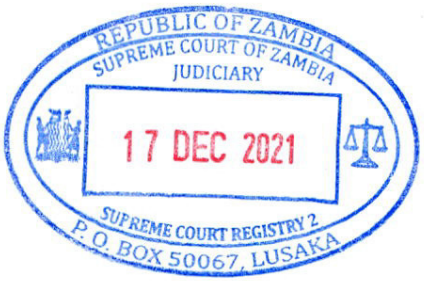
IN THE SUPREME COURT OF ZAMBIA **SCZ/8/17/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



DAR FARMS LIMITED **APPELLANT**

AND

MPONGWE FARMS LIMITED **RESPONDENT**

Coram: Mumba Malila JS in Chambers on 16th August 2021 and 17th December 2021.

For the Applicant: Mr. C. M. Sianondo, Messrs Malambo & Co.

For the Respondent: Mr. S. Musonda, Mr. K. Wishimanga & Mr. K. Banda of AMW & Co.

RULING

Cases referred to:

1. *Bidvest Foods & Others v. CAA Import & Export Ltd (Appeal No. 56 of 2017)*
2. *Savenda Management Ltd v. Stanbic Bank (Z) Ltd (Selected Judgment No 10 of 2018)*
3. *Hassan v. Transport Workers Union & Others (2007) 3 LRC35*
4. *Syvern Properties v. Royal Bank of Scotland & Others (2004) 4 AIIER 484*
5. *Posa Estates & Others v. First National Bank Zambia Ltd (SCZ/8/19/2020)*
6. *Standard Chartered Bank Zambia Plc v. Wisdom Chanda & Christopher Chanda (SCZ Judgment No 18 of 2014)*
7. *Bagus (Female) & PC Chibuye (Male) v. Standard Chartered Bank Zambia Ltd (1992 SJ 22 SC)*
8. *Clement Chuuya & Hilda Chuuya v. JJ Hankwenda (SCZ judgment No of 2002)*
9. *In Southern African Trade Limited v. Hawkwood Property Investment Ltd (SCZ/8/2018)*

I regret the delay in handing down this ruling. It was occasioned by a combination of hostile factors.

The applicant was unhappy with a judgment of the Court of Appeal given on 11th March, 2021 and seeks to appeal to the Supreme Court. In obedience to the law as set out in Article 131(2) of the Constitution and section 13(1) of the Court of Appeal Act, it applied for leave to appeal before that Court. Leave was denied by the Court in its ruling of 17th June 2021.

The applicant has now applied before me, sitting as a single judge, in terms of section 24B of the Supreme Court (Amendment) Act No 24 of 2016 as read with Rule 48(1) of the Supreme Court Rules, chapter 25 of the Laws of Zambia.

The renewed application for leave is supported by an affidavit deposed to by Efthimios Vangelatos, a director in the applicant company. In it he recounts the facts that precipitated the application before me. More relevantly, he has attached to his affidavit a copy of the notice of appeal and memorandum of appeal. The memorandum of appeal enlists five potential grounds of appeal.

The basic premise upon which the application is made is that the intended appeal raises a point of law of public importance; it has prospects of success and that there are other compelling reasons for the appeal to be heard.

The applicant also filed an application to stay execution of the judgment of the Court of Appeal pending the determination of the application for leave. It, too, was supported by an affidavit sworn by the said Efthimios Vangelatos. In there, he swore that unless a stay was granted 'the judgment will take effect and make the applicant's application academic'.

Both applications are strenuously opposed. John William Kelly Clayton, the Managing Director of the respondent, swore the affidavit in opposition to the summons for leave to appeal. The opposition is on two bases: first a technical basis; and second, a substantive one.

On the technical front, Clayton believes that the application for leave before me does not constitute a renewed application but is rather a recasting of the application that was filed in the Court of Appeal. This, according to the respondent, is confirmed in the grounds outlined in the summons filed into court which are distinct from the ones

outlined in the notice of motion that was filed in the Court of Appeal. This, according to Clayton, makes the application incompetent and must thus be discountenanced by me.

On the substantive objections, Clayton avers that the proposed appeal does not raise any point of law of public importance as it revolves around a private contract that does not affect the entire banking sector or the court system as the applicant alleges. Furthermore, that the appeal has no prospects of success and there are, additionally, no other compelling grounds justifying the appeal being heard by the Supreme Court.

Both parties had filed copious skeleton arguments in support of their respective positions regarding the two applications before me. At the hearing of the matter, Mr. Sianondo, intimated that he believed that the application for a stay will depend on the outcome of the application for leave to appeal. He then submitted that he relied on the affidavits and skeleton arguments to support the applicant's case.

In the skeleton arguments which were filed earlier on behalf of the applicant it was contended that the issues being raised in the proposed appeal were coming for the first time in this jurisdiction and were of "great importance" as they affected borrowers, lenders and the "effect of receivership which is an entire industry."

Various case authorities were cites and relied upon. They include our decisions in **Bidvest Foods & Others v. CAA Import & Export Ltd**[1] and **Savenda Management Ltd v. Stanbic Bank Ltd**[2]. Another case referred to was **Hassan v. Transport Workers Union & Others**[3].

In supplementing, Mr. Sianondo identified what he considered as the issues intended to be addressed in the appeal. He submitted that far from flattening the curve, the judgment handed down by the Supreme Court has raised issues that have exerted the minds of the parties. One such issue is that the respondent was under receivership for nearly eleven years and it was during that period that the applicant took possession. The question is who, during the period of receivership, should account to the respondent?

According to Mr. Sianondo, his search for an authority on this point was unsuccessful. He points out that what compounded the situation

in the present case, is the fact that the receiver is also under a duty to account to the company under receivership. This, counsel submits, is what ground 1 of the appeal seeks to raise.

Another issue which Mr. Sianondo, on behalf of the applicant, suggests deserves the decision of the Supreme Court, relates to the approach the court should take towards a mortgage deed in view of the decision in the case of **Syvern Properties v. Royal Bank of Scotland & Others**[4]. That decision suggests that anyone seeking protection as mortgagee (as the respondent in this case) should find such protection in the mortgage deed itself. However a clause in the mortgage deed states that a mortgagee would not be liable for any impropriety during the exercise of the powers of the mortgagee. The question, according to Mr. Sianondo, is how should the court approach a deed of mortgage when dealing with questions of accounting? This, he submitted, is the issue raised in ground two of the proposed appeal.

Yet another issue fit for determination by the Supreme Court, according to Mr. Sianondo, relates to improvements and expenses incurred by the mortgagee in possession. The question is: at what

point should the line be drawn in as far as the mortgagee can be credited for clause expenses? How much should be the expenses to be credited to the mortgagee in possession and does the intention of the mortgagee in possession matter in this regard?

The final question Mr. Sianondo believes the Supreme Court ought to pronounce itself upon relates to the burden of proof during the accounting process. Is it the party alleging that the other earned some money, or the one denying that there was any money earned that ought to prove? The Court of Appeal, quite against the tenet that he who alleges must prove, seemed to have come to the conclusion that the accounting party bears the burden. Mr. Sianondo was unable to find a local authority on the point and thus believes the Supreme Court should fill the void. He ended his submission by urging us to grant the application.

Mr. Musonda, on behalf of the respondent preferred arguments in opposition to the application. In addition to relying on the affidavit in opposition, he also relied on the skeleton arguments filed in court. In those skeleton arguments, it was contended that the application for leave before the Court of Appeal and the renewed application before

me differed materially and that the difference between the two far removed the present application from what it ought to have been, namely a renewed application.

Reference was made to a decision of a single judge of this court in **Posa Estates & Others v. First National Bank Zambia Ltd**[5] stressing that an application for leave to appeal before a single judge of the Supreme Court is a renewal of the application that is refused by the Court of Appeal. There was here no such renewed as there were two different application, according to counsel.

The failure to renew the application that was before the Court of Appeal is, counsel submitted, fatal for the respondent. The only way the court could proceed to consider such an application is if an appropriate amendment is done to the application through a relevant application as guided by the Supreme Court in **Standard Chartered Bank Zambia Plc v. Wisdom Chanda & Christopher Chanda**[6].

As regards the proposed appeal raising a point of law of public importance, counsel for the respondent reproduced, copiously, statements from the Supreme Court judgment in **Bidvest Foods Zambia Ltd & Others v. CAA Import & Export Ltd**[1]. The substance of the

submission is that the relationship between the applicant and the respondent is a private one governed by a mortgage deed. Besides being private, the issues raised in the proposed appeal are, according to the respondent, not new.

It was submitted that accounting as a process is ably dealt with in the Rules of the Supreme Court of England 1999 edition and in a number of Supreme Court judgments such as **Construction Sales and Services Ltd, AI Bagus** (Male) D. H. **Bagus (Female) & PC Chibuye (Male) v. Standard Chartered Bank Zambia Ltd**[7] and **Clement Chuuya & Hilda Chuuya v. JJ Hankwenda**[8].

The learned counsel for respondent also cited several foreign authorities on the issue of leave and quoted rather generously from them.

Concerning prospects of success, again the **Bidvest**[1] judgment was quoted before submitting that the proposed appeal showed no prospects of success at all. Counsel then traversed the five grounds of the proposed appeal before submitting that none of them satisfies the threshold for the grant of leave as prescribed in section 13 of the Court of Appeal Act.

In his supplementary oral submissions, Mr. Musonda repeated that the application for leave to appeal was incompetently before me as the summons, when considered alongside the notice of motion for leave to appeal which was filed in the Court of Appeal, shows that it is advancing different grounds from those argued in the Court of Appeal. According to counsel, a renewed application does not entail the recasting of the original application. For this submission, counsel reiterated the respondent's reliance on the Supreme Court of Zambia ruling in **Posa Estates Ltd & Others v. First National Bank Zambia Ltd**[5] where it was stressed that an application for leave before a single judge is a renewed application of the one rejected by the Court of Appeal premised on the same ground(s).

In the event that I did not agree that the application was improperly before me for the reason given by Mr. Musonda, I was urged to still dismiss the application because it did not meet the threshold set forth in the Court of Appeal Act for the grant of leave to appeal and as explained by the Supreme Court in **Bidvest Foods Zambia Ltd v. CAA Import & Export Ltd**[1].

Additionally, counsel contends that a perusal of ground one of the proposed appeal shows that it has no prospects of success because the issue raised did not arise from the judgment of the lower court or on appeal. An appeal cannot raise new issues.

As regards ground two of the proposed appeal, counsel submits that it is brought up because the applicant has failed to appreciate what acts were unimpeachable. Under clause 22 of the mortgage deed, the connection between the acts of the mortgagee and the exercise of his power are what is referred to an unimpeachable acts. It should follow, according to Mr. Musonda, that ground two has no prospects of success.

Concerning ground 3, it was submitted that it raises a totally new issue for the first time. There should be evidence that any expenses incurred by the mortgagee were necessary. No such evidence was available in this case nor was the respondent made aware of the developments.

Reacting to ground five of the proposed appeal, Mr. Musonda submitted that there was no proof of any interference with the

property or any proceeding relating to land acquisition. The Court of Appeal can thus not be faulted for its finding.

Mr. Wishimanga then added to the submissions on behalf of the respondent. He contended that by insisting that the receiver is the one that ought to have accounted to the respondent owing the receivership, the applicant is simply trying to avoid its duty to account as required by the law.

During the period of receivership, the applicant remained in possession of the property as mortgagee in possession. The accounting period directed by the Supreme Court related to the time when the applicant was in possession of the property. The applicant must account for that period.

As regards the burden of proof, Mr. Wishimanga maintained that the basic tenet that he who alleges must prove extends to the accounting process too. His understanding is that the applicant would be stating that it came into possession on a particular date and that it carried out certain acts. Those statements must of course be supported by the applicant.

Mr. Wishimanga submitted that all the proposed grounds of appeal did not satisfy the leave granting criteria as set out in section 13 of Court of Appeal Act. This, according to counsel, is particularly because the relationship between the parties is a private one that does not transcend into the public realm; the applicant is not even a lending institution. On the basis of these submissions, Mr. Wishimanga prayed that the application be dismissed with costs.

Mr. Sianondo still had something to say in reposte. He submitted that when a matter comes before a single judge it comes by way of a rehearing. New matters could be raised then as the rehearing is not an appeal. He maintained, however, that all the issues raised in the motion were raised in the Court of Appeal and therefore the respondent's objection was unfounded. I was urged to grant the application.

I have scrupulously examined the arguments of the parties in this matter in light of the documents in the application. As I see it, there are two questions that are determinative of the application before me. The first is whether the application is competent. This question is in turn dependent on whether a renewed application may introduce

points and arguments that were not canvassed in the initial application before the lower court. The second is whether the requirements for the grant of leave to appeal in accordance with all the enabling provisions have been satisfied.

As to the competence of the application before me, I have taken note of the submissions of counsel that the application before a single judge should be the same as that which was presented before the Court of Appeal. I have also taken note of the views of a single judge in **Posa Estates Ltd & Others v. First National Bank Zambia Ltd**[5] cited by counsel for the respondent.

My own view is that a renewed application need not be a replication, *ipsissma verba*, of the application that was tabled before the Court of Appeal. I am fortified in this view by the ordinary meaning of the term 'renew' which is to make like new; restore to freshness, vigor or perfection, or to restore to existence. It may also mean to rebuild or to make changes etc. Thus, while a renewed application must not entail discarding entirely the application that was before the Court of Appeal, it may be restated, recast or reformulated when brought before a single judge. It cannot, however, be replaced altogether. I do

not see why, with the benefit of the decision of the Court of Appeal on the application for leave, the applicant should not restate the same application taking into account the views expressed by the Court of Appeal when it rejected the application.

Provided the spirit and substance of the original application is not discarded or so significant altered as to change its character, the renewed application, in my view, may be recast in its renewed form.

I accordingly conclude that the renewed application was properly before me.

Turning to the substantive argument, it need not be repeated that applications for leave to appeal to this court from any judgment of the Court of Appeal require, as both parties have widely acknowledged, to meet the threshold set forth in section 13 of the Court of Appeal Act No 2 of 2016. This provision has been quoted by counsel in their submissions.

In **Bidvest Foods Zambia Ltd v. CAA Import & Export Ltd**[1], the Supreme Court took time to explain the full import of section 13 of the Court of Appeal Act and what each of the individual paragraphs of that

section entails. I do not find it either prudent or desirable to repeat the position which was so clearly set out in that case.

Regarding section 13(3) (c) concerning prospects of success of the appeal, which seems to be a significant basis upon which I believe the applicant has anchored the present application, the Supreme Court in the **Bidvest**[1] judgment stated as follows:

> **"We must make the point that as regards the requirements for prospects of success the wording employed by that section is not very different from that used in the Civil Procedure Rulers (CPR 52.7(1)(a) of England and Wales. In that jurisdiction permission to appeal to a faciful prospect of success as explained by Lord Woolf MR in Swain v. Hillman (1999) CPLR 777.**

Elsewhere in its judgment in the **Bidvest**[1] case. The Supreme Court pointed out that:

> **"While section 13(3) (c) provides a stand-alone basis for granting leave to appeal against a judgment of the Court of Appeal, it should be resorted to sparingly. If used liberally the purpose of the restriction of appeals contemplated in section 13 of the Court of Appeal Act would be grossly undermined.**

My view is that prospects of success demand absolute caution to justifying a finding that the door to the Supreme Court should be opened for an intending appellant. It is no longer the role of the Supreme Court to correct each and every error or misperception in a

lower court judgment. Prospects of success must thus be evaluated in the general context of the appeal and the philosophy behind restricting appeals to the Supreme Court as we explained it in **Bidvest**[1].

As regards issues in the intended appeal being between private entities, in **Southern African Trade Limited v. Hawkwood Property Investment Ltd**[9] I, sitting as a single judge considered a renewed application for leave to appeal. I made the following observation in regard to disputes being of a private character satisfying the threshold of raising a point of law of public importance:

> **"I do sense serious difficulties for an appellant in a purely civil dispute involving the private rights or interests of the disputants to satisfy the public importance criterion for their appeal to pass through the filter envisaged by section 13(1) of the Court of Appeal Act."**

In explaining the position further in the same case, I stated that:

> **"Many cases of a purely private nature as in contract or tort are likely to raise very important points of law. That, in my view, is not sufficient. It is not even sufficient that an interesting or difficult question of law is raised. It should be both a point of law and one of public importance. In other words the legal point must go beyond immediate interest or rights of the individual parties to the dispute. It should transcend or snowball into the public arena in a manner that**

> **engages or affects the broader public interest or public concerns. It should go beyond the litigants in the sense that it affects a community or the general polity."**

In the present application, Mr. Sianondo admits that the dispute arises out of a private treaty between private parties; that it is contractual in nature gyrating around provisions of a deed of mortgage. He, however, has pointed out what he views as unsettled legal questions whose answers, if provided by the Supreme Court, would serve the greater public good by providing guidance to disputants generally.

Mr. Wishimanga maintained that the relationship between the parties is a private one and that the applicant is not even a lending institution.

The Supreme Court pointed out in **Bidvest**[1] that for a legal point to be regarded as one of public importance it should relate to a widespread concern in the body politic the determination of which should naturally have effect beyond the private interests of the parties to the appeal. In the same case it was observed that there is no suggestion

> **"That such disputes would never transcend or snowball into the public arena or arouse or engage broader public interest or concern.**

> **To be certain, where there is a discernable public interest or public policy concern in the anticipated elucidation by the Supreme Court of a point of law in what in otherwise litigation between private parties, there is a definite possibility that such point of law should be one of public importance notwithstanding its private genesis."**

I have examined, with much interest, the questions that the applicant raises in the intended appeal. The question as to who should account during the period of receivership when there is also a mortgagee in possession; at what point should a line be drawn for purposes of crediting the mortgagee in possession with the expenses he incurred; and the burden of proof.

All these issues, in my view, are ordinary in their substance and do not require to be determined by the Supreme Court. They do not, in my estimation, raise any unusual legal points or ones which are of a rare public interest or public policy concern. I, therefore, accept the position of the respondent on this point. The intended appeal does not raise any points of law of public importance in the manner we explained the concept of public importance in the **Bidvest**[1] case, nor has the applicant articulated the prospects of real, sufficient, eventual success rather than nominal success.

The applicant has also invoked section 13(3) (d) that there are other compelling reasons why the appeal should be heard. No arguments on this point have been presented. I can only surmise that the only reason Mr. Sianondo did not advance argument supporting the other compelling reasons for the appeal to be heard, is that there are in fact none.

From what I have explained in this ruling, it is clear that I am inclined to dismiss the application, and I so dismiss it with costs.

Dr. Mumba Malila, SC
JUDGE OF THE SUPREME COURT