IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 125 OF 2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SPRINT TELECOM LIMITED	**1ST APPELLANT**
BENNY MULENGA	**2ND APPELLANT**
MUTALE CHISENGA LUMBWE	**3RD APPELLANT**
AND	
FOCUS FINANCIAL SERVICES LIMITED	**RESPONDENT**

CORAM: Chashi, Mulongoti and Lengalenga, JJA

ON: 25th September, 2019 and 15th January, 2020

For the 1st, 2nd and 3rd Appellants:	*Z. Simposya, Messrs MSK Advocates*
For the Respondent:	*M. Siansumo (Ms) Messrs Malambo and Company*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Zambia State Insurance Limited v Chanda (1992) ZR 175**
2. **MTN Zambia Limited v Investrust Bank Plc Zambia Limited – SCZ Judgment No. 8 of 2015**
3. **Lyons Brooke Bond (Zambia) Limited v Zambia Tanzania Road Services Limited (1972) ZR 317**
4. **Nkhata and Four Others v The Attorney General of Zambia, (1966) ZR, 147 – Reprint**

Legislation referred to:

1. **The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia**
2. **The Banking and Financial Services Act, No 7 of 2017**

Other works referred to:

1. **James P. Cooke, in Equity Partnership in Texas: A Lender's Dream or a Usurious Nightmare**
2. **Black's Law Dictionary - Brian A Garner, Eighth Edition, Thomson West**
3. **Oxford Advanced Learner's Dictionary: International Student's Edition**
4. **Chitty on Contracts, Volume II on Specific Contracts**

5. **Investopedia - Dotdash Publishing Family – https.//www. Investopedia .com ▶terms**

6. **Odgers' Principles of Pleading and Practice, 22nd Edition DB Casson and IH Dennis, London, Stevens & Sons 1981**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of Hon. Mrs Justice Irene Zeko Mbewe in the High Court (Commercial Division) delivered on 16th January, 2019.

1.2 In the said Judgment, the learned Judge awarded the Respondent which was the plaintiff in the court below, the reliefs it was seeking and dismissed the defendants' counter claims who are the Appellants herein.

2.0 BACKGROUND

2.1 The Respondent on 1st August, 2019 commenced proceedings against the Appellants by way of writ of summons seeking the following reliefs:

2.1.1 Against the 1st,2nd and 3rd Appellants jointly and severally, the sum of K16,838,229.38, being the outstanding amount due to the Respondent as at 30th January, 2019.

2.1.2 Interest, costs and any other relief the court may deem fit.

2.2 According to the attendant statement of claim, the 2nd Appellant acting on behalf of the 1st Appellant, had on 8th December, 2015 applied for a facility of K12,000,000.00 as working capital and by an agreement of even date, made between the Respondent and the 1st Appellant, the Respondent granted the 1st Appellant a loan facility in the sum of K9,000,000.00, which facility was due to expire within one hundred and twenty (120) calendar days.

2.2.1 On 8th December, 2015, the 2nd and 3rd Appellants executed an unlimited personal guarantee, guaranteeing the Respondent of any sums that would be repayable to the Respondent under the facility.

2.2.2 The Respondent's case was that, the 1st Appellant in breach of the facility agreement failed to repay the facility and continued to neglect to liquidate its debt,

notwithstanding several demands for payment made by the Respondent.

2.2.3 On 28th June 2017, the Respondent made a demand in writing on the 2nd Appellant for the sum of K16,323,229.38 under the terms of the guarantee which was outstanding as at 30th January, 2017, and the 2nd Appellant failed to effect payment.

2.3 The Appellants settled their defence and counter claim on 22nd March, 2018.

2.3.1 In the defence, the 2nd and 3rd Appellants admitted being directors in the 1st Appellant but denied being guarantors for the repayment of facilities obtained by the 1st Appellant from the Respondent as the said guarantees, if any, were null and void and of no effect.

2.3.2 As regards the Respondent's claim that it granted the 1st Appellant a loan facility of K 9,500,000.00, the Appellants averred that the 1st Appellant in July 2015 secured a contract with Airtel Mobile Service Zambia Limited (Airtel) to perform E- money distribution service.

2.3.3 That following discussions between Airtel, the Respondent and the 1st Appellant, the 1st Appellant at the behest of Airtel, approached the Respondent for an equity participation agreement (EPA).

2.3.4 Under the EPA, the Respondent was to provide the required Capital to perform the contract while the 1st Appellant was to provide the expertise and technical resources.

2.3.5 According to the Appellants, the parties upon noting that the Respondent's financing expertise, traditionally lay in the area of invoice discounting, which would usually fair for shorter periods, the Respondent offered the 1st Appellant a specially structured arrangement, which would involve the Respondent participating in the deal as an equity partner and not a loan provider. The only pre condition being that, Airtel would guarantee making commission payment earned by the 1st Appellant directly to the Respondent.

2.3.6 The EPA was executed in 2015 and that triggered the first tranch of funds to be cleared by the Respondent in July, 2015 to Airtel and the 1st Appellant.

2.3.7 The Appellants further averred that, the last EPA was signed on 8th December, 2015. That under clause 3 of the EPA, it was intimated that both parties were going to be involved in participating in the contract for their mutual benefit.

2.3.8 According to the Appellants, the Respondent in principle approved K12,000,000.00 of equity capital injection, but however failed to make it available to the 1st Appellant, as according to their explanation they were experiencing cash availability challenges and only made available K6,000.000.00 from which the Respondent subtracted fees.

2.3.9 The Appellant's position was that, the Respondent being an equity partner and fully aware of the contract with Airtel, proceeded to practice predatory, unfair and flawed funding practices by applying excessive fees and charges

to the detriment of the 1st Appellant. That the Respondent was receiving all the commission proceeds directly from Airtel and only passed on commissions to the 1st Appellant on two occasions, thereby causing the 1st Appellant to fail to deliver the contract optimally.

2.3.10 The Appellants alleged that the Respondent contributed to the decline of the business by not remitting a portion of the agreed requisite funds, to sustain the business operations.

2.3.11 The 1st Appellant averred that the Respondent was privy to and fully aware of the outlined business model between Airtel and the 1st Appellant which required the 1st Appellant to meet a parameter called compliance which involved the 1st Appellant providing overnight lending services to Airtel agents via mobile money. That the practice caused the 1st Appellant to suffer huge losses when a number of agents failed to meet their obligations with the 1st Appellant.

2.3.12 According to the 1st Appellant, the Respondent as an equity partner should share in the losses accrued in the business model, as it had a right under its obligation as per clause 6.2 of the EPA to take over the management of the contract if it felt that the 1st Appellant was under performing, but it did not.

2.3.13 Arising from matters outlined, the 2nd and 3rd Appellants averred that, the purported guarantees they signed are null and void and of no effect as there was never any loan agreement between the 1st Appellant and the Respondent.

2.3.14 The Appellants denied that they are indebted to the Respondent, as the sums invested by the Respondent was equity capital which did not attract interest.

2.4 The Appellants then counterclaimed the following:

2.4.1 A declaration that, the guarantees that the 2nd and 3rd Appellants signed in favour of the Respondent are null and void and of no effect, as what the Respondent and the 1st Appellant entered into was an equity participation agreement and not a loan agreement.

2.4.2 An Order that they be delisted from the Credit Reference Bureau (CRB).

2.4.3 Exemplary or punitive damages for malice.

2.4.4 Damages for negligence.

2.4.5 Damages for injury to business reputation.

2.4.6 Interest and costs

2.5 The Respondent settled its reply and defence to the counter claim on 8th January, 2018.

2.5.1 According to the Respondent, the deed of guarantee executed by the 2nd and 3rd Appellants is valid and enforceable.

2.5.2 Further, according to the Respondent, the 1st Appellant's financial requirements did not fall under the credit products the Respondent ordinarily offers and at the request of the 1st Appellant, the Respondent tailored a form of financing to meet the 1st Appellant's need.

2.5.3 That it was at all material times the intention of the 1st Appellant and the Respondent that the funds advanced

would be returned with interest, hence the execution of the deed of guarantee.

2.5.4 According to the Respondent, the 1st Appellant did not make available the relevant information the Respondent required to monitor the 1st Appellant's performance, despite several requests from the Respondent and Airtel.

2.5.5 As regards the administration fees, the Respondent averred that it was a condition under clause 8 of the EPA that the 1st Appellant had to meet the fees prior to the disbursement of funds.

2.5.6 The Respondent averred that it was only bound to disburse funds agreed upon in the facility agreement.

2.5.7 According to the Respondent, it was not privy to the relationship and operations between the 1st Appellant and Airtel agents and that the meeting which was held in September 2015 was only for assessment purposes on the disbursement of funds made in December, 2015.

2.6 In its defence to the counter claims, the Respondent averred that, the 1st Appellant expressly authorised the Respondent to provide the 1st Appellant's credit data to CRB and third parties. That there was no malice in giving the CRB information regarding the 1st Appellant's status as the Respondent furnishes both positive and negative credit data which the Respondent, is, in any event, mandated to do by law.

2.7 At the trial, the Respondent called one witness, Francis Mandona Mwape (PW1) head of treasury. The Appellants did not call any witnesses.

2.7.1 According to PW1, the 1st Appellant applied for a facility of K12,000,000.00 to enable it access working capital for a contract with Airtel. The Respondent then tailored a form of order financing to meet the requirement and termed it an EPA. The Respondent then availed a facility of K6,000,000.00 to the 1st Appellant on the undertaking that the amount would be repaid under the contract with Airtel.

2.7.2 It was PW1's evidence that the 1st Appellant accepted the terms and the monies were disbursed bringing the total of the amount disbursed to K5,000,000.00.

2.7.3 According to PW1, as part of the securing for repayment of the facility, an assignment of contract debt was executed on 8th December 2015, wherein, the 1st Appellant assigned absolutely to the Respondent as first priority, all its rights and interests to the receivables due to the 1st Appellant from Airtel. An addendum thereto was executed for the 1st Appellant, including an unlimited guarantee by the 2nd and 3rd Appellants.

2.7.4 It was PW1's testimony that, the 1st Appellant defaulted, as it failed to repay the facility on due dates and on 20th May, 2016, the 1st Appellant at the Respondent's request, refused to facilitate an e-value balance from Airtel.

2.7.5 That further on 13th September, 2016, the 1stAppellant through the third Appellant met with the Respondent and proposed how it intended to settle the outstanding debt, but despite the undertaking to pay, the 1st Appellant failed

to settle the debt. The debt as at 20th January 2017 stood at K16,883,227.38.

3.0 **FINDINGS BY THE COURT BELOW**

3.1 Upon considering the pleadings, the evidence and the submissions by the parties, the learned Judge in the court below opined that, three issues emerged for determination as follows:

3.1.1 Whether the Respondent was entitled to the relief sought.

3.1.2 Whether the Respondent was an equity partner or loan provider.

3.1.3 Whether the Appellants are entitled to any reliefs as counter claimed.

3.2 The learned Judge took the view that, the financing model was peculiar in that, not only did the Respondent disburse funds to the Appellant, but there was a clause to the effect that the Respondent, as the provider of the finances, would be involved in the management of the contract between the 1st Appellant and Airtel, in the event of the 1st Appellant's

failure to perform its obligations. That it was on that strength that Counsel for the Appellants strenuously argued that the Respondent was an equity partner.

3.2.1 The learned Judge observed that, the financing arrangement was such that the Respondent availed monies to the 1st Appellant and in return, the 1st Appellant would direct the monies from Airtel to the Respondent until the principal was repaid.

3.2.2 The learned Judge was of the considered view that, the Respondent was paying out money whilst the 1st Appellant was receiving money, which was synonymous with a lender and borrower relationship.

3.2.3 That there was no evidence to show that there was an intention by the Respondent to acquire any shares or equity in the 1stAppellant as a Company. That if that was the case, the parties would have executed shareholders agreements or allotted such shares to the Respondent within the duration of the EPA. The learned Judge opined that, it was apparent that from the advancement of funds

to the 1st Appellant, it was incumbent upon the 1st Appellant to pay back the money to the Respondent.

3.3.3 The learned Judge found that, in a typical equity participation arrangement, a repayment of the principal by the borrower would have been absent. In an equity participation agreement, an equity partner would not be charged an administrative fee from the same monies both parties are purportedly to benefit from.

3.3.4 The learned Judge, further found that, in a loan, the lender mitigates its risks by requesting the borrower to provide security, which the Respondent did in this case.

3.3.5 The learned Judge opined that, the arrangement between the parties was typical of a loan transaction, where the proceeds from Airtel were structured in such a way that they are paid directly to the lender.

3.3.6 According to the learned Judge, The EPA was devoid of any clause expressly stating the sharing of profits and losses of the contract or order price payable by Airtel. That although, clause 7.1 stated that:

"The supplier and Focus agree that upon termination events occurring in accordance with clause 14 below, the contract or order price payable by the off-taker (Airtel) to the supplier, shall be shared as follows:

7.1.1 Focus shall be entitled to the payment of K7,740.000.00

7.1.2 The balance of the contract of order price remaining after payment of focus in accordance with clause 7.1.1 above shall be paid to the supplier.

It is apparent that clause 7.0 was applicable in the event of a termination. It was not indicative of any profit and loss sharing agreement between the parties as alleged by the Appellant.

3.3.7 The learned Judge found that the Respondent was entitled to recoup its principal amount on the commissions due to the 1st Appellant from Airtel as structured in the EPA and by any stretch of imagination could not be construed to

mean that the parties will share profits and losses. If anything, the 1st Appellant was expected to pay back the Respondent monies advanced which again is typical of a loan agreement.

3.3.8 Based on the reading of clause 6.0 of the EPA, the learned Judge opined that the Respondent as lender was merely securing its interest by ensuring that its debt obligations by the 1st Appellant were met through close monitoring of oversight of the 1st Appellant's activities. According to the learned Judge, the clause did not in any way impute that the Respondent was an equity partner.

3.3.9 Further, according to the learned Judge, another fact that removes the transaction in question from the realms of an EPA is the assignment of contract debt executed on 5th December 2015 which assigned the 1stAppellant's rights and interest to the receivable from Airtel to the Respondent. The learned Judge was of the settled mind that this was done by the Respondent and is typical of lenders who wish to secure payment of monies lent.

3.3.10 The learned Judge upon analysing Section 32 of **The Banking and Financial Services Act[1] (the Act)** and the material on record, such as the financial statements, the description of the assignment of contract debts and the terms of the credit, found that the requirement for the schedule of repayments and the purpose of borrowing was stated in the EPA.

3.3.11 That the material on record, clearly defeats the arguments by the Appellants that the Respondent was an equity partner. The learned Judge found and held that the Respondent did not in any way contravene Section 32 of the Act. That if anything, that proved and consolidated the fact that the transaction entered into between the 1st Appellant and the Respondent was a loan agreement.

3.3.12 On the Appellants argument that, the EPA was devoid of a rate of interest applicable, thereby making the transaction an equity agreement and not a loan, the learned Judge observed that no interest had been stated in the EPA except where there is a default under clause 7.1.3 of the EPA where the 1st

Appellant receives monies from Airtel and fails to remit it to the Respondent.

3.3.13 The learned Judge then posed the question as to where there is no interest rate stated, that invalidates the loan agreement. She found and held that it does not invalidate the contractual obligations between the 1st Appellant and the Respondent. The learned Judge found support in Section 120 of the Act.

3.3.14 Further, the learned Judge found that from an analysis of the EPA, though it described itself as an EPA, it was simply a label and did little to bring it within the framework commonly associated with an EPA. That the realities of the transaction strongly gravitated towards a loan agreement.

3.3.15 As regards the guarantee by the 2nd and 3rd Appellants, the learned Judge found that it was executed by the 2nd and 3rd Appellants and it was clear from the said guarantee that it was of an unlimited nature and had no limit and that in the event of the 1st Appellant failing to settle the debt, the guarantee remained enforceable against the 2nd and 3rd Appellants.

3.3.16 The learned Judge on a balance of probabilities found that the Respondent had proved its case.

3.4 On the counter claim by the Appellants, the learned Judge found that the Appellants did not take care to particularize the special damages in their pleadings.

3.4.1 On the claim for delisting from CRB, the learned Judge did not find a malicious intent on the part of the Respondent in reporting the Appellants to the CRB. That it merely followed the requirements as laid out by statute. That in fact there was a declaration by the 1st Appellant acknowledging that it was bound by the agreement which was duly executed and which was clear and unambiguous.

3.4.2 According to the learned Judge, there was no information furnished to CRB which was misapplied by the Respondent in total disregard of the Appellant's rights and business reputation. Furthermore, that the Appellants failed to lead any evidence to that effect. The learned Judge, in any case, took the view that the 1st Appellant expressly authorised the

disclosure of credit information and cannot be reneged on that.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge found for the Respondent and dismissed the counter claim by the Appellants.

4.1.1 The learned Judge entered Judgment in favour of the Respondent against the 1st Appellant in the sum of K 7,240,000.00 plus ten (10) per centum interest from the date of termination of the EPA to date of the writ. The learned Judge disallowed the roll over fee, discount fee and processing fee.

4.1.2 That the recomputed amount was to attract interest at the short-term deposit rate as determined by Bank of Zambia from date of the writ to date of Judgement and thereafter at the commercial lending rate until full payment.

4.1.3 In the event that the 1st Appellant failed to settle the recomputed debt, the Respondent were to enforce the

unlimited guarantee dated 8th December 2015 against the 2nd and 3rd guarantors to settle the Judgement debt.

4.1.4 Costs were awarded to the Respondent to be taxed in default of agreement.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the Judgement of the court below, the Appellants have appealed to this Court advancing six grounds of appeal couched as follows:

5.1.1 The court below erred in law and fact when it failed to recognise that the nature of the agreement the parties entered into was an EPA and not a loan agreement and that the said agreement clearly fell short of being considered a loan agreement as enshrined in the Act (the law applicable at the time the parties entered into the agreement at issue).

5.1.2 The court below erred in law and fact when it failed to appreciate that the words of the EPA or facility were clear and unambiguous and therefore, the literal rule of

statutory interpretation ought to have been applied and no implied terms should have been implied into the express wording.

5.1.3 *The court below erred in law and fact when it held contrary to the evidence on record that "I find the Plaintiffs evidence credible and hold that the 1st Defendant breached the terms of the EPA" and found in favour of the Respondent in the sum of K 7,340,00.00 plus interest from the date of the determination of the EPA to date of the writ.*

5.1.4 The court below erred in law and fact when it failed to find that the guarantee that the 2nd and 3rd Appellants signed in favour of the Respondent was null and void and of no effect, because what the parties entered into was an EPA and not a loan agreement warranting guarantees.

5.1.5 The court below erred in law and fact when it failed to find that the EPA was in fact illegal because it was not preceded by Bank of Zambia approval as required under Section 8 of the Act.

5.1.6 The court below erred in law and fact when it failed to find that the listing on CRB was erroneous because the Appellants never obtained a loan facility from the Respondent but simply participated in an EPA that accrued no liabilities as between the parties if the agreement failed.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 At the hearing of the appeal, Mr. Simposya, Counsel for the Appellants relied on the heads of argument filed into Court. Grounds one and two were argued together.

6.1.1 In arguing the two grounds, Counsel drew our attention to the EPA which was executed by the parties and submitted that the literal interpretation of the same is key, because the words are not ambiguous in any way. That from the provisions of the EPA, it is abundantly clear that the parties did not execute any form of loan agreement or facility but signed an EPA, under which they were to obtain a mutual benefit or indeed share the pain of any financial meltdown. According to Counsel, the Respondent

was given a stake in the business and therefore the issue is not one of allotment of shares. That the wording of the EPA is clear in terms of assignment of rights and business interests to the Respondent.

6.1.2 According to Counsel, each of the two parties to the agreement contributed something of value which amounted to sufficient consideration, hence they met the consideration threshold stressed in the case of **Zambia State Insurance Limited v Chanda**[1]. That furthermore, the fact that the Respondent had management rights under the agreement makes it clear that the Respondent was an equity partner to the 1st Appellant and entitled in the daily running of the business.

6.1.3 Counsel submitted that, the issue is not one of purchasing shares or equity in the 1st Appellant as that factor is not cardinal in determining whether or not there is a valid EPA in place.

6.1.4 It was argued in the alternative, that should this Court doubt as to what the parties intended, then the Court

should apply the **Contra proferentum** rule against the Respondent who drew the agreement. Reliance in that respect was placed on the case of **MTN Zambia Limited v Investrust Bank PLC Zambia Limited**[2]

6.1.5 As regards the issue of the EPA not meeting, the characteristics of a loan agreement, as per Section 22 of the Act, it was submitted that, the agreement has no characteristics of a loan agreement or facility.

6.2.1 In arguing the third ground of appeal, it is contended that, the Respondent had been paid a total of K6,329,517.00 over and above the commission it collected from Airtel, which evidence was not disputed, but was not considered by the court. That the Respondent was fully aware of the business model outlined by the Appellants and they had the option to insist on taking over the running of the 1st Appellant's operations, if it felt there were deliberate attempts not to fully participate in the EPA.

6.3.1 As regards the fourth ground of appeal, it was submitted that in view of the submission that there was no loan

agreement executed between the parties, this Court should find that the guarantee was irregular and therefore null and void, as it was premised on a non-existent loan agreement.

6.3.2 Alternatively, it is argued that, the guarantee is unenforceable because it was premised on an illegal agreement which did not meet the provisions of the law in terms of requirements or content of a proper and lawful loan agreement.

6.3.3 In a further alternative, it is Counsel's argument that the parties were mutually mistaken as to the subject matter of the contract and the contract is therefore, unenforceable as between them and that the ambiguity in relation thereto should in any case, be interpreted against the Respondent as the drafter of the agreement.

7.0 ARGUMENTS IN RESPONSE TO THE APPELLANT'S GROUNDS OF APPEAL

7.1 In response to the first and second grounds of appeal, Counsel for the Respondent, Ms Siansumo, drew our

attention to the learned author of **Equity Participation in Texas: A lenders Dream or a Usurious Nightmare** at page 879 where equity participation is defined as follows:

> *"The basic concept involves an advance of money in consideration for some form of ownership position in the borrower's enterprise given in lieu of or in addition to simple interest".*

7.1.1 We were also referred to the learned author of **Black's Law Dictionary** where equity is defined to mean an ownership in a property especially a business. Our attention was further drawn to the learned authors of **Oxford Advanced Learner's Dictionary: International Students Edition** at page 494 where equity is said to mean:

> *"The value of a company's shares. The value of a property after all the charges and debts have been paid".*

According to Counsel, from the said definitions, equity participation requires a borrower to give partial ownership of a company's equity to the lender as consideration for the money advanced.

7.1.2 Counsel contends that, the 1st Appellant did not advance the Respondent any equity in its business enterprise or company so as to meet the threshold of the payment being classified as an equity participation agreement.

7.1.3 It was submitted that clause 4.0 of the EPA had a fixed duration of one hundred and twenty (120) days following which the agreement would terminate as per clause 14.1.1. Further clause 7.1, and repeated under clause 10.1 and 11.1 were indicative that the 1st Appellant had a repayment obligation to the Respondent. That the funds advanced were intended to be repaid and as such, what was contracted from the Appellant was a loan.

7.1.4 As regards Clause 6.2, it was argued that the Respondent had a "**reserved right**" to take over management of the contract, if it appeared that the 1st Appellant was failing to

perform its obligations under the contract. That the primary obligation to perform the contract always rested on the 1st Appellant and clause 9.1 gave the parties guidance on how the parties were expected to proceed in the event of clause 6.2 materializing.

7.1.5 According to Counsel, the Respondent could only ascertain that the 1st Appellant would fail to meet its obligation when it did not receive payment on the effective date in April, 2016. Further that the Respondent had limited facilities to monitor the 1st Appellant's performance, owing to the 1st Appellant's failure to provide the necessary information required by the Respondent. That the Respondent cannot therefore, be faulted for failing to take over the management of the contract.

7.1.6 Counsel further submitted that, according to the board resolution of 8th December, 2015, the 1st Appellant needed to borrow K12,000,000.00 from the Respondent, as such the 1st appellant was always aware that it was borrowing funds. Additionally, clause 2 of the EPA contained

conditions precedent to the coming into effect of the EPA such as confirmed direct pay agreement, execution of the deed of assignment and upfront and non-refundable payment of the administration fee.

7.1.7 It was submitted that, had the intention of the 1st Appellant and Respondent been to be equity partners, there would have been no need for the 1st Appellant to pay administration fees, execute a deed of assignment, as well as have a direct payment agreement in place.

7.1.8 Our attention was drawn to clause 13 on events of breach and default and submitted that it was clear that failure by the 1st Appellant to perform the contract terminated the EPA and the Respondent was entitled to be paid the sum of K7,240,000.00 under clause 7.1.1 of the agreement.

According to Counsel, the Appellants' claim that the Respondent was to share in any losses incurred on the failure to perform the contract venture flies in the teeth of clause 13 of the EPA.

7.1.9 It was further submitted that, the 2nd and 3rd Appellants as directors in the 1st Appellant, executed an unlimited deed of guarantee in favour of the Respondent as security for the money advanced. That the 2nd Appellant also signed a declaration appearing at page 128 of the record, to the effect that the assignment of contract debts would be irrevocable until all the debts the 1st Appellant had with the Respondent were paid in full.

Counsel then made reference to the learned author of **Equity Participation in Texas**[1], in reference to circumstances surrounding the transaction were it was observed that:

> *"Another situation that might indicate that a transaction is a loan is the failure of the transaction to fit into any category other than a loan ... and ...a final circumstance surrounding the transaction that may lead a court to find a loan occurs when a lender makes a substantial immediate profit".*

7.1.10 As regard the Appellants' claim that the EPA fell short of characteristics of a loan agreement, Counsel reiterated that the transaction entered into by the parties was a loan agreement. It was submitted that the EPA does not state anywhere that the Respondent was to bear part of the losses should the contract fail.

7.2.1 In response to the fourth ground of appeal, Counsel referred us to the learned authors of **Chitty on Contracts**[4] at paragraph 44-002 where it states that:

> *"A contract of guarantee is, in essence, a contract in which one person (the guarantor) agrees to answer for some liability of another (the principal debtor) to a third person (the creditor).*
>
> *A guarantor does not merely undertake to perform if the principal debtor fails to do so; he undertakes to see that the principal debtor will perform. In particular, it means that a guarantor is normally liable to the same extent as the principal debtor for damages for breach of the principal debtor's obligations even though he*

has not in terms guaranteed the payment of damages".

7.2.2 It was submitted that, the 2nd and 3rd Appellants guaranteed to pay whatsoever sums were payable under the agreement upon the failure by the 1st Appellant to repay. Counsel contended that the deed of guarantee is valid and the court below was on firm ground to find the 2nd and 3rd Appellants liable.

7.2.3 On the allegation of mistake in respect to the deed of guarantee, it was submitted that the defence was never raised in the defence and counter claim, but was merely argued in the Appellant's submissions in the court below. Reliance in that respect was placed on the case of **Lyons Brooker Bond (Zambia) Limited v Zambia Tanzania road Services Limited**[3] on the function of pleadings, where it was emphasized that every defence must be pleaded specifically.

7.2.4 Counsel emphasised that the Appellants did not plead the defence of mistake, did not provide any particulars of such

mistake and did not lead any evidence to show that they were mistaken as to the subject matter of the guarantee.

8.0 DECISION OF THIS COURT

8.1 We have considered the record, the Judgment being impugned and the arguments by the parties. We note from the onset that grounds five and six of the grounds of appeal have not been argued. In that respect, we will take them as having been abandoned.

8.1.1 The first and second grounds of appeal have been argued together and correctly so, as they are entwined. In our view, the outcome on these two grounds will have a bearing on the resolution of the fourth ground of appeal.

8.1.2 The first and second grounds of appeal attack the finding of fact by the learned Judge in the court below that, the agreement the parties had entered into was an EPA and not a loan agreement. In the case of **Nkhata and Four Others v The Attorney General of Zambia**[4], the Court of Appeal resolved that findings of fact by a trial Judge can only be reversed in (1) if the Judge erred in accepting

evidence, or (2) the Judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered or (3) the Judge did not take proper advantage of having seen and heard the witnesses, (4) external evidence demonstrates that the Judge erred in assessing manner and demeanor of witnesses.

8.1.3 In arriving at the finding that the agreement entered into between the 1st Appellant and the Respondent was not an EPA, but a loan agreement, the learned Judge in the court below considered the evidence which was before the court and found that the agreement was a loan agreement.

8.1.4 The learned author of **Black's Law Dictionary**[2] at page 663 defines equity financing as:

> *"The raising of funds by issuing capital securities (shares in the business) rather than making loans or selling bonds".*

8.1.5 **Investopedia**[5] refers to equity participation as ownership of shares in a company or property that may involve the purchase of shares through options or by allowing partial ownership in exchange for financing. That allows stakeholders to own shares and tie the stakeholder's success with that of the company. It goes on to state that, equity participation is used in any investment primarily to tie the financial rewards of executives or stakeholders to the fate of the company, increasing the likelihood that the executives will make decisions that will improve profitability.

In other words, the primary purpose of the agreement is to enhance profitability of the enterprise.

8.1.6 On the other hand, a loan agreement is an agreement in which a lender sets out terms and conditions on which it is prepared to lend money to a borrower to help it with its business needs. The purpose of a loan agreement is to detail what is being loaned and when the borrower has to pay it back and how. It might include terms such as

interest, collateral and what happens when there is default. Once the agreement is executed, it is essentially a promise to pay.

8.1.7 It is common cause that, the 1st Appellant approached the Respondent at the behest of Airtel to borrow money to finance the contract with Airtel. As the Respondent's financing expertise suited invoice discounting, which faired for shorter periods, the parties agreed upon a special product away from the Respondent's traditional business. This culminated in the preparation and execution of an agreement which they termed as EPA. It is that agreement which has put the parties at variance as to whether it is an equity participation agreement in strict sense or a loan agreement.

8.1.8 The learned Judge, after considering all the evidence and a careful perusal of the EPA, opined that the arrangement between the parties as spelt out in the EPA together with the attendant documentation was typical of a loan transaction. The learned Judge based that on the

understanding that there was a covenant by the Appellant to pay back the monies which were advanced by the Respondent. Further that, in a loan, the lender mitigates its risks by requesting the borrower to provide security, which the Respondent did by providing a guarantee and assigning the contract debt by deed.

In addition, the learned Judge took the view that the Respondent was paying out money whilst the 1st Appellant was receiving, which was synonymous with a lender and borrower relationship.

8.1.9 Furthermore, there was payment of an administrative fee, which does not occur in an equity participation. We are in consonant with the learned Judge that such attributes can only relate to a loan transaction and not an equity participation.

8.1.10 We do in addition note that, the facility in issue was due to expire within one hundred and twenty (120) days and the Respondent at the end of the day was to be paid back the monies together with other built in benefits, which

entailed that the Respondent would make a profit from the transaction. We have also noted that, the board resolution by the 1st Appellant, appearing at page 103 of the record, made it clear that the 1st Appellant was mandated to borrow money from the Respondent.

8.1.11 On the other hand, the transaction and the said EPA falls short of the necessary elements which would qualify it to be an equity participation. There is no element of the Respondent acquiring and owning shares in the 1st Appellant in return for the finances provided. And, as rightly observed by the learned Judge in the court below, the EPA was simply a label and did little to bring it within the framework associated with equity participation as there was neither provision nor intention that the Respondent would in return of the financing share in the profits and losses of the 1st Appellant, so as to be said to be an equity partner.

8.1.12 We note the contention by the Appellants, that based on clause 6.2 of the EPA, the Respondent as provider of the

finances would be involved in the management of the contract between the 1st Appellant and Airtel, in the event of the 1st Appellant failing to perform its obligations. It is clear that, this was an option the Respondent could exercise in the event of failure on the part of the Appellant and not something which the Respondent had a right to do from inception of the EPA, so as to qualify the Respondent to be an equity partner.

8.1.13 In the view that we have taken, the learned Judge in the court below was on firm ground in finding that the EPA was a loan transaction and/or agreement and we find no basis to fault him and reverse that finding. We find no ambiguity in the EPA nor any need to apply the **contra proferentum principle.** The first and second grounds of appeal therefore fail for lack of merit.

8.2.1 The third ground of appeal attacks the learned Judge's finding that the Respondent's evidence was credible and consequently holding that the 1st Appellant breached the EPA and as a result awarding the sum of K7,340,00.00

with interest. This ground of appeal according to the Appellants' arguments is premised on the Appellant's contention that the Respondent was fully aware of the business model outlined by the Appellants and they had the option to insist to take over the running of the 1st Appellant's operations if it felt the 1st Appellant was failing in its obligations.

8.2.2 As earlier alluded to when we were considering the first and second grounds of appeal, that option was open to the Respondent to exercise, and as countered by the Respondents in their arguments, it was a "reserved right" for the Respondent to take over management of the contract, if it appeared that the 1st Appellant was failing to perform its obligations under the EPA. We agree with Counsel for the Respondent that, the primary obligation to perform the contract at all times, rested on the 1st Appellant and clause 9.1 of the EPA gave guidance on how the parties were to proceed in the event of default. It is not in dispute that the 1st Appellant defaulted and that gave

way to clause 9.1 of the EPA. It was not mandatory for the Respondent to take over management of the contract between the 1st Appellant and Airtel. In the view that we have taken, the third ground of appeal equally has no merit.

8.3.1 We now turn to the fourth ground of appeal, which as we earlier indicated would be resolved by taking into consideration the outcome in respect to the first and second grounds. The fourth ground alleges that the court below failed to find that the deed of guarantee which was executed by the 2nd and 3rd Appellants in favour of the Respondent is null and void and of no effect as what the parties entered into was an equity participation agreement and not a loan agreement warranting guarantees.

8.3.2 Having agreed with the learned Judge in the court below that, the relationship between the parties was that of lender and borrower and therefore a loan transaction and the EPA was a loan agreement and not an equity

participation agreement, the fourth ground of appeal falls away and is accordingly dismissed.

8.3.3 We note that in the alternative, the Appellants have advanced arguments bordering on the enforceability of the guarantee as it was premised on an illegal agreement. Further that, the parties were mutually mistaken as to the subject matter of the agreement.

8.3.4 The alternative arguments in our view seem to be a complete afterthought as they are not part of the grounds of appeal before us. In addition, as correctly argued by Counsel for the Respondent, they were not pleaded by the Appellants in the court below. As stated by the learned authors of **Odgers' Principles of Pleading and Practice** at pages 94 – 95, all acts tending to show the insufficiency or illegality of any contract must be specially pleaded. They go on to state at page 185 as follows:

> *"Otherwise, where the contract is not **ex facie** illegal, as a general rule the Court will not entertain the question of illegality unless it is specifically pleaded*

and the Court is satisfied that it has before it all the necessary facts concerning the contract and its setting".

8.3.5 The aforestated also applies to all equitable defences. They must be pleaded fully.

8.3.6 In the view that we have taken, we decline to entertain the Appellants' alternative arguments.

9.0 **CONCLUSION**

9.1 All the four grounds of appeal having failed, we accordingly dismiss the appeal with costs to the Respondent. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE