IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 282/2022**
HOLDEN AT NDOLA
(Civil Jurisdiction)

IN THE MATTER OF: **ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF: **ORDER 88 RULE 1 OF THE RULES OF THE SUPREME COURT, 1999 EDITION**

IN THE MATTER OF: **A THIRD PARTY MORTGAGE RELATING TO SUBDIVISION No. 20 OF SUBDIVISION E OF FARM No. 215a, LUSAKA**

BETWEEN:

CHILOLA INTERTRADE **1ST APPELLANT**

ABRAHAM MWANSA **2ND APPELLANT**

CHARITY MWANSA **3RD APPELLANT**

AND

CITIZENS ECONOMIC EMPOWERMENT COMMISSION **RESPONDENT**

CORAM : Makungu, Chishimba and Muzenga JJA
On 23rd November, 2023 and 16th February, 2024

For the Appellants : Mr. A. Mwansa (SC) of Messrs AMC Legal Practitioners

For the Respondent : Mr. A. Nyirenda of Messrs. SLM Legal Practitioners

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J U D G M E N T

CHISHIMBA JA delivered the judgment of the court.

REPUBLIC OF ZAMBIA COURT OF APPEAL 16 FEB 2024 CIVIL REGISTRY 2 P.O BOX 50067, LUSAKA.

CASES REFERRED TO:

1) Credit Africa Bank Limited v Kalunga & Another SCZ Appeal No. 144 of 1997
2) Indo Zambia Bank Limited v Leonard Mwelwa Witika & Others Selected Judgment No. 16 of 2018
3) Intermarket Banking Corporation Zambia Limited v Courtyard Hotel Limited SCZ Appeal No. 133 of 2015
4) Courtyard Hotel Limited v Intermarket Banking Corporation Zambia Limited SCZ Appeal No. 139 of 2015
5) Attorney General v Achiume (1983) ZR 1
6) Kapembwa v Maimbolwa & Attorney General (1981) ZR 127
7) Magic Carpet Travel & Tours v Zambia National Commercial Bank Limited (1999) ZR 61
8) Colgate Palmolive (Z) Inc. v Shemu & Others, Appeal Number 11 of 2005
9) Kanjala Hills Lodge Limited & Another v Stanbic Bank Zambia Limited SCZ Judgment No. 17 of 2012
10) Zambia Railways Limited v Pauline S. Mundia & Brian Sialumba (2008) 1 Z.R. 287
11) Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172

LEGISLATION REFERRED TO:

1) The High Court Act Chapter 27 of the Laws of Zambia
2) The Rules of the Supreme Court, 1999 Edition.
3) The Citizens Economic Empowerment Commission Act No. 9 of 2006
4) Banking and Financial Services Act No. 21 of 1994

1.0 INTRODUCTION

1.1 This appeal is against the judgment of Justice Lameck Mwale dated 30th June, 2022 in which he entered judgment in the sum of ZMW 3, 354, 027. 70 in favour of the respondent. In default foreclosure and sale of the mortgaged property.

1.2 The appeal amongst other issues raised, deals with the continued charging of interest on a non-performing loan, the effect of **Section 110 of the banking and Financial Services Act 2012 (BFSA)**. And whether the respondent is bound by the provisions of the said BFSA applicable to financial institutions.

2.0 **BACKGROUND**

2.1 The respondent issued originating summons against the appellants out of the High Court Commercial Registry seeking the following reliefs:

(1) An order for the payment by the 1st appellant of the sum of ZMW3,354,027.70 as at 30th September, 2021, due to the respondent from the 1st appellant being the outstanding sum under a credit facility furnished to the 1st appellant on 19th August, 2010, whose repayment was guaranteed by the 2nd and 3rd appellants as directors of the 1st appellant and was also secured by a third party mortgage relating to S/D No. 20 of S/D E of Farm No. 215a, Lusaka;

(2) An order that the 2nd and 3rd appellants as guarantors of the said monies doe to be paid to the applicant under the aforesaid credit facility be ordered to honour the terms of the guarantee;

(3) An order that the said mortgage deed executed by the 1st and 2nd appellants in favour of the respondent may be enforced by foreclosure and sale of the mortgaged property being S/D No. 20 of S/D E of Farm No. 215a, Lusaka;

(4) An order for delivery up of possession by the 2nd appellant of the mortgaged property being S/D No. 20 of S/D E of Farm No. 215a, Lusaka;

(5) Interest, costs and any other relief the court may deem fit.

3.0 **EVIDENCE IN THE COURT BELOW**

3.1 The respondent filed an affidavit in support of the originating summons deposed by Jimmy Phiri Chifita, the Credit Manager of the respondent. He stated that the on 19th September, 2009, the 1st appellant acting through the 2nd and 3rd appellants, applied for a loan for purposes of capitalizing the 1st appellant company and to finance its business projects. By a facility letter dated 19th August, 2010, the 1st appellant was furnished with a loan of ZMW 2,000,000.00. The loan and interest of 12% per annum was to be paid in monthly instalments of ZMW 52,667.67 six months after disbursement.

3.2 Clause 9 of the facility letter further provided that the loan facility would be secured by inter alia, a charge over S/D No. 20 of S/D E of Farm No. 215a, Lusaka (here in after referred to as one word 'the property') and a debenture on all assets of the 1st appellant. The 2nd appellant surrendered the certificate of title, executed a memorandum of deposit of title deeds and third party mortgage in relation to the property. Further, the 2nd and 3rd appellants executed personal guarantees agreement for the repayment of the loan facility to the respondent.

3.3 Though the loan was disbursed in full in 2012, the 1st appellant neglected to settle the debt in accordance with the terms of the facility letter. The respondent wrote a demand letter to the 1st appellant dated 26th February, 2019 requesting payment of the outstanding amount but to no avail. A second demand letter was issued on 31st August, 2021. By 30th September, 2021, the total outstanding amount due under the loan was ZMW 3,354,027.70 being the principal and interest.

3.4 Mr. Chifita deposed that in a letter dated 20th September, 2021, the 2nd appellant did not dispute its liability to the respondent but raised issues to the main claim by the respondent for the payment of the outstanding amount.

3.5 The appellants opposed the originating summons through an affidavit deposed by the 2nd appellant, Abraham Mwansa who stated that the loan facility was not disbursed as a bullet disbursement but in a piecemeal manner. That the respondent did not show when the 1st and last disbursement of the funds was made, the grace period therefrom and when the loan term facility was commenced for the stipulated loan term period of 54 months.

3.6 Mr. Mwansa deposed that the monthly repayments were to be met from the revenues of the 1st appellant in accordance with paragraph 7(ii) of the facility letter but, which at the time, was not generating revenue. The appellants were never given the respondent's account number to which the funds could be transferred in terms of Annexure 2 of the facility letter.

3.7 The appellants denied neglecting to settle the loan in accordance with the terms and conditions of the facility or that the outstanding sum stood at ZMW 3,354,027.70. A list of reasons including delay in disbursing the funds to the 1st appellant's contractors resulting in the main contractor terminating their services; the appellants being forced to engage and pay for the services of other consultants using their personal resources and the advent of the Covid19 pandemic were cited for the failure to discharge the debt outstanding.

3.8 The 2nd appellant lamented that the respondent, as a financial business, has continued to charge interest on the loan facility. That the appellants having discharged their obligations against the Zambia National Commercial Bank, can now service the facility with the applicant.

3.9 In an affidavit in reply, the respondent deposed that upon approval of the facility, the loan was disbursed in accordance with draw down procedures contained in clause 8 of the facility letter which did not provide for the payment of funds as a bullet disbursement. Even though the appellants claimed not to know the account number in which to deposit the payments, the 1st appellant made one payment of K100,000.00 to the respondent without any complaints.

3.10 The respondent maintained that funds were fully disbursed in 2012 to the contractors engaged by the appellants in accordance with the draw down procedures but failed to make any repayments until 2016. That at the time the lodge was gutted by fire on 25th August, 2016, the 1st appellant was in arrears for a period of four years without any payment save for the K100,000.00 paid on 12th August, 2016. Further that the property was insured at the time. The respondent stated that the 1st appellant accessed the loan facility and was given sufficient time of about 9 years from 2012 to 2021 to pay back the funds but failed to do so. That an unreasonable period of time has lapsed without any serious commitment for payment.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge considered the evidence and arguments on record and found that it was common cause that around August 2010, the 1st appellant obtained a loan of ZMW2,000,000.00 from the respondent. The loan was secured by a charge over S/D No. 20 of S/D E of Farm No. 215a, Lusaka (the property) and a debenture on all assets of the 1st appellant. In addition, the 2nd and 3rd appellants guaranteed the repayment of the loan facility whilst the 2nd appellant executed a third party mortgage in relation to the property. It was also not in dispute that the 1st appellant had defaulted in repaying the loan.

4.2 The court below rejected the appellants' argument that they did not know when the first disbursement of the loan was made in light of the payment voucher exhibited in the affidavit in reply showing that the first payment was made on 26th October, 2010 to Al-Jarmwi Enterprises in the sum of K23,850,000.00. The last disbursement was made on 4th October, 2012 as per the instruction made by the respondent. While the terms of the loan facility were that the loan was to be paid back in 54 months from the date of the first disbursement, the lower court took the view that the last date

of disbursement was irrelevant as only the first disbursement was relevant.

4.3 The court below noted that the appellants only made one payment on 12th August, 2016 of ZMW100,000.00 during the entire subsistence of the loan which was one and half years past the due date for repayment. This amounted to willful neglect on the part of the appellants in making repayments. The argument by the appellants that they were not aware of the bank account in which to deposit the loan repayments was rejected as they had adequate time in which to request for the details, if they were truly interested in repaying the loan.

4.4 The lower court rejected the argument that the respondent was not entitled to charge interest on a non-performing loan and cited the cases of **Credit Africa Bank Limited v Kalunga & Another** [1] and **Indo Zambia Bank Limited v Leonard Mwelwa Witika & Others** [2] in which the Supreme Court held that the placing of a loan on non-accrual status does not suspend the legal obligations under the loan agreement to pay interest.

4.5 The court below entered judgment in favour of the respondent in the sum of ZMW3,354,027.70 as at 30th September, 2021

at 12% interest per annum from the date of originating summons to date of judgment. Thereafter at the current commercial bank lending rate as determined by the Bank of Zambia from time to time till complete payment. The judgment sum and interest was to be paid within 90 days failing which the respondent would be at liberty to foreclose and sell the mortgaged property without further recourse to court.

4.6 The lower court further ordered that should the sale of the mortgaged assets not discharge the 1st appellant's obligations and debt due and owing, the respondent shall be at liberty to enforce the 2nd and 3rd appellants' guarantees.

3.0 GROUNDS OF APPEAL

3.1 Dissatisfied by the decision of the court below, the appellants appealed raising four grounds as follows:

1) ***The court erred on a point of law and fact when it adjudged that the respondent finished disbursement of the loan facility on 4th October, 2012 by relying on the respondent's payment vouchers and the respondent's letter to Zambia National Commercial Bank without further proof;***

2) ***The court erred on a point of law and fact when it adjudged that the appellants willfully neglected to make repayments on the loan account without taking into account the fact that the project was a greenfield project, the construction period, the role of the respondent in the project, the erratic***

disbursement of the loan facility by the respondent, the securing of alternative or additional funds for the same project and the repayment thereof, the gutting of the project and the outbreak of the Covid19 pandemic leading to the closure of the facility which was the source of the revenue for the repayments;

3) ***The court erred on a point of law and fact when it adjudged that the appellants should pay the judgment sum within 90 days from the date of judgment without taking into account the default on the part of the respondent to timely disburse funds for the project, the fact that the source of the revenue for repayments was the gutted project which remained closed since the outbreak of the Covid19 pandemic; and***

4) ***The court erred on a point of law and fact when it adjudged that the respondent was within its right to charge interest on a non-performing loan in line with the facility letter without having recourse to the clear provisions of the law prohibiting the charge of interest on non-performing loans.***

4.0 APPELLANTS' HEADS OF ARGUMENTS

4.1 The appellants filed heads of arguments dated 28th June, 2023 in which grounds one, two and three were argued together. The appellants submit that they were granted a loan facility by the respondent in the sum of ZMW2,000,000.00. Clause 5 of the facility letter provided that the facility was to expire after 54 months from the date of the first disbursement, but that the loan could become due on

demand. The respondent made a demand on 31st August, 2021.

4.2 The appellants further submitted that the respondent disbursed the funds directly to the suppliers of goods and services, and not the 1st appellant. That this is crucial in terms of computation of time for the loan facility period. That apart from two payment vouchers at pages 191 and 193 of the record of appeal acknowledged by the 2nd appellant, most if not all the payments were made directly to the suppliers of goods and services. Aside from this, the respondent exhibited internal memoranda speaking to raising of payments and not actual proof of payments. See page 204 of the record of appeal.

4.3 The appellants lamented that even after paying the suppliers, the respondent neither advised the appellants of such payments nor kept them in copy. That it was strange that the respondent advised its bank that it was making the last disbursement to the 1st appellant instead of advising the appellants. Therefore, the court below erred on a point of law and fact in holding that the respondent finished disbursing the loan facility on 4th October, 2012.

4.4 It was further argued that had it been the case that the respondent had completed the disbursements, the 1st appellant would not have requested the respondent to disburse funds to Messrs. Forgeweld of South Africa on 3rd October, 2012 and 16th November, 2012.

4.5 The appellants contend that this was a proper case in which the lower court ought to have ordered assessment of the amounts disbursed by the respondent to the 1st appellant.

4.6 As regards ground two, the appellants contend that they did not willfully fail to make the repayments. That the court below ought to have taken into account the fact that the project was commenced from the scratch with the initial capital coming from the 2nd, 3rd appellants and the respondent. Therefore, the lower court should have taken into account the construction period and the role of the respondent in the project, particularly the erratic disbursement of the loan facility by the respondent.

4.7 That the appellants ended up securing alternative and/or additional funds for the project and repayment to the Zambia National Commercial Bank Limited. In light of the Covid19 pandemic, it was argued that the court should have taken into account its impact leading to the closure of the facility

which was the source of the revenue for the repayments. Reference was made to governments in the world that put measures to mitigate the impact of the Covid19 pandemic on the citizens and businesses by passing debt moratoriums. The Bank of Zambia CB Circular No. 13/2020 – Bank of Zambia Prudential Relief Measures in View of Covid19 was also cited on measures taken by the Bank to mitigate the effects of the pandemic on businesses.

4.8 The appellants further argued that a strict consideration of the law establishing the respondent makes the facility granted to the appellants less of a strict mortgage, in the sense of the law relating mortgages. That a reading of the preamble to and **section 6(1)(2)(c) of the Citizens Economic Empowerment Act No. 9 of 2006 (the CEEA)** will show that in dealing with mortgages for the citizens, citizen owned and empowered companies, the main aim should be to promote the economic empowerment of citizens in order to contribute to sustainable economic growth, than would a commercial bank.

4.9 The appellants further contend that even if the respondent is fully entitled to recover the loan facility, the recovery of the amounts due on the facility should be done in accordance

with the spirit and letter of the enabling legislation regulating the respondent, that is, to empower the citizens. That the appellants put the funds disbursed by the respondent to good use and borrowed more funds from commercial banks to facilitate construction. That no evidence of the last disbursement was shown to bring into force the provisions of clause 7 and 8 of the facility letter

4.10 In the circumstances, the appellants submit that the court below ought to have followed the Supreme Court decision in **Intermarket Banking Corporation Zambia Limited v Courtyard Hotel Limited** [3] and **Courtyard Hotel Limited v Intermarket Banking Corporation Zambia Limited** [4] by exercising its equitable jurisdiction to interfere with the respondent's right to enforce the securities by extending the right of redemption for a reasonable period, there being reasonable prospects that the money owed can be paid within a reasonable time.

4.11 In ground four, the appellants challenge the charging of interest on the non-performing loan. It was argued that the judgments in **Credit Africa Bank Limited v Kalunga & Another** [1] and **Indo Zambia Bank Limited v Leonard Mwelwa Witika & Others** [2] relied upon by the court below

were based on **Regulation 10 of the Banking and Financial Services Regulations** made under the **Banking and Financial Services Act No. 21 of 1994** (the BFSA) that operationalized sections 124 and 47 of the Act dealing with the cost of borrowing.

4.12 The appellants submit that **Regulation 10 of the Banking and Financial Services Regulations** made pursuant to the BFSA, 1994 was enacted into a substantive provision of law as **section 110 of the BFSA, No. 7 of 2017** and now has force of law than a regulation. Therefore, the two cases have since been overtaken by the enactment of **Regulation 10** into substantive law. Reference made to said **section 110 of the BFSA (2017)** on the charging of interest on a performing loan.

4.13 In this regard, the appellants contend that the court below erred in finding that the respondent was within its rights to charge interest on the non-performing loan in line with the loan facility letter when a perusal of the said letter does not reveal a provision relating to non-performance of the loan facility. It was argued further that even assuming that the non-performance of a loan facility was provided for in the facility letter, the same cannot oust the provisions of the law.

4.14 Therefore, the lower court having established that the loan facility had become non-performing, should have invoked the provisions of **section 110 of the BFSA, 2017** and would not have ordered the appellants to pay the sum of ZMW3,354,027.70 as this amount has not waived the interest after the facility became non-performing from the time it became due.

4.15 We were urged to allow the appeal and order assessment of amounts due on the loan facility, to ascertain the commencement date of the loan facility, the commencement of the grace period, the recalculation of interest due on the loan and enlargement of time within which to pay the amounts due and payable to the respondent.

5.0 RESPONDENT'S HEADS OF ARGUMENTS

5.1 The respondent filed heads of argument dated 14th July, 2023. Grounds one, two and three were addressed together. The respondent noted that in these grounds, the appellants argue that the respondent did not finish disbursing the funds; that the 1st appellant did not willfully fail to make payment as there was inter alia the Covid19 pandemic; the project was gutted and that the funds were not disbursed timely.

5.2 The respondent submits that these arguments are without merit and not legally convincing. This is because there is enough evidence on record that the 1st appellant was fully funded to the tune of K2,000,000.00 in accordance with the terms of the facility letter which is a contractual and binding document showing how the money was to be disbursed to the 1st appellant. That under clause 8 of the loan facility letter, the 1st appellant agreed to receive K2,000,000.00 less charges such as insurance, security perfection and registration fees by way of direct payment to the contractors for the goods and services rendered for the benefit of the 1st appellant.

5.3 The respondent submitted that it proceeded to pay the contractors directly on invoices or request for payments which were issued to various contractors of the 1st appellant. Evidence thereof is contained on pages 191 to 204 of the record of appeal. In any case, it was submitted that the appellants did not dispute or argue that they did not receive the goods and services which were paid directly to the contractors by the respondent.

5.4 The court was referred to page 201 of the record of appeal where on 27th September, 2012, the respondent issued a statement signed by its fund manager, procurement

manager, director of empowerment, director of finance and the acting director general who all confirmed that the sum of K1,518,724,526.56 (unrebased) was disbursed to the 1st appellant as at the aforesaid date. That the only pending payment of K481,275,473.44 (unrebased) was disbursed to the 1st appellant by way of a transfer to Al-Jamwi Enterprises on 4th October, 2012 as confirmed by the letter of instructions on page 199 of the record of appeal. This was the final disbursement due to the 1st appellant. That in a letter issued by the 1st appellant at pages 166 to 167 of the record of appeal, the 1st appellant confirmed that there was full disbursement of the funds and stated that it put to good use all the funds it received.

5.5 The respondent submitted that in ground one, the appellants are essentially attempting to impugn the findings of fact of the court below which found that the full amount was disbursed. Citing the cases of **Attorney General v Achiume** [5] and **Kapembwa v Maimbolwa & Attorney General** [6], it was submitted that this is legally unattainable the appellants having failed to prove that the decision of the lower court was perverse or that no reasonable tribunal can make such a finding. The respondent submitted that the findings of the

court below were not perverse or unreasonable but based on concrete evidence that was tendered during the hearing and is in the record of appeal.

5.6 The respondent submits that the argument of the advent of the Covid19 pandemic and its effects on businesses world over, does not appear to be reasonable. The court was invited to note that the 1st appellant was fully funded by 4th October, 2012 and was expected to settle the loan facility within 54 months according to clause 5 of the facility letter. This entails that the 1st appellant was required to settle the entire loan facility on or before 17th September, 2017 which was way before the advent of the Covid19 pandemic which afflicted Zambia in or about 2019 by which time, the loan facility had expired and the repayment period had lapsed by two years.

5.7 The Bank of Zambia circular cited by the appellant came into force in 2020 long after the period for repayment had lapsed. Therefore, the respondent submits that the argument that the 1st appellant was unable to service the facility due to the Covid19 pandemic is without merit and the finding of the court below that the appellants were not just interested in making payment, is accurate.

5.8 The respondent submits that the appellants' arguments that the facility granted to the appellants was less of a strict mortgage in the sense that the mandate of the respondent is to empower citizens and not to disempower, lacks merit. This is because at law, a deposit of title deeds to secure a facility amounts to a mortgage as per the case of **Magic Carpet Travel & Tours v Zambia National Commercial Bank Limited** [7]. Therefore, the third party mortgage between the 1st and 2nd appellant, and the respondent is a mortgage like any other legal mortgage at law. It is not less of a mortgage merely because the mortgagee is the respondent whose mandate is to economically empower Zambian citizens.

5.9 The respondent submits that it is acting within its mandate as per **section 30 of the CEEA** which states that there should be effective use of loan funds and repayment mechanisms by the beneficiaries. The intention of the Act being to ensure that loans are recovered for the proper administration of the fund for the benefit of the general citizenry. By failing to make payment since 2012, the appellants have essentially deprived other members of the public from accessing the funds. Therefore, the argument that the conduct of the respondent is disempowering targeted

citizens and citizen owned companies lacks merit as it departs from the intention and purpose of the Act.

5.10 It was further submitted that in terms of clause 12.2 of the facility letter, the 1st appellant was aware that default of payment will entail that the respondent may commence court proceedings. In addition, Annexure 1 of the facility letter provided that the respondent shall take possession of the mortgaged property and sale the same to recover the debt.

5.11 It was reiterated that a facility letter is contractual and binding on the lender and borrower. To this end, the court was referred to the case of **Colgate Palmolive (Z) Inc. V. Shemu & Others** [8] wherein the Supreme Court held that:

> ***"if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the most liberty in contracting and that their contract, when entered into freely and voluntarily, shall be entered by the courts of justice."***

The appellants, being fully aware of the terms and conditions of the facility that was availed to them, cannot argue that they are being disempowered when the respondent is essentially enforcing the terms of the facility letter.

5.12 Therefore, it was submitted that the court below was on firm ground to enter judgment in favour of the respondents

because the appellants were in default having failed to fully settle the loan facility and in breach of the terms of the facility letter. Reliance was placed on the case of **Kanjala Hills Lodge Limited & Another v Stanbic Bank Zambia Limited** [9] that once a mortgagor defaults on its obligations in the loan agreement, the mortgagee is entitled to commence court proceedings and claim for payment, foreclosure and sale of the mortgaged property.

5.13 In ground four, the respondent submits that the case of **Indo Zambia Bank Limited v Leonard Mwelwa Witika & Others** [2] cited by the court below, has not been overtaken by any enactment or a later judicial precedent. That even assuming that **Regulation 10 of the Banking and Financial Services (Classification and Provision of Loans) Regulations, 1996, S.I. No. 142 of 1996** has now been enacted as **section 110 of the BFSA**, the bottom line is that the law has not changed regarding the charging of interest on non-performing loans as interpreted in the **Indo Zambia Bank Limited v Leonard Mwelwa Witika & Others case.**

5.14 That **section 110 of the BFSA** in its ordinary and plain meaning does not proscribe the recovery of interest on a non-performing loan contrary to the appellants' arguments.

5.15 The respondent prayed that the appeal should be dismissed with costs.

6.0 ANALYSIS AND DECISION OF THIS COURT

6.1 We have considered the appeal, the authorities cited and the arguments advanced by respective Learned Counsel. It is not in dispute that on 19th September, 2009, the 1st appellant, acting through its directors, the 2nd and 3rd appellant, applied for a loan facility from the respondent. In a facility letter dated 19th August, 2010, the respondent furnished the appellants with a loan of ZMW2,000,000.00 at 12% interest per annum to be paid in monthly instalments.

6.2 Clause 5 provided that the expiry date of the facility is the last day of the 54 months (or four and half years) from the date of the first disbursement but that the loan was payable on demand. In terms of clause 7, a grace period of 5 months was given in which no interest would be paid while the monthly instalments stood at ZMW52,667.86 to be met from the revenues of the 1st appellant.

6.3 Further, clause 9 provided for security being the individual directors' personal guarantees, fixed and floating debenture over all the assets of the 1st appellant and a charge over S/D No. 20 of S/D E of Farm No. 215, Lusaka (the property). For

this reason, the 2nd respondent executed a memorandum of deposit of title deeds and a third party mortgage in respect of the property to secure the payment and discharge of the loan facility. The 2nd and 3rd appellants also executed a guarantee.

6.4 Clause 12 of the facility letter provided that default by the 1st appellant would bring into operation Annexure 1 of the facility letter, that is, sell of the mortgaged property and/or the assets of the 1st appellant provided the loan remained outstanding 60 days after the respondent's written reminder.

6.5 The respondent adduced evidence showing that pursuant to the facility letter, it made the following disbursements to the 1st appellant and its contractors:

	DATE	**Payee**	**Amount – ZMW**
1.	23/10/2010	Chisulo General Dealers	64,800.00
2.	26/10/2010	Kalahari Drilling & Exploration Limited	262,560.00
3.	27/12/2010	Al-Jamwi Enterprises Limited	23,850.00
4.	10/10/2011	Chilola Intertrade Limited	137,000.00
5.	07/12/2011	Tempaul Limited	158,680.00
6.	22/05/2012	Al-Jamwi Enterprises Limited	350,000.00
7.	23/08/2012	Al-Jamwi Enterprises Limited	400,000.00

8.	04/12/2012	Al-Jamwi Enterprises Limited	481,275.47
		Total paid out	**1,878,165.47**

6.6 Clause 5 of the facility letter having provided that the expiry date of the facility is the last day of the 54 months (or four and half years) from the date of the first disbursement, it follows that the date of the first disbursement being 23rd October, 2010, the loan facility expired around April 2015. The 1st appellant only made one payment of ZMW100,000.00 on 12th August, 2016.

6.7 It was also not in dispute that the appellants' project was gutted by fire on 25th August, 2016 as per the letter, exhibit **"AM14"** at page 164 of the record. However, the letter shows that out of eight structures at the project site, only two executive thatched rooms and a hybrid roofed conference centre were gutted. The said property was insured.

6.8 The appellants having defaulted on their obligations, the loan accumulated interest and stood at ZMW3,354,027.00 as at 30th September, 2021.

6.9 We shall now address the grounds of appeal. In ground one, the appellants are in effect arguing that the respondent did not finish disbursing the loan facility on 4th October, 2012

and the lower court should not have relied on the respondent's payment vouchers and letter to Zambia National Commercial Bank without further proof.

6.10 The appellants argue that the payments were made directly to their contractors without the respondent keeping them in copy. Further, that the respondent exhibited internal memoranda speaking to raising of payments and not actual proof of payments. Having disputed the payments to the contractors, the appellants urged us to order an assessment.

6.11 In **Zambia Railways Limited v Pauline S. Mundia & Brian Sialumba** [10], the Supreme Court guided on the civil standard of proof as follows:

> ***"In the appeal before us, we are dealing with a civil case and not a criminal case. The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability "as opposed to beyond all reasonable doubt in a criminal case". The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable. In these proceedings, the respondents alleged negligence against the appellant as the cause of the accident. It was, therefore, their duty to prove that the appellant was negligent for their claim for damages to succeed on a balance of probability."***

6.12 In this case, the respondent alleged that the appellants defaulted in repaying a loan which was disbursed to them, a fact which the appellants have not denied. The respondent provided evidence of the disbursement in form of payment vouchers and instructions to the bank including a letter of instruction to the bank indicating that it had completed the disbursement. None of the paid contractors/suppliers of the 1st appellant, raised issue of non-payment by the respondent

6.13 In our view, the respondent did disburse the loan in full. No evidence by the appellant was adduced to disprove the assertion that the respondent did fully disburse the funds to it as alleged.

6.14 Was the finding of the court below to the effect that the respondent finished disbursing the loan on 4th October, 2012 perverse or made upon a misapprehension of facts to warrant setting aside?

6.15 In **Wilson Masauso Zulu v Avondale Housing Project Limited** (11) the court guided that an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. We have examined the payment

vouchers and letters of instruction to the bank disbursing funds to the appellants' contractors as per the facility letter. Having found that disbursement of the loan was effected in full, the findings by the court below, are neither perverse nor made on a misapprehension of the facts.

6.16 We find that the respondent proved that it disbursed all the funds to the appellants through its contractors. The last disbursement being made on 4th October, 2012, we uphold the decision of the court below to that effect.

6.17 In ground two, the appellants contend that they did not neglect to settle the loan and that the lower court should have taken into account the fact that the project was a greenfield project, the construction period, the role of the respondent in the project, the erratic disbursement of the loan facility by the respondent, the securing of alternative or additional funds for the same project and the repayment thereof, the gutting of the project and the outbreak of the Covid19 pandemic leading to the closure of the facility which was the source of the revenue for the repayments.

6.18 While we sympathise with the appellants for the challenges they might have encountered, we note that there was an agreement in place that specified the parties' obligations

towards each other clearly. The respondent began disbursing the loan in August, 2010 and completed doing so in October 2012. The facility letter in clause 7 required payment to start 6 months after the disbursement. However, the appellants never made any payments towards servicing the loan until 12th August, 2016 being four years after the last disbursement. The said payment being the sum of K100,000.00. Therefore, the appellant cannot be heard to refute having failed to pay back the loan.

6.19 The appellants allege a number of reasons for failure to discharge the loan, i.e that the project was gutted on 25th August, 2016. However as at the date of the fire incident, the 1st appellant had already defaulted. The Covid19 pandemic affected Zambia between 2020 and 2021 long after the expiry of the loan facility. Therefore, the reasons advanced by the appellants for not making the monthly repayment instalments cannot hold. We are of the view that the lower court was on firm ground to hold that the appellants willfully neglected to make repayments on the loan account.

6.20 In view of what we have said in ground two, we find that the court below properly exercised its discretion to order the

appellants to pay the judgment sum within 90 days from the date of judgment.

6.21 Ground four in our view is the main issue of substance in this appeal. It is challenging the holding by the court below that the respondent was within its rights to charge interest on a non-performing loan in line with the facility letter. The issue for determination is whether the respondent (lender) could charge contractual interest on a non performing loan.

6.22 The appellants argue that their loan with the respondent was a non-performing loan for which no interest can be charged. **Section 110 of the Banking and Financial Services Act, (BFSA) 2017** provides for the charging of interest on a non-performing loan as follows:

> ***110. (1) A financial service provider shall recover the following amounts from a borrower on a non-performing credit facility:***
>
> ***(a) the principal amount owing when the credit facility becomes non-performing;***
>
> ***(b) any interest in arrears due in accordance with the credit facility agreement but not exceeding the principal amount owing when the loan becomes non-performing; and***
>
> ***(c) expenses incurred in the recovery of amounts owed by the borrower.***

(2) This section does not apply to interest awarded in terms of a Court order or judgment and accruing after the making of the order or judgment.

6.23 **Section 2 of the BFSA** defines a non-performing loan as follows:

> ***"nonperforming loan " means a loan in respect of which payment of principal or interest is in arrears for more than ninety days;***

6.24 A reading of these provisions shows that interest may only be charged on a non-performing loan when the principal and/or interest has not been in arrears for more than 90 days. This means once there is default in repaying the loan for more than 90 days, that loan is deemed to be non-performing and the lender may recover the principal amount owing when the credit facility becomes non-performing and any interest in arrears due in accordance with the agreement, but not exceeding the principal amount owing when the loan becomes non-performing. The effect of the provision being the proscribing of the charging of interest on non-performing loans and that the interest due should not exceed the principal amount owing at the time the loan becomes non-performing.

6.25 The respondent argues that it operates under an Act namely the **Citizens Economic Empowerment Act Number 9 of 2006** and as such is not bound by the BFSA. It argues that the respondent, is not amenable to the Banking and Financial Services Act. It is not in issue that the respondent was established to promote the economic empowerment of citizens, companies etc. Further, that it advances loans for the aforestated purpose. In our view, the respondent can be classified on the same footing as a financial institution and as such **section 110 of the BFSA** is applicable to it.

6.26 The loan facility was obtained in 2010 for the sum of ZMK 2,000,000.00 (two billion kwacha unrebased). The facility was up to the last day of the fifty four (54) months from the date of the first disbursement. However the loan was repayable on demand. Interest was paged at 12% per annum subject to change without notice. The monthly repayment amount was in the sum of ZMK52,667,60.86. Demand was initially made on 26th February 2019, despite the loan having expired 54 months from the date of first disbursement.

6.27 In our view, the first date of disbursement of loan was 23rd October, 2010 when the respondent paid Chisulo General Dealers a supplier of the appellant. Therefore, the expiry date

of the facility should be taken as 54 months from that date, being around April 2015. No payments were made until 12th August 2016 when a sum of K100,000.00 was paid. The question then is, when can it be said the loan became non-performing for purposes of ascertaining interest to be charged.

6.28 Interest contractually agreed is allowed on the principal from the date of the loan until the date the facility became non-performing. We hold that the loan become non-performing three months after the expiry of the loan facility namely July 2015. Therefore, the respondent was entitled to repayment of the sum of K2,000,000 plus interest at 12% until July 2015.

6.29 We therefore find merit in ground 4 and order that the principal and interest outstanding be assessed by the Registrar and that interest found due should not exceed the principal amount owing when the loan became non-performing.

6.30 The amount found due shall attract interest at short term deposit rate from date of writ up to date of assessment. Thereafter, interest at the current bank lending rate until complete payment.

6.31 The said assessed sum shall be paid within 90 days from date of assessment. In the event of default, the respondent shall be entitled to the reliefs granted by the lower court, namely foreclosure and sale of the mortgaged property. And in the event the proceeds from the sale are not sufficient to liquidate the debt, the respondent is at liberty to enforce the 2nd and 3rd appellant's guarantees.

7.0 CONCLUSION

7.1 The appeal having substantially succeeded, we award costs to the appellants on appeal to be taxed in default of agreement.

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C. K. Makungu
COURT OF APPEAL JUDGE

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F. M. Chishimba
COURT OF APPEAL JUDGE

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K. Muzenga
COURT OF APPEAL JUDGE