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

Appeal No. 93/2020

BETWEEN :

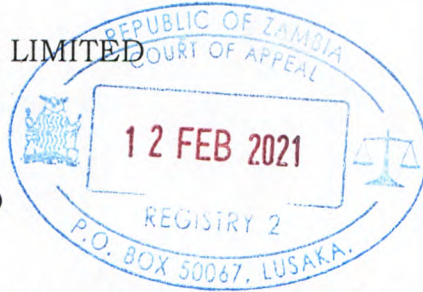
ACCESS BANK ZAMBIA LIMITED

APPELLANT

AND

UPEO ZAMBIA LIMITED

RESPONDENT



CORAM : Mchenga, Chishimba and Ngulube JJA
On the 13th October, 2020 and 12th February, 2021

For the Appellant : Ms. A. Theotis and Ms. J.R. Mutemi – Messrs
Theotis Mataka & Sampa Legal Practitioners

For the Respondent : Ms. R. Chirambo of Mando & Pasi Advocates

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. OTK Ltd v. Amanita Zambia Ltd and Others (2005/HPC/0199)(2011) ZMHC 23
2. The Attorney General v. Marcus Kampumba Achiume (1983) Z.R.1
3. Mugala and Kenneth Kabenga v. The Attorney General (1988-1989) Z.R 171
4. Fiscer v. Ramahlele 2014 SA 614(SCA)
5. AES-3C Maritza East 1 Eood v. Credit Agricole Corporation and Investment Bank (Previously Known as Calyon Corporate and Investment Bank) and Another (2011) EWHC 123 (TCC)
6. L'Estrange v. Graucob Ltd (1934) 2 KB 394
7. Kalala v. The Attorney General (1977) Z.R.310 (S.C)

8. Colgate Palmolive (z) Inc v. Abel Shemu Chuka and 110 Others (2005) SCZ Judgment Number 11 Of 2005.
9. Central London Property Trust Limited v. High Tree, House Limited (1947) KB 130
10. Galaunia Farms Ltd v. National Milling Company Limited (100 (2002) Z.R.135
11. Edward Owen Engineering Limited v. Barclays Bank International Limited (1978) All E.R 976
12. Geoffrey Chuumbwa v. Keith Mukata and ECZ (2015) Z.R 2010
13. Murray and Roberts Construction Limited and Kaddoura Construction v. Lusaka Premier Health Limited and Industrial Development Corporation of South Africa Appeal No 141 of 2016.
14. Moorgate v. Twitchngs (1976) QB 225

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Evidence Act Chapter 43 of the Laws of Zambia
2. Evidentiary Foundations. Edward J. Imkwinkelried
3. Pagets Law of Banking ,12th Edition (2003)

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of the High Court upholding the respondent's claim for payment of the sum of ZMW 500,000.00 by the appellant with interest at short term deposit rate.

2.0 FACTS OF THE CASE

2.1 The facts preceding the appeal are as follows; on or about July, 2010, the Respondent had entered into a contract with

ZCON Construction Limited for the refurbishment of houses situated at stand No 18 Warthog Road Kabulonga, Lusaka. In addition ZCON was to construct a guard house, changing rooms and a sub-station on the said property.

2.2 Pursuant to the said contract, a performance guarantee was executed in favour of the respondent by the appellant valid for an alleged period of 12 months from 25th July 2010. On the faith of the said guarantee, the respondent entered into a contract with ZCON Construction Limited to carry out the construction works. The appellant undertook to pay the respondent a sum of ZMW 500,000.00 in the event of breach of contract.

2.3 The respondent terminated the contract with ZCON Construction Limited by letter dated 7th March, 2011 due to inadvertent delay by ZCON Construction Ltd in the performance of the work. Pursuant to the above, the respondent requested the appellant to fulfill its obligations under the performance guarantee. The appellant refused to pay the respondent, hence the instituted action by the

respondent for the payment of the sum of ZMW 500,000.00, interest and damages for loss and use of funds.

3.1 **DEFENCE BY THE APPELLANT**

3.2 The appellant in its defence averred that the performance guarantee which was in its possession was valid for a period of 6 months from 25th June, 2010 and not 12 months as alleged by the respondent. The appellant only undertook to pay the sum of ZMW 500,000.00 for the said period of subsistence of the performance guarantee. Under clause 2.1.2 of the facility letter, the performance guarantee was to be valid for a period of 180 days. The said guarantee expired and became null and void by 7th March, 2011.

3.3 By the time the performance guarantee was called in by letter dated 7th March, 2011, the appellant's liability to the respondent had extinguished by expiration. The appellant further averred that it was not in breach of the terms of the performance guarantee and that any subsequent loss, damage or inconvenience incurred by the respondent was not due to any breach on its part.

4.0 **EVIDENCE AT TRIAL**

4.1 At trial, the evidence of PW1, managing director of the respondent company was essentially as stated in the witness statement namely that there were two contracts entered into with ZCON Construction Limited. One entered into in 2009 and the revised one in 2010, as a result of the change in the parameters. The contract dated July, 2009 between the respondent and ZCON Construction Limited was not signed by either party and was just a draft contract. PW1 could not confirm the name of the person from the appellant bank who had verbally confirmed the performance guarantee and stated that his lawyers verbally confirmed the said guarantee. PW1 stated that there was correspondence to the effect that the appellant had accepted having issued the performance guarantee but did not have the said correspondence produced before court.

4.2 When PW1 was shown some of the correspondences from the appellant, he stated that there was an overdraft facility issued to ZCON Construction Limited with a performance guarantee of ZMW 1,200,000,000.00 for construction of student housing at the University of Zambia and that this document tallied with the one that showed a performance guarantee of

ZMW500, 000.00 on the contract value of ZMW 500,000,000.00. PW1 further stated that there was a contract between the respondent and ZCON Construction Limited whose value was ZMW3, 100,000.00. When shown the performance guarantees in issue, he stated that there was a discrepancy in the validity and duration period of the performance guarantee. PW1 stated that the duration of the performance guarantee produced by the bank was 6 months from 25th June, 2010, to 25th December, 2010 whilst the respondents was for twelve months. The demand letter was made on the performance guarantee around March/April 2011. One of the performance guarantees referred to the refurbishment of houses and construction of guard house, change room at 18 Warthog Road Kabulonga while the other performance guarantee was on the construction of student housing at the University of Zambia, Ridgeway Campus, Lusaka. He stated that the signatories on both performance guarantees looked the same and that he was not aware that the appellants had disputed the performance guarantee. The respondent maintained that it was not privy to the underlying contract/agreement between the appellant and ZCON

Construction Limited and further that it did not undertake any construction works for the hostels at the University of Zambia and had nothing to do with student housing. He averred that the discrepancies in the contract were as a result of revision of the contract by additional work which resulted in the contract value coming to the sum of ZMW 500,000,000.00.

4.3 DW1 the Operations Risk Officer, testified that he joined the appellant Bank in 2017. The procedure after issuing a loan facility is that a performance guarantee should cover the same subject matter. He confirmed that the facility letter appearing at page 1 of the defendant's bundle of document was issued by the appellant and that a performance guarantee was issued dated 25th, June, 2010 for the construction of student hostels at the University of Zambia.

4.4 DW1 conceded that there was a letter on record whose subject matter was the refurbishment of 4 houses and construction of a guard house, change room and substation. A performance guarantee was issued to the respondent. The appellant authored a letter referencing the ***“termination of contract between the respondent and ZCON Construction Limited”***. DW1 could not produce a facility letter to ZCON Construction

Limited relating to the refurbishment of 4 houses and construction of guard house, change room and substation.

4.5 DW1 in cross examination stated that the performance guarantee produced by the respondent for the sum of ZMW500, 000,000.00 was for the duration of 12 months from the date of issue and was to expire on 24th June, 2011. The respondent terminated its contract with ZCON Construction Limited and claimed damages for breach of contract. The performance guarantee dated 25th June, 2010 showed that a claim made on 10th March 2011 would have been valid. DW1 reiterated that the appellant would not have guaranteed any amount on a non-existent contract. He stated that the performance guarantee for the refurbishment of a guard house was not issued by the appellant but it issued the one for the student hostels at the University of Zambia although the signatures on both documents appeared to be the same. DW1 stated that none of the performance guarantees were altered by the appellant and that he did not produce any guarantee relating to the refurbishment of the 4 houses because the facility letter only speaks to the construction of student hostels.

5.0 DECISION BY THE COURT BELOW

5.1 The court identified the issues for determination mainly whether or not the performance guarantee issued by the appellant to the plaintiff is enforceable; whether there was an underlying contract upon which the performance guarantee is based and whether the respondent was entitled to the reliefs sought. The court found that the matter appeared to be based on performance guarantees. The record revealed that the matter steered to another tangent on an underlying contract. The respondent sought to enforce a performance guarantee which the appellant starkly states it never existed. The appellant argued that there was no underlying contract on which the performance guarantee could be based on.

5.2 The court further found that this matter was based on the effect and terms of a performance guarantee, whether an underlying contract existed and its effect on the performance guarantee. Counsel for the defendant tried to establish whether there was an underlying contract. PW1 testified that he was not privy to a contract between the appellant and ZCON Construction Limited and never inquired whether there

was an underlying contract on which the appellant had issued the performance guarantee. As between ZCON Construction and the respondent, the respondent produced a construction contract of 2009 which was undated and unsigned. The court considered it to be a draft document which is not legally binding and that it would have disposed the issue of a contract between the respondent and ZCON Construction Limited.

5.3 The lower court went on to allude to the essentials of a contract of guarantee and the law of guarantees. In respect of the objections by the appellant to the production of the performance guarantee on the basis that it was not authentic and allowing its production would prejudice the appellant; the court relied on the provisions of **Section 3(b) of the Evidence Act, Cap 43 of the Laws of Zambia** which gives discretion to admit documents in evidence and for the court to draw an inference that it is a reflection of the original.

5.4 The court stated that there were two performance guarantees. One related to the refurbishment of 4 houses, construction of a guard house, and substation on stand No 18 Warthog Road,

Kabulonga Lusaka and the other related to the construction of hostels at the University of Zambia. Having admitted into evidence the performance guarantee relating to stand No. 18 Kabulonga as the best available evidence on record, the court below stated that the intention of the parties can be discerned from the performance guarantee dated 25th June, 2010 document which was duly executed. That both the performance guarantees referred to ZCON Construction as the contractor for the projects with the exact narratives as to the date of execution and the contract value.

5.5 The court found that the correspondence between the parties particularly the appellant's letter dated 22nd March 2012 was corroboration of the issuance of the performance guarantee issued by the appellant. Further the letter dated 26th March 2012 from ZCON Construction Limited to the appellant not only presupposes an underlying contract between the respondent and ZCON construction Limited but also that the bank was aware of the performance guarantee in favor of the respondent. The court held that the appellant through its conduct is estopped from denying that it issued a performance

guarantee. The court found that a performance guarantee was issued by the appellant to the plaintiff valid for 12 months expiring on 25th June 2011 for the refurbishment of houses, change room and substation at stand No 18 Warthog Road Kabulonga, Lusaka. Therefore, there was no justification for the appellant's refusal to honor the performance guarantee and that the attempt to dispute the existence of the performance guarantee was an afterthought. The demand was made within validity period which was to end on 24th June 2011 and complied with the terms of the performance guarantee.

5.6 The court below ordered the appellant to pay the respondent the sum of ZMW 500,000.00 with interest.

6.0 **THE APPEAL**

6.1 The appellant, raised the following grounds of appeal namely that;

- 1. The learned trial Judge in the lower court erred in law and in fact when she admitted and attached weight to a duplicate performance guarantee in evidence without addressing the***

nature of the objection raised by the appellant regarding the authenticity and existence of the performance guarantee.

- 2. The learned trial Judge in the lower court erred in law and in fact when she without advancing any reasons, disregarded the appellant's evidence disputing the existence and issuance of a performance guarantee and held that the performance guarantee relating to relating to stand No 18 Warthog Road Kabulonga, Lusaka was executed by the defendant and discerned the intention of the parties from the same.*
- 3. The learned trial Judge in the lower court erred in law and in fact when she held that and gave an unbalanced evaluation of the evidence that the issuance of the performance guarantee relating to relating to stand No 18 Warthog Road Kabulonga, Lusaka by the respondent to the appellant was corroborated by a letter dated 22nd March, 2012 issued by the appellant, to imply the existence of an underlying contract between the guarantor and the principal debtor.*
- 4. The learned trial Judge in the lower court erred in law and in fact when she held that the appellant was essttoped through its conduct from denying that it issued the performance guarantee relating to stand No 18 Warthog Road Kabulonga, Lusaka in favor of the respondent when in fact when in fact estoppel was neither pleaded nor raised by the parties in their evidence and arguments before court. The learned trial Judge in the lower*

court erred in law and in fact when she found the appellant liable to pay the sum of ZMW 500,000.00 and held that the demand by the respondent on the appellant for payment of the sum of ZMW 500,000.00 was made within the validity period of 12 months as opposed to the 6 month period described in the performance guarantee for construction of hostels at the University of Zambia.

7.0 **THE ARGUMENTS ADVANCED BY THE PARTIES:**

7.1 The appellant filed into court heads of argument dated 8th June, 2020. With regard to the issue of the admission by the court below of a photocopy of the performance guarantee dated 15th June, 2020, the appellant began by referring the court to the provisions of **Section 3(2) (b)** of ***The Evidence Act Chapter 43 of the Laws of Zambia***, the learned author **Edward J. Imkwinkelried's book entitled , *Evidentiary Foundations* ,at page 2**, and the High Court decision in the case of ***OTK Ltd v. Amanita Zambia Ltd and Others*** ⁽¹⁾ in which the court stated that the proponent of an item of evidence must lay the foundation before offering the item into evidence; that proof of its authenticity is a condition precedent to its admission.

7.2 The appellant argued that the respondent did not lay a foundation for production or proof of the alleged secondary evidence. The court below ignored this and held that such evidence could be admitted under the **evidence act**.

7.3 With regard to ground two on the issue of execution of the performance guarantee, the appellant argued that the trial court misapplied the principles of law when it held that the performance guarantee relating to Stand No 18, Warthog Road Kabulonga Lusaka, was executed by the appellant and the intention of the parties can be discerned from the same. It was contended that the respondent did not lead any evidence that the appellant had confirmed the performance agreement. The respondent instead relied on the verbal confirmation that was made by its lawyers. Further that the authenticity of the performance guarantee relied upon by the respondent was denied by the appellant because the bank did not author the said document and the respondent did not adduce any evidence to show that the purported performance guarantee was corroborated by any document.

7.4 It was further contended that the respondent relied on an unsigned contract in which the sum specified therein did not

tally with the sum specified in the purported performance guarantee relied upon by the respondent. The reason advanced by the respondent for the discrepancy that the contract price was allegedly amended from ZMW 3,100,000,000.00 to ZMW 500,000,000.00 was not pleaded nor was evidence adduced.

7.5 The appellant's thrust of contention being that it did not issue any facility to ZCON Construction Company Limited for refurbishment of houses and construction of guard houses and change rooms at 18 Warthog Road. Reference was made to DW1'S evidence that after issuance of a facility letter, a performance guarantee should cover the same subject. Other than the subject matter of the contract and the duration of the performance guarantee, the signatures, dates , the contract number and the contents on the performance guarantee relied upon by the parties were the same and this was an anomaly. The appellant submits that the respondent did not dispute the authenticity of the appellant's performance guarantee but the court proceeded to accept the respondent's purported performance guarantee over that of the appellant on the basis of corroboration which was equally wrong.

7.6 In respect of the two competing performance guarantees, the court below, without advancing any reasons, held that the intention of the parties could be discerned from the performance guarantee dated 25th June, 2010 and that the appellant had executed the performance guarantee contrary to her earlier findings at page J12, lines 4-13 of its judgment that the appellant denied ever issuing a performance bond in favour of the respondent. It was evident that the court below only focused on the appellant's weaknesses.

7.7 In ground three on the issue whether there was corroboration to imply the existence of an underlying contract between the guarantor and the principal debtor, relating to stand No 18, Warthog Road Kabulonga; reference was made to the holding that "***the defendant acted on information availed to it though it was erroneously referred to as an advance payment guarantee.***" It was argued that the above finding was not supported by any evidence as there were no allegations made that the appellant was misled. The court below therefore took into account a matter which it ought not to have taken into account contrary to the holding in the case of ***Nkhata and Others v. The Attorney General*** (2).

7.8 It is contended that the appellant did not dispute issuing a performance guarantee as stated in a letter dated 22nd March, 2012 which letter appears to have been misunderstood by the court, resulting in it taking into account extraneous matters. The appellant argued that the issue which was in dispute was about which one of the two performance guarantees was issued by the appellant. The overwhelming evidence on record was that the appellant was only aware of the performance guarantee which it issued.

7.9 The appellant contended that it had no knowledge of the performance guarantee relating to the refurbishment of houses and construction of a guard house, change room and substation at stand No 18, Warthog Road Kabulonga, Lusaka. The court below did not consider whether the letter dated 12th March 2012 referred to the performance guarantee which the appellant admitted to issuing but had expired before the demand to honour it was made. DW1 was only requested to confirm whether the said letter was issued by the appellant. Evidence before court showed that the letter dated 12th March, 2012 was the appellant's first reaction to the demand. After reviewing its documents, the appellant advised that the

performance agreement had expired. The said letter did not evidence the existence of any underlying contract. Reference was made to ***Pagets Law of Banking, 12th Edition 2003*** on the principle underlying demand guarantee that each contract is autonomous and that the obligations of the guarantor are not affected by the disputes under the underlying contract between the beneficiary and the principal.

7.10 The above stated authority shows that two autonomous contracts must co-exist. In the case before us, the respondent did not produce any contract between ZCON Construction Company Limited and the plaintiff and neither did it allege that there was a verbal contract. Though the court below acknowledged in its judgment that the contract that was exhibited between ZCON Construction Company Limited and the respondent was just a draft contract which was not legally binding, it went on to hold that there was an underlying contract.

7.11 The court below disregarded the evidence by DW1 that the appellant could not guarantee any amount on a non-existent contract except where there is an existing contract. The appellant further argued that the amount guaranteed under

the performance agreement relating to the construction of student hostels was the same as the amount guaranteed in the facility which appeared at pages 68-73 of the record of appeal. The facility letter further stated that if the sum of ZMW 500,000,000.00 was not utilized for the overdraft, it could be utilized for the guarantees.

7.12 The purpose of the facility is the same as the one for the performance guarantee of 25th June, 2012 relating to construction of student hostels at University of Zambia, Ridgeway Campus. It was submitted that the court below erred in accepting the respondent's evidence.

7.13 Ground four, assails the holding that the appellant was estopped by conduct from denying that it issued the performance guarantee relating to Stand No 18 Warthog Road, Kabulonga Lusaka. It was contended that estoppel was not pleaded nor was it raised by the parties in arguments or the evidence before court. Reference was made to the case of ***Mugala and Kenneth Kabenga v. The Attorney General*** ⁽³⁾ on the undesirability for a trial court Judge to volunteer a ruling without affording the parties an opportunity to address him. It was contended that even if the question of estoppel had

arisen, the court ought to have satisfied itself that there would be no prejudice caused to the appellant in raising the point of law. The case of **Fischer v. Ramahlele** (4) was cited as authority for the above proposition. The appellant contended that it was prejudiced by the actions of the court because it did not have an opportunity to address the court over the said issue of estoppel.

7.14 With regard to the finding that the appellant was liable to pay the respondent the sum of ZMW500, 000.00 and that the demand was made within the validity period of 12 months as opposed to 6 months prescribed in the performance guarantee for the construction of hostels at the University of Zambia, Ridgeway Campus, it was argued in ground five, that the demand was made outside the 6 months period set out in the performance guarantee. The banking facility on which the performance guarantee was based stated in clear terms that the performance guarantee was issued with respect to the construction of student hostels at the University of Zambia Ridgeway Campus which was valid for a period of 6 months and expired on 25th December 2010. The respondent made their demand on 22nd March 2011 after the performance

guarantee had expired and become void. The case of **AES-3C Maritza East 1 Eood v. Credit Agricole Corporate and Investment Bank (previously known as Calyon Coporate and Investment Bank) and Another** ⁽⁵⁾ was cited in which the court opined that a called upon demand on a bond must be in strict adherence with the terms of the bond.

7.15 The appellant argued that in this case there was no adherence to the terms of the performance guarantee as the demand was made outside the 6 months validity period stipulated in the terms of the performance guarantee. The respondent could not rely on the performance bond dated 25th June 2010 as the same had become unenforceable by effluxion of time. The case of **L'Estrange v. Graucob Ltd** ⁽⁶⁾ was cited on the principle of law that a signed document containing contractual terms binds the parties that have signed in the absence of fraud whether read or not.

7.16 To support its argument that the findings of fact made by the lower were perverse and made in the absence of evidence, the appellant cited the **The Attorney General v. Marcus Kampumba Achiume** ⁽²⁾ where the court held that a judge can be reversed on questions of fact if he erred in accepting

evidence, assessing and evaluating evidence, assessing the manner and demeanor of witnesses, and taking into account matters which he ought to have ignored.

7.17 The appellant prayed that the appeal be upheld and that the lower court's findings be set aside.

7.18 The Respondent filed heads of argument dated 15th October, 2020. It was submitted that the learned trial Judge was on firm ground when she admitted the duplicate performance guarantee based on **section 3(2)(b) of the Evidence Act**. It is settled law that a foundation must be laid before a document is admitted in evidence. Reference was made to the case of **OTK Limited (supra)** on the proposition of an item of evidence to lay a foundation before formally offering it into evidence. In opposing the appellant's assertion that the respondent did not lay a foundation before producing a duplicate performance guarantee, the respondent contends that the witness statement made reference to the performance guarantee and the witness explained what the document was and that he had personal knowledge of the performance guarantee thereby rendering it authentic as prescribed by section 3 of **Evidence Act**. It is the respondent's submission that the court is allowed

to exercise its discretion to admit a statement even when the requirements of **section 3(1)** of the **Evidence Act** have not been met as supported by **section 3(2)(b)** .

7.19 The respondent cited the case of **Kalala v. The Attorney General** ⁽⁷⁾ where the court stated that discretion to admit a statement shall be exercised if the maker of statement is dead, outside Zambia or not reasonably available provide the court is satisfied that undue delay or expense would otherwise not be caused. It was contended that the respondent had informed the court that the original performance guarantee had been misplaced by the respondent's previous advocates in another matter. It was submitted that the duplicate copy was the best evidence which the respondent was able to produce and that the court below rightly admitted the duplicate performance guarantee.

7.20 The respondent argued grounds 2 and 3 of the appeal together. It was submitted that the court below was on firm ground when it attached weight to the performance guarantee produced by the respondent. The respondent contended that the evidence presented at page 18 of the defendant's bundle of documents provided sufficient corroboration and affirmed the

existence of a contract between ZCON Construction Company Limited and the respondent. Further reference was made to page J6 of the lower court's judgment. It was further submitted that the lower court rightly exercised its discretion in admitting the duplicate performance guarantee as it was the best evidence available to ensure that the court had all the material evidence needed for the speedy determination of the matter. The appellant in its arguments has not denied that the performance guarantee was ever issued by the appellant to the respondent. The respondent contends that the only issue that remained was to determine which one among the 2 performance guarantees issued was the correct one.

7.21 The respondent argued that PW1 in his evidence clearly stated that he had never seen the performance guarantee relating to the construction of student hostels at the University of Zambia Ridgeway Campus and that the discrepancies in the contract were attributed to the revision of the contract due to additional works. The respondent contended that the above evidence showed that it would be unreasonable for any person to assume or expect that the respondent could have accepted a performance guarantee which related to a contract other than

for the refurbishment of the 4 houses, construction of a guard house, change rooms and sub-station. Therefore, the lower court was on firm ground when it disregarded the performance guarantee adduced by the appellant and inferred the intention of the parties from the performance guarantee produced by the respondent dated 25th June, 2020.

7.22 The defendant through its' witness DW1 confirmed that the appellant would not guarantee an amount on a non-existent contract. In his evidence DW1 revealed that the signatures on the performance guarantee produced by the respondent and the appellant were the same. The confirmation of the similarity of signatures corroborated the assertion by the respondent that the performance guarantee produced in the plaintiff's bundle of documents was issued by the appellant. DW1 confirmed that the letter at page 21 of the defendant's bundle of documents related to the refurbishment of 4 houses and construction of a guard house, change room and sub-station and that if a performance guarantee was to be issued, it would relate to the same subject matter.

7.23 It was the respondent's submission that DW1 affirmed that the letter at page 18 of the defendant's bundle of documents

acknowledged that the bank was expected to pay the funds to the respondent and to ask for cash cover from ZCON Construction Company Limited. By so doing, it was argued that the appellant had acknowledged an existing contract and a breach thereof between the respondent and ZCON Construction Company Limited and that the only existing contract was that relating to the refurbishment and construction at stand No 18 Warthog Road Kabulonga.

7.24 It was contended that the appellant in its arguments admits that it issued the performance guarantee to the respondent relating to the refurbishment of 4 houses and the construction of a guard house, change rooms, and sub-station at stand No 18 Kabulonga, but that the side guarantee expired. Therefore the court was on firm ground when it held that the performance guarantee was issued by the appellant. The respondent further contended that it was clear from the appellant's admission that the appellant issued the performance guarantee to the respondent relating to the refurbishment of 4 houses and the construction of a guard house, change rooms, and sub-station at stand No 18 Kabulonga. Parties that enter into an agreement cannot seek

to be excused from an agreement they willingly entered into. DW1's confirmation of the signatures on the performance guarantee is sufficient proof of the intention of the parties. The court below was on firm ground when it upheld the performance guarantee relating to the refurbishment of 4 houses and the construction of a guard house, change rooms, and sub-station at stand No 18 Kabulonga. The case of **Colgate Palmolive (z) Inc v. Abel Shemu Chuka and 110 others** ⁽⁸⁾ was cited and the holding that men of full age shall have the utmost liberty to contract and such contracts shall be sacred and enforced by the courts of law.

7.25 The respondent in response to ground four submits that the appellant's position that he did not have an opportunity to address the court on the issue of esstopel is misconceived. In respect of the **Mugala case** cited by the appellant, it referred to a situation where the court made a ruling on a case to answer stage without receiving submissions from the defense. We were urged not to place any weight on the above cited authority.

7.26 The respondent contends that there was an existing valid performance guarantee issued to it which was intended to

create a binding contractual relationship between the appellant and the respondent. It was on this basis that the court below made its findings. As a result, the appellant was estopped from acting inconsistently with the said performance guarantee. The cases of **Central London Property Trust Limited v. High Trees, House Limited** ⁽⁹⁾ and **Galaunia Farms Ltd v. National Milling Company Limited** ⁽¹⁰⁾ were cited on promises which are intended to create legal relations and which gives rise to estoppel.

7.27 In response to ground five, the respondent submits that the demand on the performance guarantee was made as a result of a breach of contract that occurred relating to the works on Stand No 18 Warthog Road, Kabulonga. The respondent was not aware of a performance guarantee relating to the construction of hostels at the University of Zambia. The appellant admitted having made an advance payment guarantee to the respondent relating to the refurbishment of 4 houses, construction of a guard room, change rooms and sub-station. The respondent submits that it did not and could not have accepted a performance guarantee related to the construction of student hostels at the University of Zambia

Ridgeway Campus. The respondent made a demand on the performance guarantee whose validity period is 12 months and that the lower court was on firm grounds when it held that the appellant was liable to pay the respondent the sum of ZMW 500,000.00 as mandated by the performance guarantee. The respondent drew our attention to the case of ***Edward Owen Engineering Limited v. Barclays Bank International Limited*** ⁽¹¹⁾ in which the court held that a bank which gives a performance guarantee must honour the guarantee according to its terms except when there is a clear fraud. The respondent argued that it had satisfied the court below based on the evidence produced that the performance guarantee was consistent with the issues between the parties as fortified by the evidence of DW1 who stated that the appellant cannot issue a guarantee that bears a different subject matter than that of the contract submitted to it. It was prayed that the appeal be dismissed with costs as it lacks merit on all grounds.

7.28 The appellant in response to the respondent's heads of argument begun by drawing our attention to the facility letter which does not contain the first page of the facility letter

contained at pages 68-78 of the record. The appellant attached the said letter to their heads of argument in reply for use by the court. It was submitted that the witness statement of the respondent's witness does not present proof that the disputed guarantee was what it was claimed to be. Further, the said the witness cannot be said to have personal knowledge of the purported performance guarantee when it was allegedly issued by the bank.

7.29 In addition that a certified copy of the purported performance guarantee was not produced in court as required under **section (3)(2)(b) of the Evidence Act**. The copy of the document relied upon was not the best evidence available as the maker of the said document is not dead, unfit or not reasonably available. The appellant reiterates that it did dispute issuing the purported performance guarantee for a period of 12 months.

7.30 In response to ground two and three the appellants repeats its earlier contentions that the letter at page 83 of the record did not provide corroboration or affirm the existence of a contract between ZCON Construction Company and the respondent. The court wrongly interpreted the said letter as referring to the

Kabulonga refurbishment. There being no evidence of the contract between the respondent and ZCON, or a facility letter issued by the bank availing a performance guarantee for the Kabulonga refurbishment, the finding by the court below that the appellant issued the guarantee was not supported by evidence. The case of **Geofrey Chuumbwa v. Keith Mukata and ECZ** ⁽¹²⁾ was cited on the assessment and evaluation of evidence by the court and reasons for the decision reached.

7.31 The appellant refuted the allegations by the respondent that DW1 acknowledged that the bank was expected, to pay funds to the respondent and to ask for cash cover from ZCON Construction Company Limited and that there is no such admission on the record or any admission in the arguments conceding to the issuance of the performance guarantee.

7.32 In response to the contention that the cited case of **Mugala & Kabenga** was misconceived, the appellant submits that it espouses the principle of law that a Judge should not volunteer a ruling and must give parties an opportunity to address him/her. As further supported by the Supreme Court in **Murray and Roberts Construction Limited and Kaddoura Construction v. Lusaka Premier Health Limited**

and Industrial Development Corporation of South Africa

(13).

7.33 On the issue of estoppel, it was submitted that it was neither pleaded nor evidence revealed to that effect. The definition of estoppel by the learned author ***Proffessor Edwin McKendrick on Contract Law 3rd Edition*** was cited. It was argued that the views of the court below were subjective as it did not consider the elements of estoppel. We were urged to set aside the judgment of the court.

8.0 **DECISION OF THE COURT**

8.1 We have considered the appeal, the evidence adduced in the court below, the submissions advanced by Learned Counsel and the authorities cited.

8.3 The facts not in dispute are as follows; that the respondent and Zcon Construction Limited entered into a contract for the refurbishment of stand No. 18 Warthog Road Kabulonga, Lusaka. (Hereinafter referred to as the Kabulonga Contract) Zcon Contraction Limited in addition to the refurbishment works, was to construct a guard house, changing rooms and a substation on the property. To guarantee performance of the

works to be undertaken, a performance guarantee was to be furnished by Zcon Limited. The appellant issued a performance guarantee in favour of the respondent, to be enforced in the event of breach of contract.

8.4 It is further not in dispute that the respondent terminated the contract with Zcon Construction on the basis of breach on account of inadvertent delay in performance. A demand was subsequently made by the respondent to the appellant bank to pay the sum guaranteed.

8.5 The issues in dispute revolve around the performance guarantee allegedly issued. On one hand the respondent contends that a performance guarantee was issued in its favour valid for a period of twelve months. The appellant conversely contends that it issued a performance guarantee to Zcon in favour of the respondent valid for a period of six months. Further that the said guarantee had expired at the date of demand on the 7th of March 2011.

8.6 The appellant raised four grounds of appeal, in our view the issues raised for determination as are follows;

- (i) Whether the court below properly admitted into evidence the objected to duplicate performance guarantee produced by the respondent.
- (ii) Whether the appellant issued a performance guarantee to the respondent relating to stand No 18 warthog Road Kabulonga? If so the validity period of the said performance guarantee.
- (iii) Whether there was unbalanced evaluation of evidence by the court in arriving at its conclusion in respect of the performance guarantee.
- (iv) Whether the issue of estoppel by conduct was pleaded or let into evidence for the court to hold that the appellant was estopped by conduct from denying issuance of the performance guarantee in favour of the respondent.

8.7 In regard to the issue of the court below admitting into evidence a copy of the performance guarantee dated 25th June 2010, the record will show that the court below heard the application by the appellant to expunge from the respondent's bundles of documents the said document. The basis being that no foundation was laid for the production of the documentary

evidence of the guarantee. The court below held that the objection raised was premature as it pre-empted the tendering of the documents into evidence.

8.8 At trial, the appellant again objected to the production of the copy of the performance guarantee on the basis of lack of authenticity. The court below overruled the objection pursuant to section 3 (2)(b) of the Evidence Act and admitted the documents into evidence.

8.9 The appellant contends that the court below ought not to have admitted the document into evidence because the respondent did not lay a foundation for production of the alleged secondary evidence. Further that there was no application on the part of the respondent to rely on secondary evidence.

8.10 It is trite that a proponent of an item of evidence must ordinarily lay the foundation before it is offered in evidence. It is further trite that secondary evidence includes copies made from the original that is photostat copy. Section 3 (2)(b) of the Evidence Act stipulates as follows;

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the

circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence.

(b) Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

8.11 It gives discretion to the court to admit into evidence a copy of the original documents where it is satisfied that undue delay or expense would otherwise be caused.

8.12 Reverting back to secondary evidence, it is admissible only in the absence of primary evidence or better evidence which the law requires to be given first; when a proper explanation of its absence is given.

8.13 The secondary evidence must be authenticated by foundational evidence that alleged that the copy is in fact a true copy of the original document and could not be produced by the party

relying on it in spite of best efforts; the inability must be beyond its control that is the original document is lost.

8.14 As regards the laying of foundation, we refer to the witness statement on record by Noel Puta, paragraphs 3 and 5. The said witness averred that Zcon provided a performance guarantee issued by the appellant bank, confirmed verbally with the respondent. In the affidavit in opposition to the affidavit in support of summons to expunge documents, the deponent deposed that the original bank guarantee at the centre of the dispute was provided to its previous advocates Messrs Mulenga Mundashi. The original bank guarantee went missing as consequence of the movement of documents back and forth under cause **2011/HPC/0278**. An action between principal debtor Zcon and the respondent. That the deponent had personal knowledge of the performance guarantee. We are of the view that as regards laying of foundation, the witness statement does lay the foundation.

8.15 As regards the contention that there was no attendant application made by the respondent to rely on secondary evidence, we are of the view that under section 3 (2)(b) of the

Evidence Act, there is no requirement that an application is required to be made to produce secondary evidence. As standard practice, a party may choose to file an application to be considered by the trial court. The important issue is the laying of foundation of leading of secondary evidence. This can be laid either in the plaint or in evidence. The secondary evidence in our view cannot be ousted for consideration merely because an application for permission to admit secondary evidence was not made.

8.16 Admission of a document vide section 3 (2)(b) of the Evidence Act by the opposite party does not by itself dispense the party to prove its truthfulness of the content. The genuineness, correctness and existence of secondary evidence/or existence of the document has to be established during trial.

8.17 In our view, there was proper justification for the court below to allow the respondent to produce secondary evidence. The non-production of the original performance guarantee was satisfactory accounted for. The respondent did account for the production of the photocopy instead of the original. There was reason for the court below to dispense with the best evidence

rule which requires the production of the original document as provided for under section 3(2)(b). The court below properly exercised its discretion to allow the photocopy of the document in issue. We find no merit in ground one.

8.18 The second issue for determination is whether a performance guarantee was issued to the respondent valid for period of twelve months by the appellant bank. Commercial instruments especially in the area of bank guarantees arose out of the necessities of commerce, especially the need for risk aversion and the commercial demand to secure prompt payment upon default.

8.19 The characteristic of demand guarantees/performance guarantees is that they are enforceable on their own terms, independently from the rights and obligations created by the underlying contract, hence being desirable instruments of security in a number of commercial arrears such as performance guarantees.

8.20 They contemplate, payment of an obligation by the guarantor upon demand made by the beneficiary. The disputes that may arise between the parties to the underlying contract, is of no

relevance in so far as the bank's obligation is concerned. The banks' liability is to the beneficiary, which it undertook to pay provided the terms specified in the performance guarantee are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary.

8.21 We refer to the case of ***Edward Owen Engineering Limited v. Barclays Bank International*** (Supra) in which Lord Denning MR on the autonomy of performance guarantees stated the following;

“All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated without proof on conditions. The only exception is when there is a clear fraud of which the bank has notice”.

8.22 Therefore by issuing a performance bond or performance guarantee, a bank assumes obligation to a beneficiary and must honour that guarantee according to its terms upon the occurrence of the event which gives rise to the obligation to

pay. It is trite that a performance guarantee is payable on demand upon the occurrence of the specified event, the beneficiary's demand must state that the event has occurred.

See **Halsbury's Laws of England 4th Edition Volume 3 (1) (Reissue)** paragraph 256.

8.23 The appellant bank refutes issuing a performance guarantee that was valid for twelve months, that instead, it issued one valid for six months, dated 25th June 2010 appearing at page 77 of the record. The said guarantee was for the sum of ZMK 500,000,000, valid for six months from the date of issue and referred to the underlying contract in respect of construction of student hostels at the University of Zambia as opposed to the works at kabulonga property.

8.24 The respondent on the other hand produced the alleged issued performance guarantee at page 61 of the record dated 25th June 2010 issued by the bank relating to stand No. 18 Kabulonga.

The guaranteed sum was up to ZMK 500,000,000 (old currency), valid for twelve months from date of issue and was to be paid upon receipt of a written demand to the bank by the respondent upon default under the contract.

8.25 The record will show that the two performance guarantees differ only in respect of duration of validity period and the construction premises. The signatures appended thereto, the dates, contract number and contents are identical. The performance guarantee relied upon by the court is alleged to be unauthentic.

8.26 We have perused the documentary evidence on record to determine whether a performance guarantee was issued by the bank to the respondent on the terms alleged. We have particularly perused the letter from the appellant to Zcon Construction Company Limited dated 22nd March 2012. The said letter in part was worded as follows;

“You may be aware that Access Bank issued a Performance Guarantee in favour of Upeo Zambia Limited on your behalf, however due to alleged breach of contract, the Performance Bond was called in. Please provide cash to cover for this request immediately as we are expected to transfer the funds to Upeo Zambia Limited”.

8.27 This letter certainly lends credence to the issuance of a Performance Guarantee by the bank in favour of the respondent.

8.28 The said letter does not allege expiry of the performance guarantee and even requested for cash to cover the request immediately which the bank was fully aware it was under obligation to pay upon demand by the respondent.

8.29 On 26th of March, 2012, Zcon wrote to the appellant in respect of the termination of contract between Upeo (Z) Limited and itself. The contents of the letter simply stated that the issue of termination of contract was in court and that Zcon was claiming in excess of one billion kwacha. Zcon went on to state that;

“Upeo must not use the bank to jeopardize the possible outcome of the Court. We therefore would like to ask the bank not to go ahead and pay Upeo”.

8.30 The bank on 4th of July, 2012 requested from the respondent for the original copy of the guarantee in respect of Kabulonga contract whose contract period had expired. The appellant in the said letter acknowledges having issued what they referred to as an ‘advance payment guarantee’ to the tune of US\$ 150, 000 on 25th June, 2010 in favour of the respondent for refurbishment of four houses, guard house, change rooms and

a substation. This letter was disregarded by the court below because it referred to an advance payment guarantee.

8.31 We are of a view that from the evidence adduced on record, the learned trial Judge was on firm ground in holding that a Performance Guarantee was issued to the respondent by the bank. We are further of the view that the demand by the respondent on 7th March, 2011 upon termination of contract was made within the period of twelve months.

8.32 The appellant bank in its letter of 22nd March, 2012, acknowledged being in receipt of the demand letters from Messrs Mulenga Mundashi & Company regarding the termination of contract between Zcon and the respondent and the calling in of the Performance Bond. We therefore find no merit in ground two.

8.33 The appellant in ground three contends that there was unbalanced evaluation of evidence by the court below when it held that the letter dated 22nd March, 2012 implied the existence of an underlying contract between Upeo and Zcon. We are of the view that there was no unbalanced evaluation of evidence by the court below. The court below considered both

Performance Guarantees and the letters on record, particularly the one dated 22nd March, 2012.

8.34 Issues in respect of underlying contracts between Zcon and the respondent on one hand and the Guarantor and Principal Debtor on the other hand are in our view not in dispute. The appellant bank makes reference to the termination of contract between Upeo Zambia Limited and Zcon and to the alleged breach of the said contract, resulting in the Performance Bond being called in.

8.35 As regards the underlying contract between the guarantor and principal debtor, the appellant (guarantor) alludes to the issue of Performance Guarantee in favour of Upeo on Zcon's behalf. Therefore the finding by the court below was on firm ground to presuppose an underlying contract between the respondent and Zcon Construction Company Limited. In any event, the disputes that may arise between the parties to the underlying contract is of no relevance on so far as the banks obligation is concerned. We find no merit in ground three.

8.36 Ground four assails the holding by the court below that the appellant was estoppel through its conduct from denying that it

issued the performance guarantee in favour of the respondent when estoppel was neither pleaded nor raised. This was prejudicial to the appellant which did not have an opportunity to address the court on it.

8.37 An estoppel by conduct arises where one person induces another to adopt and act upon an assumption of fact or an assumption as to the future conduct of the representor. The basic concept of an estoppel is that where a person has caused another to act on the basis of a particular state of affairs, he/she is prevented from going back on the words or conduct which led the other person to act on that basis if certain conditions are satisfied. Lord Denning MR in the ***Moorgate v. Twitchings***¹⁴, stated that estoppel is a principle of justice and of equity which provides in basis terms that;

“When a man by his words or conduct has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust and inequitable for him to do so”.

8.38 There are different types of estoppel, we are only concerned with estoppel by conduct. As regards the issue whether estoppel was pleaded or led in evidence, we are of the view that the respondent did show in the evidence adduced that a

performance guarantee was issued. The bank even requested Zcon to put it in funds as it was called upon to honour the obligation to the respondent. Therefore, the lower court was on firm ground in holding that the bank was estopped by conduct from denying that it issued the performance guarantee to the respondent. The appellant in our view conducted itself in such a manner that would be unfair or unjust to allow him to escape from liability in respect of the issued performance guarantee to the respondent.

8.39 Ground five assails the holding by the court below that the appellant is liable to pay the sum of ZMW 500,000 and that the claim was made within the validity period of twelve months. We had earlier on in determining ground two stated that from the evidence adduced on record the learned trial judge was on firm ground in holding that a performance guarantee was issued to the respondent by the bank. We further went on to hold that the demand by the respondent on 7th March 2011, upon termination of contract was made within the period of twelve months. In the letter dated 22nd March 2012, the appellant acknowledged being in receipt of the letter from Messrs

Mulenga Mundashi & Company regarding the termination of contract between Zcon and the respondent and the calling in of the performance guarantee to be honoured.


8.40 The performance guarantee dated 25th June 2010 issued by the appellant to the respondent stipulated as follows;

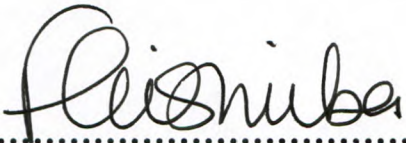
“We undertake to make payment under this guarantee upon receipt by us of your first written demand, signed by your dully authorized officer declaring the contractor to be in default under the contract and without cavil or argument any sums or sums within the above names limits”.


8.41 The respondent complied with the issued performance guarantee by notifying the bank in writing of the occurrence of the specified event, namely the breach/default of the contractor Zcon and demanded payment.

8.42 Therefore the court below was on firm ground to hold the appellant liable to pay the guaranteed sum of ZMW 500,000=00. It goes without stating the obvious that a bank which gives a performance guarantee must honour that guarantee according to its terms, on demand. Being virtually a promissory note, it is payable on demand.

8.43 For the forgoing reasons, we find no merit in the appeal and uphold the lower court's judgment. The appeal is accordingly dismissed with costs to the respondent to be taxed in default of agreement.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL


.....
F.M. Chishimba
COURT OF APPEAL JUDGE


.....
P. C. M Ngulube
COURT OF APPEAL JUDGE