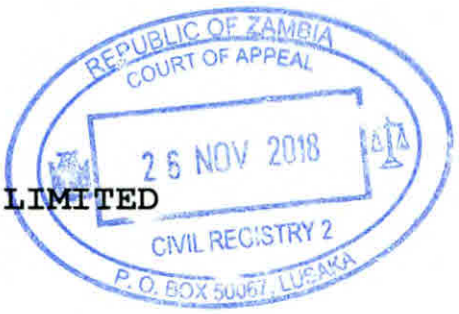
IN THE COURT OF APPEAL
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL No. 60/2017

Between:



JIMMY KALUNGA — 1ST APPELLANT

KALUMBE ENTERPRISES LIMITED — 2ND APPELLANT

AND

STANBIC BANK ZAMBIA LIMITED — RESPONDENT

CORAM: Mchenga, DJP, Chishimba and Kondolo, JJA

On 20th September 2017 and 26th November 2018

For the 1st and 2nd Appellants: C. Magubbwi, Messrs Magubbwi and Associates

For the Respondent: A. Siwila, Messrs Mambwe, Siwila & Lisimba Advocates

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. L. Estrange v F. Gracicob Limited [1934] 2KN 394

2. Indo Zambia Bank Zambia Limited v Muhanga [2009] Z.R. 56

3. African Banking Corporation (Z) Limited v Plinth Technical Works Limited and 5 Others SJZ No. 28 of 2015

4. Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited [1999] Z.R.61

5. Chilufya Dainess Bwalya Silwamba and Another v Stanbic Bank Zambia Limited Appeal No. 205/2016

6. The Attorney General v Achime 1983 ZR 61

7. Zulu v Avondale Housing Project Limited 1983 ZR 112

8. Musonda v Investrust Bank Plc Appeal No. 198 of 2009

9. Chrisma Hotel v Stanbic Bank Zambia Limited SCZ 6 of 2017

10. Huyton-With-Roby Urban District Council v Hunter [1955] 2 ALL ER 398

11. Nkhata and Four Others V The Attorney-General of Zambia [1966] Z.R. 124

Legislation referred to:

1. **The High Court Act, Chapter 27 of the laws of Zambia**

Works referred to:

1. **Chitty on Contract Volume I, 24th Edition, Sweet and Maxwell**
2. **Halsbury's Laws of England, Fourth Edition, Vol. 17, Butterworths, London, 1976.**

This is an appeal against a judgment delivered by the High Court on 10th March 2017. In that judgment, which was entered in favour of the respondent, the appellants were ordered to pay US$500,004.32, which was owing as at 14th July 2014, with interest at 13% per annum, within 60 days. In default, the respondent was at liberty to foreclose on Plot No. 9, Stand No. 8097, Sub-division D4 Sub-division Y4 of Farm No.748 Ndola and Lot 13135/M Masaiti and exercise its power of sale of the properties.

The history of the matter is that in April 2007, the respondent extended credit facilities totaling K1,300,000.00 to the 2nd appellant. As security, the 1st appellant surrendered his certificates of titles for Plot No. 9, Stand 8097, Sub-division D4 of Sub-division Y4 of Farm No.748 and Lot 13135/M Masaiti. In addition, the appellants executed a mortgage debenture deed, which was registered.

On 10th October 2007, the respondent availed the 2nd appellant an additional credit facility for the sum of US$ 1,000,000.00. According to the respondent, in the facility letter extending that credit, it was agreed that the mortgage debenture executed earlier would form part of the security for this additional facility. Contrary to the terms and conditions of that credit facility, the 2nd respondents did not service the debts regularly. As of May 2014, the outstanding amount totaled US$500,004.32.

The respondent, pursuant to **Order 30 Rule 14 of the High Court Rules** read together with **Order 88 of the Rules of the Supreme Court,** took out Originating Summons seeking payment of the outstanding sum; delivery up and possession of the mortgaged properties; foreclosure and sale; further or other relief; and costs.

The appellants did not dispute borrowing K1,300,000.00 from the respondent in April 2007 or that a mortgage debenture was executed to secure the amount. Neither did they dispute borrowing US$1,000,000.00, in October 2007, for the lease and buy back, of trucks and trailers. It was their position that by 1st December 2011, the K1,300,000.00 had been had been paid off through a payment by Leasing Finance Company. Following this payment, the mortgage debenture was discharged. It was also their position that the US$1,000,000.00 was not secured by the mortgage debenture.

It was the appellant's further position that as at 11th July 2014, when these proceedings were taken out, they

were only owing the respondent US$286,819.59 and not US$500,004.32. The amount claimed by the respondent, included US$122,037.00 in illegal finance charges, US$52,885.07 in rentals after accidents, US$4,083.35 in illegal extension charges and US$34,179.30 in illegal journal debits.

The appellants led evidence showing that US$1,000,000.00 advanced to them was split into 10 separate transactions, each relating to a truck and referred to as a "deal", and serially numbered. All the deals run for 35 months, with 5 expiring in October 2010 and the remainder in January 2011. Their records showed that 7 of the deals had been settled on 26th July 2010, but the respondent had unilaterally restructured them, and imposed the illegal financial and rental charges. They also averred that 5 of the trucks where involved in accidents and their insurer paid to the respondent after salvage, yet the respondent continued to charge them rentals.

The respondent denied the claim that the restructuring was unilateral and also denied receiving payment following the salvage of the trucks that were involved in accidents. They also denied making any illegal journal debits or illegal rental extensions.

The trial judge held that it was common cause that the respondent availed a credit facility in the sum of K1,300,000.00 and as security, a mortgage debenture deed was executed on 16th April 2007. It was then registered in the Lands and Deeds Registry. On the basis of the facility letter dated 10th October 2007, he held that the mortgage debenture deed executed on 16th April 2007, secured the US$1,000,000.00 lent to the 2nd appellant. In addition, he held that the payments by Leasing Finance Company did not discharge the debenture.

As regards, the amounts outstanding, he held that the vehicle asset finance accounts statements showed that the rental charges were not regularly serviced and as a

result, the appellant incurred late payment charges and extension charges. He held that in lease financing, if the lease is terminated for whatever reason before its expiry date the lessor is entitled to recoup its capital investment and also its finance charges. On this basis, the respondent was entitled to continue charging even on trucks that had been involved in accidents.

Coming to the restructured deals, the trial judge held that the respondent was entitled to terminate the deals after the expiry date because they remained unpaid. They were also entitled to restructure them and creating new accounts, transferring the money owed and charge interest on it. In any case, he held that the appellants consented to the restructuring, consequently, the finance charges for the restructured deals were not unilaterally, inexplicably, unconsciously or uncontractually levied by the respondent.

Four grounds of appeal have been advanced on behalf of the appellants, their thrust is essentially two-fold. Grounds 1, 2 and 3, are concerned with whether the respondent can foreclose on the properties set out in the mortgage debenture deed, when the US$1,000,000.00 credit facility was not secured by that deed. It is contended that in any case, the debenture was discharged following payments made to the respondent on behalf of the appellant, by Leasing Finance Company. Ground 4 relates to the holding that the appellants consented to the restructuring of the "deals" through which the US$1,000,000.00 was disbursed; it is contended that the holding is not supported by evidence.

In support of the 1st, 2nd and 3rd grounds of appeal, Mr. Magubbwi submitted that the mortgage debenture dated 16th April 2007, which was specifically registered for the K1,300,000.00 facility, could not have been used to secure the US$1,000,000.00 facility. He also submitted that the court's holding that the payment by Leasing

Finance Company Limited only discharged Plot No. 10 President Avenue, was against the weight of evidence because there was evidence that it was in settlement of full amount owed to the respondent.

He referred to the 2nd appellant's letter to the Leasing Finance Company Limited, dated 17th November 2011 and argued that it indicated that after the payment, the respondent was supposed to hand over title deed for Plot No.10 to Leasing Finance Company Limited. The appellants would thereafter collect the other title deeds.

In response, Mr. Siwila submitted that the trial judge's holding that the US$1,000,000.00 facility was secured by the mortgage debenture was supported by the evidence. The facility letter dated 10th October 2007, set out that the asset financing facility of US$1,000,000.00, would be secured by the security "already held" and the securities held at the time, was the mortgage debenture Deed of 16th April 2007 and a 3rd party mortgage over Plot No. 10 Ndola.

On the authority of **L. Estrange v F. Gracicob Limited**[1], Mr. Siwila submitted the appellants, having reduced their contract with the respondent into writing, cannot resile on the terms of that contract, whether they understood it or not unless they prove that it was under duress. Following the decision in **Indo Zambia Bank Zambia Limited v Mubanga**[2], he argued that sanction must visit a party who attempts to depart from agreed terms.

Mr. Siwila also referred to the case of **African Banking Corporation (Z) Limited v Plinth Technical Works Limited and 5 Others**[3] and submitted that property covered by a mortgage debenture in a transaction, as was the case in this matter, can be used as continuing security, in a future transaction.

As regards Mr. Magubbwi's submission that the respondent confirmed that the amount owed by the appellant had been settled in full, he submitted that a

correct reading of the letter indicates that it was just an undertaking that in the event of a payment, only Stand No. 10 would be discharged.

In the alternative, Mr. Siwila referred to the case of **Magic Carpet Travel and Tours Limited v Zambia National Commercial Bank Limited**[4] and argued that should we find that the mortgage debenture was discharged following the payment by Leasing Finance Limited, an equitable mortgage was created by virtue of the security for the property remaining in the respondent's hands. Further, on the authority of **Chilufya Dainess Bwalya Silwamba and Another v Stanbic Bank Zambia Limited**[5] and **Order 30 Rule 14 of the High Court Rules,** Mr. Siwila submitted that the respondent is entitled to the payment of money secured by the mortgage or charge, sale of the mortgaged property and delivery or possession, whether before or after foreclosure; the remedies are cumulative and he is not bound to select one of them.

The first issue we will deal with is whether the payments by Leasing Finance Company limited discharged the mortgage debenture. In their letter dated 15th November 2011, to the respondent, the 1st appellant asked them to set out the outstanding balances on three specified accounts. They also asked them to make an undertaking that once those accounts have **"..... been settled by Leasing Finance Company Limited, the original Title Deeds together with duly executed discharge documents shall be furnished directly to them in respect of Stand 10 President Avenue, Ndola"** (the underlining is ours for emphasis). In response to this letter, in a letter dated 17th November 2011, addressed to Leasing Finance Company Limited, titled **"Undertaking to Release Title for Plot No. 10 Ndola"**, the respondents set out the amounts owing and that they would release the title deed for the said property.

In our view, it is clear from these two letters that the payment by Leasing Finance Company Limited, would only discharge the security held by the respondent on

Plot. No.10. This being the case, we find that the trial judge's holding that the payment by Leasing Finance Company Limited did not discharge the debenture deed, cannot be faulted. We are not persuaded by Mr. Magubbwi's argument that the payment discharged the debenture deed, it is not supported by the evidence that was before the trial judge and we dismiss it.

Coming to the question whether the debenture also secured the US$1,000,000.00 facility, in clause 2.1.3 of debenture deed, the "principal sum" was defined as follows,

> **"Principal Sum shall mean the sum of KWACHA ONE BILLION THREE HUNDRED MILLION ONLY (K1,300,000,000.00) as set out in this Mortgage Debenture or such sum or aggregate of the amounts for the time being and from time to time disbursed by the bank in accordance with this Mortgage Debenture or any other written agreement"** (the underlining is ours for emphasis)

Further, the facility letter for the US$1,000,000.00, dated 10 October 2007, under sub-titles "SECURITY" lists out the security for the facility as:

> **"Held**

1. Suretyship signed by Jimmy Kalunga, NRC/Passport No. 202826/62/1 for ZMK1,600,000,000.00 (Zambian Kwacha One Billion Six Hundred Million Only);
2. Suretyship signed by Jimmy Kalunga, NRC/Passport No. 202826/62/1 for ZMK1,300,000,000.00 (Zambian Kwacha One Billion Three Hundred Million Only);
3. Suretyship signed by Jimmy Kalunga, NRC/Passport No. 202826/62/1 for ZMK464,000,000.00 (Zambian Kwacha Four Hundred and Sixty-Four Million Only);
4. Third Party Mortgage ZMK464,000,000.00 (Zambian Kwacha Four Hundred and Sixty-Four Million Only) over Plot No. 10 Ndola;
5. Deed of Mortgage Debenture for ZMK1,300,000,000.00 (Zambian Kwacha One Billion Three Hundred Million Only) incorporating Plot No. 9 Ndola; Plot No. 8097 Industrial Area Ndola; Plot No. 748 Twaliculile Road, Ndola; Lot No. 13135 Masaiti, Ndola;
6. Debenture (Floating) for ZMK1,300,000,000.00 (Zambian Kwacha One Billion Three Hundred Million Only) over company assets

Required

1. Fixed Charge for US$1,000,000.00 (United States Dollars One Million Only) over 10 x Axle Ribless Sloper Tipper Trailers and 10 x Horses;
2. Directors Guarantees signed by Jimmy Kalunga, NRC/Passport No. 202826/62/1, Juliet Kalunga, NRC/Passport No. ....., Erick Mulando, NRC/Passport No..... for US$800,000.00 (United States Dollars Eight Hundred Thousand Only) each supported by their respective personal Balance Sheets;" (the underlining is ours for emphasis)

From clause 2.1.3 it is that the debenture deed was not limited to securing the K1,300,000.00, it extended to future disbursements amounts that the respondent would have disbursed to the appellant. In addition, the facility letter the appellants signed to obtain the US$1,000,000.00, indicated that the mortgage debenture was one of the securities for the amount. In the face of this evidence, we find that the trial judge cannot be faulted for the holding that the US$1,000,000.00 facility was secured by the mortgage debenture.

Consequently, we find that the 1st, 2nd and 3rd grounds of appeal have no merits and they fail.

Coming to the 4th ground of appeal, it attacks the holding that the deals where restructured at the instance of the appellant. Mr. Magubbwi submitted that no written evidence was led to show that they were restructured with the consent of the appellant. He pointed out that Clause 17 of the lease agreement made it mandatory for any variation of the leases to be in

writing and signed by both the appellants and respondents. He referred to the cases of **Attorney General v Achiume**[6] **and Zulu v Avondale Housing Project Limited**[7], and submitted that the holding be set aside as it is not supported by the evidence.

Further, Mr. Magubbwi referred to the case of **Musonda v Investrust Bank**[8] and submitted that the respondent is not entitled to the finance charges interest as they were beyond what was agreed with the appellant. The respondent restructured the leases without the appellants consent and they continued to charge interest beyond the agreed period.

He also referred to the case of **Chrisma Hotel v Stanbic Bank Plc**[9] and submitted that by imposing extension charges the bank acted outside its mandate. This is because none of the lease clauses provide for restructuring of the leases and payment of extension and finance charges; consequently, they were illegal.

Mr. Magubbwi also submitted that interest charges debited to the appellants post 20th July 2010, were uncontractual and illegal because the amount collectable on each lease was set out in each deal. They did not go beyond that date. This being the case, all interest, late charges, journal debits should be refunded.

In response to his ground of appeal, focusing on the restructuring of deals no 0001, 0003, 0004, 0007, 0011, 0012, 0013 and 0015, Mr. Siwila submitted that the trial judge was entitled to hold that the appellant had agreed to pay finance charges on the restructured deals. He pointed out that Clauses 2.4 of the lease agreement, 11.1.2 and 18.5 of the agreement and it was submitted that the respondent was entitled to debit finance charges because they were in default.

Counsel also submitted that prior to the restructuring, the 2nd appellant was engaged and that the demand letters dated 25th July 2011 and 29th June 2013, prove

that they were in default. He then submitted that the holding in the cases of **Musonda v Investrust Bank Plc**[8] and **Chrisma Hotel v Stanbic Bank Zambia Limited**[9] were not applicable because it is obvious that there was no agreement between the client and the bank. He ended by submitting that clause 17 is inapplicable because there were no changes or variation in the lease agreement.

This ground of appeal, as we see it, is concerned with whether deals number 0001, 0003, 0004, 0007, 0011, 0012, 0013 and 0015 were restructured by the respondent with the consent of the appellants, following default. If it was the case, it would then follow that the respondent was entitled to the charges that followed the restructuring.

The respondent did not provide any document setting out the terms on which the restructuring took place. In fact, the appellant's position is that the changes were made unilaterally. But the trial judge accepted the evidence on behalf of the respondent that the restructuring was mutually agreed upon, after the

appellant's default. He held that despite claiming that they had paid off the deals, the appellants provided no evidence to support the assertion. He held that the deals were marked settled on 26th July 2010 because they were transferred to new accounts.

The first issue we will deal with are the charges associated with assets that were involved in accidents. We agree with the trial judge's holding that clause 8.4 of the lease agreement obligated the appellants to continue paying for assets involved in accidents. The terms of the clause are in our view clear and do not require any interpretation. As the trial judge held, other than claim that the insurer paid, the appellants have not provided any proof to support the claim. It is our view that the trial judge was entitled to hold that no payments were made and that the appellant was obligated to continue paying.

We have looked at the evidence that was before the trial judge relating to the restructured deals. As was

held by the trial judge, other than referring to the entries on each of the deals that they had been paid off, the appellants did not prove that they had actually paid. The trial judge accepted the evidence on behalf of the respondent that in fact the original deals were "settled" following the restructuring that created the new deals and not because they were actually paid off.

It is trite that a restructured loan is a loan that replaces the outstanding balance on the older loan and is paid over a longer period, usually with a lower instalment amount to accommodate a borrower in financial difficulty.

As we see it the question that remains to be resolved is whether the respondent proved that the deals were actually restructured with the agreement of the appellant. In **Halsbury's Laws of England, Fourth Edition, Vol. 17,** paragraph 19, page 16, the authors

opined as follows on the standard of proof in a civil matter:

> **"To succeed on any issue the party bearing the legal burden of proof must satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and adduce evidence sufficient to satisfy them to the required standard of proof. .....**
>
> **In civil cases the standard of proof is satisfied on a balance of probabilities. However, even within this formula variations in subject matter or in allegations will affect the required standard; the more serious the allegation, for example fraud, crime or professional misconduct, the higher will be the required degree of proof, although it will not reach the criminal standard."**

In the English case of **Huyton-With-Roby Urban District Council v Hunter**[10], at page 401, Denning, L.J., commenting on the burden of leading evidence in a case where there was a dispute as to whether a road was a public highway or not, observed as follows:

> **"In an article which I wrote in 1945 in the LAW QUARTERLY REVIEW (at p375) I tried to point out the distinction between a legal burden imposed by the law and a provisional burden raised by the state of the evidence. The part played by the legal burden of proof was well stated by VISCOUNT DUNEDIN in *Robins v National Trust Co.* (4) ([1927].A.C. at p.520):**
>
> > **"... onus as a determining factor of the whole case can only arise if the tribunal finds**

> **the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."**
>
> **It seems to me that is what happened in this case. The justices, after hearing and weighing the evidence, came to a determinate conclusion that is was a public highway repairable by the inhabitants at large, and so no question of onus came to it."**

From the forgoing, it is our view that even if the respondent did not produce the restructuring agreement, the trial judge's holding can still be upheld if it is supported by the evidence. It follows, that if there was evidence before the trial judge showing that it was more probable than not, that there was agreement, it was then within the judge's power hold that that there was a restructuring agreement.

The evidence before the trial judge established that the appellants did not pay on the initial deals, they defaulted. The appellants themselves admit having been

in default as at 11th July 2014, when the proceedings were instituted. The deals were restructured and the appellant started making payments on the restructured deals, but yet again defaulted. Though the respondent had the right to repossess the leased assets following the lapse of the initial deals, the evidence before the trial court does not suggest that they did. In the face of this evidence, it is our view that the trial judge's holding that the restructuring was with the agreement of the appellant, cannot be faulted.

In the case of **Nkhata and Four Others v The Attorney-General of Zambia**[11] the Court of Appeal held that:

> **"A trial judge sitting alone without a jury can only be reversed on questions of fact if (1) the judge erred in accepting evidence, or (2) the judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the judge did not take proper advantage of having seen and heard the witnesses, (4) external evidence demonstrates that the judge erred in assessing manner and demeanor of witnesses."**

The holding that the restructuring was with agreement, cannot in the face of the evidence we have just outlined be said to be perverse. There is therefore no basis for us to interfere with it.

We agree with Mr. Siwila's submission that the cases of **Musonda v Investrust Bank Plc**[8] and **Chrisma Hotel v Stanbic Bank Zambia Limited**[9], can be distinguished from the circumstances of this case. In this case, the issue was whether there was agreement to restructure, while those cases were concerned whether the changes were in line with the terms on the contract. It is for the same reasons that clause 17 of the leasing agreement is not applicable, it relates to a change in the terms of the lease while in this case is concerned with the creation of new leases. The fourth ground of appeal similarly fails.

Having dismissed the all the grounds of appeal, we uphold the judgement of the High Court delivered on 10th March 2017. The 1st and 2nd Appellants must pay the sum

of US$500,004.32, with interest at 13% per annum from 14th July 2014, within 60 days of this judgment. In default, the respondent is at liberty to foreclose on the mortgaged properties, namely, Plot No. 9, Stand No. 8097, Sub-division D4 Sub-division Y4 of Farm No.748 Ndola and Lot 13135/M Masaiti and exercise its power of sale of the properties.

Costs to the respondent.

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

F.M. Chishimba
JUDGE OF THE COURT OF APPEAL

M.M. Kondolo SC
JUDGE OF THE COURT OF APPEAL