

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

**APPEAL NO 98/2019**

**BETWEEN:**

**PROFAB ZAMBIA LIMITED**  
**ALEXANDER ZIMBA**  
**MICHEAL ZULU**  
**WINFRIDAH CHITONDO**



**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**  
**3<sup>RD</sup> APPELLANT**  
**4<sup>TH</sup> APPELLANT**

**AND**

**FIRST NATIONAL BANK ZAMBIA LIMITED**

**RESPONDENT**

**CORAM: KONDOLO, MULONGOTI AND SIAVWAPA, JJA**

**On 25<sup>th</sup> September and 19<sup>th</sup> November, 2019**

**FOR THE APPELLANTS: MR. KHOSA OF ALBERTO NGOYI**  
**ADVOCATES**

**FOR THE RESPONDENTS: MISS MWAPE BWALYA OF MESSRS**  
**MWENYE MWITWA ADVOCATES**

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## **J U D G M E N T**

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**SIAVWAPA, JA, delivered the Judgment of the Court.**

### **1.0. INTRODUCTION**

1.1. This is an appeal against the Judgment of the High Court, Commercial Division, presided over by Mr. Justice Sunday Nkonde, SC by which he ordered the Appellants to pay the

Respondents all monies owing, a foreclosure on and an order to sell the properties mortgaged to secure the facilities.

## 2. **BACKGROUND**

- 2.1. Between October 2012 and September 2013, the 1<sup>st</sup> Appellant obtained three facilities from the Respondent which were secured by a third party legal mortgage on the property of the 2<sup>nd</sup> Respondent.
- 2.2. Further security was provided by third party equitable mortgages by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. Further to that the 4<sup>th</sup> Respondent and one Robert Banda gave suretyship/guarantees in favour of the Respondent which were unlimited in nature.
- 2.4. The three facilities which were obtained on 8<sup>th</sup> October 2012, 30<sup>th</sup> November 2012 and 6<sup>th</sup> September 2013 comprised an overdraft, a performance guarantee, advance payment guarantee and an asset based finance except for the first facility which did not include asset based finance.
- 2.5. The 1<sup>st</sup> Appellant defaulted and the Respondent issued demand letters with a seven day ultimate failure to which foreclosure on the mortgaged properties and the enforcement on the guarantees would follow.

- 2.6. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants did not dispute their indebtedness but attributed the failure to meet the monthly instalments on the failure by the Ministry of Health to pay them on the project they were contracted to undertake. They in turn proposed a repayment plan.

In view of the confirmed default by the Appellants, the Respondent commenced an action in the Court below.

### 3. **THE CLAIMS IN THE COURT BELOW**

- 3.1. In the Court below, the Respondent commenced an action by way of originating summons seeking the following reliefs;
1. *Payment of all monies which as at 28<sup>th</sup> January, 2016 stood at K6,836,242.41 plus interest, costs and all other charges due and owing to the Applicant Bank by the 1<sup>st</sup> Respondent under facilities availed to the 1<sup>st</sup> Respondent and secured by a third party legal mortgage and two third party equitable mortgages over sub-division C of Lot No. 5199/M, Lusaka, Stand No. 26163, Lusaka and LOT No 7110/M Lusaka (the mortgaged properties) registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively.*
  2. *An order to foreclose on the mortgaged properties.*
  3. *Delivery of vacant possession of the mortgaged properties by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to the Appellant.*
  4. *An order of sale of mortgaged properties by the Applicant.*

5. *An order for the enforcement of the guarantees/ suretyship signed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.*
6. *Costs and*
7. *Any other relief the Court shall deem fit.*

#### 4.0. **FINDINGS AND DECISION OF THE COURT BELOW**

4.1. After evaluating the evidence before him, the learned Judge made the following findings;

- (a) *The Respondent was entitled to charge interest on a delinquent account.*
- (b) *As at 6<sup>th</sup> September 2013 when the third facility letter was issued, the second facility was still in arrears.*
- (c) *Inability to pay a loan instalment is not a defence.*
- (d) *That even if the 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not sign consent letters for their properties to be used as unlimited securities for the 1<sup>st</sup> Appellant's facilities, the deeds of deposit of Title Deeds they executed clearly provided the consent.*

#### 5. **JUDGMENT**

5.1. The learned Judge granted all the orders asked for by the Respondent accordingly.

#### 6. **THE APPEAL**

6.1. The Memorandum of Appeal filed into Court on 12<sup>th</sup> November 2018 contains two grounds of appeal as follows;

1. *The learned trial Judge erred in both law and fact when he held that the 4<sup>th</sup> Respondent (now 4<sup>th</sup> Appellant) was a Director in the 1<sup>st</sup> Respondent (now 1<sup>st</sup> Appellant) and knew or ought to have known of the dealings of the 1<sup>st</sup> Respondent including the facilities it was being availed by the Applicant when in fact the 4<sup>th</sup> Respondent has never been a Director in the 1<sup>st</sup> Respondent.*
  2. *The learned trial Judge erred both in law and fact when he dismissed an application on record which had complied with all the Rules of Court.*
- 6.2. Both parties filed their heads of argument on 9<sup>th</sup> June 2019 and 11<sup>th</sup> September 2019 respectively.
- 6.3. We wish to observe at the outset that from the two grounds of appeal, the Appellants are not challenging the Judgment in respect of the 1<sup>st</sup> to the 3<sup>rd</sup> Appellant. They have only taken issue with the Judgment as it relates to the 4<sup>th</sup> Appellant in the first ground of appeal.
- 7.0. **OUR VIEWS ON GROUND 1**
- 7.1. This ground as already alluded to seeks to impugn the Judgment of the Court below as it finds that the 4<sup>th</sup> Appellant

was a Director in the 1<sup>st</sup> Appellant who knew or ought to have known the state of affairs of the 1<sup>st</sup> Appellant.

- 7.2. In attempting to dispel this finding of fact by the learned trial Judge, the Appellants have argued that the 4<sup>th</sup> Appellant, who was initially a Director at the time the 1<sup>st</sup> Appellant was incorporated, had submitted with PACRA, a notice of withdrawal as Director in 2011.

According to the heads of argument, the Appellants contend that the withdrawal notice was submitted way before the 1<sup>st</sup> Appellant obtained the three facilities but that for some reason PACRA did not act on the notice by reason of which the 4<sup>th</sup> Respondents' name remained on the company's Register as a Director.

- 7.3. In his Judgment, the learned Judge found the 4<sup>th</sup> Appellant to have been a director, which fact is not in dispute.
- 7.4. What is in dispute is her directorship at the time the facilities were obtained by the 1<sup>st</sup> Appellant.
- 7.5. In her 2<sup>nd</sup> further affidavit in opposition to the originating summons, filed on 8<sup>th</sup> September, 2016, she states that by Board resolution of 25<sup>th</sup> September, 2012, she was made Director of the 1<sup>st</sup> Appellant.

7.6. We have however, examined the three facility letters and the first one is dated 8<sup>th</sup> October, 2012. The second is dated 30<sup>th</sup> November 2012 while the third is dated 6<sup>th</sup> September 2013. Clearly, the 4<sup>th</sup> Respondent had already become a Director by the time the first facility letter was executed.

7.7. We also note that the 4<sup>th</sup> Appellant executed the Memorandum of Deposit of Title Deeds on 8<sup>th</sup> October 2012, the same date the 1<sup>st</sup> facility letter was issued. She cannot therefore, now be heard to say that she was not a Director at the time the facilities were obtained. To confirm that fact, a printout obtained from PACRA dated 2<sup>nd</sup> October 2012 bears the 4<sup>th</sup> Appellant as one of the three Directors.

7.8. We therefore, find no difficulty in finding that the learned trial Judge was on firm ground to hold the 4<sup>th</sup> Appellant as Director, who knew or ought to have known the financial status of the 1<sup>st</sup> Appellant. Ground 1 must therefore fail and we dismiss it accordingly.

## **8. OUR VIEW ON GROUND 2**

8.1. This ground is an attempt to resurrect a dead issue. This is based on an interlocutory application raised by the 4<sup>th</sup> Appellant in the Court below for the Court to proceed as though the matter was commenced by writ of summons. The

learned trial Judge dismissed the application for being irregular.

8.2. Following the dismissal of the interlocutory application, no application for leave to appeal was filed and the Court below proceeded with the main matter, the originating summons.

8.3. It is our considered view that, if the 4<sup>th</sup> Appellant was dissatisfied with the ruling of the Court on the interlocutory application, she ought to have sought leave of the Court to lodge an appeal.

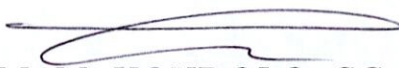
8.4. Having slept on her right of appeal, the 4<sup>th</sup> Appellant cannot now purport to appeal to this Court, a decision on an interlocutory matter after the main action has been heard and determined.

8.5. It is our considered view that the second ground is misconceived at law and that we possess no jurisdiction to entertain the appeal based on that ground.

#### 9.0. **CONCLUSION**

9.1. In view of our position on the two grounds of appeal, the appeal must fail in its entirety for being devoid of merit.

9.2. We dismiss it accordingly with costs to the Respondent to be taxed in default of agreement.



M. M. KONDOLO, SC  
**COURT OF APPEAL JUDGE**



J. Z. MULONGOTI  
**COURT OF APPEAL JUDGE**



M. J. SIAVWAPA  
**COURT OF APPEAL JUDGE**