

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

2017/HPC/0090



IN THE MATTER OF: **AN APPLICATION UNDER ORDER 30 RULE 14 OF
THE HIGH COURT RULES, CHAPTER 27 OF THE
LAWS OF ZAMBIA**

IN THE MATTER OF: **THE PERSONAL CHATTELS COMPRISED IN THE
WRITTEN FACILITY LETTER MADE BETWEEN
THE APPLICANT AND THE 1ST RESPONDENT**

IN THE MATTER OF: **POSSESSION AND SALE OF THE MORTGAGED
PROPERTY**

BETWEEN:

BETTERNOW FINANCE COMPANY LIMITED **APPLICANT**

AND

KOMUGA LIMITED **1ST RESPONDENT**
EMMANUEL MUSONDA **2ND RESPONDENT**

**Before the Honourable Mr. Justice W. S. Mweemba in Chambers
at Lusaka**

For the Applicant: *Mr. L. Mudenda, Messrs Kalokoni & Co.*

For the Respondents: *No Appearance*

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.**
- 2. Bills of Sale Acts 1878 and 1882.**
- 3. Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

CASES AND OTHER WORKS REFERRED TO:

1. **Halsbury's Laws of England, 4th Edition Volume, 32.**
2. **S. Brian Musonda (Receiver of First Merchant Bank Zambia Limited (In Receivership) V Hyper Food Products Limited, Tony's Hypermarket Limited and Creation One Trading (Z) Limited (1999) ZR 124.**

The Applicant by way of Originating Summons filed into Court on 24th February, 2017 made pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia seeks the following remedies or reliefs against the Respondents:

1. Payment of all monies due secured by the Facility Letter dated the 27th September, 2016 which stood at ZMW229,964.18 as at 27th January, 2017;
2. Delivery and possession of Ford Ranger T6,2015 Model with Registration NO. BAB 7145 and Chassis No. 6FPPXXMJ2PFT09883;
3. A declaration and Order that the 1st and 2nd Respondents are severally and jointly liable;
4. Damages for breach of contract;
5. Interest on all sums due to the Applicant;
6. Further or other relief the Court shall deem fit; and
7. Costs.

The application is supported by an Affidavit in Support and Skeleton Arguments filed into Court on 24th February, 2017 and 12th July, 2017 respectively. The Affidavit in Support was sworn by

James Kashiba the Head of Credit in the employ of the Applicant Company. It is deposed that on 26th September, 2016 the 1st Respondent resolved to borrow ZMW150,000.00 from the Applicant. A copy of the Board dated 26th September, 2016 is exhibited marked "JK1". That on 27th September, 2017 the Respondents completed the SME/Individual Loan Application Form for purposes of obtaining the loan from the Applicant. A copy of the SME/Individual Loan Application Form is exhibited marked "JK2".

It is stated that by a letter dated 26th September, 2016 the 1st Respondent applied for a loan amounting to ZMW150,000.00. That by a Contract made in writing (the Facility Letter) dated 27th September, 2016 between the Applicant and the Respondents (1st Respondent) the Applicant agreed to advance a loan facility to the 1st Respondent to finance cost of wages for casual workers working on ZESCO projects. A copy of the Facility Letter is exhibited marked "JK4". It is deposed that the value of the loan facility was ZMW150,000.00.

It is stated that it was an express term of the Facility Letter under Clause 4.1 that interest would be at the rate of 8.5% per month. That under Clause 6.2 of the said Facility Letter the loan is secured by the 1st Respondent's Motor Vehicle, Ford Ranger T6, 2015 Model, Registration No. BAB 7145 and Chassis No. 6FPPXXMJ2PF09883 and a Personal Unlimited Guarantee by a Company Director. A copy of the vehicle's White Book is exhibited marked "JK5".

It is deposed that on 27th September, 2016 another contract was made in writing (the Personal Guarantee) between the Applicant and the 2nd Respondent. A copy of the Personal Unlimited Guarantee is exhibited marked "JK6". That it is an express term of the Personal Guarantee that the 2nd Respondent shall repay the amount due within 2 days on demand to the extent that such amount is not paid by the 1st Respondent. It is stated that it was an express term under Clause 2 of the Personal Guarantee that the 2nd Respondent shall be primarily responsible for the liabilities of the 1st Respondent.

It is further deposed that under Clause 3.1 of the Facility Letter, the 1st Respondent was to repay the Applicant the amount due by 27th November, 2016 (the due date) which date has long lapsed. That in breach of the Facility Letter and the Unlimited Personal Guarantee the Respondents have failed, neglected and/or refused to honour their obligations despite being reminded. Copies of letters of demand dated 24th January, 2017 and 9th February, 2017 are exhibited marked "JK7" and "JK8" respectively. That due to the Respondent's continued breach of the Loan Facility and deliberate failure, neglect or refusal to honour their obligation, the amount due has accumulated to ZMW229,964.18 as at 27th January, 2017. A copy of the Statement of Account is exhibited marked "JK9".

It is stated that the Respondents have not made any effort to liquidate the amount due and further that the 1st Respondent is in possession of the vehicle pledged as security.

Counsel for the Applicant filed Skeleton Arguments into Court on 12th July, 2017. He submitted that the action is filed pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons...”

Learned Counsel submitted that premised on the foregoing position of the law as read with Order 3 Rule 2 of the High Court Rules, the Applicant has ably demonstrated in the Affidavit in Support that the Applicant is entitled to the reliefs of *inter alia*, payment of all monies secured by the Facility Letter dated 27th September, 2016 which stood at ZMW229,964.18 as at 27th January, 2017.

An Affidavit of Service sworn by one Samuel Mugambwiwa and filed into Court on 8th June, 2017 shows that the Respondents were served with the Originating Summons and Affidavit in Support on 19th February, 2017. Another Affidavit of Service sworn by the Applicant’s Counsel Mr. Lumamba Mudenda and filed into Court on 28th June, 2017 shows that on 26th June, 2017 he attempted to serve on the Respondent’s pleadings including the Notice of Hearing returnable on 28th June, 2017. He found the Accountant to the 1st Respondent at its offices at Plot No. 2796 Great North Road, Lusaka

who declined to receive process and the letter from the Applicant's Advocates.

The Respondents have not opposed the Applicant's application herein and did not attend the hearing of the Originating Summons on 28th June, 2017. I proceeded to hear the Originating Summons pursuant to Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant”.

I have considered the Applicant's claim together with the Affidavit in Support and Skeleton Arguments.

As there is no defence or Affidavit in Opposition by the Respondents on record, the Respondents have therefore not denied the Applicant's claim in any way.

The action herein brought pursuant to Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia is a mortgage action because it is a claim for money secured by personal chattels as well as a claim for possession of the mortgaged chattels. It is trite that a “*mortgage*” includes an assignment or transfer of a chattel for

securing money or money's worth. The learned authors of HALSBURY'S LAWS OF ENGLAND 4th Edition, Volume 32 at paragraph 401 define a mortgage as follows:

“Meaning of “mortgage”. A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub-demise of land, by a transfer of a chattel, by an assignment of a chose in action, by a charge on any interest in real or personal property or by an agreement to create a charge, for securing money or money's worth, the security being redeemable or repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself or from any other instrument or from oral evidence, it is considered as mortgage and redeemable”. Emphasis Supplied.

A legal mortgage of personal property is a conditional assignment to the mortgagee of the mortgagor's legal interest in it. An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest to the creditor; such a charge amounts to an equitable interest. The learned authors of HALSBURY'S LAWS OF ENGLAND at paragraph 405 regarding the operation of an equitable mortgage say that:

“Its operation is that of an executory assurance which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual

assurance, and is enforceable under the Court's equitable jurisdiction.

As a general rule all property, whether real or personal, which may be the subject of a legal mortgage can equally be charged in equity”.

The learned authors of HALSBURY'S LAWS OF ENGLAND (ibid) at paragraph 414 state that personal chattels may be made security for repayment of a debt in two ways, namely by pledge or by mortgage. If a mortgage of personal chattels is in writing, it is subject to the statutory provisions affecting bills of sale, but such a mortgage need not be in writing. A parol mortgage of chattels, completed by actual delivery is not within the statutory provisions affecting bills of sale, and the terms of the mortgage may be proved by oral evidence. A parol mortgage, even without delivery, is good at common law, although as the chattels then remain in the debtor's order and disposition the mortgagee has no priority over general creditors upon the debtor's bankruptcy.

The Record shows that the Facility Letter executed by the Applicant Company and the 1st Respondent dated 27th September, 2016 at Clause 6.2 states that the facility would be secured by a Ford Ranger T6,2015 Model with Registration No. BAB 7145 and Chassis No. 6FPPSSMJ2PFT09883. There is however no Mortgage Deed or other Instrument creating the Mortgage over the motor vehicle. The 1st Respondent did however surrender the White Book i.e. the Certificate of Ownership of the said Ford Ranger T6 to the

Applicant with the intent that the said motor vehicle be equitably charged with the repayment of the money advanced i.e. K150,000.00.

I accordingly **FIND** and **HOLD** that the 1st Respondent deposited the White Book relating to the Ford Ranger T6 to the Applicant as security for the sum of K150,000.00 advanced to it. The Applicant has an equitable mortgage over the Ford Ranger T6 and as there is no Mortgage Deed or Instrument in writing I hold that the provisions of the Bills of Sale Acts 1878 and 1882 do not apply to the said Equitable Mortgage.

From the evidence adduced by the Applicant, I am satisfied that the Applicant has proved its case on the balance of probabilities.

I accordingly enter Judgment in favour of the Applicant against the Respondents for payment of K229,964.18 and contractual interest from 28th January, 2017 to date of Judgment and thereafter at the current bank lending rate as determined by Bank of Zambia up to day of full payment.

The Judgment sum together with interest must be paid within 30 days from date hereof.

As espoused in the case of **S. BRIAN MUSONDA (RECEIVER OF FIRST MERCHANT BANK ZAMBIA LIMITED (IN RECEIVERSHIP) V HYPER FOOD PRODUCTS LIMITED, TONY'S HYPERMARKET LIMITED AND CREATION ONE TRADING (Z) LIMITED (2)**, a mortgagee has several remedies available which are cumulative. It

follows that all the remedies endorsed on the Originating Summons are hereby granted.

In the event that the Judgment debt and interest remains unpaid at the expiry of the said period of 30 days the 1st Respondent shall deliver possession of the Ford Ranger TS motor vehicle to the Applicant Company who shall be at liberty to foreclose and exercise its right of Sale.

The Applicant is at liberty to demand immediate payment of the Judgment debt and interest herein from the 2nd Respondent who is a Guarantor.

Costs to the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka the 8th day of August, 2017.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE