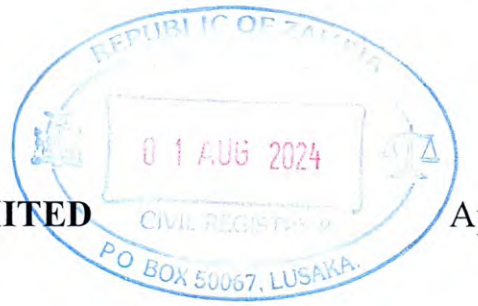
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 193 of 2022



BETWEEN:

GOLDMAN INSURANCE LIMITED Appellant

AND

ATTORNEY GENERAL Respondent

CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA
On 19 June 2024 and 1 August 2024

For the Appellant: Mr. K Kamfwa of Messrs Wilson and Cornhill

For the Respondent: Ms. M. Katolo, Assistant Senior State Advocate of Attorney General's Chambers

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J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court.

Cases referred to:

1. *National Milling Corporation v Angela Chileshe Bwembya Silwamba (Appeal No. 171 of 2015, SCZ)*
2. *Cusa Zambia Limited v Zambia Feed Company Limited (Appeal No. 47 of 2000, SCZ)*
3. *Bidvest Food Zambia Limited and 4 Others v CAA Import and Export (Appeal No. 56 of 2017, CAZ)*
4. *Burton Construction Limited v Zaminco Limited (1983) Z.R. 20 (S.C.)*
5. *Bernard Leigh Gadsden v Vincent Joseph Chila, (1991) S.J (HC)*
6. *Eastern Co-Operative Union Ltd V Yamene Transport Ltd (1988 - 1989) Z.R. 126 (S.C.)*

Other works referred to:

1. *Chitty on Contract Volume 2 Twenty-Eighth Edition*

1.0 INTRODUCTION

1.1 This appeal relates to a judgment of Justice Mikalile of the High Court, delivered on 24 June 2022.

2.0 BACKGROUND

2.1 The action giving rise to this appeal was initiated by the Respondent, as Plaintiff, through a writ of summons and statement of claim filed on 10 August 2018, against the Appellant, as Defendant.

2.2 The Respondent asserted that, at all relevant times, it was an obligee under performance bond number 010/510/1/000641/2013, which bond had been issued by the Appellant. This bond arose from a contract entered by the Ministry of Transport, Works, Supply and Communications with a company called Yangts Jiang Enterprises Limited (the contractor) on 16 July 2017. The contract pertained to the construction of a palisade fence, two staff houses, a guard house, and the performance of associated external works at the retirement house of the 5th Republican President of Zambia, located in the State Lodge area of Lusaka, under contract number 32/2013.

2.3 It was a contractual requirement that the contractor provide performance security in the form of a performance bond issued by an insurance company, amounting to 30% of the contract price. Accordingly, a performance bond was executed between the contractor and the Appellant on 19 August 2013, with the following pertinent terms:

i. *That Yangts Jiang Enterprises Limited were bound unto the Ministry of Transport, Works, Supply and Communications.*

ii. *That the surety was in the amount of K2,230,839.39.*

iii. *That the contractor and the surety bound themselves by the terms therein.*

iv. *That the contractor promptly and faithfully performs the said contract, then the said obligation shall and was to be null and void.*

v. *That the performance bond would remain in full force and effect and that whenever the contractor declared by the employer to be in default under the said contract and the Respondent having performed its obligations, the surety may promptly remedy the default or shall promptly:*

1. *Complete the contract in accordance with its terms and conditions; or*
2. *Obtain a bid or bids from qualified bidder's submission to the employer for completing the contract in accordance with its terms and conditions, and upon determination by the employer and the surety of the lowest responsive bidder arrange for a contract between such bidders and employer.*
3. *Pay the employer the amount required by the employer to complete the contract in accordance with the terms and conditions up to a total exceeding the amount of this bond.*

2.4 The statement of claim disclosed that the contractor failed to perform under the contract, prompting the Respondent to terminate the contract on 20 October 2015 in accordance with its terms.

2.5 Subsequently, on 2 March 2016, the Respondent requested the Appellant to encash the performance bond and remit the surety sum of K2,230,839.39 due to the contractor's default, contractor as previously agreed.

2.6 In its response dated 10 June 2016, the Appellant asserted that it had not been given the opportunity to elect an option to remedy the default as stipulated in the performance bond. The Appellant requested documentation, including a copy of the contract, acknowledgment of the contract's termination and interim certificates up to the date of termination, to determine the appropriate course of action to address the contractor's default.

2.7 All the requested documentation was provided to the Appellant by the Respondent by 27 July 2016. However, over a year passed without any response from the Appellant regarding the Respondent's demand. The Respondent communicated this lack of response to the Appellant on 5 September 2017.

2.8 On 26 September 2017, the Appellant's Advocate responded indicating that the Appellant had reviewed the requested documents and wished to remedy the breach by electing option 2, as outlined in paragraph 2.3(v)(2) thereunder.

2.9 The Respondent maintained that the prolonged silence by the Appellant caused it significant financial burdens, necessitating the procurement of alternative accommodation for the 5th Republican President's family at an exorbitant cost. The Respondent asserted that it was essential to promptly complete the required works, leading to the engagement of another contractor on 20 July 2017.

2.10 The Respondent further asserted that the Appellant's preferred option 2 involves the disbursement of public funds, which must comply with the procurement system of the Government of the Republic of Zambia under the Public Procurement Act No. 12 of 2008. The Respondent contended that this option was not feasible due to the Appellant's failure to promptly exercise its rights under the performance bond by timely indicating its preferred option. Therefore, the Respondent claimed the sum of K2,230.839.39, damages, interest thereon, and other reliefs in the action in the Court below.

2.11 The Appellant's defence filed on 23 August 2018, was a straightforward denial. It argued that contrary to the assertion that it had neglected its rights to elect an option for remedying the default, it was the Respondent that had denied this right by insisting on encashment, which would have allowed for performance of the contract.

3.0 DECISION OF THE LOWER COURTT

3.1 The trial Court determined that although the Respondent did not inquire how the Appellant would remedy the default, it still believed that the Appellant's right to choose was not removed.

3.2 Additionally, the trial Court disagreed with the notion that the Respondent breached the agreement by demanding encashment, as this was a specific term of the bond. The Court maintained that a breach would only occur if the Respondent had introduced a completely new term or demanded a course of action not previously agreed upon.

3.3 The trial Court further concluded that the Respondent, which was a victim of the breach of contract, had a duty to mitigate its loss and could therefore not be faulted for choosing to engage a new contractor. The trial Court observed that the Appellant chose to sit back as opposed to making its position known, adding that a year had elapsed and there was no way of telling how long the Appellant would remain silent had it not been nudged by the Respondent. The Court stated that the Appellant had frustrated the commercial purpose of the venture, and the Respondent was therefore entitled to act as it did.

4.0 THE APPEAL

4.1 Being dissatisfied with part of the judgment, the Appellant lodged a notice of appeal and memorandum of appeal on 30 June 2022, citing the following three grounds of appeal:

i) **The learned Judge in the Court below erred both in law and fact when, after finding as a fact that it was the Defendant as a surety that had the right to choose how the works were to be completed from the listed options went on to hold that the Defendant's right to make a choice was not taken away (page J14 line 27 to line 12 page J15) against the Plaintiff's own admission that they did not allow the Defendant to exercise the right to elect the option for remedying;**

ii) **The Judge in the Court below erred both in law and fact when she held that the Plaintiff was not in breach of the terms of the performance bond by insisting on encashment because this was**

one of the terms of the bond (page J15 lines 17 to 19) when in fact encashment was just one of the options exercisable by the Defendant; and

iii) **The learned Judge in the Court below erred both in law and fact when she held that the Plaintiff, as the victim of a breach of contract had a duty to mitigate its loss and therefore cannot be faulted for choosing to engage a new contractor (page J19 lines 16 to 18) when the evidence showed that the Plaintiff breached the terms of the performance bond by insisting on encashment from the time the demand was made.**

5.0 HEARING OF THE APPEAL

5.1 The appeal was heard before us on 27 June 2024. The Appellant and the Respondent were represented by their respective counsel, who relied on their heads of argument of 26 August 2022 and 17 October 2022 respectively. The arguments of the parties will not be recast here but referenced in the subsequent analysis section below, where necessary.

6.0 OUR DECISION ON THE APPEAL

6.1 We have conducted a thorough review of the evidence on record, the judgment under scrutiny, the grounds of appeal, the arguments and submission presented by the parties.

6.2 The Appellant argued all three grounds of appeal together. The Respondent argued ground 1 alone and ground 2 and 3 together. We shall adopt the

approach taken by the Appellant as the three grounds are interrelated. The Appellant submitted that the Respondent's letter of demand dated 2 March 2016, found at page 65 of the record of appeal, breached the conditions of the performance bond. Instead of inquiring how the Appellant intended to remedy the default, the correspondence demanded cash payment.

6.3 The Appellant argued that the clear intention of the parties was to ensure the completion of the works, which could have been achieved through any one of the listed options. The Appellant, as the surety, had the right to choose which option to employ to complete the works. The Appellant contended that the performance bond constituted the sole instrument establishing a legally binding business relationship between the parties. The Appellant further argued that by demanding payment of the guaranteed sum, the Respondent was effectively seeking to have the Court amend the terms of the performance bond. The Appellant cited the case of **National Milling Corporation v Angela Chileshe Bwembya Silwamba**[1] in which the Supreme Court determined that:

> ***"We have often cited the principle in the case of Printing and Numerical Registering Company v Simpson as quoted at page 8 in the unreported case of Colgate Palmolive (Z) Inc v Chuka and Others 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 utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by the courts of justice."***

6.4 The Appellant additionally contended that the Respondent's appropriation of the right to select a remedy for the default constituted a fundamental breach that undermined the essence of the performance bond, thereby discharging the Appellant from any further obligations under the said bond. The Appellant supported this position by referencing the authoritative text Chitty **on Contract, volume 2, Twenty-Eighth Edition, at page 1344, paragraph 44-091,** which states that:

> ***"If the creditor is guilty of a breach of the terms of the contract of suretyship, the question whether the surety is wholly discharged depends on whether the breach goes to the root of the contract as evinces an intention to repudiate the contract. If it does so, the breach will, in accordance with the normal principles, discharge the surety entirely."***

6.5 In response, the Respondent, addressing ground 1, acknowledged that, pursuant to the performance bond terms, detailed on pages 60 to 61 on the appeal record, the Appellant had three options for remedying the default as specified in paragraph 2.3 (v). These options were: first, to complete the contract in accordance with its terms and conditions; second, to obtain bids from qualified bidders for submission to the employer to complete the contract, and, following the employer's and the surety's determination of the lowest responsive bidder, arrange for a contract between the selected bidders and the employer; and third, to pay the employer the necessary amount to complete the contract up to a sum exceeding the bond amount. However, the Respondent argued that the Appellant adopted a *laissez-faire* approach despite being promptly notified of the contract termination via the first letter of demand dated 2 March 2016.

6.6 The Appellant's response was not received until 10 June 2016, which was three months after the initial communication, as evidenced on pages 251 to 252 of the record of appeal. Subsequently, the Respondent issued a reply on 27 July 2016. The Respondent further contended that a follow-up letter concerning option 2 of the performance bond was sent to the Appellant on 5 September 2017, as reflected on page 248 of the record of appeal. In response, the Appellant, through its legal representative, replied on 26 September 2017, attempting to assert that the Appellant had not been afforded an opportunity to select among the available options. The Respondent's final correspondence dated 20 December 2017 and detailed on pages 257 to 259 of the record of appeal, reiterated that while the Appellant had a right to choose among the available options, it only acted after being reminded of its obligations. The Respondent cited the case **Cusa Zambia Limited v Zambia Feed Company Limited,**[2] where the Supreme Court found that the Appellant in that case had 'slept on its rights'.

6.7 The Respondent addressed grounds 2 and 3 collectively, asserting that it is a well-established legal principle that once parties have voluntarily and freely entered a contract, they are bound by its terms, and the Court must uphold the contract's effectiveness. The Respondent directed the Court's attention to the performance bond located at page 60 of the record of appeal, specifically referencing paragraph 3, which states in part as follows:

> ***"Whenever the contactor shall be, and is declared by the employer to be, in default under the contract, the employer having performed the employer's obligations thereunder, the surety may promptly remedy the default, or shall promptly…"***

6.8 The Respondent asserted that the performance bond included a term requiring the Appellant to promptly remedy the default or to promptly select an option for addressing the default. The Respondent noted that, despite being notified of the contractor's default, the Appellant failed to take any action.

6.9 The Respondent further argued that the Appellant only acted after being reminded of its obligation in September 2017, which was over a year following the initial notification. The Respondent cited the case of **Bidvest Food Zambia Limited and 4 Others v CAA Import and Export**[3] in which the Court held as follows:

> ***"Following on the forestated, it was the view of the learned Judge that failure to grant adequate notice constituted a breach of contract... We have also upheld the learned Judge's finding that there was a breach of contract by the 2nd and 3rd Defendant at the instance of the 4th Defendant. Therefore, the argument by Counsel for the Defendants that there cannot be an inducement of breach of contract is untenable."***

6.10 The Respondent contended that while awaiting the Appellant's selection of a remedy option, it was compelled to secure alternative accommodation for the family of the 5th Republican President, incurring rental expenses due to the incomplete construction of the palisade fence, staff houses, and guard house. The Respondent further argued that the Appellant's response was delayed until after the Respondent had engaged another contractor, more than a year after the initial notification of the contractor's default.

6.11 In addressing the grounds of appeal, the central issue for determination is whether the Respondent properly exercised its option to encash the performance bond, as contemplated by the bond executed by the parties. For clarity, the relevant provisions of the Bond, detailed on pages 60 to 61 of the appeal record, are reiterated in paragraph 6.7 above, and the three available options are also summarized in paragraph 6.5 above.

6.12 In analyzing the matter, we have closely examined the correspondence exchanged between the parties following the contractor's default and the associated breach of contract, which was secured by the Appellant under the performance bond in question. After the contractor's default and the termination of the contract on 20 October 2015, as evidenced by the correspondence dated 20 December 2017 from the Respondent to the Appellant's legal representatives (pages 257 to 259 of the record of appeal), the Respondent's initial communication to the Appellant was a letter dated 2 March 2016, located at page 250 of the record of appeal. The letter notified the Appellant of the contractor's termination and requested encashment of the sum of K2,230,839,39 in respect of the performance bond No. 010/510/1/000641/2013.

6.13 The Appellant responded three months later with a letter dated 10 June 2016, which can be found on pages 251 to 252 of the appeal record. The response from the Appellant is excerpted as follows:

> ***"We are in receipt of your letter concerning the above matter together with our original bond.***
>
> ***We note however that you have not given us the opportunity to choose the option to remedy the default as provided for in the***

performance bond in question which gives us the following three (3) options:

....

In view of the foregoing and in order to enable us determine how best to remedy the default, we kindly request that you furnish us with the following:

1. ***Copy of the contract No. 32/2013.***
2. ***Acknowledgement of the termination of the contract.***
3. ***Interim certificate up to the date of termination.***

We now look forward to hearing from you..."

6.14 The Respondent issued a reply on 27 July 2016, as documented on pages 253 to 254 of the record of appeal. The pertinent extract from this correspondence is provided below:

"Reference is made to your letter No. GIL/CLAIMS/YS dated 10 June 2016 in which you requested for additional documentation. Attached hereto are photocopies of the following:

1. ***Contract number 32/2013***
2. ***Warning letter No. SA5/BDHQ/1/9/6....***
3. ***Letter of termination of the contract, number SA5/BDHQ/1/9/6***
4. ***Payment Certificates, numbers 1 to 3***

Kindly note that the K2,230,839.39 which is being encashed is 30% of the contract sum of K7,436,131.28 as provided under Clause 51. Our account details are: ... "

6.15 The Appellant, through its legal representative, responded to the Respondent's correspondence over a year later, with a letter dated 26 September 2017, found on pages 255 to 256 of the record of appeal. In this letter, the Appellant's Advocates insisted on obtaining the Respondent's stance, contending that the Appellant had not been afforded an opportunity to select a remedy option as stipulated in the performance bond. The Respondent subsequently replied in a letter dated 20 December 2017, detailed on pages 257 to 259 of the record of appeal. In this correspondence, the Respondent informed the Appellant that the contractor had fundamentally breached the contract by failing to complete the required works, leading to the contract's termination on 20 October 2015. The Respondent reiterated that, in light of these developments, the Appellant was obligated to pay the sum of K2,230,839.39 in accordance with the terms of the performance bond.

6.16 In our view, given the nature of works for which the contractor was engaged and the purpose - constructing suitable facilities for the family of the 5th Republican President - the Appellant ought to have taken appropriate steps to promptly advise the Respondent on what options it considered favourable to remedy the default caused by the contractor's failure to complete the contracted works. Even upon notification of the contractor's default and upon being furnished with documents it requested via the Respondent's letter of 27 July 2016, the Appellant went against the provision of the Performance Bond which required its prompt action in the event of the contractor's default by only responding to the Respondent over one year later, through its Advocates, with an attempt to augment its option to pick among available remedies, a situation which defeated the business context Performance Bond.

6.17 We concur with the Respondent's argument that the Appellant, from the initial notification of default and request for encashment on 2 March 2016 to the final demand letter sent on 20 December 2017, failed to act proactively. The Appellant did not engage or take active steps to remedy the default through the available alternative options, thereby effectively 'sleeping on its rights' as described by the Supreme Court in **Cusa Zambia Limited v Zambia Feed Company Limited**.

6.18 Additionally, it is a well-established principle that a party which fails to act in a timely manner, resulting in detriment of another party, may be estopped from asserting technicalities, such as failure to be given an opportunity to exercise alternative options under the performance bond. This principle of estoppel was affirmed by the Supreme Court in **Burton Construction Limited v Zaminco Limited**[4] that:

> ***"Mere presence at the auction sale without more i.e. evidence that the plaintiff was aware of its own rights as well as the Defendants' mistaken belief, cannot lead to the inference that the Plaintiff encouraged the Defendant to incur the expenditure, and therefore acquiesced, resulting in it being estopped from taking legal action."***

6.19 The estoppel of the Appellant from asserting such a defence is further justified by the fact that paragraph 3 of the performance bond explicitly required the Appellant to undertake prompt remedial action upon the contractor's default, which it failed to do in this instance.

6.20 In the High Court decision of **Bernard Leigh Gadsden v Vincent Joseph Chila**[5], the Court addressed the significance of timely action in contractual obligations and held as follows:

> ***'Time was therefore the essence of the Contract and the stated time for completion would start to run on the date of issuance of the State's Consent to Assign and /or when that fact is brought to the attention of the Defendant.'***

6.21 Notwithstanding that the Appellant may not have been given a choice to choose between the available options through the letter of demand of 2 March 2016, it can still be said that as of that date, the Appellant had been put on notice of the existence of the default for which it had provided suretyship and therefore ought to have promptly taken steps to remedy the default.

6.22 Following the said correspondence, the Appellant only replied on 10 June 2016, as evidenced by its letter to the Respondent appearing at pages 68 to 69 of the record of appeal, in which it sought, among other things, to be furnished with the copy of the contract, acknowledgment of termination, and interim certificate. When these documents where finally availed to the Appellant through a letter dated 27 July 2016, appearing at pages 70 to 71 of the record of appeal, the evidence on record shows that the Appellant remained silent until 26 September 2017, when its Advocates responded to a further reminder dated 5 September 2017. The Appellant's letter appears at pages 255 to 256 of the record of appeal.

6.23 We must add that the option taken by the Respondent was the most suitable and reasonable to mitigate its losses and safeguard its interests, given the casual approach with which the Appellant conducted its business relationship with the Respondent in this transaction. Had the Appellant responded promptly to the demand in March 2016, notifying the Respondent that it wished to exercise an alternative option under the Performance Bond, the situation might have been different. The Supreme Court has firmly established the obligation of a party affected by a breach to mitigate losses. This was affirmed in **Eastern Co-Operative Union Ltd V Yamene Transport Ltd**[6] where the Court held that:

> ***"A plaintiff who has a profit-making chattel damaged beyond economic repair is under obligation to replace that chattel and the poverty or otherwise of the plaintiff is irrelevant. Credit should be given for the salvage when limiting the period within which the respondent should have mitigated his loss by purchasing a replacement chattel of similar age and value."***

6.24 Given the Appellant's failure to take prompt action to remedy the contractor's default, the Respondent was fully entitled to exercise its right of encashment and make alternative arrangements to mitigate further losses. Having concluded that the Respondent properly exercised its right to encash the performance bond, the three grounds of appeal are therefore unsuccessful for the reasons outlined herein. The appeal is accordingly dismissed.

7.0 CONCLUSION

7.1 Given the failure of the entire appeal, we order that the costs of the appeal be borne by the Appellant, to be taxed in default of agreement.

J. Chashi
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE