IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 98/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PROFAB ZAMBIA LIMITED	**1ST APPELLANT**
ALEXANDER ZIMBA	**2ND APPELLANT**
MICHEAL ZULU	**3RD APPELLANT**
WINFRIDAH CHITONDO	**4TH APPELLANT**

AND

FIRST NATIONAL BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: KONDOLO, MULONGOTI AND SIAVWAPA, JJA

On 25th September and 19th November, 2019

FOR THE APPELLANTS: MR. KHOSA OF ALBERTO NGOYI ADVOCATES

FOR THE RESPONDENTS: MISS MWAPE BWALYA OF MESSRS MWENYE MWITWA ADVOCATES

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

1.0. INTRODUCTION

1.1. This is an appeal against the Judgment of the High Court, Commercial Division, presided over by Mr. Justice Sunday Nkonde, SC by which he ordered the Appellants to pay the

Respondents all monies owing, a foreclosure on and an order to sell the properties mortgaged to secure the facilities.

2. **BACKGROUND**

2.1. Between October 2012 and September 2013, the 1st Appellant obtained three facilities from the Respondent which were secured by a third party legal mortgage on the property of the 2nd Respondent.

2.2. Further security was provided by third party equitable mortgages by the 3rd and 4th Respondents. Further to that the 4th Respondent and one Robert Banda gave suretyship/guarantees in favour of the Respondent which were unlimited in nature.

2.4. The three facilities which were obtained on 8th October 2012, 30th November 2012 and 6th September 2013 comprised an overdraft, a performance guarantee, advance payment guarantee and an asset based finance except for the first facility which did not include asset based finance.

2.5. The 1st Appellant defaulted and the Respondent issued demand letters with a seven day ultimate failure to which foreclosure on the mortgaged properties and the enforcement on the guarantees would follow.

2.6. In response, the 1st and 2nd Appellants did not dispute their indebtedness but attributed the failure to meet the monthly instalments on the failure by the Ministry of Health to pay them on the project they were contracted to undertake. They in turn proposed a repayment plan.

In view of the confirmed default by the Appellants, the Respondent commenced an action in the Court below.

3. THE CLAIMS IN THE COURT BELOW

3.1. In the Court below, the Respondent commenced an action by way of originating summons seeking the following reliefs;

1. *Payment of all monies which as at 28th January, 2016 stood at K6,836,242.41 plus interest, costs and all other charges due and owing to the Applicant Bank by the 1st Respondent under facilities availed to the 1st Respondent and secured by a third party legal mortgage and two third party equitable mortgages over sub-division C of Lot No. 5199/M, Lusaka, Stand No. 26163, Lusaka and LOT No 7110/M Lusaka (the mortgaged properties) registered in the names of the 2nd, 3rd and 4th Respondents respectively.*
2. *An order to foreclose on the mortgaged properties.*
3. *Delivery of vacant possession of the mortgaged properties by the 2nd, 3rd and 4th Respondents to the Appellant.*
4. *An order of sale of mortgaged properties by the Applicant.*

5. *An order for the enforcement of the guarantees/ suretyship signed by the 2nd, 3rd, 4th and 5th Respondents.*
6. *Costs and*
7. *Any other relief the Court shall deem fit.*

4.0. **FINDINGS AND DECISION OF THE COURT BELOW**

4.1. After evaluating the evidence before him, the learned Judge made the following findings;

(a) *The Respondent was entitled to charge interest on a delinquent account.*

(b) *As at 6th September 2013 when the third facility letter was issued, the second facility was still in arrears.*

(c) *Inability to pay a loan instalment is not a defence.*

(d) *That even if the 3rd and 4th Respondents did not sign consent letters for their properties to be used as unlimited securities for the 1st Appellant's facilities, the deeds of deposit of Title Deeds they executed clearly provided the consent.*

5. **JUDGMENT**

5.1. The learned Judge granted all the orders asked for by the Respondent accordingly.

6. **THE APPEAL**

6.1. The Memorandum of Appeal filed into Court on 12th November 2018 contains two grounds of appeal as follows;

1. *The learned trial Judge erred in both law and fact when he held that the 4th Respondent (now 4th Appellant) was a Director in the 1st Respondent (now 1st Appellant) and knew or ought to have known of the dealings of the 1st Respondent including the facilities it was being availed by the Applicant when in fact the 4th Respondent has never been a Director in the 1st Respondent.*

2. *The learned trial Judge erred both in law and fact when he dismissed an application on record which had complied with all the Rules of Court.*

6.2. Both parties filed their heads of argument on 9th June 2019 and 11th September 2019 respectively.

6.3. We wish to observe at the outset that from the two grounds of appeal, the Appellants are not challenging the Judgment in respect of the 1st to the 3rd Appellant. They have only taken issue with the Judgment as it relates to the 4th Appellant in the first ground of appeal.

7.0. **OUR VIEWS ON GROUND 1**

7.1. This ground as already alluded to seeks to impugn the Judgment of the Court below as it finds that the 4th Appellant

was a Director in the 1st Appellant who knew or ought to have known the state of affairs of the 1st Appellant.

7.2. In attempting to dispel this finding of fact by the learned trial Judge, the Appellants have argued that the 4th Appellant, who was initially a Director at the time the 1st Appellant was incorporated, had submitted with PACRA, a notice of withdrawal as Director in 2011.

According to the heads of argument, the Appellants contend that the withdrawal notice was submitted way before the 1st Appellant obtained the three facilities but that for some reason PACRA did not act on the notice by reason of which the 4th Respondents' name remained on the company's Register as a Director.

7.3. In his Judgment, the learned Judge found the 4th Appellant to have been a director, which fact is not in dispute.

7.4. What is in dispute is her directorship at the time the facilities were obtained by the 1st Appellant.

7.5. In her 2nd further affidavit in opposition to the originating summons, filed on 8th September, 2016, she states that by Board resolution of 25th September, 2012, she was made Director of the 1st Appellant.

7.6. We have however, examined the three facility letters and the first one is dated 8th October, 2012. The second is dated 30th November 2012 while the third is dated 6th September 2013. Clearly, the 4th Respondent had already become a Director by the time the first facility letter was executed.

7.7. We also note that the 4th Appellant executed the Memorandum of Deposit of Title Deeds on 8th October 2012, the same date the 1st facility letter was issued. She cannot therefore, now be heard to say that she was not a Director at the time the facilities were obtained. To confirm that fact, a printout obtained from PACRA dated 2nd October 2012 bears the 4th Appellant as one of the three Directors.

7.8. We therefore, find no difficulty in finding that the learned trial Judge was on firm ground to hold the 4th Appellant as Director, who knew or ought to have known the financial status of the 1st Appellant. Ground 1 must therefore fail and we dismiss it accordingly.

8. **OUR VIEW ON GROUND 2**

8.1. This ground is an attempt to resurrect a dead issue. This is based on an interlocutory application raised by the 4th Appellant in the Court below for the Court to proceed as though the matter was commenced by writ of summons. The

learned trial Judge dismissed the application for being irregular.

8.2. Following the dismissal of the interlocutory application, no application for leave to appeal was filed and the Court below proceeded with the main matter, the originating summons.

8.3. It is our considered view that, if the 4th Appellant was dissatisfied with the ruling of the Court on the interlocutory application, she ought to have sought leave of the Court to lodge an appeal.

8.4. Having slept on her right of appeal, the 4th Appellant cannot now purport to appeal to this Court, a decision on an interlocutory matter after the main action has been heard and determined.

8.5. It is our considered view that the second ground is misconceived at law and that we possess no jurisdiction to entertain the appeal based on that ground.

9.0. **CONCLUSION**

9.1. In view of our position on the two grounds of appeal, the appeal must fail in its entirety for being devoid of merit.

9.2. We dismiss it accordingly with costs to the Respondent to be taxed in default of agreement.

M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE