GILBERT JONGA
versus
AGRICULTURAL BANK OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 11 and 18 May, 2016

Urgent Chamber Application

P Kwenda, for the applicant
Z T Zvobgo, for the respondent

MANGOTA J: On 12 January 2013, the respondent advanced a loan of $15 000-00 to the applicant. The loan was for implementation of 15 hectares of commercial maize programme. The programme was under the Government's $15 million facility.

The applicant used the property which is the subject of this application as security for the loan. He, by note of hand which the respondent registered over the property on 16 January 2013, agreed that, in the event of him defaulting, the respondent would attach and sell the property with a view to recovering what he owed to it.

Somewhere somehow the applicant did not meet his own side of the loan agreement. He stated as much in his application. He said he failed to repay the loan in full within the agreed time frame. He attributed his failure in the mentioned regard to what he termed unforeseen circumstances.

On 29 March, 2016 the respondent addressed a letter of demand to the applicant. The letter, Annexure A, was attached to the application. It was posted to the applicant in a registered envelope. It reads, in part, as follows:

"Dears Sir

INDEBTEDNESS TO THE AGRICULTURAL BANK OF ZIMABWE

> We have to inform you that Agribank has decided to foreclose and proceed against you in terms of paragraph (f) of subsection (1) as read with subsection (2) and subsection (2a) of section 38 of the Agricultural Finance Corporation Act [*Chapter 18:02*] [hereinafter referred to as "the Act"]. We are, therefore, empowered to act as follows:
>
> Firstly ……
>
> Secondly, failing payment as demanded, to take possession of the whole or any part of the security taken for the advance made to you and dispose of such security in accordance with the provisions of the second schedule of the Act …"

It was the applicant's statement that, following the letter which the respondent addressed to him, he, to his surprise, saw an advertisement in *The Herald* newspaper of 5 May, 2016. He attached the advertisement to the application. He called it Annexure B. The annexure which Choruma Marias Valuation and Estate Executives P/L placed in *The Herald* of 5 May, 2016 reads, in part, as follows:

> "Duly instructed by Agribank of Zimbabwe Limited we have on offer the following immovable properties for sale by Public Auction on 13th May 2016 at RAYLTON SPORTS CLUB, Fifth Street/George Silundika Avenue, Harare, Time: 10:00. Confirmation and registration starts at 08:45 on the same day.
> Sale 1…….
> Sale 2 ……
> Sale 3…….
> Sale 4……..
> Sale 5……..
> Sale 6……
> Sale 7……
> Sale 8……
> Sale 9…….
> Sale 10……
> Sale 11…….
> Sale 12: Agribank v Gilbert Jonga, certain piece of land situate in the District of Salisbury called Stand 2585 Warren Park Measuring 200m^2".

The applicant contented that the conduct of the respondent in the above mentioned regard constituted self – help which he said was not permitted at law. He argued that the respondent did not institute court proceedings and was not in possession of a court order which authorised it to sell the property. He insisted that the sale and transfer of the property should have followed due process. He, therefore, filed this application in which he moved the court to stop the sale.

The respondent opposed the application. It raised a number of *in limine* matters after which it proceeded to address the court on the merits. It argued, on the merits, that the law

authorised it to act as it did in the instant case. It referred the court to s 38 as read with the second schedule of the Agricultural Finance Act [*Chapter 18:02*] which it said justified its conduct of attaching the property, without a court order, and putting it up for sale by public auction.

Whilst the *in limine* matters which the respondent raised carry some measure of weight and, as such, cannot be easily glossed over, the court remains of the view that the present application should not be decided on technicalities but on the substance of the same. The circumstances which relate to the application persuade the court to pursue that route.

The respondent is a creature of statute. It was established in terms of the Agricultural Finance Corporation Act, [*Chapter 18:02*]["the Act"]. Its aim and object are to:

(a) provide for the establishment of Schemes for the assistance of persons engaged in agriculture and for the implementation of such schemes.

(b) set out terms and conditions of an Agricultural Assistance Scheme providing for assistance as previously afforded by the Agricultural Assistance Board - and

(c) provide for matters incidental to the foregoing.

The respondent's operations are spelt out in the Act and so are its powers as well as limitations. The Act, for instance, confers upon the respondent certain powers which outst the jurisdiction of the court. Some such powers are contained in subsection (2) of s 38 as read with the second schedule of the Act. Section 38 refers to the remedies which are available to the respondent against a defaulting debtor.

The power which the Act confers upon the respondent to oust the jurisdiction of the court is not absolute. It is subject to the fulfilment of certain conditions which are stipulated in the Act. The fulfilment of those conditions constitutes the applicant's bone of contention. He submitted that the respondent's conduct was not supported by law. He said the conditions which allowed it to circumvent due process were not fulfilled when the respondent acted as it did in this case.

The court is, in this regard, called upon to determine the propriety or otherwise of the respondent's conduct. In its determination of the same, it necessarily has to have regard to s 38 of the Act as read with the Second Schedule of the same.

The respondent's position was that its conduct was lawful. It said it acted in terms of s 38 (2) as read with the second schedule of the Act. Section 38 (2) of the Act reads:

> "The corporation may, in the case of an advance in respect of which security is given, including any security by way of a notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable in terms of subsection (1) shall be entitled, subject to subsection (3) after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given for the advance, to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security in accordance with the second schedule" (emphasis added].

The respondent attached to its opposing papers the Note of Hand which it called Annexure 3. It made reference to the letter of demand, Annexure A, which it addressed to the applicant on 29 March, 2016. It advised the applicant of its decision to foreclose and proceed against him in terms of paragraph (f) of subsection (1) as read with subsection (2) and subsection (2a) (*sic*) of s 38 of the Act. It submitted that the letter of 29 March, 2016 was forwarded to the applicant by registered post and at the address which he gave when he applied for the advance. It, in this regard, referred the court to its Annexure 2 wherein the applicant, at the time that he applied for the advance, gave his address as Reveille Farm P. Box 204, Glendale. It submitted that, in terms of para (f) of subsection (1) of s 38 of the Act, the applicant breached the condition of the advance when he defaulted in his repayments of the loan as he did. It stated that the ten (10) day period which was stipulated in s 38 (2) of the Act had elapsed when it took possession of the property with a view to disposing of such in accordance with the second schedule of the Act.

What the respondent failed to appreciate was that the subsection under which it acted *in casu* is not a stand-alone provision. Subsection (2) of s 38 of the Act can only be employed by the respondent subject to subsection (3) of the Act. The subsection reads:

> "The corporation shall be entitled to exercise the powers conferred upon it in accordance with any condition referred to in subsection (2) as soon as it has posted a registered letter of demand to the borrower in terms of that subsection where any event referred to in para (c), (d) or (e) of subsection (1) occurs" [emphasis added]

On a proper interpretation of the mentioned three paragraphs, therefore, it is clear that paragraphs (c) and (d) of subsection (1) of the s 38 of the Act remain inapplicable to the conduct of the respondent. Paragraphs (c) makes reference to a security for an advance which security has been declared executable by an order of court or which is attached in pursuance of a judgment of

a court. The respondent cannot, therefore, base its conduct on paragraph (c) as it did not obtain an order of court to justify the attachment and sale by public action of the property which pertains to the present application. Paragraph (d) of subsection (1) of s 38 of the Act does not apply for the simple reason that the paragraph makes reference to a movable security when, as *in casu*, the property which is the subject of the application is of an immovable nature.

The only paragraph under which the respondent could have lawfully acted is paragraph (e). The respondent could not, unfortunately for it, employ that provision when it did not plead that the applicant who is the debtor had either vacated or abandoned or relinquished possession or had been dispossessed, of the security for the advance. No event which justified the conduct of the respondent under para (c), (d) or (e) occurred in the instant case. It was for the mentioned reasons, if for no other, that the court remained of the view that the respondent's conduct was not, as the applicant correctly argued, supported by law. The conduct which arose out of the respondent's misconstruction of the Act's clear and unambiguous provisions cannot, therefore, be allowed to stand.

The respondent attached to its opposing papers Annexure 1. The annexure is the title deed which the applicant used to secure the advance which the respondent made to him on 12 January, 2013.

A reading of the annexure shows that the title deed did not belong to the applicant. It belonged to one Ruth Chikukwa. The circumstances under which the respondent allowed the applicant to use the title deed of Ruth Chikukwa as security for an advance which it made to the applicant were not clarified. No papers were filed by either party to explain the observed anomaly. Ruth Chikukwa was not joined to these proceedings. Her interest in the title deed which related to the property under consideration was real. The applicant and the respondent should not be allowed to temper with that real right. Ruth Chikukwa should have been accorded an opportunity to explain her position on the same.

The applicant did not explain how he came to possess Ruth Chikukwa's title deed let alone use it as security for a loan which was for his benefit. He may have stolen the title deed or he may, without Ruth Chikukwa's knowledge and/or consent, laid his hands upon it and made up his mind to use it for his own benefit. The respondent did not come up with any explanation as to how it was able to accept Ruth Chikukwa's title deed as security for the advance it made to the

applicant. That security appeared, to all intents and purposes, to have been tainted with some measure of illegality which the court could not accept, let alone condone.

The court's sworn duty is to protect interests of third parties where, as *in casu*, there appears to be connivance between the applicant and the respondent to use and/or abuse a third party's property for the benefit of the one or the other or both of the parties.

The court has considered all the circumstances of this case. It is satisfied that the conduct of the respondent is not supported by law. The application, accordingly, succeeds for the stated reasons.

Dube, Manikai & Hwacha, respondent's legal practitioners
Kwenda & Chagwiza, applicant's legal practitioners