

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

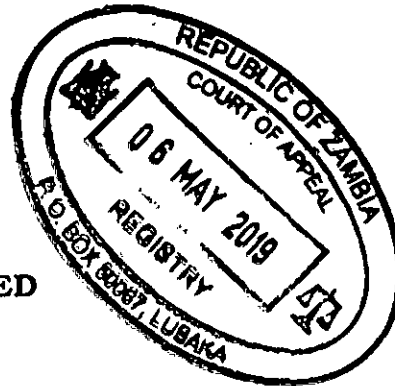
**NOM/15/2019
NOM/17/2019**

BETWEEN:

CAVMONT BANK LIMITED

AND

**SPANCRETE ZAMBIA LIMITED
DAVIES CHOLA KATAYA
ANDISENI AILOSI PHIRI**



APPLICANT

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

Coram: Makungu, Sichinga and Ngulube, JJA
On 22nd February 2019, 6th March, 2019 and 30th April, 2019

For the Appellant: Mr. S.C Mwanashiku of Messrs M & M Advocates, Mr. P.G Katupisha of Messrs Milner & Paul Legal Practitioners
For the Respondents: Mr. M. Mwansa of Messrs Mosha and Associates

RULING

Sichinga, JA, delivered the Ruling of the Court

Cases referred to:

1. *Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited* SCZ No. 20 of 2011
2. *Edward Owen Engineering Limited v. Barclays Bank International Limited* (1978) ALL ER 976

Legislation referred to:

1. Court of Appeal Act No. 7 of 2016
2. Court of Appeal Rules, Statutory Instrument No. 65. of Act No. 7 of 2016

3. *Rules of the Supreme Court 1999 Edition (White Book)*

This is a Ruling encompassing two Motions by the applicant, Cavmont Bank Limited.

The first motion is for leave to appeal the Judgment of this Court dated 30th January, 2019 made pursuant to **Section 13(2) and (3) of the Court of Appeal Act¹** and **Order 11 Rule 1 of the Court of Appeal Rules²**. It was filed into Court on 12th February, 2019. The second Motion is for stay of execution of the said Judgment pending the hearing and determination of the application for leave to appeal made pursuant to **Order 59/13/1 of the Rules of the Supreme Court 1999 Edition³** and **Section 13(4) of the Court of Appeal Act *Supra***.

The first Motion for leave to appeal is supported by an affidavit in support deposed to by one Rita Ndhlovu, filed into Court on 12th February, 2019 and by skeleton arguments of even date. The second Motion for stay of execution of Judgment is equally supported by an affidavit deposed to by the said Rita Ndhlovu and filed into Court on 13th February, 2019 together with skeleton arguments and supplementary affidavit deposed to by one Carol

Kaputa filed into Court on 22nd February, 2019 together with skeleton arguments.

According to the supporting affidavits, sworn by Rita Ndhlovu, the applicant is dissatisfied with the Judgment and wishes to exercise its right of appeal to the Supreme Court. The proposed grounds of appeal are as follows:

1. The court below erred in law and fact when it held that the letter of demand dated 22nd October, 2016 was not in compliance with the provisions of the Advance Payment Guarantee issued by the appellant.
2. The court erred in law and fact when it held that the issue of interest was raised by the respondents in the High Court when the record shows that in the proceedings before the High Court, there were no clear and specific directions raised by the respondent against the interest claimed by the appellant.
3. The court below erred in law when it directed the appellant to refund the respondents the sum of K5,800,000 when

there was no such claim made by the respondents in the High Court.

4. The court below erred in law when it awarded the respondents damages when there was no such claim by the respondents in the High Court.

The applicant states that it should not be deprived of its right to appeal. Reliance is placed on the case of ***Twampane Mining Co-operative Society Limited v. E and M Storti Limited***¹ which held *inter alia* that as a general rule an applicant should not be deprived of his right to appeal. It is contended that the proposed grounds of appeal reveal that the applicant stands a very reasonable chance of success on the two grounds which state that this Court granted reliefs which were not pleaded in the court below. Another ground contends that the Court allowed the appeal on a ground that was not clearly and specifically addressed by the respondents in the court below.

Mr. Mwanashiku, learned counsel for the applicant restated the contents of the skeleton arguments. Counsel submitted that the Court awarded the respondents damages which were not asked for in the court below. That the Court ordered the applicant to refund

the sum of K5,800,000=00 when this was not canvassed in the court below.

Mr. Katupisha, learned counsel for the applicant equally relied on the affidavits in support of both motions. He repeated the submissions made by Mr. Mwanashiku. In addition, he urged the Court to have due regard to the record of appeal and the sum of K5,800,000=00 ordered to be refunded to the respondents by this Court. Counsel submitted that this was a compelling reason to stay execution of Judgment. We were urged to exercise our discretion in favour of granting the stay, and further urged to grant leave to appeal.

The Motions were vehemently opposed by the respondents by way of affidavits and skeleton arguments. In opposing the application for leave to appeal, the respondents relied on the affidavits sworn by counsel on 19th February, 2019 and skeleton arguments of even date. The gist of the affidavit is that the applicant has not presented this Court with any real or reasonable prospect of success of the appeal and has purely submitted a fanciful prospect. That the applicant has not shown how the proposed appeal raises a

point of law of public importance or compelling reasons such as questions of great public interest or questions of general policy.

In opposing the application for stay of execution, the respondents relied on their affidavit in opposition sworn by counsel and filed into Court on 19th February 2019 together with skeleton arguments. The gist of the affidavit is that the applicant has not shown the prospect of success of the appeal and merely relies on the fact that it intends to apply for leave to appeal against this Court's judgment.

We have considered the applications and authorities cited by the parties. We shall first consider the application for leave to appeal to the Supreme Court. **Order 11 Rule 1 (1) of the Court of Appeal *Supra*** provides that:

"An appeal from a judgment of the Court shall be made to the Supreme Court with leave of the Court."

Leave to appeal may only be granted if the Court is satisfied that at least one of the conditions stipulated in **Section 13** of the Court of Appeal Act is satisfied. **Section 13(3)** provides as follows:

"The Court may grant leave to appeal where it considers that-

(a) the appeal raises a point of law of public interest;

(b)

(c) the appeal would have a reasonable prospect of success;

Or

(d) there is some other compelling reason for the appeal to be heard."

The applicant contends that the appeal raises a point of law of public importance as to whether the respondents should be refunded the sum of K 5,800,000=00. Further, that there is a compelling reason for the appeal to be heard as to whether the applicant should refund Zesco and the respondents the same amount.

We are of the view that the appeal does not raise any matter of public interest or general policy upon which a further scrutiny and decision of the Supreme Court would be to the public advantage. It was not a moot point in the Court below that there was an agreement between the applicant and the 1st respondent to issue an advance payment in favour of Zesco Limited to enable the 1st respondent carry out its obligations under a contract for the supply of 1000 kilometers of ABC cable to ZESCO. That in furtherance of

that agreement the 1st respondent provided a third party mortgage in respect of stand **No. 1044/CL/4** and additional security of K5,800,000=00 deposited with the applicant into a fixed deposit account it held.

In considering the grounds before us, we gave our interpretation to the guarantee issued by the 1st respondent in favour of ZESCO and the awards granted by the trial court. We took the position that the lower court misapplied the principles laid down in the case of ***Edward Owen Engineering Limited v. Barclays Bank International Limited***². We distinguished the facts in that case from the present one. In the **Edward Owen** case the guarantee was payable on demand without proof or condition whilst in this case the guarantee was payable on demand, if the condition precedent occurred as couched in the terms of the advance payment guarantee.

Our view was that it was 'imperative' to adhere to the terms of the advance payment guarantee. As such we quashed the lower court's judgment, the effect of which the parties were placed in their

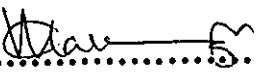
original positions with the applicant ordered to refund the respondent the sum of K5, 800,000=00.

As regards the issue of damages raised, we awarded damages in relation to the refund of the house, stand number **1044/CL/4 Makishi /Broads Road, Rhodes Park, Lusaka**, if the property had been sold. The reliefs granted were a consequence of our position in allowing the appeal. To achieve clarity to our Judgment, the parties were required to settle an order embodying the Judgment of the Court in accordance **with Order 10 Rule 23 of the Court of Appeal Rules**. Had the parties settled an order for approval by the Court, the awards granted would have been clear to them. We are thus not persuaded that a point of public importance or a compelling reason warranting the Supreme Court's attention has been raised by this appeal. For the foregoing, the application for leave to appeal is accordingly refused with costs.

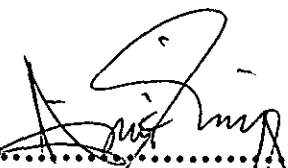
Given the position we have taken, that the motion for leave to appeal to the Supreme Court does not raise a point of law of public importance or disclose a compelling reason for the appeal to be heard by the Supreme Court, we are inclined not to grant the

application for stay of execution of the Judgment. We accordingly discharge the ex-parte order of stay of execution granted by a single Judge on 15th February, 2019.

We award costs to the respondents.

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C. K. Makungu
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE