IN THE HIGH COURT OF ZAMBIA **2020/HPC/0261**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF : PROPERTIES COMPRISED IN A THIRD PARTY LEGAL MORTGAGE RELATING TO STAND NO. 235 CHILANGA

IN THE MATTER OF : ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH ORDER 88 OF THE RULES OF THE SUPREME COURT, 1999, EDITION

BETWEEN:

PULSE FINANCIAL SERVICES LIMITED
(T/A Entrepreneurs Financial Centre) **APPLICANT**

AND

PAMELA BWALYA LOMBE MUKUKA **1ST RESPONDENT**
KELVIN HAULE **2ND RESPONDENT**

Before the Honourable Mrs. Justice K. E. Mwenda-Zimba on the 25th day of June, 2020.

For the Applicant : Ms. M. Msoni and Mr. Joseph Shawa-in-house Counsel
For the Respondents : Mr. F. Zulu of MSK Advocates

JUDGMENT

Cases referred to:

1. *Rodgers Zulu v. Pulse Financial Services 2017/HN/04 (unreported)*
2. *National Drug Company Limited and Zambia Privatization Agency v Mary Katongo Appeal No. 79 of 2001*
3. *L'Estrange v. F. Graucob, Limited (1934) 2KB 394*
4. *Printing and Numerical Registering Co v. Sampson (1875) LR 19 Eq 465*
5. *Colgate Palmolive (Z) Inc. v. Abel Shenu Chiku and 110 Others Appeal # 181 of 2005*
6. *Kalusha Bwalya v. Chadore Properties and Another (2015) 2 ZR 100*

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia, Order 30 Rule 14*
2. *The Rules of the Supreme Court, 1999, Order 88*
3. *The Movable Property Security Interest Act No. 3 of 2016, Section 72(3)*

Other works referred to:

Nigel P. Gravels Land Law Texts and Materials, 3rd Edition, London, Thompson Sweet and Maxwell 2004 that no page was given

1.0 INTRODUCTION

1.1 This is a Judgment on the Applicant's application for foreclosure, possession and sale of mortgaged property.

1.2 The Judgment examines, among other questions, a new point of law on whether a secured creditor of movable and immovable property can seize the borrower's movable property without an order of the Court pursuant to the **Movable Property (Security Interest) Act, No. 3 of 2016.**

2.0 BACKGROUND

2.1 By an Originating Summons dated 3rd April, 2020, the Applicant claimed the following reliefs against the Respondents:

1. payment of all monies secured by a mortgage which, as at 25th March, 2020, stood at ZMW314,199.96 plus contractual interest on the loan amounts;

2. delivery and possession of Stand 235 Chilanga, being the mortgaged property;

3. foreclosure and sale of Stand 235 Chilanga, being the mortgaged property;

4. further or other relief the Court may deem fit; and
5. costs.

3.0 THE APPLICANT'S CASE

3.1 The Originating Summons was supported by an affidavit sworn by Christopher Banda, the Chief Credit Officer in the Applicant Company. His evidence was to the effect that by a loan agreement dated 15th April, 2019, the 1st Respondent applied for and was afforded an individual loan, in the sum of

ZMW300,000.00, to be paid in 24 monthly instalments. To this end, Mr. Banda exhibited a copy of the individual loan agreement as **"CB 1".** He highlighted two salient provisions in the agreement as follows:

> **"1. By clause 1 and 2 of part 1, the Applicant agreed to lend to the 1st Respondent the principal sum of ZMW300,000.00 for a duration of 24 months and the 1st Respondent covenanted to repay the amount at the interest rate of 4.58% interest per month and that in default, the said 4.58% would apply to the total principal and interest due at the time of default.**
>
> **2. By clause 5 of part 1, the 1st Respondent agreed to fully indemnify the Applicant against all costs and expenses including legal fees being incidental and or in connection with the 1st Respondent's loan account..."**

3.2 He added that the loan was partially secured by several movable goods namely; black sofas, black flat screen TV, grey microwave, brown and grey dining suit, brown display cabinet and a black stove. Further, that the Third Party Legal Mortgage deed over Stand No. 235 Chilanga, Lusaka dated

15th April, 2019, was executed voluntarily by the 2nd Respondent and registered at the Lands and Deeds Registry on 16th April, 2019. To prove this, he exhibited copies of the Third Party Mortgage and lodgment schedule as **"CB 2** and **CB 3"**, respectively.

3.3 He added that a guarantee agreement dated 15th April, 2019, was executed and as a condition precedent to the Applicant granting the 1st Respondent a loan, the 2nd Respondent guaranteed payment of all monies due and owing in the event that the 1st Respondent defaulted in repayment. He exhibited a copy of the guarantee as **"CB 5."**

3.4 He deposed that the 1st Respondent defaulted on the loan and continues to be in default and despite being issued with demand notices, has failed to repay the loan. He disclosed that on 7th February, 2020, the Applicant seized the 1st Respondents' pledged movable properties. To this end, he exhibited an asset seizure form as **"CB 7."** He added that the movable goods were auctioned and sold at a total of ZMW4,300.00 which amount was applied towards the loan

through deposits on the same day. He exhibited a copy of the auctioneer's receipt sale and deposit slip as **"CB 8a"** to **"CB 8d"**, respectively.

3.5 He revealed that the Respondents' loan account as at 25th March, 2020, stood at ZMW314,199.96 and as proof of this, he exhibited copies of the loan account statement, payment schedule and loan principal balance and accumulated interest print out as **"CB 9"**, **"CB 10"** and **"CB 11"**, respectively.

3.6 He urged this Court to grant the Applicant the reliefs sought.

3.7 In the skeleton arguments, Counsel referred this Court to the following authorities:

1. Order 30 Rule 14 of the High Court Rules;
2. Order 88 of the Rules of the Supreme Court, 1999;
3. Rodgers Zulu v. Pulse Financial Services;(1) and
4. Nigel P. Gravels Land Law Texts and Materials, 3rd Edition, London, Thompson Sweet and Maxwell: 2004.

3.8 He argued that the Court in the **Rodgers Zulu v. Pulse Financial Services**[1] case, held that a surety/guarantor is liable to a creditor as if he had made a pledge for his own debt.

4.0 THE RESPONDENTS' CASE

4.1 In opposing the application, the Respondents filed an affidavit sworn by Pamela Bwalya Lombe Mukuka, the 1st Respondent herein. She deposed that she signed the individual loan agreement on 15th April, 2019, the day she was called and informed that the loan had been approved. That she had been advised by her advocates and believe the same to be true that it is the duty of a financial institution, such as the Applicant, to inform a would be client of the need to obtain legal advice on the nature and consequences of entering into a loan agreement such as the one in issue.

4.2 She revealed that in June, 2019, she lost both her grandparents and informed the Applicant's Relations Officer about her misfortune which led to her not being able to pay the debt obligations as per agreement. She added that she is in the process of sourcing alternative funds to refinance the

loan facility with the Applicant. To this end, she exhibited letters exchanged between her advocates and the Applicant regarding the refinancing marked **"PBLM 2"** to **"PBLM 4."** She went on to state that she had been advised that by allowing the refinancing of the debt, the Applicant would not have lost anything and it is an arrangement that is widely accepted in the financial industry.

4.3 She disclosed that on 7th February, 2020, the Applicant seized her property. That she had been advised that the sale was null and void as there was no Court order allowing the Applicant to seize and sale her property. Further, that she was not aware of the consequences of obtaining the loan from the Applicant and would probably have not obtained the same had she gotten independent legal advice.

4.4 She added that she did not refuse to pay the debt but wished to request for the indulgence of the Court to grant the Respondents time to finalize the refinancing of the loan from the Applicant.

4.5 No skeleton arguments were filed on behalf of the Respondents.

5.0 THE HEARING

5.1 At the hearing of the application, Mr. Shawa relied on the Originating Summons, affidavit in support as well as skeleton arguments in support. He informed the Court that the seizure of the items was done pursuant to **Section 72(3) of the Movable Property Security Interest Act, No. 3 of 2016**, which allows a lender to seize movable property outside the Court system. He reiterated his arguments that pursuant to the **Rodgers Zulu v. Pulse**[1] case, a surety/guarantor or mortgagor will be liable to a lender as if he had made the pledge for his own debt.

5.2 Mr. Zulu, in opposition, relied on the affidavit in opposition.

6.0 CONSIDERATIONS

6.1 I have considered the affidavit evidence on record, the parties' written and oral arguments and authorities relied on. From the evidence presented before me, it appears that the

Respondents do not dispute being indebted to the Applicant. This is clear from paragraph 18 of the affidavit in opposition wherein they state as follows:

> **"That in the premises, I have not refused to pay the debt but wish to request for the indulgence of the Honourable Court to grant us time to finalize the refinancing of the loan from the Applicant."**

6.2 What appears to be in dispute, however, is whether it was the duty of the Applicant to inform the Respondents of the need to obtain legal advice on the nature and consequences of entering into a loan agreement and whether the seizure of the Respondents movable property, without a Court order, was null and void.

6.3 For convenience, I will start with the requirement for independent legal advice.

6.4 The Supreme Court, in the case of **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo**[2] held that-

"It is trite that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it, by respecting, upholding and enforcing the contract."

6.5 Further, in the case of **L'Estrange v. F. Graucob, Limited** [3], the Court held that -

"as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents; and that the action failed and that the sellers were entitled to Judgment."

6.6 In another case between **Printing and Numerical Registering Co v. Sampson,** [4] the following was stated by Sir George Jesses:

"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracts and that their contracts, when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of Justice ..."

6.7 The above holding has been accepted in our jurisdiction in the Supreme Court decision of **Colgate Palmolive (Z) Inc. v. Abel Shenu Chiku and 110 others**.[5] The Supreme Court, in another case between **Kalusha Bwalya v. Chadore Properties and another,**[6] in dismissing an argument by Counsel for the Appellant stated that-

> "The contract of sale and the deed of assignment together with the acknowledgement of receipt are in one view, categorical and clear in their meaning and import. They do not require esoteric interpretation to underStandthem. Resort to extrinsic evidence is inappropos. The parties entered into those agreements freely and voluntarily. And those agreements should, therefore, be enforced by the courts."

6.8 I adopt the words of the Supreme Court as my own. The present case, manifests free and voluntary execution of the agreement. There is no evidence of any undue influence or misrepresentation.

6.9 The Respondents have exhibited the loan agreement as **"PBLM 1"**. A consideration of this agreement, which was signed by the 1st Respondent, states as follows:

"Declaration

The borrower declares having read all the clauses of the contract and understood the terms of the agreement. The borrower commits to respect these terms and conditions and declares having received a copy of the said agreement as duly signed by the parties hereto. The borrower certifies that this agreement constitutes irrefutable proof that the loan was granted and funds were received. The borrower recognizes that he or she cannot under any circumstances, transfer or dispose all or any part of the collateral property listed herein without the preliminary prior written and express authority of PFSL.

Read and approved.

Signed at Lusaka on 2 copies, on the date of 15th April, 2019.

Full name of client: Pamela Bwalya Lombe Mukuka Signed...,"

6.10 Further, the loan agreement contains the following note:

"NOTE

The client clearly states that they were advises by PFSL to seek and obtain Independent Legal Advice on the nature and consequences of entering into this agreement as a client..."(SIC)

6.11 From the foregoing, the Respondents' argument that they should have been advised to obtain independent legal advice, flies in the teeth of the above authorities and warnings in the loan agreement. They confirm that the Respondents entered into the agreement freely and voluntarily, therefore, bound by it. The Courts are accordingly obliged to enforce it. The Respondents' argument is, therefore, without merit and I dismiss it.

6.12 I now come to the argument that the seizure of the movable property belonging to the Respondents was legal having been done pursuant to **Section 72(3) of the Movable Property (Security Interest) Act, No. 3 of 2016. Section 72** of this Act provides as follows:

> **(1) A secured creditor may take possession, or without rendering the collateral unusable, remove the collateral or dispose of the collateral when the debtor is in default or the collateral is at risk.**
>
> **(2) For purposes of sub-section (1), collateral is at risk if the secured creditor has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled,**

removed, concealed, sold or otherwise disposed of contrary to the security agreement.

(3) A secured creditor may proceed under this section –

(a) pursuant to a judicial process; or

(b) without judicial process, if the debtor consented, in the security agreement, to relinquish possession without a Court order.

(4) A secured creditor may require a debtor to assemble the collateral and make it available at a designated place.

(5) A prior notice to a debtor is not required for the secured creditor to repossess or render the collateral unusable under this section."

6.13 From the above Section, it is clear that for the Applicant to benefit from the provisions of the Section, the following have to be met:

1. the Applicant must be a secured creditor;
2. the Respondents must be in default or the collateral must be at risk; and
3. the debtor (Respondents herein) should have consented, in the security (loan) agreement, to relinquish possession without a Court order.

6.14 The question I ask myself, therefore, is who is a secured creditor? **Section 2** of the same Act defines a secured creditor in the following terms:

> "secured creditor means is person in whose favour a security interest is created, and includes a –
>
> (a) financial lessor;
>
> (b) seller who reserved title to the goods sold;
>
> (c) <u>chargee under any type of charge, chattel mortgage or holder of any type of consensual lien;</u> and
>
> (d) buyer of accounts receivables, commercial consignor and an operating lessor under an operating lease were the account receivables, goods provided under the commercial consignment or the leased object do not secure an obligation.

6.15 The same Section defines security interest to mean-

> "a property right or interest in movable property that is created by agreement or a transaction that secures payment or other performance of an obligation, any type of charge over movable property, chattel mortgage and consensual lien and includes-

(a) retention of a title in movable property;

(b) right under a financial operating lease;

(c) rights of a transferee of accounts receivable; and

(d) right of a commercial consignor even if it does not secure payment or other performance of an obligation."

6.16 From the foregoing definitions, the Applicant ought to have created a security interest in the property. In the present case, what appears to create the security interest is **Clause 4** of the loan agreement. It states that-

> "the borrower commits to give physical movable and/or immovable collateral, titled or invoiced assets."

6.17 In the above Clause, the Respondents listed the following movable assets: black sofas, black flatscreen TV, grey microwave, brown and grey dining suit, brown display cabinet and a black stove.

6.18 The aforementioned movable assets are the same ones seized by the Applicant. I am, therefore, satisfied that a security interest was created in the foregoing movable property.

6.19 However, apart from the above, **Section 72** requires that the Respondents must be in default or the collateral must be at risk. There is no doubt that this requirement has been met. I say so because the Respondents' default is not in dispute.

6.20 The third requirement is that the Respondents must have consented, in the security agreement, to relinquishing possession.

6.21 Clause 4 referred to above shows that the Respondents agreed to give "physical movable and/or immovable collateral". In my view, giving "physical movable and/or immovable collateral" can be interpreted to mean relinquishing of possession. However, my interpretation of **Section 72 of the Movable Property (Security Interest) Act** is that a creditor can only benefit from it if the borrower agreed in the loan agreement to relinquish possession <u>without a Court Order</u>.

6.22 The words "without a Court order" in my view are very pertinent. Clause 4 did not go further to require that the relinquishing of possession ought to be without a Court Order. There was no consent given by the Respondents to do away with the judicial process. I am of the view, therefore, that the Applicant ought to have waited for a Court order before seizing the Respondents' movable property. The third requirement under **Section 72** above was not met.

6.23 Even assuming that the Applicant was given the benefit, the Respondents agreed to give Stand No. 235 Chilanga as collateral. To this effect, a mortgage deed was signed and the Certificate of Title surrendered to the Applicant. Despite this security, the Applicant cannot proceed to take possession of the Stand without a court order. The same principle applies herein. I believe the legislature intended that the debtor should expressly agree to the relinquishing of possession and disposal of his or her property without a court order.

6.24 I am, therefore, of the view, that the seizure of the movable assets was irregular and not backed by law. Since the assets

were already sold, it would be impossible to assess them with a view of establishing their value. However, since their value was agreed upon as being ZMW8,100.00, in the loan agreement, it shows that this is the value that both parties agreed to attach to them. In the circumstances of this case, I find that this is the correct value to attach to the movable assets that were sold. I, therefore, order that the difference between the agreed value in the loan agreement and the value obtained after the auction be credited to the loan account.

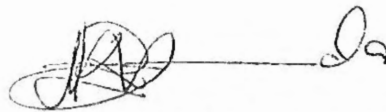
6.25 The above notwithstanding, I find that the Applicant has largely proved its claim against the Respondents on a balance of probabilities.

6.26 I, accordingly, enter judgment in its favour against the Respondents in the sum claimed of ZMW314,199.96 as at 25th March, 2020. The said judgment sum shall attract interest, at the contractually agreed rate of 4.58% per month, from the date of the Originating Summons to date of Judgment. Thereafter, at the current bank lending rate as determined by the Bank of Zambia until full payment.

6.27 Further, I order that the Respondents pay the said judgment sum plus interest, within a period of 120 days from today, failing which the Applicant will be at liberty to repossess and sell the mortgaged property being plot No. 235, Chilanga, and enforce the deed of guarantee against the guarantor being the 2nd Respondent.

6.28 I award costs to the Applicant, to be taxed in default of agreement.

Delivered at Lusaka this 25th day of June, 2020.



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HIGH COURT JUDGE