

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 138/2020

B E T W E E N :

GRANDUARE PROPERTY DEVELOPMENT LTD
AND

EMPORIUM FRESH FOODS LIMITED T/A
FOOD LOVERS MARKET (IN RECEIVERSHIP)



1st APPELLANT

1st RESPONDENT

2nd RESPONDENT

CORAM : Kondolo, Chishimba and Sichinga, JJA
On 21st July, 2020 and 19th November, 2020

For the Appellant : Mr. Yasa of Messrs Dudhia and Company.
For the Respondent : Mr. G. Cornhill of Messrs Wilson and Cornhill

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Indeni Petroleum Refinery Co. Ltd v. Kafco Oil Limited and 3 others**
SCZ No. 29/2017
2. **Central Electricity Board v. Halifax Corporation (1962) 3 All ER 715**
3. **Letang v. Copper (1965) 1QB 232**
4. **William David Carlisle Wise v EF Harvey Limited (1985) ZR 179**
5. **Hickman v. Potts (1939) 3 All ER 794**
6. **Godfrey Miyanda v The Attorney General (2009) ZR 76**
7. **Mpande Nchimunya v Steven Hibwani Michelo SCZ Judgment No. 12**
of 1997
8. **African Life Financial Services Limited v Faith Simbao and Others.**
(2011) ZR Volume
9. **Neave & Co, Re, North of England Trustee Debenture and Assets Corp**
v Marriage Neave & Co (1895-9) All ER 393
10. **Jackson vs British Medical Association**



11. **Marius Mwelwa vs Konkola Copper Mines PLC Appeal No.119/2004**
12. **Turnkey Properties vs Lusaka West Development Company Limited and BSK Chiti (1984) ZR 85**
13. **Ahmed Abad vs Turning and Metals Limited (1987) ZR**
14. **Zambia National Holdings Limited and UNIP v The Attorney General 1995/1997 ZR 115**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **The Corporate Insolvency Act No. 9 of 2019**
2. **Gowers Principals of Modern Company Law 6th Edition page 374**
3. **Law of Distress Amendment Act 1888**
4. **Palmer's Company Law 15th Edition**
5. **The Rules of the Supreme Court of England 1999 Edition**
6. **The Court of Appeal Rules S.I No. 65/2016**
7. **Distress Amendment Act of 1908**

1.0 **INTRODUCTION**

- 1.1 This is an appeal against the judgment of the lower court delivered by Justice E.L Musona, declining to strike out the respondent's writ of summons and statement of claim on alleged account of failure to disclose a reasonable cause of action and abuse of court process.

2.0 **FACTUAL BACKGROUND**

- 2.1 The parties had entered into a lease agreement under which the respondent trading as Food Lovers' Market rented the appellants business premises at East Park Mall at a monthly

rent of US\$ 34, 526.42. The respondent fell into rental arrears of about US\$ 130, 560.

2.2 On the 5th of May 2020, the appellant distrained for the rentals outstanding on the premises and seized various goods. Thereafter, the respondent, issued a writ of summons seeking an order that the distressed goods be returned to it because they were wrongly seized.

2.3 The appellant entered conditional appearance and applied by way of summons to strike out the writ of summons and statement of claim on account of the following;

(i) Failure to disclose a reasonable cause of action against the 1st and 2nd defendants.

(ii) It is an abuse of process of court.

(iii) In the alternative, that the plaintiff as cited has no legal capacity to bring this action and it wrongly cited the 2nd defendant.

3.0 AFFIDAVIT IN SUPPORT OF APPLICATION TO STRIKE OUT WRIT OF SUMMONS AND STATEMENT OF CLAIM

3.1 The appellant deposed that it distrained for rental arrears of US\$ 130, 560.19 pursuant to a warrant of distress, therefore the respondent had no cause of action. The appellant initially refuted the fact that the respondent was placed under

receivership pursuant to a deed of debenture with a floating charge over all its moveable assets. In any event, that any purported appointment of a receiver would be null and void as the alleged debenture was only registered on 11th of March 2020 and has not been in existence for the statutory period of 12 months and that the loan in issue is between related parties.

4.0 **AFFIDAVIT IN OPPOSITION**

4.1 The receiver of the respondent company stated that she was appointed receiver by Mr Mahesh Patel, a security creditor. The cause of action is a claim by a priority creditor for assets seized by unsecured creditor. The creditor having lent money to the respondent for business start-up costs and capital investment.

5.0 **DECISION OF THE COURT BELOW**

5.1 The learned judge considered the application and noted that the respondent was indeed placed under receivership. As to the question whether the writ discloses a reasonable cause of action, the court stated that the pleadings contained a statement in summary form and disclosed a cause of action arising from the lease agreement entered into between the parties in which currently the rent was in arrears, which led

to the levy and distress of goods on the premises. That the statement of claim cannot, be said it does not state facts which will put the defendants on their guard and tell them what case they will meet. The judge refused to strike out the pleadings.

6.0 **GROUND OF APPEAL**

6.1 Being dissatisfied with the ruling of the court below, the appellant has raised 5 grounds of appeal as follows;

- (i) **The court below misdirected itself in law and in fact when it decided that the respondent had disclosed a reasonable cause of action against the appellant on the strength of a mere pleading by the plaintiff that there was a lease agreement between the parties and that the appellant distrained for rent arrears on the respondent's leased premises without taking into account that the facts pleaded did not disclose a cause of action against the appellant and that the respondent's claims are unenforceable against the appellant;**
- (ii) **The court below erred in law and in fact when it neglected to make a pronouncement on the question whether the respondent has priority to have**

recourse to the distrained goods at law, which issue was raised for the Court's determination;

- (iii) The court below misdirected itself in law and in fact when it ruled that Section 129 of the Corporate Insolvency Act No. 9 of 2017 does not apply to the Debenture in issue herein as the respondent was in receivership without taking into account the other arguments by the appellant and the evidence on record which showed that the purported debenture was void and unenforceable;
- (iv) The court below erred in law and in fact when it found that the appellant had not filed an affidavit in reply and arguments in reply as directed by the Court and as a consequence failed to consider the said arguments in reply and the facts deposed to in the appellant's affidavit in reply which had been duly filed by the appellant on 22nd May, 2020 by the stipulated time, and in so doing nonsuited the appellant and denied it the right of reply; and
- (v) The court below erred in law and in fact when it omitted to make a pronouncement on the question whether the respondent's action was an abuse of

court process and whether the respondent was obliged to follow the procedure under the Law of Distress Amendment Act 1888 which does not provide for judicial intervention where a tenant in default seeks to recover possession of the goods seized under a warrant of distress.

7.0 **HEADS OF AGUMENTS BY THE PARTIES**

7.1 The appellant in its heads of argument began by submitting that a court is mandated to weed out frivolous matters at an early stage in order to avoid unnecessary costs. The action by the respondent is intended to deprive the appellant of its remedy to recover the unpaid rent. The case of ***Indeni Petroleum Refinery Co. Ltd v. Kafco Oil Limited and 3 others*** ⁽¹⁾ was cited.

7.2 In relation to ground one, the appellant defined a cause of action as every fact which it would be necessary for the respondent to prove, if traversed in order to support his right to the judgment of the court. Reference was made to the cases of ***Central Electricity Board v. Halifax Corporation*** ⁽²⁾, ***Letang v. Copper*** ⁽³⁾ and ***William David Carlisle Wise v EF Harveyhe Limited*** ⁽⁴⁾ where in the latter case the

Supreme Court alluded to the definition of the phrase "*cause of action*" as stated in the **Letang v. Copper** case as

"Simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person"

7.3 It was submitted that the facts pleaded in the statement of claim discloses nothing entitling the respondent to the claims endorsed in their statement of claim. Mere pleading of a lease agreement executed between the parties and execution levied does not disclose reasonable cause of action.

7.4 The appellant went on to refer to execution and distress as a self-help remedy given by the law to the party, for the exercise of which he required no permission from any court as stated in the case of **Hickman v. Potts** ⁽⁵⁾. It was argued that since a warrant of distress is a remedy and not an execution it does not require an order of the court and can be effected by a landlord through a certified bailiff. This is not therefore, an appropriate case in which a stay of execution can be granted.

7.5 We were referred to the **Law of Distress Amendment Act 1888** entitling a Landlord to secure payment of rent by seizing goods and chattels found upon the premises in respect of which rent is due and to distrain for rent in arrears.

- 7.6 The mere pleading by the respondent that there was a lease agreement under which the goods were seized or that the respondent is under receivership does not establish a cause of action and will not suffice. There are no grounds alleging wrongful seizure set out by the respondent. Further that there is no substratum of facts pleaded to support the reliefs sought as the rent due is not disputed.
- 7.7 As regards the function of pleadings, it was contended that the respondent did not plead any facts that would put the appellant on notice of what is being alleged. Reference was made to paragraphs 18/19/16 of the explanatory notes to **Order 18 Rule 19 of the Rules of the Supreme Court of England 1999 Edition** as well as **Order 18 Rule 19(i)(d)** on frivolous pleadings being an abuse of the process of the court and the power of the court to at any stage of the proceedings order to be struck out any pleading/writ on ground that it is otherwise an abuse of process of the court.
- 7.8 It was submitted that the action by the respondent does not disclose a reasonable cause of action and ought to be struck out. We were referred to the provisions of **Order 53 Rule 6(i) of the High Court Rules** on the striking out a statement of claim which does not state in clear terms the material facts

upon which a party relies or show a clear cause of action. The cases of ***Godfrey Miyanda v The Attorney General*** ⁽⁶⁾ and ***Mpande Nchimunya v Steven Hibwani Michelo*** ⁽⁷⁾ were cited where in the latter case, it was stated that there can be no waiver in case of non-disclosure of a cause of action because there is simply nothing to try or prove.

- 7.9 Grounds two and five are argued together and assail the alleged failure of the court below to make a pronouncement on the question of whether the respondent has a priority recourse to the distrained goods and whether the action was an abuse of court process. It is contended that the the issue of whether the respondent has recourse to the distressed goods on account of the purported receivership is a question of law which would have disposed of the entire action without trial.
- 7.10 It was submitted that the right to levy distress for rent in arrears is a common law right under the **Law of Distress Amendment Act 1888** (Distress Act) allowing a landlord to seize property on the leased premises and hold until the rent is paid. The case of ***African Life Financial Services Limited v Faith Simbao and Others*** ⁽⁸⁾ was cited in which Judge Chashi as he then was stated in respect of the goods

of the tenant that the landlord is entitled to have recourse to all the chattels actually on his tenant's premises without reference to their ownership.

7.11 It is the appellant's contention that the recourse to chattels without reference to their ownership extends to a mortgagee, a secured creditor or receiver on the understanding that if the owner of the goods cannot assert their rights in the goods, a mortgagee, or receiver should not be allowed to do so. Reference was made to **Section 24(3) of the Conveyancing and Law of Property Act 1881** and argued that a receiver appointed by a mortgagee will have the same rights as the mortgagor and will not assert rights beyond what a mortgagee can assert. It was submitted that a landlord has priority over a receiver or a tenant for goods seized under a warrant of distress as a receiver cannot claim a greater interest than that of the tenant as per **Section 1 of the Distress Act 1908**, which stipulates the list of persons protected under the said Act.

7.12 The issue of the respondent being placed under receivership due to the floating charge is not a basis upon which the respondent may challenge the distress. As authority the case of ***Marriage Neave & Co, Re, North of England Trustee***

Debenture and Assets Corp v Marriage Neave & Co ⁽⁹⁾ was cited where it was stated in reference to goods seized by the lessor under a power conferred either before the debentures were issued or whilst they were floating security, that the distress having been made before the commencement of the winding-up of the company and before a receiver was appointed was in the court's opinion valid as against the debenture holders.

7.13 The Learned Authors' of **Palmer's Company Law 15th Edition** were referred to where at page 326, it is stated that-

"A landlord can distrain for rent before the appointment of a receiver. Afterwards he can still distrain at common law, but where a receiver has been appointed by the court, he must apply for leave of court."

7.14 It is contended that the Receiver was appointed on 11th March 2020, pursuant to the fixed and floating debenture. The floating charge over the goods were to crystallize by notice in writing from the lender to the respondent and the appointment of a receiver. The appellant levied distress on 5th May 2020 whilst the receiver was appointed on 6th May, 2020. The distrain was levied before the appointment of such receiver and before crystallization of the floating charge. The

said appointment cannot take precedence over the warrant of distress levied prior to appointment of receiver.

7.15 It was in the 2nd instance argued that the Distress Act of 1908 only provides a procedure for a person who is not a tenant to claim goods subject to distress and not for a tenant to claim goods subject of distress. The goods in issue were in the possession of the respondent who also has the right of property seized. Therefore, it is an abuse of court process to have commenced this action. A tenant is only entitled to return of goods under section 6 of the **Distress Act** if payment of the rental arrears is made within 5 days or provides security for extension. Therefore, the respondent has a priority in respect of the seized goods

7.16 As regards ground three, the holding by the court that **Section 129 of the Corporate Insolvency Act No. 9 of 2019** does not apply to the Debenture in issue as the respondent was in receivership, the court below erred. The said Section 129 provides that a floating charge created in favour of an unconnected person within 12 months of commencement of winding up or making of an administration order shall be invalid unless the company was solvent immediately after the creation of the charge. The learned

author **Gowers Principals of Modern Company Law 6th Edition page 374** was cited on floating charges created in favour of a connected person and challenges to the charge. In a nut shell that the loan by Mahesh Patel was to his sons Samir Patel and Ishaan Patel shareholders and directors of the respondent and is liable to challenge. The said loan agreement concluded 6 years ago and funds disbursed four years prior to the security created amounts to past consideration. The floating charge is said to be void on account of past consideration. The case of **Re Meardle (1951)1 ALLER 905** on past consideration was cited. Therefore, the alleged debenture is argued to be void and unenforceable.

7.17 In ground four, the appellant contends that contrary to the holding by the court below, that it did not file an affidavit in reply, it filed one on 22nd May 2020 within the stipulated time.

7.18 That since the court made a decision before considering all the evidence by the appellant, an incorrect finding was made based upon a misapprehension of facts. The same should be reversed and its affidavit in reply and arguments considered by the appellate court in determining the appeal. We were

urged to uphold the appeal and struck out the writ and statement of claim and dismiss the matter.

8.0 **RESPONDENT'S HEADS OF ARGUMENTS**

8.1 In response to ground one on whether the action had disclosed a reasonable cause of action, the respondent submits that the basic requirement of a pleading is that it must provide notice to an adversary of what case is expected to be met in court. **Order 18 Rule 7 of the Rules of the Supreme Court** was cited in respect of what every pleading must contain. The already cited case of **William David Carlisle and E. F⁽³⁾** was cited on when a cause of action can be said to be disclosed.

8.2 Reference was made to the statement of claim particularly the averments under paragraphs 6 (a) (b) (c) and (d). It is contended that the respondent was enforcing its rights as a priority creditor secured by a debenture with floating charge over all assets against an unsecured creditor who had exercised its rights to destrain for rentals. That a court will only resort to striking out a pleading on account of failure to disclose a reasonable cause of action in obvious cases, where the claim is certain to fail. The case of **Jackson vs British Medical Association⁽¹⁰⁾**, was cited as authority. The claims

being capable of enforcement in event of success, there is a cause of action disclosed and the court below was on firm ground to dismiss the application to strike out.

8.3 As regards ground two, the summons by the appellant sought to strike out the writ and statement of claim on grounds that it did not raise a reasonable cause of action and was an abuse of court process as well as for lack of legal capacity to bring this action. It did not seek pronouncement of the question whether the respondent has priority on the distrained goods. Determination of the question of priority of creditors would clearly have pre-empted any decision on the merit of substantive case. As authority the cases of ***Mavius Mwelwa vs Konkola Copper Mines PLC*** ⁽¹¹⁾, ***Turnkey Properties vs Lusaka West Development Company Limited and BSK Chiti*** ⁽¹²⁾ and ***Ahmed Abad vs Turning and Metals Limited*** ⁽¹³⁾.

8.4 As regards ground three, it was submitted that the court below was on firm ground in holding that section 129 as appears in part III of the Act headed "*Liquidation*" cannot apply to receivership under Part (ii) of the Act. No argument can extend the applicability of **Section 129 under Part Viii**

to receivership under Part II as its applicability is limited to Liquidations.

- 8.5 In response to ground 4, it is a question of fact whether or not the appellant had filed an affidavit in reply and what time as time limitation was not stipulated. The question of fact can only be reversed under circumstances stated in the Wilson Zulu case (supra).
- 8.6 The respondent went on to attach the affidavit which they contend is replete with arguments, conclusions and opinions contrary to the provisions of **Order 5 Rule 15 and 16 of the High Court Act**.
- 8.7 The respondent contended that the law of Distress Amendment Act does not provide for procedure to stop a landlord from distraining for rentals. That the action before court by the respondent is at the behest of a secured creditor suing to recover goods distrained at the instance of unsecured creditor (landlord). It is not an action by an indebted tenant challenging the power of a landlord from distraining for rental arrears. We were urged to dismiss the appeal with costs.

9.0 **ARGUMENTS IN REPLY**

- 9.1 The appellants on 29th October, 2020 filed heads of arguments in response. They began by withdrawing and abandoning grounds 2 and 3 of the appeal as they since been rendered academic due to intervening circumstances. Such as the placing of the respondent in liquidation under **Cause 2020/HPC/0499** and the appointment of a provisional liquidator by judgment dated 30th August 2020 and subsequent dismissal of the liquidation.
- 9.2 In response to the contention by the respondent that the action is at the behest of a secured creditor, suing to recover goods distrained upon at the instance of an unsecured creditor, it is submitted that the action was taken out, under the respondent's name and not to enforce any right between the parties. An action on behalf of the debenture holder Mahesh Patel who appointed the receiver. This fortifies the contention by the appellant that there is not cause of action in this matter. That a creditor secured or unsecured cannot use a company under receivership to launch private claims which have nothing to do with the rights of the company under receivership.
- 9.3 It is submitted further that even the lower court was totally unaware that the claim was in fact not on behalf of the

company under receivership but was meant to secure private interests of a debenture holder who is not even a party to the proceedings. Therefore, the premise upon which the lower court made its Ruling was wrong. The debenture holder having no right to sue the appellant and recover the goods properly distrained by the appellant. A third party cannot use a tenant as a conduit to claim reliefs against a landlord.

- 9.4 The appellant in respect of the cited case of William David Carlisle (supra) on a case of action, reiterated that the facts pleaded by the Respondent do not entitle the respondent to judgment or attach liability. No facts speak to the purported priority of the respondent to the goods seized.
- 9.5 We were implored to apply the guidance of the Supreme Court in the case of **Indeni Petroleum Refinery Co Limited v Kafco Oil Limited and 3 Others** ⁽¹⁾ on the role of court to weed out frivolous, hopeless and vexatious matters.
- 9.6 In response to ground 4, on the issue of the affidavit in reply filed on 22nd May, 2020, the appellant reiterates that it did file its affidavit and the court below erred by making a pronouncement which has been shown to be untrue. The said finding of fact based on a misapprehension of fact ought to be reversed.

- 9.7 As regards the argument that the said affidavit offends the provisions of the **High Court Rules**, the issue is whether the said documents were filed. In any event, the respondent seeks to raise a preliminary issue without following the correct procedure which is an affront to **Order XIII Rule 5 (i) of the Court of Appeal Rules**.
- 9.8 The appellant reiterated that the action was an abuse of process as the **Law of Distress Act** regulates and provides for certain persons or goods to be protected and for claiming goods subject of distress. The respondent in its capacity as tenant or company under receivership is not protected under the **Law of Distress Act**.
- 9.9 The appellant went on to touch on the jurisdiction of the High Court. Reference was made to **Section 134** of the **Constitution and** the Supreme Court decision in the case of ***Zambia National Holdings Limited and UNIP v The Attorney General*** ⁽¹³⁾ on the jurisdiction of the High Court, being although not so limited, it is unlimited but not limitless.
- 9.10 We were urged to reverse the High Court ruling and strike out the matter on account of failure to disclose a reasonable cause of action and for being an abuse of court process with costs.

10.0 **DECISION OF THE COURT**

- 10.1 We have considered the appeal, the arguments advanced and the authorities cited by the Learned Counsel for the respective parties. Grounds 2 and 3 having been abandoned we will not consider the issues therein.
- 10.2 The parties have advanced wide arguments ranging from the applicability of the **Distress Amendment Act of 1908** to a person who is not a tenant to claim goods subject of distress and to the right of a debenture holder to enforce rights as a secured creditor using a company under receivership to recover goods distrained by a landlord.
- 10.3 In our view the main issue for determination is as raised in ground one; whether the writ and statement of claim by the respondent discloses a reasonable cause of action.
- 10.4 It is not in dispute that the parties were in a landlord and tenant relationship. The respondent leased business premises from the appellant at a monthly rental value of US\$ 34,526.42. The respondent subsequently fell into arrears exceeding US\$130,000. Thereafter the appellant distrained for rent on the demised premises and seized various goods. An action was commenced by the respondent challenging the

seizure, which pleading is contended not to disclose any reasonable cause of action.

- 10.5 It is trite that a writ and statement of claim may at any stage of proceedings be struck out or ordered amended by the court on ground that it discloses no reasonable cause of action or that it is otherwise an abuse of court process. See **Order 18 (19)(1) of the white book**. Further a statement of claim must state in clear terms the material facts upon which the plaintiff relies and show a clear cause of action failing which the statement of claim may be struck out or the action dismissed.
- 10.6 The test to be applied is whether it is "*plain and obvious*" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail should the statement of claim be struck out or where it is plain and obvious that allowing the action to proceed would amount to an abuse of process. It is not for the court on a motion to strike to reach a decision as to the plaintiff's chances of success.
- 10.7 We have perused the writ and statement of claim. The respondent sought an order directed at the appellant to return the distressed goods to the plaintiff.
- 10.8 In the statement of claim, the respondent averred as follows;

- (i) That by a lease made between the appellant and the respondent the appellant demised into the plaintiff the shop premises known as stand number 5005 Great East Road at a monthly rental of US\$ 34,536.42.**
- (ii) The appellant issued a warrant of distress on the said premises on 5th May 2020.**
- (iii) That the plaintiff was placed under receivership pursuant to a Deed of Debenture with a floating charge over all moveable assets of the plaintiff subject of the wrongfully seized goods.**
- (iv) That the rental arrears was in the total sum of US\$ 130,560.19 but the seized goods estimated value is ZMW 16,500,000.**

10.9 The issue is whether looking at the pleadings and particulars, there is a reasonable cause of action disclosed by the respondent.

10.10 The appellant strongly contended that the facts pleaded in the statement of claim disclosed nothing to entitle the respondent to the claims endorsed in the statement of claim because as landlord, the appellant had the right to distrain for rentals outstanding. Further that the respondent was

merely seeking to enforce its right on behalf a priority creditor secured by a debenture with floating charge on the assets of the respondent.

10.11 We are of the view that the earlier cited paragraphs of the statement of claim, make sufficient disclosure of a reasonable cause of action, which facts would enable the defendant to respond.

10.12 The issue here is not about the admitted rental arrears and the rights of a landlord to distrain for outstanding rent on the premises of the tenant. The remedy of distress allowing the landlord to enter the premises of a tenant in arrears of rent and seize goods to the value of the outstanding rent is not in issue.

10.13 The issue that appears to be in contention for determination by the trial judge is the alleged wrongfully seized goods without notice and the alleged value of the seized goods. The respondent averred that it was placed under receivership pursuant to a deed of debenture with a floating charge over all moveable assets of the tenant which were subject of distress. That therefore, the appellant wrongfully seized the goods without notice.

10.14 We are therefore of the view that there appears to be a cause of action for alleged wrongful seizure of goods.

10.15 In regard to the contentions that the floating charge is void and unenforceable as it was provided by a connected person and that the consideration of the loan agreement is past consideration as the loan was advanced four years ago; these in our view are matters for determination at trial. The best course in this matter is to allow the whole matter to come to trial and leave it to the trial judge to decide what claims are sustainable. The respondent in the particulars of the claim gave details of the ground on which it alleged that the distress was wrongful. It appears to us that it is not plain and obvious that the claim by the respondent did not disclose a reasonable cause of action. Therefore, the learned trial judge was on firm ground in holding that a reasonable cause of action was disclosed.

10.16 As regards the contention that the lower court omitted to determine whether the cause of action was an abuse of court process, we hold the view that by the lower court holding that there was disclosure of a reasonable cause of action, it essentially entailed that the action was not an abuse of court process. The term abuse of court process is the employment

of judicial process to the irritation and annoyance of the opponent and the effective administration of justice. Essentially proceedings wanting in bona fides or which are frivolous, vexatious or oppressive with an element of malice.

10.17 Having held that the claim appears to disclose a reasonable cause of action, it follows that it cannot be considered to be an abuse of court process.

10.18 Equally the issues raised in grounds 5 as to whether the respondent was obliged to follow the procedure under the Law of **Distress Amendment Act 1888** which does not provide for judicial intervention where a tenant in default seeks to recover possession of the goods seized under a warrant of distress, are in our considered view matters for determination at trial and which can be raised in the defence by the appellant.

10.19 The appellant took issue with the omission by the court to take into account its affidavit in reply to the affidavit in opposition to summons to strike out the writ of summons and statement of claim by the lower court. The court below stated that the appellant had not filed the affidavit in reply by the date stipulated.

- 10.20 It is not in issue that the appellant did file the said affidavit on 22nd May 2020. We cannot make presumptions as to whether the said affidavit in reply was placed on the record or brought to the Judge's attention after filing it in the registry. Save to state that it is desirable that an adjudicator takes into account all the documents on record. If possible inquire as to whether the document has been filed on record.
- 10.21 We have perused the affidavit in reply in issue. The appellant deposed that the floating charge is void. That the loan agreement does not indicate that it is a secured loan and alluded to the financial statements of the respondent showing a reported loss of K3,606,547.
- 10.22 Further that the appointment of receiver is null and void. The goods seized would be insufficient to satisfy the admitted debt of US\$130,560.19 and that the appellant has priority to the distrained goods regardless of the receivership.
- 10.23 We have considered the facts deposed to in the omitted affidavit. We are of the view that the dispositions therein would not have yielded a different outcome or decision as regards the issue of whether the action had disclosed a reasonable cause of action. The facts stated in the affidavit in reply are matters that ought to be raised in defence.

10.24 In conclusion, we reiterate that the action by the respondent appears to have disclosed a reasonable cause of action. For the foregoing reasons, we find no merit in the appeal and accordingly dismiss it. Costs follow the event.

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M. M. Kondolo, SC
COURT OF APPEAL JUDGE

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F.M. Chishimba
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE