873 Lusaka, and is currently in the process of disposing of the said mortgaged property. The defence states that the Plaintiffs' action lacks merit, and is misconceived at law, and an abuse of court process, as the dispute was resolved in the mortgage action commenced by the Defendant.

At the hearing the Plaintiffs called two witnesses, while the Defendant called one witness.

The 2nd Plaintiff was the first witness. He testified that he is the manager of the 1st Plaintiff, and that sometime in the year 2010, the 1st Plaintiff had borrowed money in the amount of ZMW480, 000.00, from the 1st Defendant. He identified the document on pages 1 to 6 of the Defendant's bundle of documents as the loan facility document that he signed on obtaining the loan.

PW1 told the court that the collateral that was provided for the loan was his house, being Stand No 873 Chilanga. It was stated that the document states that the loan was for ZMW400, 000.00, and it was secured by a third party mortgage, and that the house pledged as security was as at 2010 valued at ZMW1, 200, 000.00. The documents on pages 14 – 21 of the Plaintiffs bundle of documents were identified as the valuation documents for the house. That after servicing the loan for fourteen months thieves broke into the shop and stole his money.

Further in his evidence, PW1 testified that thereafter the bank had called him to find out why he was not repaying the loan, and he had explained the difficulties that he was facing, and informed the bank that he would resume the payments, as the company had a twenty eight tonne truck. He went on further to state that the bank had informed him that it had a tender with Pepsi and asked him to give them the truck to work at Pepsi, so that the proceeds thereof would go towards the repayment of the loan. He identified the document on page 10 of the Defendant's bundle of documents as the white book for the truck.

That whilst he was in Kitwe, the Defendant through an officer assigned to debt collection had called him to go the Kitwe branch, where he was told that the truck was needed at Pepsi. He stated that he got a driver who drove the truck back to Lusaka, and after two days he returned to Lusaka, and was asked by the Defendant to meet its officers at Makeni Mall with the white book for the vehicle, as well as the comprehensive insurance.

It was PW1's testimony that there he was asked to sign a letter, which is on page 33 of the Plaintiffs' bundle of documents. He stated that he went to the bank after about three months to enquire on how much money had been raised from the truck, and he was informed that it had been sold. That the lady he had seen at the bank had shown him a letter on his file, which was partially handwritten and signed, and when PW1 had asked who had written in pen on the document, he was told that the white man who had dealt with his case would be called.

It was his testimony that after two months he was called by the bank, and he went there with his friend who can read English. That there he was told that the white man had written and signed on the letter, and the vehicle was sold at ZMW80, 000.00. His evidence was that he had bought the truck at $46, 000, as evidenced on the documents on pages 22, 28, 29, 30, 31 and 32 of the Plaintiffs bundle of documents, which are the receipts for the payments. That the document on page 22 shows that he paid $20, 000 leaving a balance of $26, 000, and the one on page 32 was the last payment.

PW1 explained that the Defendant asked for forgiveness as it had done something wrong, and asked him to write a letter indicating the value of the truck as ZMW200, 000.00, which letter is at page 11 of the Defendant's bundle of documents. He stated that the letter states that it is a proposal for settlement of the loan, and it is proposed in that letter that the 1st Plaintiff would pay the balance of the loan being ZMW321, 000.00, and that ZMW200, 000.00 being the value of the truck would be deducted from that amount, leaving a balance of ZMW121, 000.00, to be paid off in twenty four months.

It was also stated that some two years later the Defendant sent a letter indicating that the Plaintiffs owed it money, and that they had put the value of the truck at ZMW150, 000.00. He identified the letter on page 36 of his bundle of documents as the said letter. This letter indicates the Plaintiffs indebtedness at ZMW480, 074.00, due to interest that had accumulated. The letter further states that the truck was sold at ZMW85, 000.00, which amount was credited to the account, and that the Defendant had written off ZMW65, 000.00, giving

the net value of the truck at ZMW150, 000.00. The balance remaining unpaid was ZMW415, 000.00.

PW1 testified that his house and vehicle were seized, even though the vehicle was not part of the collateral. That he had at one time gone to Pepsi, and had found the vehicle being loaded with crates for Pepsi, and he was assured that the contract would liquidate what the 1st Plaintiff owed the Defendant. PW1 also in his evidence stated that a person selling a vehicle will provide an offer letter, and that change of ownership of the vehicle is done when documents pertaining to ownership of the vehicle are presented. That in this case, this was not done. He asked the court to order that he be given back the vehicle, as the house that was pledged as security has a higher value than the vehicle, and when sold, it would be able to pay off the loan.

In cross examination, PW1 agreed that a total sum of ZMW480, 000.00 was borrowed from the Defendant. He also agreed that he had understood that he was obtaining a loan when he signed the facility letter, and he had even provided collateral for the loan, being a house. He further agreed that he had difficulties paying the loan as thieves stole his money, and that he had informed the bank of the development in writing.

It was his evidence that he had told the Defendant that he had a truck which he could use to pay off the loan. When referred to clause 3 of the loan agreement, PW1 stated that it states that the loan was to be paid off in 36 monthly instalments, and that if one instalment was not paid, then there was default in the repayment. He agreed that the loan was secured by a third party mortgage over Stand No 873 Chilanga, which security would be used to pay off the loan, in the event of default.

PW1 further in cross examination agreed that the Defendant in 2014 sued him in cause number 2014/HPC/0430 in which action, an order for the possession of Stand No 873 Chilanga, was granted. He stated that as he was facing difficulties in paying off the loan, he had approached the Defendant, and had proposed to have the house sold, and the proceeds thereof applied to pay off the loan. That the Defendant had asked him if there was another way of

repayment instead of selling the house, and he had explained that there was a truck that could be used to pay off the loan.

PW1 agreed that he was in the transport business, and that the Defendant had asked him to surrender his truck so that it could be used in the contract that it had at Pepsi. That as he had surrendered the truck for that purpose, he did not pay off the loan. He also testified that the Defendant had followed him to Kitwe under a month after he had informed it that he had a truck. He told the court that when he signed the letter on page 33 of his bundle of documents, the truck was already in the Defendant's hands, and he was in Lusaka. PW1 agreed that he had freely surrendered the truck to the Defendant, as it was with a view to use it to liquidate the debt owed.

He maintained that the white man had told him that the Defendant had a contract with Pepsi, and that the proceeds of the contract would be used towards liquidating the debt. PW1 also stated that he was not shown the contract with Pepsi, or given any document to show that his vehicle would be taken to Pepsi. He agreed that he had signed on the top part of the document at page 33 of his bundle of documents, explaining that he had done so on the basis that the Defendant had informed him that Pepsi would not allow use of the vehicle without the authority of the owner. PW1 added that he had signed the letter on page 33 of the bundle of documents, so that the vehicle could be used at Pepsi to recover the money owed.

Whilst agreeing that he had signed the letter, PW1 told the court that the Defendant did not tell him that the letter was to the Road Transport and Safety Agency (RTSA) to change ownership of the vehicle to the Defendant. That he was told that the white book and insurance for the vehicle were wanted by Pepsi. It was also stated that PW1 only became aware of the bottom part of the letter when he went to the Defendant about two to three months later, to ask whether the message that he had received on his phone over ZMW80, 000.00, was from the payments for the truck at Pepsi.

He testified that he did not report the forgery as he was waiting for his truck, and he stated that the court would believe his testimony that his signature had

been forged, and his truck sold thereafter, even if he had not reported the forgery.

PW1 denied having handed over the truck to the Defendant so that it could sell it to offset the loan, stating that when he had discovered the sale, he had demanded documents to show ownership at RTSA. He maintained that he had bought the truck at $46, 000, and that the receipts that he had filed in the bundle of documents corresponded with the deposit slips. When referred to page 14 of the Defendant's bundle of documents, PW1 stated that the opening loan balance as at 31st May, 2013, was ZMW98, 600.00, and that there was a transfer for the sale of the truck on 7th June, 2013. He noted that the closing balance on 29th June, 2013 was higher than the balance reflected on 7th June, 2013.

Further in cross examination PW1 testified that after the sale of the truck he only went back to the Defendant after a period of one year to ask for his truck, as he did not agree with the price for which it was sold, and more importantly because he had not agreed that the truck be sold. He agreed that he did not service the loan after the truck was sold, and stated that he was forced to write the letter so that the loan could be closed. He told the court that the issue in the letter was the price of the truck.

It was stated that PW1 does not understand what absolute owner means, and neither was it explained to him. That the Defendant did not also explain the contents of the first part of the letter on page 33 of his bundle of documents.

In re-examination PW1 testified that the handwritten part of the letter on page 33 states that he had given authority to sell his truck. He denied having written that, adding that there was no correspondence from the Defendant asking for his authority to sell the truck, or notifying him of the balance on his account.

PW2 was Kenson Soneka Kangaso. He testified that on a date he did not recall in 2014, he was asked by his friend, the 2nd Plaintiff, to go with him to the Defendant, as he was not very conversant with spoken and written English. There they had met two gentlemen and a lady who was the credit controller,

and had discussed the 2nd Plaintiff's scania truck, which was sold by the Defendant.

That PW2 was availed the loan agreement between the 1st Plaintiff and the Defendant which is at page 1 of the Defendant's bundle of documents. He stated that he had noted that the truck was not part of the collateral that was provided as security for the loan, and he had queried why it had been taken from the 2nd Plaintiff. He testified that he was then shown a letter written by the Defendant which had handwritten writings on the bottom, which he identified as the document at page 33 of the Plaintiffs' bundle of documents.

PW2 further in his evidence testified that the 2nd Plaintiff had questioned who had written on the bottom part of the document, as he only admitted to having written on the top part of the letter. He added that through the discussion, the Defendant's staff had stated that a white man in the debt collection department of the Defendant had written on the document. When PW2 had asked that the person be availed, he was told that a mistake had already been made, and they should instead ask how much the truck was worth.

He continued testifying that the meeting was re-scheduled, and when they reconvened some three weeks later, they were told that the white man's contract had been terminated, so he could not attend the meeting. That thereafter PW2 and the 2nd Plaintiff had drafted a proposal letter to the Defendant, which is on page 11 of the Defendant's bundle of documents, whose purpose was to state the worth of the truck, for purposes of settling the loan.

He stated that when they met with the Defendant's staff, the lady and two gentlemen, had proposed the value of the truck as ZMW150, 000.00, and the letter on page 36 of the Plaintiffs' bundle of documents was identified as that written by the Defendant. That PW2 thereafter left everything in the 2nd Plaintiff's hands.

When cross examined PW2 stated that the 2nd Plaintiff is not fluent in speaking English, and understands very little of it. He maintained that the 2nd Plaintiff admitted having only authored the first part of the letter on page 33 of his bundle of documents, which states that he had handed over the white book for

the vehicle to the Defendant. That the 2nd Plaintiff had denied having authorized the Defendant to sell the truck, or allowing the Defendant to change ownership of the vehicle. Whilst agreeing that the 2nd Plaintiff had allowed the Defendant to be noted as the absolute owner of the vehicle, there was no agreement that the vehicle would be sold.

PW2 stated that he had nothing in writing to show that the Defendant had acknowledged the error in selling the vehicle, and he denied that the proposal that they had written to the Defendant was a summary of the meeting.

In re-examination PW2 testified that noting a person as an absolute owner, does not amount to authority to sell.

The only defence witness was Euphrice Kombe, a senior manager in risk management at the Defendant bank. She confirmed that the Defendant had granted an overdraft, and loan facility to the 1st Plaintiff in 2010, adding that the overdraft was used as working capital, while the loan was used to purchase trucks. That as a policy of the bank, the facility ran in their books, and was managed by the relationship manager, who brings business to the bank. That they reached a point where the customer was in arrears in terms of repayment, and as a bank policy they had engaged the customer to find a way of normalizing the arrears.

She identified the documents on pages 1 to 6 of the Defendant's bundle of documents as the facility letter. It was her testimony that discussions with the customer to normalize the arrears did not materialize, after the customer was engaged through a debt collector, and an agreement was entered into between them where the truck was assigned to the Defendant, so that upon its sale, the proceeds would be applied towards reducing the debt, and the balance remaining would be paid in a number of equal months.

She went on to further state that the customer signed a written agreement, and the signature on that document corresponded with what was on the facility letter. The document on page 33 of the Plaintiff's bundle of documents was identified as the said letter that the customer had signed. That after that change of ownership of the vehicle into the Defendant's name was done, and as

payment for the loan was not made, the process continued and authorization was given to sell the truck, and apply the proceeds to reduce the debt, which authority is contained in the handwritten notes on page 33 of the Defendant's bundle of documents.

She told the court that after change of ownership was effected, the truck was sold, and the proceeds applied to reduce the liability with the bank, as the money realized from the sale of the truck was credited to the customer's account, thereby reducing the balance.

Further in her testimony, DW1 stated that the customer had meetings with the bank, as the value at which the truck was sold, being K85, 000.00, was disputed. That the Defendant was willing to reach an agreement with the customer, and it was decided to cancel part of the debt, and communication to this effect was made to the customer in writing, and served. She identified the letter on page 36 of the Plaintiff's bundle of documents as the said letter. That the customer wrote to the Defendant proposing what should be done to the truck, and valued it at a certain amount that would go towards reducing the liability, and proposed to settle the remaining balance over twenty four months. The document on page 11 of the Defendant's bundle of documents was identified as the said letter.

DW1 told the court that as they could not agree on the proposed amount to be written off, the matter stalled, and they proceeded to realize the security which had secured the facility, being a residential property in Chilanga owned by the director. With regard to the current status of the matter, DW1 testified that nothing has moved, and no further payments have been made, but that the Defendant has been trying as per the court judgment, to take possession of the security and sell it, by giving notice to the sitting tenant, and advertising the property for sale, in order to get the best offer. However the property has to date not been sold.

In cross examination DW1 testified that the security for the facility was the property in Chilanga. She stated that it has been advertised for sale, but that they did not indicate a reserve price for the same, though they are looking for

the best market value. It was also her testimony that the value of the property is known to the bank, and not the public. She agreed that the property was valued at ZMW1, 200, 000.00, in 2012.

DW1 also agreed that there is a banking code for banks, which states that when a client is in arrears they are called to see how the arrears can be cleared. It was stated that it is not banking policy to sell an asset that was not offered as security for a loan, and that when a client defaults they are engaged by the bank with the aim of firstly not to sell the security, but finding other alternative solutions. With regard to this matter, her evidence was that the client proposed the price of the truck.

DW1 agreed that their agent dealt with the customer, adding that it was not their core business to chase debtors, as their agents collect their debts. She also agreed that the debt collectors are engaged to assist the bank recover debts, and they are not employees of the bank. It was further agreed that where the agent errs, the bank is liable.

DW1 told the court that she had no evidence to show that the truck was advertised for sale, and agreed that an agreement involves two or more persons agreeing. When referred to the document on page 33 of the Plaintiffs' bundle of documents, she stated that it was not an agreement, but an instruction to RTSA. She further testified in cross examination that it is common for the bank to issue hand written instructions, and that the confirmation is the customer's signature. It was her testimony that the debt collector wrote the statement and the customer thereafter signed, adding that the customer was given the benefit of doubt, as he disputed having signed.

DW1 stated that where they cannot prove the signature, the customer is given the benefit of doubt. While stating that the negotiations happened before and after the sale of the truck, her evidence was that she was not part of the negotiations before the sale. DW1's evidence was that as the first option failed, they had proceeded to sell the house, and that the normal practice is to demand payment then sue, but that a customer can still pay in the process.

She maintained that the bank acted in the best interests of the client by selling the truck, although she stated that the bank is not allowed to sell other assets before selling the security. DW1 testified that there was no document before court to show that the debt collector was the defendant's agent, but maintained that the truck was sold with the customer's consent. She explained that she was part of the meeting with PW1 and PW2, but denied that calling the two to a meeting after the sale was an admission on their part, but was meant to resolve the dispute over the value of the truck, and write off amounts. Further that the meeting was meant to discuss PW1's denial of having signed the document on page 33 of the Plaintiff's bundle of documents.

When referred to page 11 of the Defendant's bundle of documents, DW1 testified that it is a proposal for loan settlement, and not permission to sell. That the letter was written after the sale of the truck. She stated that clients are engaged on which alternatives can be used before going for the security, and that in this case the bank followed the correct procedure, by exploring the other alternatives before going for the security. She denied that the Defendant fraudulently sold the truck.

I have considered the evidence. It is not in dispute in this matter that the 1st Plaintiff was given an overdraft facility in the amount of ZMW80, 000.00, and a loan in the amount of ZMW400, 000.00 by the Defendant in 2010. It is also not in dispute that the said facility was secured by a third party mortgage over Stand No 873 owned by the 2nd Plaintiff, a director in the 1st Plaintiff Company.

There is also no dispute that the 1st Plaintiff defaulted on the repayments, and the 2nd Plaintiff as director of the 1st Plaintiff Company was called by the Defendant to see how best the arrears could be cleared. There is no dispute that following those discussions the 2nd Plaintiff had handed over the 1st Plaintiff's scania truck registration number ALB173 to the Defendant, and he wrote a letter to the Road Transport and Safety Agency (RTSA) to note the Defendant as absolute owner of the truck.

It is further not in dispute that the Defendant sold the 1st Plaintiff's truck to Sarayaan Investments at a net price of ZMW85, 000.00, which amount was

credited to the 1st Plaintiff's loan account, thereby reducing its indebtedness with the Defendant.

The dispute is on whether the 2nd Plaintiff as director of the 1st plaintiff gave his authority to the Defendant in writing, to sell the said truck, and apply the proceeds thereof towards reducing the indebtedness. The document in contention is that on page 33 of the Plaintiffs' bundle of documents. PW1 agreed that he had authored the typed part of the document, and signed it asking RTSA to note the Defendant as absolute owner of the truck. This he explained, was premised on the fact that the Defendant's debt collector had informed him that the Defendant had a contract with Pepsi, and that the truck would be used under that contract, and raise ZMW16, 000.00 monthly, which would go towards settling the loan.

PW1 had also in his evidence stated that he was informed by the debt collector that the truck could only be accepted at Pepsi if the authority of the owner was availed, and that is how he had signed the first part of the document on page 33 of the Plaintiff's bundle of documents. He denied having authored or signed that second part of that document hence his allegation that the truck was fraudulently sold. He claims the value of the truck at $85, 000.

In the submissions filed on 5th June, 2017, the Plaintiffs' state that DW1 in cross examination confirmed that the handwritten notes on page 33 of the Plaintiffs' bundle of documents were authored by the debt collector, who was their agent. That the said document is the only document evidencing authority to sell the truck. It is also submitted that the Defendant by writing off the debt in the amount of ZMW65, 000.00 admitted that the truck was sold fraudulently, and at an undervalued price.

Further that the truck was not part of the security offered in the facility letter. The Plaintiffs rely on the case of ***SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109*** where it was held that;

> ***"where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud***

must equally lead evidence, so that the allegations are clearly and distinctly proved", in support of the assertion of fraud on the Defendant's part in selling the truck.

The other cases relied on are ***NKOLONGO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK AND OTHERS 2007 ZR 149*** which held that;

> ***"fraud arises from acts and circumstances of imposition. It usually takes the form of a statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is a special duty to disclose it",*** and the case of ***DAVY V GARRET 1878 7 CH 473.***

It was stated in that case that ***"any charge of fraud or misrepresentation must be pleaded with the utmost particularity, and that fraudulent conduct must be distinctly alleged, and as distinctly proved, and is not allowable to leave fraud to be inferred from the facts".***

Their submission is that the hand written notes appearing at page 33 of the Plaintiff's bundle of documents are a false statement, and that the truck was sold fraudulently, as even admitted by the DW1. That in fact the Defendant has not rebutted PW2's evidence that its employees admitted having sold the truck without authority. Therefore on the authority of the case of ***SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109,*** they have established the fraud on the Defendant's part.

Further that PW1 had denied that the handwritten notes and signature on the bottom part of the document on page 33 of the Defendant's bundle of documents were his, and thus the Defendant's agent forged them, which evidence is corroborated by DW1.

It is also submitted that clause 10.5 of the Code of Banking Practice required the Defendant to obtain duly executed indemnity in original form from the Plaintiffs, so that they could have been indemnified against any loses which may have arisen from such instructions. Clause 10.5 of the said Code of Banking Practice provides that;

"where you give instructions to us on fax, telephone or e-mail, we shall require you to provide a duly executed indemnity in original form to indemnify us against losses arising from such modes of communication".

While denying that the Plaintiffs instructed the Defendant to sell the truck, it is the Plaintiffs' submission that the Defendant did not take any steps to obtain a duly executed indemnity in original form from the Plaintiffs, in order to indemnify itself against the losses that may have arisen from such instructions. Further that the Defendant did not take the necessary steps to ensure that the best price was obtained for the truck by advertising the sale, or asking the 2nd Plaintiff its value or informing the Plaintiffs of the sale itself. That all this was confirmed by DW1 in cross examination.

Therefore the Defendant's agent was not honest with the 2nd Plaintiff when obtaining the truck from him, and it is unjust enrichment on the Defendant's part to sell property that was not pledged as security, without lawful authority. That the Plaintiffs' best interests were not taken into account, as after the sale of the truck, the Defendant proceeded to foreclose on the security pledged under cause number 2014/HPC/0430. Therefore the reliefs sought should be granted.

The Defendant in the submissions state that this case is founded on an allegation of fraud on the Defendant's part, to the effect that its agents or employees prepared a handwritten note purported to have been written by the 2nd Plaintiff, authorizing the Defendant to sell the truck. That their defence is that the Defendant sold the truck as absolute owner, and also based on the fact that there was authority to sell.

Reference is made to Black's Law Dictionary which defines absolute as ***"free from restriction, qualification, or condition"*** and ownership as ***"the bundle of rights allowing one to use, manage and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control".***

That based on the above definitions, and the 2nd Plaintiff having endorsed the Defendant as the absolute owner of the truck, the Defendant had authority to transfer the truck under a sale, and apply the proceeds thereof towards reducing the loan amount. Consequently there was no fraud on the Defendant's part, despite the truck not having been pledged as security for the loan, as the 2nd Plaintiff had instructed the RTSA to endorse the Defendant as the absolute owner of the said truck.

With reference to the case of ***ANDERSON KAMBELA MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA AND OTHERS 2005 ZR 138*** where the function of pleadings was stated as; ***"the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings, and the court ought to take them as such",*** it is argued that the Plaintiffs in paragraph 7 of the statement of claim admit having authorized the RSTA to endorse the Defendant as absolute owner of the truck.

Thus the 2nd Plaintiff's evidence disputing that assertion flies in the teeth of the case set up by the Plaintiffs, and contradicts the pleadings settled in this matter, by which they are bound.

The Defendant also relies on the case of ***SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109*** also relied on by the Plaintiffs, where it was stated that ***"a defendant or respondent wishing to rely on fraud must ensure that it is clearly and distinctly alleged, and at the trial of the cause, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly proved".***

It is also the Defendant's argument in the submissions that even assuming that the Defendant sold the truck based on the hand written notes purporting to give it authority to sell, the Plaintiffs had failed to lead evidence that the Defendant with intent to defraud the Plaintiffs, authored and signed the handwritten note to the standard required in cases of fraud. That a statement

stating that the 2nd Plaintiff did not write the handwritten notes, or that he did not sign under those notes, is not sufficient to satisfy the standard of proof, on a higher standard of proof, than on a balance of probabilities.

It is argued that the Plaintiffs have left it to the court to infer the fraud on the part of the Defendant's agent. To this end they rely on the case of ***DAVY V GARRET 1878 7 CH 473,*** where it was stated that ***"any charge of fraud or misrepresentation must be pleaded with the utmost particularity and that fraudulent conduct must be distinctly alleged, and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".***

The Defendant contends that the Plaintiffs case lacks merit and should be dismissed accordingly.

As I have already noted, the allegations of fraudulent conduct on the Defendant's part in this matter, hinges on the assertion that the Defendant's agent fraudulently authored the handwritten notes on page 33 of the Plaintiffs' bundle of documents authorizing the Defendant to sell the truck. The cases relied on by both parties show that in order for an allegation of fraud to be successfully raised, the particulars of the fraud must be pleaded clearly and distinctly, and that at the trial, evidence of the fraud must be clearly and distinctly proved. Further Order 18 Rule 8 (1) of the Rules of the Supreme Court, 1999 edition provides that;

> ***"(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of any relevant period of limitation, fraud or any fact showing illegality -***
>
> ***(a) which he alleges makes any claim or defence of the opposite party not maintainable; or***
>
> ***(b) which, if not specifically pleaded, might take the opposite party by surprise; or***

(c) which raises issues of fact not arising out of the preceding pleading".

A perusal of paragraph 8 of the statement of claim shows that the Plaintiffs allege that the Defendant's agents fraudulently sold the truck to Sarayaan Investments Limited in June, 2013, at ZMW85, 000.00. The particulars of the alleged fraud are stated as the Defendant's agents or employee preparing a handwritten note purporting to have been written by the 2nd Plaintiff, when not, giving purported permission to the Defendant to sell the truck registration number ALB 173, and to utilize the proceeds thereof towards payment of the loan, not informing the Plaintiff of the sale, writing back the amount of ZMW65, 000.00, so that the price of the truck would appear to be ZMW150, 000.00.

In my view the paragraph clearly and distinctly pleads the allegations of fraud, and therefore the requirement to specifically plead fraud has been met. The question that arises is whether there is evidence that was led clearly and distinctly to prove the allegation of fraud?

Before I deal with that issue, I wish to address the submission by the Defendant that the Plaintiffs in paragraph 7 of the statement of claim admit that they authorized RTSA to endorse the Defendant as the absolute owner of the truck, and any evidence to the contrary that they adduced, contradicts the pleadings, by which they are bound.

I agree that is trite that parties are bound by their pleadings, but a perusal of paragraph 7 of the said statement of claim shows that it states that for this purpose only, the 1st Plaintiff authorized RTSA to note the Defendant as absolute owner of the said truck. The averment in paragraph 7 of the statement of claim is a follow up from what is pleaded in paragraph 6. Paragraph 6 of the statement of claim states that the 1st Plaintiff defaulted in making the monthly repayments, and surrendered the truck to the Defendant for the sole purpose of allowing the Defendant to recover monthly hire charges of ZMW16, 000.00 from the Plaintiffs' clients, and to apply the same towards the monthly loan repayments.

The statement in paragraph 7 of the statement of claim does not say that the 2nd Plaintiff agreed that the truck be sold, and for that purpose asked RTSA to note the Defendant as absolute owner of the truck.

These averments in the paragraph are consistent with the testimony of the 2nd Plaintiff, and clearly there is no contradiction between the pleadings, and the evidence given as alleged by the Defendant, and that defence cannot stand.

Returning to the allegations of the fraud, the Defendant contends that the Plaintiffs have not met the threshold of proving the allegations of fraud, on a higher standard than a balance of probabilities, as the 2nd Plaintiff merely stated that he did not author the handwritten notes on page 33 of the Plaintiff's bundle of documents, or sign under the said notes. It is trite that allegations of fraud being criminal in nature need to be proved on a higher standard than a balance of probabilities. In this case, indeed the 2nd Plaintiff stated that he did not author the handwritten notes on page 33 of the Plaintiff's bundle of documents, or sign under them. He is on record as having met DW1 and two other employees of the bank who admitted that the debt collector engaged by the Defendant authored the writings.

The 2nd Plaintiff told the court that the debt collector had informed him that the Defendant had a contract with Pepsi, and that he should surrender the truck so that it could be taken to Pepsi to work under that contract, and the proceeds thereof applied towards the loan repayments. He also testified that the said debt collector had told him that he needed to surrender the white book and insurance for the vehicle, as Pepsi would not allow use of the truck without authority from the owner. That it was on that basis that he had authored the typed part of page 33 of the Plaintiff's bundle of documents.

This evidence was not discredited in any way by cross examination, and is credible evidence. The 2nd Plaintiff had also testified that he went to Pepsi where he found the truck being loaded with Pepsi crates, and this evidence was not challenged in any way. Further DW1 testified that they had admitted that the debt collector had authored the handwritten notes on page 33 of the

Plaintiffs bundle of documents and had signed, that the 2nd Plaintiff had given authority to the Defendant to sell the truck.

All this evidence in my view established that there was fraud. It is not correct that the 2nd Plaintiff merely denied having authored the said writings which is the only evidence that the Plaintiffs rely on, as his statement was not challenged, and is credible, and moreover an employee of the Defendant confirmed that the debt collector authored the same. The confirmation is an admission or a confession, and there is no better evidence than a confession that is obtained freely and voluntarily.

Thus while handwriting may be proved in various ways, among them through a report tendered by a handwriting expert after examining the disputed writings and provided handwriting specimens, and noting the similarities and dissimilarities between them, or even through evidence given by persons familiar with the disputed writings, there is evidence in this matter that proves on a higher standard than on a balance of probabilities, that the 2nd Plaintiff did not author the handwritten notes on page 33 of the Plaintiffs bundle of documents, or sign under them.

It is therefore my finding that in this case there was misrepresentation by the Defendant's agent, that by the 2nd Plaintiff authorizing RTSA to note the Defendant as absolute owner of the truck, it would enable the truck to be used at Pepsi to raise money, that would be applied towards the loan repayments, when the Defendant's agent intended to dispose of the truck.

Secondly there was fraud as the 2nd Plaintiff has established that he did not author the handwritten notes on page 33 of the Plaintiffs bundle of documents, and signed under them, authorizing the Defendant to sell the truck, which was the basis upon which the truck was sold, and ownership of the truck changed. The said fraud is attributed to the Defendant's agent, and it is trite that a principal is liable for the acts of its agent.

My observations as noted on the record are that the 2nd Plaintiff is a person who is not very literate, and when he was asked to read the letter on page 33 of the Plaintiff's bundle of documents, he failed to do so, and an interpreter had

to read the same for him. Even his testimony was given in Nyanja language and interpreted to the court.

Further PW2 testified that the 2nd Plaintiff had asked him to escort him to the bank, as he is not very literate. This evidence was not challenged in any way. Therefore it was expected that the 2nd Plaintiff should have been asked by the Defendant to execute indemnity over the said sale, as required by the Banking Code, whose provisions the Plaintiff relies upon, and which provisions the Defendant did not dispute. This is because the evidence shows that the 2nd Plaintiff understood that the vehicle was going to Pepsi to be used to work towards settling the loan repayments, and not to be sold.

As the 2nd Plaintiff demonstrated that he does not understand English very well, it was important to engage the services of an interpreter to ensure that he understood what was being transacted, before the Defendant asked him to author the document on the top part of page 33 of the Plaintiffs bundle of documents, which asked RTSA to note the Defendant as absolute owner of the vehicle.

Further there is no evidence to show that the 2nd Plaintiff was communicated to over the intended sale of the truck, and this vitiates the defence raised that he consented to the sale of the said truck. There was no meeting of minds, such that it can be concluded that the 2nd Plaintiff had agreed that the truck be sold.

The evidence on record also shows that no effort was made by the Defendant to advertise the sale of the truck so that the best price for the truck could have been obtained, and as rightly argued by the 2nd Plaintiff, he was not consulted on the value of the truck, before it was sold. This would have enabled the Defendant to have a reserve or minimum price for the truck, so that the best price could have been obtained.

Whilst I agree that the bank policy is that alternatives are explored before the security pledged is sold, when there is default on loan repayments, in this case the alternative which has not been disputed by the Defendant, is that the 2nd Plaintiff was asked to surrender the truck so that it could be used at Pepsi, and proceeds thereof applied towards the loan repayment. There was no agreement

to sell the truck, and the 2nd Plaintiff only surrendered the white book for the truck, and authored the typed part of page 33 of the Plaintiffs' bundle of documents, as he was told that his authority was needed for the truck to be used at Pepsi.

Having so found the question that next arises is what is the consequence of the fraudulent act of the Defendant in selling the truck without the Plaintiffs authority bearing in mind, that the 1st Plaintiff owed the Defendant money on the unpaid loan?

McGregor on Damages by Harvey McGregor 16th edition by Sweet and Maxwell, 1997 at paragraph 1962 states that the correct measure of damages in the tort of deceit is an award that serves to put the plaintiff into the position he would have been in, if the representation had not been made to him, and not as with a breach of condition or warranty in contract, which puts him in the position he would have been in, if the representation had been true.

Applying the principles above to this case, the Plaintiffs are entitled to damages that would put them in the position of the truck not having been surrendered to the Defendant, and subsequently being sold, if the fraudulent representation had not been made. This would have entailed that the Plaintiffs would still be in possession of the truck. However it has been seen that the truck was sold for ZMW85, 000.00, which was credited to the 1st Plaintiff's loan account, and the Defendant wrote off ZMW65, 000.00, giving the value of the truck as ZMW150, 000.00. Thus the damages due to the Plaintiffs is the difference between the value of the truck, less the amount it was sold for, together with the amount written off.

The 2nd Plaintiff in his evidence testified that the truck was bought at $46, 000, and when other incidental costs were added it came to $85, 000. The invoice at page 22 of the Plaintiffs bundle of documents is for the payment of $20, 000, the one on page 28 is for $10, 000, while the one on page 29 is for $5, 000. The one on page 30 is for $5, 000, the one on page 32 is for $2, 100 and the one on page 32 is for $3, 900. These amounts total $46, 000.

It is trite that registration and tax costs are incurred when vehicles are purchased, and in this matter the Defendant has not disputed that the same were incurred. I therefore find that the value of the 1st Plaintiffs truck was $85, 000. According to the Daily Mail dated 23rd June, 2017, the Bank of Zambia exchange rate of one dollar to one kwacha is K9.20. When this amount is multiplied by the $85, 000, the value in kwacha is K782, 000.00. The amount of K150, 000.00 credited to the 1st Plaintiff's loan account as the value of the truck, when deducted from the amount, gives the value of the truck at K632, 000.00.

This is the amount that I award the Plaintiffs as damages for the misrepresentation and fraud. The amount shall carry interest at the average short term deposit rate from the date of the issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

The Plaintiffs also claim damages for loss of business profit or income due to the sale of the truck, at a rate of ZMW16, 000.00 per month, from June 2013 to date. No evidence was led in support of this claim, and it is trite that it is for the party claim damages to prove them. There being no evidence to support the claim, it fails, and it is dismissed.

The next claim is for an account for the use of the income from the truck prior to the unlawful and fraudulent sale. Again no evidence was led to prove this claim, and it will also fail.

The Plaintiffs claim damages for the loss of Stand No 873 Chilanga as a result of the failure to fully liquidate the mortgage sum advanced by the Defendant, due to the fraudulent sale of the scania truck registration number ALB 173. It is on record that the Plaintiffs have not redeemed the mortgage, and that in fact the Defendant in cause number 2014/HPC/0430 obtained an order for possession and sale of the said property.

The Plaintiffs being persons who still owe money to the Defendant under the mortgage cannot claim damages for loss of the said property on the basis that because the truck was sold, they failed to redeem the mortgage and the house was subsequently seized. There was no guarantee that the truck would have

In my view, after taking into account the arguments advanced against the award of punitive damages as already seen, the Plaintiffs have been adequately compensated by the award of damages in the amount of the value of the truck, which in itself is punitive against the Defendant. On that basis I will not make any award under the head punitive damages.

The Plaintiffs are awarded costs of the proceedings, to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 28th DAY OF JUNE, 2017

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE