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

APPEAL NO 038/2015
SCZ/8/006/2015

BETWEEN

MADISON FINANCE COMPANY LIMITED — **APPELLANT**

AND

PHILLIP SINYINZA — **1ST RESPONDENT**
NELSON MAZEMBE — **2ND RESPONDENT**
ETHROW MATALISE — **3RD RESPONDENT**

Coram: **Chibomba, Hamaundu and Kaoma, JJS.**

On 15th July, 2015 and on 16th February, 2015.

For the Appellant: Mr. K. Musonda of Ventus Legal Practitioners.
For the 1st and 2nd Respondents: No appearance.
For the 3rd Respondent: Present in person.

JUDGMENT

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to: -

1. **Zambia Consolidated Copper Mines Limited vs. James Matale (1996) ZR.**
2. **Nkongolo Farms Limited vs. Zambia National Commercial Bank Limited Kent Choice Limited (In receivership) Charles Huruperi SCZ Judgment No. 19 of 2007.**
3. **National Westminister Bank Plc vs. Kitch (1996) 4 All ER 495.**
4. **Avon Finance Company Limited vs. Bridger (1985) 2 All ER. 281.**
5. **Masauso Zulu vs. Avondale Housing Project Limited (1982) ZR 172.**
6. **Attorney-General vs. Marcus Kampumba Achiume (1983) ZR 1.**
7. **Wiheim Roman Buchman vs. Attorney General, SCZ Judgment No. 14 of 1994.**
8. **Printing and Numerical Registering Company vs. Simpson (1875) LR Eq 462.**
9. **Colgate Palmolive (Z) Inc vs. Able Shemu Chuka and 110 Others, Appeal No. 181 of 2005.**

Legislation referred to: -

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**

The Appellant appeals against the Judgment of the High Court at Lusaka, which held that the Appellant was only entitled to the sum of K20,000.

The history of this matter is that on 19th March, 2013, the Appellant advanced the sum of K30,000.00 to the 1st Respondent. As security, House No. 14/351, George Improvement Area, Lusaka, belonging to the 2nd Respondent was given. The 3rd Respondent guaranteed the sum. This loan together with interest was fully discharged by the 1st Respondent.

The Appellant, however, claims that on 10th September, 2013, a further Loan Facility, in the sum of K50,000.00, was advanced to the 1st Respondent as working capital and that the 2nd Respondent created a further security over the same property and that the 3rd Respondent gave a further 3rd Party Guarantee. That, however, the 1st Respondent failed to repay both the Loan Facility in the sum of K50,000.00 and interest thereof. The Appellant, therefore, by Originating Summons sought to recover the following reliefs from the Respondents: -

> "1. **Payment of all monies due to the Applicant under the respective covenants in the Loan Facility entered into between the Applicant and the Respondents on 19th day of March, 2013, (the 'Loan Facility') as secured by a Third Party Mortgage (the 'Mortgage') relating to House No. 14/351, George Improvement Area, Lusaka under Occupancy Licence No. 10232 (the mortgaged Property) and such costs as would be payable if this were the only relief claimed;**
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> 2. **A declaration that on the true construction of the Loan Facility a total sum of ZMW 51,388.96 (Zambian Kwacha Rebased Fifty One Thousand Three Hundred and Eighty Eight and Ninety Six Ngwee) as at 6th June, 2014, is due to the Applicant from the Respondents;**

3. **A declaration that until payment shall have been made to the Applicant of the balance which shall so be found due on taking the said account (together with the costs of this action) the Respondents are not entitled to redeem the Mortgaged Property;**

4. **That the Third Party Mortgage be declared as a legal mortgage and be enforced by foreclosure or sale;**

5. **Delivery by the 2nd Respondent to the Applicant of possession of the mortgaged property;**

6. **Interest on all sums due to the Applicant at the contractually agreed rate as contained in the Facility letter dated 19th March, 2013.**

7. **Further or other relief;**

8. **Costs."**

The Originating Summons was supported by an Affidavit. The gist of this Affidavit is that although the Respondents did repay the sum of K30,000.00 under the first loan together with interest, the 1st Respondent has not repaid the sum of K50,000.00 plus interest advanced under the second loan facility. And hence, the claim as listed above.

There was no Affidavit in Opposition from the 1st Respondent.

The gist of the Affidavit in Opposition by the 2nd and 3rd Respondents was that the sum of K30,000.00 advanced to the 1st Respondent has already been paid back together with interest and that the Appellant acknowledged this in the Affidavit in Reply.

The gist of the Affidavit in Reply is that the 1st Respondent did obtain a further Loan in the sum of K50,000.00 at the interest rate of 2.5% per month and that the loan was secured by third Party Further

Charge over House No. 14/351, George Improvement Area, Lusaka (the mortgaged property) belonging to the 2nd Respondent and a personal Guarantee by the 3rd Respondent. That the 1st Respondent acknowledged receipt of the initial K50,000.00 as evidenced by exhibit "HM1" and "HM2" being the third Party Mortgage and a further Charge over the mortgaged property and "HM3", the personal Guarantee by the 3rd Respondent. And that the 2nd and 3rd Respondents executed the above stated documents as security and that the outstanding sum due is K51,388.96 as shown by the statements of Accounts, exhibits "HM8" to the Affidavit in Support of the Originating Summons. And that the 2nd Respondent is in possession of the said mortgaged property and that the Respondents are in default of payment of the said principal sum and interest for which demand was made as per exhibits "HM6" and "HM7" to the Affidavit in Support of the Originating Summons.

At the hearing of the Originating Summons and upon considering the Affidavits before her, in the Ruling appealed against, the learned trial Judge was of the view that the question before her was the determination of the sum advanced under the second loan facility, which we totally agree with, if we may say so at this stage. Based on the further Charge registered on 23rd September, 2013, the learned Judge, however, came to the conclusion that the sum owing was K20,000.00 and not K50,000.00 claimed by the Appellant. She,

accordingly entered Judgment in the sum of K20,000.00 plus interest at 2.5% per annum in favour of the Appellant against the Respondents to be paid within 90 days and in default thereof, foreclosure, possession and sale of the mortgaged property.

Dissatisfied with the Judgement by the Court below, the Appellant now appeals on two Grounds of Appeal as follows: -

> **"1. That the learned trial Judge erred in law and fact when she found that a loan of only K20,000.00 was advanced to the Respondent in the second Loan Facility and not K50,000.00 despite her having site of the Loan Agreement and Statement of Account which clearly showed that the 1st Respondent obtained a loan of K50,000.00.**
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> **2. The learned trial Judge erred in law and in fact when she found that on the balance of probabilities the Appellant is only entitled to K20,000.00 by referring only to the Third Party Mortgage and Further Charge while ignoring or neglecting to consider the Guarantee made by the 3rd Respondent."**

In support of this Appeal, the learned Counsel for the Appellant, Mr. Musonda, relied on the Appellant's Heads of Argument.

In arguing Ground 1 which challenges the learned trial Judge for holding that only a loan of K20,000.00 was advanced to the 1st Respondent under the second Loan Facility and not K50,000.00 claimed by the Appellant, it was argued that the originating process and the Affidavit in Reply show that the initial sum advanced in March, 2013, was K30,000.00 which the 1st Respondent paid back in full together with interest. That, however, thereafter, in September, 2013, a further loan

of K50,000.00 was advanced to the 1st Respondent which the Respondents have not repaid. Hence, the Appellant commenced an action to recover the sum of K51,388.96 as evidenced by the loan Facility Letter and statement of account which show the Respondents' indebtedness in the sum claimed to the Appellant. That despite this evidence, the learned Judge, however, found that the Respondents were only indebted to the Appellant in the sum of K20,000.00 plus interest. Therefore, that the learned Judge erred in her findings of fact as she failed or neglected to acknowledge the evidence before her. It was further, argued that although the Appellant is aware of the firm principle that an appeal to this Court can only be made on a point of law or mixed point of law and fact, a question arose as to whether a finding of fact can be a question of law in **Zambia Consolidated Copper Mines Limited vs. James Matale**[1] in which Ngulube, C.J., as he then was, opined that:

> **"A finding of fact becomes a question of law when it is a finding which is not supported by the evidence or when it is one made on a view of the facts which cannot reasonably be entertained."**

Further, that in **Nkongolo Farms Limited vs. Zambia National Commercial Bank Limited Kent Choice Limited (In receivership) Charles Huruperi**[2], this Court stated that: -

> **"As a general rule an appellate court rarely interferes with the finding of facts by the lower court, unless such findings are not supported by evidence on record or the lower court erred in assessing and evaluating**

the evidence by taking into account matters which ought not to have been taken into account or failed to take into account some matters which ought to have been taken into account or mistakenly, the lower court failed to take advantage of having seen and heard the witnesses and this is obvious from the record or the established evidence demonstrates that the lower court erred in assessing the evidence."

It was submitted that in view of the above authorities, the Appellant, having shown that it advanced the sum of K50,000.00 to the Respondents and having also shown that the said sum had not been repaid together with the interest, the Appellant is entitled to that sum and not to K20,000.00 adjudged by the learned trial Judge. The learned Judge should have considered the loan Facility Letter and the Statement of Account to determine what was due to the Appellant.

In support of Ground two which challenges the learned Judge for finding that on the balance of probabilities, the Appellant was only entitled to K20,000.00 by referring only to the Third Party Mortgage and the further Charge and thereby, "ignoring or neglecting" the Guarantee by the 3rd Respondent, it was submitted that the record shows that there were two advances to the Respondent, namely, K30,000.00 which was secured by the Third Party Mortgage over the 2nd Respondent's property and a personal Guarantee by the 3rd Respondent and that this loan was fully settled by the 1st Respondent, but that the sum of K50,000.00 which was secured by the Third Party Further Charge over the 2nd Respondent's property and personal Guarantee by the 3rd

Respondent has not been repaid and that it was on this basis that the second advance was made over which the sum claimed was sought to be recovered.

Citing the case of **Nkongolo Farms Limited**[2] in which Counsel argued, we highlighted the general rule that this Court can interfere with the findings of the lower Court where the lower Court fails to take into account matters that ought to have been taken into account in arriving at its decision; it was contended that in the current case, the Appellant's claim is for money in the sum of K51,388.96 which was secured by a Third Party Further Charge and a Guarantee. And that the action was brought under **Order 30 of the High Court Rules, Chapter 27 of the Laws of Zambia** because part of the debt was secured by a mortgage. It was, therefore, the Appellant's position that there is a clear distinction in determining the amount owing by a party and an amount recoverable under the security provided.

The case of **National Westminister Bank Plc vs. Kitch**[3], was cited in which the Court in England opined that the **"fact that the moneys claimed by the bank are secured by a mortgage is wholly irrelevant in the context of the bank's claim"** as there is a distinction as regards the money owed to the Bank and the security for the said monies. The Court in that case put it thus: -

> **"If they are created under and by virtue of a deed, they are specialty debts from their commencement, but if they are created by a simple contract outside a deed, they remain simple contract debts even though there is a deed in existence which gives collateral security for them."**

It was argued that the Court below should, therefore, have distinguished the amount owing to the Appellant and the amount recoverable under the Third Party Further Charge as the loan Facility of K50,000.00 was also secured by a personal Guarantee of the 3rd Respondent, and a Thirty Party Further Charge which only secured K20,000.00.

As regards the liability of a guarantor, Counsel cited the case of **Avon Finance Company Limited vs. Bridger**[4], in which Lord Denning, MR, opined as follows: -

> **"Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. Take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and a friend guarantees it. The guarantor gives his bond and gets nothing in return. The common law will not interfere."** (Emphasis ours)

Counsel again referred us to our decision in **Nkongolo Farms Limited**[2] in which he contended, we discussed and affirmed the principle in **Avon Finance Company Limited vs. Bridgert**[4]. We were, accordingly urged on that premises, to set aside the finding by the learned Judge as she did not consider all the evidence before her

including the second loan Facility Letter and the Statement of Account on record.

On the other hand, the learned Counsel for the Respondents also relied on the Respondents' Heads of Argument filed on 28th July, 2015. Counsel began by restating the claim. We do not find it relevant to recast this suffice to say we have read that portion of the Heads of Argument.

Counsel contended that the Appellant admitted that the first loan obtained by the Respondents has been repaid, but claimed a further loan of K50,000.00 under the second loan Facility dated 10th September, 2013 at 2.5% interest rate per month was advanced. And that this was secured by a Third Party Further Charge over the house in question. However, that the Respondents' argument is that the Appellant's initial reliefs were premised on the first loan. And that it was only after learning from the Affidavit in Opposition that the first loan had been repaid, that the Appellant brought in the issue of the second loan agreement. Citing the case of **Masauso Zulu vs. Avondale Housing Project Limited**[5] in which we outlined the principle that the plaintiff must prove the allegations; it was argued that the onus was on the Appellant to prove on the balance of probabilities that it was owed the sum of K51,388.96 under the second loan agreement. But that, however, perusal of the Record will show that although there were two loan

agreements between the Appellant and the Respondents, the first loan of K30,000.00 was fully paid while the second was for only K20,000.00 and that it was secured by a Third Party Further Charge dated 23rd September, 2013. Our attention was drawn to the Recitals in the Third Party Further Charge which provide as follows: -

> **"1. By a mortgage dated 22nd day of March, Two Thousand and Thirteen (herein called the "Principal Deed") and made between the Mortgagor of the one part, the Borrower of the second part and the Lender of the other part the hereditaments and premises hereinafter described in the schedule (hereinafter called the property) were mortgaged by the mortgagor and the borrower to the lender to secure the principal amount of KWACHA THIRTY THOUSAND (K30,000.00) and interest thereon.**
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> **2. The Lender has agreed to advance to the borrower and the mortgagor a further sum of KWACHA TWENTY THOUSAND (K20,000.00) upon the same security on the terms herein expressed.**

Reference was also made to Covenant 4 of the same Deed which states that: -

> **"The total amount recoverable under the Principal Deed and these presents shall not exceed the sum of KWACHA FIFTY THOUSAND KWACHA (K50,000.00) with interest thereon."**

It was submitted that it can be seen from the above covenants that the learned Judge cannot be faulted for reaching the conclusion that the amount owed was K20,000.00, as this was the evidence on record which the learned Judge was perfectly entitled to rely on. Counsel cited the case of **Marcus Kampumba Achiume**[6] in which we held, inter alia, that the appeal Court will not reverse findings of fact made by a trial

Judge unless 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 or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.

It was submitted that in this action, the learned Judge rejected the argument that the Appellant was entitled to the sum of K50,000.00 on the basis of the evidence before her. Similarly, the Appellant had failed to prove on a balance of probabilities, that the amount reflecting on the statement of accounts was the amount owed to it as the statement of account exhibited shows the amount due under the first loan which was fully paid and hence, the Appellant needed to justify the amount in the statement of account but failed to do.

In response to Ground two, it was argued that this was an action that was for the recovery of money under a mortgage and that in paragraphs 1 to 6 of the Originating Summons, the Appellant talks about monies under a mortgage but at no particular place did the Appellant claim money against the 3rd Respondent and that had the Appellant raised this claim, the Court below could have addressed it and that since the Court below did not address this issue, the Appellant cannot now raise it before this Court at this late hour. As authority, the case of **Wiheim Roman Buchman vs. Attorney General**[7] was cited in which

we observed that where a matter is not raised in the Court below it is not competent to raise it as a ground of Appeal before this Court.

It was further argued that although Clause 10 of the Facility Letter dated 10th September, 2013 provides that the Facility of K50,000.00 was to be secured by a Third Party Mortgage, Floating Charge on stock and post-dated cheques to cover for instalments, this Facility Letter was superseded by the Further Charge which provided that the amount to be advanced to the 1st Respondent would be K20,000.00. In other words, that the parties changed their minds and decided to have new conditions to govern their relationship under which the amount was reduced. That this view is supported by the provision of Covenant 4 recast above, which stipulates the sum of K20,000.00. And that there was no guarantee under the new agreement. And that the above argument is fortified by comparing the Third Party Mortgage and the Third Party Further Charge in that the Third Party Mortgage in the first Recital states that the parties intended to incorporate the terms and conditions appearing in the Facility Letter dated 19th March, 2013 and makes reference to the first Facility Letter in the mortgage. And that the Further Charge, however, did not make any reference to the Facility Letter dated 10th September, 2013 and so, the parties changed their minds. The case of **Printing and Numerical Registering Company vs. Simpson**[8] was cited. It was submitted that what was stated in the above cited case

was in the case of **Colgate Palmolive (Z) Inc vs. Able Shemu Chuka and 110 Others**[9]. This is 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 Courts of justice. Applying this test to this case, the Appellant cannot resort to the 3rd Respondent after it decided to enter into a new agreement with the 1st and 2nd Respondents."**

It was further submitted that in view of the foregoing, the Appellant has failed to show that it is entitled to the sum of K51,388.96 as claimed, Therefore, this Appeal should be dismissed with costs to the Respondents.

We have seriously considered this Appeal together with the arguments advanced in the respective Heads of Argument and the authorities cited therein. We have also considered the Judgment by the learned Judge in the Court below. The major question raised in this appeal is whether as found by the learned trial Judge, the sum advanced to the 1st Respondent under the second loan Facility is K20,000.00 and not K50,000.00 claimed by the Appellant. For convenience and to avoid repetitions, we will consider the two grounds of Appeal raised together as they are interrelated and stem from the second loan Facility.

From the evidence on record, it is evident that the learned Judge was on firm ground when she found and concluded that the Appellant did, under the first loan Facility, advance the sum of K30,000.00 to the

1st Respondent and that house No. 14/351, George Improvement Area, Lusaka, belonging to the 2nd Respondent was given as security. She was also on terra firma when she held that the 3rd Respondent did execute a personal third party Guarantee and when she held that the sum of K30,000.00 under the first loan facility together with interest was fully settled by the 1st Respondent.

As regards the second loan Facility and the sum advanced as principal, perusal of the evidence on record has clearly shown that the Appellant advanced a further sum of K50,000.00 to the 1st Respondent and not K20,000.00 claimed by the Respondents. It is also clear that the same property described above which belongs to the 2nd Respondent was given as security and that the 3rd Respondent executed a personal Guarantee in the sum of K50,000.00. In the Court below, the Appellant's claim was that the Respondents had not repaid the sum of K50,000.00 advanced under the second Facility together with interest at 2.5 percent per annum as agreed. The 2nd and 3rd Respondents however, took the position that this loan was repaid. The learned Judge in the Court below was of the view that the question before her was the determination of the sum that the Appellant advanced under the second loan Facility to the 1st Respondent. We totally agree with the learned Judge that this was the central issue before her.

The learned Judge, however, in determining the sum advanced based her decision on the sum endorsed on the further Charge which was registered on 23rd September, 2013 over the property in question. We consider this to have been a grave error as this resulted into the learned Judge coming to the wrong and erroneous conclusion that the sum advanced and owing under the second loan Facility was K20,000.00 contrary to the documentary evidence on record which clearly shows that what was advanced is/was K50,000.00 plus interest at 2.5 percent per annum amounting to K51,388.96 as claimed by the Appellant in this matter. The above position is fortified by the said loan Facility Letter which is endorsed with the sum of K50,000.00. Clause 10 of the said facility Letter reads as follows: -

"This facility shall be secured by:

- **Third Party Mortgage on property No. 14/351, George Compound belonging to Mr. Nelson Kazembe.**
- **Floating Charge on stock.**
- **Post dated cheques to cover for instalments."**

This means that the property belonging to the 2nd Respondent was given as security. Therefore, there can be no doubt that what was advanced in the second Facility letter was the sum of K50,000.00. The Record however, shows that the Further Charge was in the sum of K30,000.00. The Mortgage also mentions the sum of K30,000.00. However, the second recital mentions the sum of K20,000.00. Clause 3

of the Further Charge puts the sum as K20,000.00 while clause 4 of the same document refers to the sum of K50,000.00.

It is our considered view, however, that despite the contradictions illustrated above, the sum advanced under the second Facility letter can be easily ascertained because the second Facility letter which is the principal document in this matter is clearly endorsed with the sum of K50,000.00 as the sum loaned to the 1st Respondent and not K20,000 as found by the learned trial Judge. We are, therefore, satisfied that the learned Judge misapprehended the facts and the law in this respect as clearly, if she had properly addressed herself to the distinction between the amount endorsed on the second Facility Letter and the sum value secured by the Mortgage and Further Charge, she could not have come to the wrongful conclusion that what was Advanced was K20,000.00. We also find no basis for the 2nd and 3rd Respondents' feeble argument that the parties changed their minds after endorsing the sum of K50,000.00 on their second loan Facility letter and to reducing the sum advanced or to be advanced to K20,000.00 which is endorsed on the Further Charge. We are not at all satisfied that this was/or could have been the intention of the parties because if it was, the parties could have ensured that this was reflected on the second loan Facility which is/was the principal document as observed above. Therefore, this is a proper case in which as the Appeal Court, we can reverse the findings of facts

made by the trial Judge as the finding in question is not supported by the evidence on Record and is a misapprehension of the facts. The case of **Attorney-General vs. Marcus Kampumba Achiume**[6], fortifies our decision above.

As regards the liability of the 2nd Respondent, it is our firm view that the 2nd Respondent's liability is/was limited to the sum of K20,000.00 plus interest as agreed which is the sum endorsed on the Mortgage document under the second loan Facility. The 2nd Respondent can therefore, redeem his security by paying that sum to the Appellant plus interest as adjudged by the Court below.

As regards the 3rd Respondent, we find that he is liable to pay the sum of K50,000.00 being the principal sum advanced to the 1st Respondent plus interest at the agreed rate as adjudged by the Court below because the 3rd Respondent guaranteed to pay this sum in the event that the 1st Respondent defaulted or failed to pay. The 1st Respondent in this case, defaulted or failed to pay and so as endorsed in the guarantee document which the 3rd Respondent executed in favour of the Appellant, the 3rd Respondent must pay.

For the reasons given, Grounds 1 and 2 of this Appeal succeed to the extent reflected above. We, accordingly, set aside the sum of K20,000.00 found as outstanding to the Appellant by the Court below and replace it with the sum of K50,000.00 plus 2.5 percent interest per

annum as agreed in respect of the 1st and 3rd Respondents and we enter Judgment accordingly. As against the 2nd Respondent, we confirm the Judgment in the sum of K20,000.00 plus interest at 2.5 percent per annum as found by the court below.

Both grounds having succeeded to the extent reflected above, we order that costs in this Court and in the court below be for the Appellant. The costs are to be taxed in default of agreement.

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H. Chibomba
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE