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**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**APPEAL NO. 165/2021**

**BETWEEN:**

**PINEROADS AND GENERAL CONTRACTORS  
LIMITED**

**1<sup>ST</sup> APPELLANT**

**COLLINS KABWE, MUMBA MUSOSHA &  
MIRRIAM KASONGO MUSOSHA** *(Acting in their  
capacity as administrators of the late Chrispin  
Mumba Musosha)*

**2<sup>ND</sup> APPELLANT**

**CHAPA YOTAM CHIKABA**

**3<sup>RD</sup> APPELLANT**

**AND**

**ACCESS BANK ZAMBIA LIMITED**

**RESPONDENT**

**CORAM: CHASHI, CHISHIMBA, NGULUBE, JJA.**  
***On 21<sup>st</sup> September, 2021 and 26<sup>th</sup> November, 2021.***

***For the Appellants*** : *M. Chitundu, Messrs Barnaby, Chitundu and  
Khunga Advocates*

***For the Respondent*** : *I. Siame, Messrs TMS Legal Practitioners*

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

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

**Cases referred to:**

1. *Magic Carpet Travel and Tours vs Zambia National Commercial Bank Limited,*
2. *Dong Feng Logistics Limited vs Avocado Mining Limited and 2 others* 2017/HP/2057
3. *Collet vs Van Zyl Brothers Limited* (1966) Z.R.65
4. *African Banking Corporation Limited vs Plinth Technical Works Limited,* SCZ/8/128/2015

**Other works referred to:**

1. *Coote's Treatise on the Law of Mortgages, 9<sup>th</sup> Edition, Richard Holmes Coote, Volume 1, 1927*
2. *John Mc Ghee Snell's Equity, 35<sup>th</sup> Edition, Thomson Reuters (Legal) Limited 2005*
3. *Chitty on Contracts, Volume 1, 28<sup>th</sup> Edition paragraph 22-001*

**INTRODUCTION**

1. This appeal is against a Judgment of the High Court Commercial Division, delivered by Shonga, J. on 20<sup>th</sup> April, 2021. The court entered judgment in favour of the respondent by ordering foreclosure nisi and further ordered that the appellants pay the respondent the outstanding balance of ZMW8,576,802.11 being the judgment debt, inclusive of contractual interest owing as of 17<sup>th</sup> April, 2021.
2. The court went on to order that in the event that the appellants fail to pay the judgment debt and interest due to the respondent



within thirty days of the date of judgment, foreclosure would be rendered absolute and the third appellant would convey the mortgaged properties to the respondent unconditionally. The court awarded costs to the respondent, to be taxed in default of agreement.

### **BACKGROUND**

3. The respondent commenced an action against the appellants by originating summons with an affidavit in support on 17<sup>th</sup> April, 2020. The bank sought the payment of the sum of ZMW3,600,000.00, being the outstanding amount under Term Loan Facility which was guaranteed by the third appellant. It also sought enforcement of a third-party mortgage in respect of the remaining extent of Farm 1445, Central Province, Zambia, by foreclosure and sale of the same.
4. In the affidavit in support sworn by one Ray Kavuzya, the head credit at the respondent bank, it was deposed that by facility letter dated 10<sup>th</sup> August, 2009, the first respondent was granted a loan in the sum of ZMW2,050,000.00 for the procurement of construction machinery and equipment, which was supposed to

be repaid within a period of six months, in monthly instalments of ZMW397,450.69. with interest at the rate of 27 percent per annum being the base rate of 21 percent plus 6 percent. The loan was secured by a personal guarantee executed by the second respondent.

5. In December, 2009, the parties substituted the facility letter of 10<sup>th</sup> August, 2009 with one dated 16<sup>th</sup> December, 2009, extending the repayment period and proposing additional security which included a third-party mortgage over the remaining extent of Farm Number 1445, Central Province, which secured the sum of K2.8 Billion (unrebased).
6. It was averred that the third appellant voluntarily deposited the certificate of title relating to Farm Number 1445, Central Province, Zambia and the second and third appellants executed a third-party mortgage with the respondent, which was also registered at the Lands and Deeds Registry.
7. The appellant restructured the facilities that were given to the first respondent by a facility letter dated 24<sup>th</sup> August, 2016. It extended two facilities, one was a bank guarantee in the sum of six hundred thousand kwacha while the other was a term loan



of three million six hundred thousand kwacha (ZMW3,600,000.00).

8. The term loan was secured by a mortgage over Subdivision A of Lot Number 3764/M Ibex Hill as well as a legal mortgage relating to the remaining extent of Farm Number 1445, Central Province, Zambia. It was deposed that the first appellant defaulted in its payment obligations and is indebted to the respondent in the sum of ZMW8,576,802.11. The principal being ZMW3,600,000.00 with interest of ZMW4,976,802.11. which remained outstanding despite several demands by the respondent.

#### **LOWER COURT'S DECISION**

9. At the hearing of the matter on 8<sup>th</sup> February, 2021, the learned Counsel for the respondent informed the court that the second appellant passed away on 9<sup>th</sup> January, 2021. The court granted the appellants about thirty days in which they would file documents in opposition to the respondents originating summons out of time. However, the appellants did not file any documents and the lower court concluded that the action was

unopposed. The court opined that the facility letter appeared to be incomplete because it did not contain the closing page showing acceptance by the first respondent.

10. The court further opined that the initial lending was secured by a third-party legal mortgage over the remaining extent of Farm 1445, Central Province, to secure the sum of ZMW2,800,000.00. The court found that the respondent expressed his consent to have the remaining extent of Farm 1445 Central Province, Zambia used as security for lending to the second appellant and the first appellant.
11. The court found that the respondent extended loan facilities to the appellants over the remaining extent of Farm 1445, Central Province Zambia and a mortgage over S/D "A" of Lot Number 3764/M, Lusaka, Zambia. The court stated that the third party mortgage relating to the remaining extent of Farm 1445, Central Province appeared to be an incomplete copy and did not show the parties clause.
12. The Court referred to the learned author of ***Coote's Treatise on the Law of Mortgages, 9<sup>th</sup> Edition, Richard Holmes Coote, Volume 1, 1927***<sup>1</sup> where the following observations at page 168 were made-



***“A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit operates as an equitable mortgage or charge, by virtue of which the deposittee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself.”***

The lower court referred to the case of ***Magic Carpet Travel and Tours vs Zambia National Commercial Bank Limited***<sup>1</sup> where it was held that-

***“On the last issue of an equitable mortgage, the position at common law is that once a borrower has surrendered his title deed to the lender as security for the repayment of a loan, an equitable mortgage is thus created; the borrower, in such a relationship, cannot deal with the land without the knowledge and approval of the lender whose interest in the land takes precedence. One of the shortcomings of an equitable mortgage is that it is not registered in the Lands and Deeds Registry as an encumbrance against the land; the relationship between the lender and borrower is one that is based on mutual trust between the two.”***

The court formed the view that the deposit of title deeds relating to Subdivision “A” of Lot 3764/M by the 3<sup>rd</sup> Respondent to the Applicant created an equitable mortgage in favour of the

Applicant. The court further found that the applicant held an equitable mortgage over the remaining extent of Farm 1445, Central Province, Zambia.

13. Judgment was entered in favour of the respondent in the sum of ZMW8,576,802.11, with interest at 6% per annum from date of originating summons to date of judgment and was to be paid within thirty days of the Judgment.

#### **THE APPEAL BEFORE THIS COURT**

14. The appellants were dissatisfied with the decision of the lower court and lodged an appeal to this court, advancing four grounds of appeal couched as follows-

1. *The Learned trial Judge misdirected herself both in Law and fact by holding that the 3<sup>rd</sup> Appellant's property namely the remainder of Farm 1445 Central Province be charged with the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' loan facility of ZMW3,600,000.00 in the absence of express consent from the 3<sup>rd</sup> Appellant or evidence to that effect.*
2. *The Court below erred in both law and fact by holding that the 3<sup>rd</sup> Appellant agreed to property registered in his name, being the remaining extent of Farm 1445, Central Province, Zambia, be used as security not just for the initial loan facility, but also as a continuing security for further facilities by the 1<sup>st</sup> Respondent to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in the absence of evidence to that effect.*



3. *The Court below erred in both law and fact by holding that the Certificate of Title relating to the remaining extent of Farm No. 1445, Central Province was in fact surrendered for the purpose of providing security for the loans (ZMW2,050,000.00 and ZMW3,600,000.00) when in fact the said property was pledged as security regarding the initial loan facility of ZMW2,050,000.00 only by the 3<sup>rd</sup> Appellant.*
4. *The Court below misdirected itself when it condemned the 3<sup>rd</sup> Appellant in costs in light of the Circumstances and/or evidence on record.*

### **APPELLANTS' CONTENTIONS**

15. The appellants' advocates argued grounds one, two and three together as they are interrelated. It was submitted that the underlying issue in the three grounds is that the third respondent as the registered owner of the remaining extent of Farm Number 1445 Central Province, Zambia did not consent to his property being used as a continuing security for further facilities of the first and second appellant.
16. It was argued that the lower court erred in law and fact when it held that the third appellant's property in Central Province be charged with the first and second appellants' loan facility of ZMW3,600,000.00. It was contended that the first and second appellant provided specific security, which was subdivisions A of

Lot Number 3764/M Ibex Hill, Lusaka for the term loan of ZMW3,600,000.00, with interest of ZMW4,976,802.11.

17. According to the appellants' Counsel, the purpose of the term loan facility of ZMW3,600,000.00 was to enable the first respondent to pay the initial loan of ZMW 2,050,000 with interest. It was contended that the term loan facility of ZMW3,600,000.00 was a fresh, complete and independent transaction to which the first and second appellants provided Lot Number 3964/M, Ibex Hill, Lusaka as security.
18. It was argued that the fact of disbursing the loan facility of ZMW3,6000,000.00 in favour of the first and second respondents discharged the contractual obligations under the initial loan facility and thus freed the third respondent's property, the remaining extent of Farm 1445, Central Province, Zambia from any encumbrances as the third party mortgage stood discharged.
19. According to Counsel, the only property that was liable under the term loan facility of ZMW3,600,000.00 was subdivision A of Lot number 3784/M, Ibex Hill Lusaka. It was submitted that the debt that was financed, in the sum of ZMW2,050,000.00 was



discharged forthwith as the same was fully paid off. The case of ***Dong Feng Logistics Limited vs Avocado Mining Limited and 2 others***<sup>2</sup> was referred to where the court stated that a property under a mortgage transaction is only discharged upon full payment of the loan facility or when parties agree to discharge the property.

20. The court's attention was drawn to the author **John Mc Ghee** ***Snell's Equity, 35<sup>th</sup> Edition, Thomson Reuters (Legal) Limited 2005***<sup>2</sup>, where a mortgage is described as –

***“A mortgage is a conveyance of some interest in land or other property as a security for the payment of a debt or discharge of some other obligation for which it is given. Where a legal estate is transferred, the mortgage is a legal mortgage. Where only an equitable interest is transferred, whether because the mortgagor has merely an equitable interest or because he uses a form insufficient for the transfer of a legal interest, the mortgage is called an equitable mortgage. On satisfying the obligation in respect of which the mortgage was given, the mortgagor has a right to redeem, that is to recover full ownership in the property.”***

21. It was contended that the third appellant surrendered the certificate of title in respect of the subject property to provide security for the loan of ZMW2,050,000.00 and not for any other loan facility. It was argued that the lower court erred when it

held that the depositing of the certificate of title in respect of the remaining extent of Farm 1445, Central Province extended to other loan facilities between the respondent and the first and second appellants in the absence of any evidence of consent on the part of the third appellant.

22. Counsel contended that for any contract to be valid at law, parties must freely consent to the transaction. It was argued that the third appellant ought to have consented to the use of his subject property as continuing security.
23. In arguing ground four, it was submitted that it is not in the interest of justice to condemn the third appellant to pay costs of the proceedings in the court below to enforce the right of the respondent for the term loan facility which the third appellant was not a party to. The case of **Collet vs Van Zyl Brothers Limited**<sup>3</sup> was referred to where the Court stated that-

***“A trial Judge, in exercise of his discretion should, as a matter of principle, view the litigation as a whole and see what was the substantial result. Where he does not do so, the Court of Appeal is entitled to review the exercise of his discretion.”***



24. The court was urged to allow the appeal, with costs especially that the third appellant as the registered proprietor of the subject property did not surrender it for use as security or continuing security to any facility between the respondent and the first and second appellant apart from the initial loan facility of ZMW2,050,000.00.

### **RESPONDENT'S CONTENTIONS**

25. The respondent filed heads of argument on 3<sup>rd</sup> September 2021, in response to those of the appellant. Responding to ground one, it was argued that the lower court was on firm ground when it held that the third appellant consented to the property registered in his name, the remaining extent of Farm 1445, Central Province, Zambia, being used as security for the initial facility and for further facilities as 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.
26. Counsel referred to the affidavit in support of originating summons sworn by Ray Kavuzya, specifically exhibit "RK4" of

the said affidavit which is the Third Party mortgage Deed signed by the second and third appellants, which shows that they provided express consent.

27. It was submitted that the third appellant consented to the property registered in his name being used as security for the initial facility and for further facilities, as can be seen from paragraph 4 of the recital to the third party mortgage which reads-

**4.     *The Mortgagor will at any time if and when required by the Bank so to do execute to the Bank or as the Bank shall direct such further legal or other mortgages or charges as the Bank shall require of and on all the Mortgagor's estate and interest in the premises comprised in the said deposited deeds and writings or which may hereafter be acquired by and belong to the Mortgagor (including any vendor's lien) to secure all money and liabilities hereby agreed to be paid or intended to be hereby secured such mortgages or charges to be prepared by or on behalf of the Bank at the costs of the Mortgagor to contain such clauses for the benefit of the Bank as the Bank may reasonably require.***"

28. The court's attention was also drawn to the letter from the third appellant which shows that consent was given for the property to be used as security. It was argued that the record from the



court below shows that the third appellant did not object to the third party mortgage.

29. The respondent also exhibited account statements which showed that the appellants defaulted and owed the respondent the Judgment sum of ZMW8,576,802.00. The respondent's advocates submitted that the mortgage action was not opposed and this was an indication that the appellants acknowledged their indebtedness.
30. In arguing ground two, Counsel referred to the third -party mortgage which was executed by the appellants and the respondent, particularly paragraph 8 which reads-

***“This security shall be a continuing security to the Bank to cover advances and other banking facilities made or to be made thereafter to the customer notwithstanding any settlement of account or variation, or extension or replacement of the facility herein or other matter or thing whatsoever and shall not prejudice or affect any security which the bank may now hold or at any time hereafter hold in respect of further and future advances made or to be made by the Bank or in respect of the moneys hereby secured or any of them or any part thereof respectively.”***

31. Having made reference to the recital highlighted above, it was submitted that the third appellant consented in the third-party mortgage which secured the loan of ZMW3,600,000.00 and interest using the remaining extent of Farm 1445, Central Province, Zambia and Sub Division "A" of Lot Number 3764/M, Lusaka, Zambia. It was further argued that the third -party mortgage was validly executed and that the mortgage transferred a legal estate to the respondent, as the third respondent accepted the terms that allowed mortgaging the property for any current and future borrowing.

32. Counsel went on to refer to the case of ***African Banking Corporation Limited vs Plinth Technical Works Limited<sup>4</sup>***, where the court was of the view that-

*" . . . the meaning of the words "other obligation" in the letter of undertaking and consent and in the mortgage deed become very clear and can easily be interpreted to mean 'other facilities' or 'further advances', We do not see any ambiguity at all in these words and the real intention of the parties when they signed the mortgage deed can very easily be discerned from the documents, which is that the security was continuing security for further facilities or further advances."*



33. In ground three it was submitted that the trial court was on firm ground when it made the findings that the third appellant signed the mortgage documents freely and voluntarily and that the mortgage deed is enforceable against the third appellant because of the principle of sanctity of contract.

34. The case of ***African Banking Corporation vs Plinth Technical Works (supra)*** was referred to, where the court stated that-

***“Where the agreement of the parties has been reduced in writing and the document containing the agreement has been signed by one or both of them, it is well bound by the terms of the written agreement whether or not he is ignorant of their precise legal meaning.”***

35. The court went on to cite ***Chitty on Contracts, Volume 1, 28<sup>th</sup> Edition paragraph 22-001<sup>3</sup>*** which states that-

***“A party to a contract must perform exactly what he undertook to do and when an issue arises as to whether performance is sufficient, the Court must first construe the contract.”***

36. Counsel submitted that the principle of sanctity of contract provides that where a contract is entered into freely and voluntarily, it becomes sacrosanct and should be enforced as the principle promotes commercial certainty. We were urged to

dismiss the appeal for lack of merit and further that the judgment of the lower court be upheld, with costs.

### **THIS COURT'S ANALYSIS AND DECISION**

37. We have considered the record of appeal, the Judgment appealed against and the submissions by Counsel. Ground one and two attack the lower court's holding that the third appellant's property, Farm 1445 Central Province was charged with the first and second appellants' loan facility of ZMW3,600,000.00. The third appellant argues that there was no express consent from him nor was there consent for the use of the property as a continuing security.
38. A perusal of the third party mortgage shows that the third appellant was the mortgagor, who signed and undertook as follows-

***"The mortgagor warrants and undertakes that he has voluntarily and willingly executed this instrument of third party mortgage having obtained the necessary consent and authority to execute this Deed of Third Party Mortgage from the beneficiaries of the Estate of the Late Betheul Philemon Kapota and being fully aware of i) the nature and extent of the security created herein. ii) the Customer's obligations to redeem or settle the Facility***



***that has been availed to it by the Bank herein and iii) the Bank's recourse to exercise its rights of enforcement herein over the Property in the event of the Customer's default in complying with its obligations to the Bank as aforesaid."***

39. From the paragraph highlighted above, it is clear that the third appellant consented to the property in issue being used as security for the first and second appellants' initial facility and further facilities.

40. Further, paragraph 4 of the third party mortgage provides that-

***"The mortgagor will at any time if and when required by the Bank so to do so execute to the Bank or as the Bank shall direct such further legal or other mortgages or charges as the Bank shall require of and on all the mortgagor's estate and interest in the premises comprised in the said deposited deeds and writings or which may hereafter be acquired by and belong to the Mortgagor (including any Vendor's lien) to secure all money and liabilities hereby agreed to be paid or intended to be hereby secured such mortgages or charges to be prepared by or on behalf of the Bank at the cost of the Mortgagor to contain such clauses for the benefit of the Bank as the Bank may reasonably require."***

41. The fourth paragraph of the third party mortgage shows that the third appellant consented to the use of his property, the

remaining extent of Farm 1445, Central Province, Zambia, to be used for further legal or other mortgages or charges as the Bank would require. There was therefore express consent from the third appellant that his property would be used to secure the first and second appellants' loan facility of ZMW3,600,000.00. The third appellant also undertook to secure the initial loan facility as well as further facilities as a continuing security as is evidenced by paragraph 4 of the third party mortgage. We find no merit in grounds one and two of the appeal and they are accordingly dismissed.

42. Turning to ground three which is that the court erred when it found that the third appellant's property was used to provide security for the initial loan of ZMW2,050,000.00 and the further loan of ZMW3,600,000.00. We have perused paragraph 4 of the third party mortgage, in which the mortgagor undertook to secure such further legal or other mortgages or charges as the bank shall require of and in all the mortgaged estate.
43. Further, the third appellant wrote a letter to the Managing Director of the respondent on 11<sup>th</sup> December, 2001 and took the title deeds for the property in issue to the respondent for them to



be used as security in obtaining bids and loan which show that the third appellant voluntarily surrendered the title deed as security and further security and was not coerced into signing the third party mortgage exhibited in this matter.

44. The mortgagor, being the third appellant executed the agreement willingly and is therefore bound by the terms of the third-party mortgage. The lower court was therefore on firm ground when it found that the third appellant knew the implications of a third-party mortgage in which he transferred Farm 1445, Central Province Zambia to the respondent as collateral as it is evident that he signed the third-party mortgage freely and voluntarily. We do not find merit in the third ground of appeal and it is accordingly dismissed.
45. The last ground assails the condemnation of the third appellant in costs in light of the circumstances of this case and the evidence on record. It is trite that costs of any action or matter shall ordinarily follow the event unless the court has good reasons to depart from this. Costs are awarded at the discretion of the court. Where a trial court has exercised its discretion on

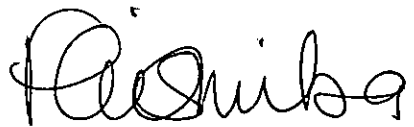
costs, an appellate court will only interfere where the discretion has not been exercised judiciously.

46. In our own view, the lower court exercised its discretion judiciously when it condemned the appellants in costs. The lower court was on firm ground in this regard. We see no reason to depart from the established principle that costs of any action shall follow the event. There is no basis to overturn the lower court's order that the appellants shall bear the costs of the action.
47. For the forgoing reasons, we find no merit in the appeal. The judgment of the lower court is upheld and the appeal is accordingly dismissed. Costs in this court and in the lower court are awarded to the respondent, to be taxed in default of agreement.




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J. CHASHI  
COURT OF APPEAL JUDGE



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F.M. CHISHIMBA  
COURT OF APPEAL JUDGE



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P.C.M. NGULUBE  
COURT OF APPEAL JUDGE



