

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

**APPEAL NO.14/2021**

BETWEEN:

**OASTER GRANT GENERAL SUPPLIERS LTD**  
**& 14 OTHERS**

**APPELLANTS**

AND

**ZAMBIA DEVELOPMENT AGENCY**

**RESPONDENT**



**CORAM: SIAVWAPA, JP, CHASHI AND BANDA-BOBO, JJA**

On 14<sup>th</sup> January and 25<sup>th</sup> April, 2023

FOR THE APPELLANTS: ROSEMARY BWALYA, 15<sup>TH</sup> APPELLANT

FOR THE RESPONDENTS: NOT IN ATTENDANCE

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

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

### **1.0 INTRODUCTION**

- 1.1 This is an appeal against the Judgment of the Honourable Mr. Justice Mathews L. Zulu dated 12<sup>th</sup> October 2020.
- 1.2 By the said Judgment, the learned Judge granted an order of foreclosure against the Appellants' properties in favour of the Respondent.

## **2.0 BACKGROUND**

- 2.1 In or before 2010, the Delegation of the European Commission in Zambia made available an Export Finance Facility and transferred it to the National Authorising Office (NAO).
- 2.2 In turn, the National Authorising Office appointed the Zambia Development Agency to manage the Fund on a day-to-day basis through its Export Promotion and Market Development Division.
- 2.3 The Fund was designated as the Zambia Export Development Fund (ZEDEF) for the purpose of assisting the expansion of Non-Traditional Exports on a revolving-fund basis.
- 2.4 Clause 23 of the Fund Implementation Rules provides as follows;
- “The borrower Producer Association will borrow on behalf of their respective participating members and may charge an additional percentage point or a fixed administration fee at that stage.”*
- 2.5 The Appellants herein were members of the Handcrafts Association of Zambia and being the borrower Producer Association, Handcrafts Association of Zambia applied for loans on behalf of its members, the Appellants.

- 2.6 Subsequently, the Zambia Export Development Fund and the Handcrafts Association of Zambia entered into two loan Agreements, one in April, 2010, worth USD220,000.00 and another, on 1<sup>st</sup> October, 2010, worth USD80, 000.00.
- 2.7 In line with Clause 24 of the Implementation Rules, the Appellants herein executed Mortgage Deeds which also provided for personal guarantors in the schedules.
- 2.8 By letter dated 4<sup>th</sup> May, 2015, the fund Coordinator requested the principal borrower, Handcrafts Association of Zambia, to confirm outstanding amounts on the loans as indicated in the letter.

### **3.0 CLAIMS BEFORE THE HIGH COURT**

- 3.1 On 28<sup>th</sup> July 2015, the Respondent herein took out originating summonses in the High Court asking for the following orders;
1. Foreclosure and sale of the mortgaged properties as specified in each Mortgage Deed to secure the sum borrowed by each member organization.
  2. Further or other relief that the Court may deem fit and
  3. Costs of the action.

- 3.2 It must be stated here that the Respondent took out separate originating summonses against each of the Appellants. The actions were later consolidated by order of the Court below.
- 3.3 The Respondent (Applicant in the Court below) filed an affidavit in support of the originating summons deposed to by Grace Tembo-Jonker.
- 3.4 The overriding argument was that the Appellants had procured loans as members of the Handcraft Association of Zambia and that they had defaulted and in debt to the Respondent, which was the Manager of the Fund.
- 3.5 In the further affidavit in opposition to the originating summons for foreclosure, deposed to by Angelica Rumsey, the main points of argument are as follows:
- (i) The Appellants, who are members of the Association, got unsecured loans from it.
  - (ii) That the Association was not a party to the Mortgage Deeds.
  - (iii) That the Respondent did not disburse any moneys on the collateralised properties and could not therefore, foreclose on them.

#### **4.0 DECISION OF THE COURT BELOW**

4.1 On the hearing date, parties placed reliance on the affidavit and documentary evidence before the Court.

4.2 After considering the affidavit evidence and the various documents before him, the learned Judge, condensed the arguments for his resolution into two namely;

- (i) Whether the Association obtained unsecured loans on behalf of its members and
- (ii) Whether the Respondent had never advanced secured loans to the members of the Association.

4.3 After referring to rules 1 and 24 of the Implementation Rules, which provide for 100% Collateral of the value of the loan and personal guarantee by the loan beneficiary members, the learned Judge dismissed the arguments by the Appellants that the loans were unsecured and that the Mortgage Deeds were procured by fraud.

4.4 Having found as stated above, the learned Judge stated that although a Mortgage Deed implicates the mortgagor, the case was different with the Association and its members in that rules 22 and 4 implicate both the Association and the Appellants.

## **5.0 THIS APPEAL**

5.1 The Appellants did not accept the verdict of the Court below and launched the herein appeal via a Notice and Memorandum of Appeal filed into Court on 17<sup>th</sup> November 2020.

5.2 The Memorandum of Appeal contains three grounds of appeal; namely;

1. The learned Judge in the Court below erred in law and fact when, despite acknowledging the fact that the Responsibility to pay back the loan lay with Handcrafts Association of Zambia, proceeded to enter Judgment against the Appellants.
2. The learned Judge in the Court below erred in law and fact when he categorically stated that the Appellants, despite alleging fraud in the manner the mortgages were executed, did not distinctly and clearly lay evidence to support the alleged fraud when in fact as the original Court of jurisdiction had a duty to order the Appellants to adduce such evidence.
3. The learned Judge, in the Court below, erred in law and fact when he failed to adjudicate over evidence before him to the effect that the said mortgages were executed much later than the time the monies were disbursed to the Association which clearly proved that the said loan was

not secured by any mortgage and further that the assertion by the Appellant to the effect that the mortgages were executed for further sums of money.

## **6.0 ARGUMENTS IN SUPPORT**

- 6.1 The Appellants filed their heads of argument on 10<sup>th</sup> January, 2021, and in arguing ground one, the Appellants have attacked the learned Judge on findings of facts. This is with particular reference to the learned Judge's statement in the Judgment to the effect that the Association received loans in the sums of USD220,000.00 and USD80,000.00 in May and October respectively. To this end the argument is that the loan contract was with the Association and not the Appellants.
- 6.2 They further dispute the learned Judge's assertion that the Association disbursed the loans to its members as not being supported by evidence.

Further, they argue that the learned Judge entered Judgment against the Association and not the Appellants. The Appellants urged us to allow ground one.

- 6.3 In ground 2, the Appellants have argued that they did not have an opportunity to lead evidence to prove fraud in the execution of the Mortgage Deeds because the matter was commenced by originating summons. They have blamed the learned Judge for

not ordering that the matter proceeds as if commenced by writ of summons.

6.4 In ground three the Appellants allege that the learned Judge failed to adjudicate on the evidence showing that the Mortgage Deeds were executed long after the funds were disbursed to the Association leaving the loans unsecured.

## **7.0 ARGUMENTS IN OPPOSITION**

7.1 The Respondent argued grounds one and three together, largely asserting that although the loan was made to the Association, the beneficiary members of the Association were jointly and collectively liable for the repayment of the loans.

7.2 Further to the above, the Appellant argued that pursuant to the ZEDF Implementation rules, the beneficiary members of the Association were required to furnish collateral at 100% of the value of the loan while the Association was required to obtain personal guarantees.

7.3 In ground two, the Respondent simply agreed with the learned Judge below that the Appellants did not lead evidence of fraud to the requisite standard.



## **8.0 ANALYSIS AND DECISION**

- 8.1 After considering the grounds of appeal, the Judgment of the Court below and the arguments for and against the appeal, it appears that the Appellants are of the view that they have no contractual connection with the Respondent and that the loans they obtained from the Association were not secured.
- 8.2 What is not in dispute is the fact that the loan agreements in issue were executed between the Zambia Export Development Fund and the Handcrafts Association of Zambia.
- 8.3 It is also not in dispute that the parties to the Mortgage Deeds were the Appellants and the Respondent. The Appellants have however, sought to distance themselves from the Mortgage Deeds arguing that the same were fraudulently procured.
- 8.4 The issue in the main is whether or not there is a legal link among the parties to the Loan Agreements and the parties to the Mortgage Deeds.
- 8.5 In the introduction part of this Judgment, it has been shown that the Zambia Export Development Fund, which is a party to the Loan agreements, was placed under the operational mandate of the Respondent, which is a party to the Mortgage Deeds.

8.6 The Record shows that under Rule 6.4 of the ZEDEF Implementation Rules, the ZEDEF Fund Manager, is a member of the Management Board chaired by the Respondent's Board of Directors Chairman. This is the person who signed the Loan Agreements on behalf of the Fund Management Board.

8.7 It follows therefore, that the Respondent, as administrator of the Fund, was a party to the Loan Agreements through one of the Management Board members who signed on the Board's behalf.

8.8 So, the question that the Appellants are asking is, if the parties to the Loan Agreements are the Respondent and the Association, how can liability attach to them? The answer lies in Clause 4 of the Loan Agreements themselves which provide as follows;

*"This loan is made to the Association and it is the members of the Association who assume joint and collective liability for repayment, irrespective of whether the members who have benefited have repayed the Association or not"*

8.9 Under Rule 5.2 of the Implementation Rules, the intended beneficiaries of the loans are individual registered companies which are supported by the Handcrafts Association of Zambia. This meant that even if the individual companies supported by the Association were not party to the Loan Agreements, they were to be the beneficiaries of the loans.

- 8.10 It is on the premise of this rule that the earlier cited Clause 4 of the Loan Agreements places joint and collective liability on the members of the Association for the repayment of the loans.
- 8.11 The liability however, only attaches to those members of the Association who would have applied for the loans to the Association and received its approval.
- 8.12 Further, in terms of rule 14 of the Implementation Rules, it is the Association that has the obligation to pay back the loan in line with rule 22 of the Implementation Rules.
- 8.13 As correctly stated by the learned trial Judge, the Association submitted applications for loans to the Fund on 15<sup>th</sup> February 2010 based on requests from the Appellants who had undertaken to comply with rule 27 which requires the borrower to furnish collateral at 100% of the value of the requested loan.
- 8.14 Based on the above and the Appellants' full understanding of their obligations, the Respondent and the Appellants executed the individual Mortgage Deeds and personal guarantees to secure the loans.
- 8.15 The next issue is the one relating to the variance between the date of the loans and the Mortgage Deeds wherein the Appellants have argued that the Mortgage Deeds were executed

way after the loans were disbursed rendering the loans unsecured.

8.16 A close scrutiny of the Mortgage Deeds shows that the majority of them were entered into in June 2010 and some in October 2010. On the other hand the two Loan Agreements were executed on 1<sup>st</sup> October 2010 based on the applications dated 15<sup>th</sup> February 2010.

8.17 There is however, no documentary evidence on the Record stating the date or dates when the two loans were disbursed to the Association as Loan Agreements do not have the draw down date.

8.18 It is however, the practice by lending institutions to only disburse funds after the requisite security documents have been executed. It would therefore, be reasonable to infer that funds were only disbursed to the Association after the Mortgage Deeds were executed and subsequent disbursements to the Appellants by the Association would follow later.

8.19 It is therefore, our considered view that the funds were disbursed to the Association and to the Appellants after the Mortgage Deeds which included personal guarantees, were executed.

8.20 On the allegation of fraud, it is noted that the same is mentioned in paragraph 26 of the further Affidavit in opposition but no particulars of the fraud are given. Although the Appellants have argued that it was the learned Judge's duty to order that the matter proceeds as though commenced by writ of summons to allow for the calling of evidence, our view is that that duty only arises if fraud is specifically and particularly pleaded.

8.21 The allegation in paragraph 25 of the Further Affidavit in opposition is based on the fact that the Association was not party to the Mortgage Deeds. This argument is not tenable in the light of the fact that the Implementation Rules provide for the provision of security and personal guarantees by the beneficiary member entities.

8.22 We therefore, find no merit in the argument that the learned Judge below should have proceeded as though the action was commenced by writ of summons and allowed the Appellants to call evidence to prove fraud.

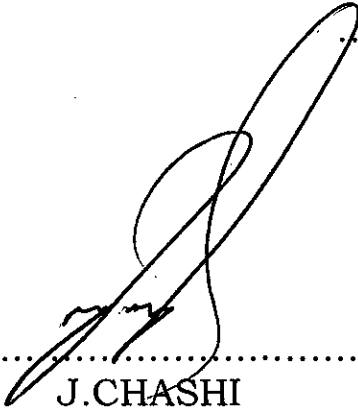
## **9.0 CONCLUSION**

9.1 All in all, the arguments advanced by the Appellants lack merit. The learned trial Judge was on firm ground to give Judgment in favour of the Respondent.

9.2 We accordingly dismiss the Appeal for lack of merit with costs to the Respondent.



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**M.J SIAVWAPA**  
**JUDGE PRESIDENT**



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**J.CHASHI**  
**COURT OF APPEAL JUDGE**



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**A.M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**