

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

Appeal No. 17 of 2022  
CAZ/08/425/2022

BETWEEN:

**APPLEBY SOLUTIONS LIMITED**  
**(T/A AXIZ WORKGROUP)**



**AND**

**NEUROTECH ZAMBIA LIMITED**  
**MICHAEL NJUKI**

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent

Coram: Kondolo, Makungu and Sharpe-Phiri, JJA  
on 21<sup>st</sup> September 2022 and 21<sup>st</sup> December 2022

For the Appellant: Ms. T. Mulima-Puta & Mr. T. K. Maimisa of  
Messrs Theotis Mutemi Legal Practitioners  
For the 1<sup>st</sup> Respondent: Mr. Michael Njuki as Managing Director  
For the 2<sup>nd</sup> Respondent: In person

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## J U D G M E N T

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**Sharpe-Phiri, JA, delivered the Judgment of the Court**

Cases referred to:

1. *Thomas Sinkala v Engen Petroleum Zambia Limited* CAZ No. 208 of 2019
2. *Nkongolo Farms Limited vs Zambia National Commercial Bank Limited*, Kent Choice (In Receivership) and Charles Haruperi SCZ No. 19 of 2007
3. *Credit Lyonnais Bank Nederlands NV v Burch* (1997) 1 All ER 144
4. *Mazoka and Others v Mwanawasa and Others* (2005) ZR 138
5. *Attorney General v Roy Clarke* (2008) ZR 138
6. *Jacques Chisha Mwewa V Attorney General* (2011) Vol.2 ZR 290

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the judgment of Mbewe J of the High Court Commercial Division delivered at Lusaka on 13<sup>th</sup> September 2020.
- 1.2 By that judgment, the learned trial Judge found that the appellant had failed to prove its claim on a balance of probabilities against the 2<sup>nd</sup> respondent.

## **2.0 BACKGROUND**

- 2.1 The background of the matter is that the appellant and the 1<sup>st</sup> respondent entered into an agreement in which the 1<sup>st</sup> respondent was to resell various computer equipment and to pay for the said equipment within 30 days after issuance of invoice by the appellant.
- 2.2 The 1<sup>st</sup> respondent failed to pay the sum of US\$668,650.34 for the equipment delivered, which led to the initial claim in the High Court of Zambia that culminated into a judgment in default being entered against the 1<sup>st</sup> respondent. After failing to recover sums due to it against the 1<sup>st</sup> respondent, the appellant then sought to join the 2<sup>nd</sup> respondent to the action and the Court allowed a joinder of parties on 18<sup>th</sup> April 2018.

2.3 This prompted an amendment to the writ of summons and statement of claim and the amended process was filed into Court on 30<sup>th</sup> May 2018.

2.4 In the said pleadings, it was averred that the 2<sup>nd</sup> respondent stood as personal surety for the 1<sup>st</sup> respondent in connection with the Reseller Agreement executed between the appellant and the 1<sup>st</sup> respondent. It was further averred that it was an express term of the said agreement that the 2<sup>nd</sup> respondent would be co-debtor in relation to any liability arising against the 1<sup>st</sup> respondent.

2.5 It was the appellant's contention that following the breach of the Reseller Agreement, it was entitled to recover the amount claimed from the respondents plus interest and costs.

2.6 The 2<sup>nd</sup> respondent denied the appellant's claim and contended that neither he nor the 1<sup>st</sup> respondent entered into any agreement with the appellant and that the appellant was not entitled to any relief as claimed.

### 3.0 **DECISION OF THE COURT BELOW**

3.1 The trial Court determined the matter on the strength of evidentiary hearing, pleadings, and written submissions.



3.2 The learned Judge identified 3 issues for determination as follows:

- i. Whether the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Respondent herein) is indebted to the Plaintiff as a co-surety of the Defendant (1<sup>st</sup> Respondent herein);**
- ii. Whether the Plaintiff had an obligation to explain the nature and effect of a co-surety to the 2<sup>nd</sup> Defendant; and**
- iii. Whether the Plaintiff is entitled to the reliefs sought.**

3.3 In considering the issue of suretyship before her, the learned trial Judge determined that a party could escape liability as a surety by raising the defence of misrepresentation, fraud, illegality, duress, undue influence, or mistake.

3.4 The trial Judge went on to propound that the guiding principle on suretyship is stated in ***Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 20 at paragraph 101*** where the learned authors guide that:

***“The surety or guarantor is a person who engages with the creditor of a third party to be answerable in the second degree, for some debt, default or miscarriage of another person whose primary liability must exist or be contemplated.”***

3.5 The trial Judge considered the wording of clause 19 of the Reseller Agreement and was of the view that the said provision



distinguishes between a customer and a surety using the words “jointly” and “severally”. She stated that the clause clarified that a surety signs in a personal capacity as an authorized representative of the 1<sup>st</sup> respondent which is the customer.

- 3.6 The Judge added that clause 19.3 specifically provides that the surety must have read and understood each term and condition of the agreement.
- 3.7 The said clause further provided that the 2<sup>nd</sup> respondent would sign in his personal capacity and in a representative capacity as authorized representative of the 1<sup>st</sup> respondent, confirming acceptance of the terms and conditions of the agreement as binding jointly and severally on the 2<sup>nd</sup> respondent and the customer, which was the 1<sup>st</sup> respondent.
- 3.8 The trial Judge subsequently considered that the question which fell for determination was whether the relationship between the appellant and the 2<sup>nd</sup> respondent gave rise to a duty to explain the meaning and effect of the Reseller Agreement.
- 3.9 The Court referred to the case of **Thomas Sinkala v Engen Petroleum Zambia Limited**<sup>1</sup> in which it was stressed that there exists a duty imposed on creditors to explain to a surety the effects, implications, and consequences of execution of a

mortgage or guarantee transaction, including advising a surety to seek independent legal advice.

3.10 The trial Judge therefore noted that PW1's testimony on behalf of the appellant on the Reseller Agreement was self-explanatory, hence he did not explain the agreement to the 2<sup>nd</sup> respondent. The Judge concluded that it was clear that the appellant did not explain the effect and obligations of a co-surety to the 2<sup>nd</sup> respondent at the time he was signing the Reseller Agreement nor did the appellant advise the 2<sup>nd</sup> respondent to seek independent legal advice before signing the agreement.

3.11 The Judge made further reference to the case of **Nkongolo Farms Limited vs Zambia National Commercial Bank Limited, Kent Choice (In Receivership) and Charles Haruperi**<sup>2</sup> in which the Supreme Court established that a '*creditor has a duty to ensure that a surety has adequate understanding of the nature and effect of the transaction in question*'.

3.12 In view of the foregoing, the trial Judge concluded that the 2<sup>nd</sup> respondent was absolved from any liability under the Reseller Agreement as the appellant had failed to explain the nature of suretyship to him nor had it advised him to seek independent legal advice. The Court also concluded that given the aforesaid findings, it would be unnecessary to delve into the issue the 2<sup>nd</sup> respondent's indebtedness to the appellant for the sum

claimed. The Court concluded therefore that on a balance of probabilities, the appellant had failed to prove its claim against the 2<sup>nd</sup> respondent.

#### 4.0 **THE APPEAL**

4.1 Being dissatisfied with the judgment of the lower Court, the appellant filed a Notice of Appeal and Memorandum of Appeal on 13<sup>th</sup> October 2021, advancing four grounds of appeal namely:

- (i) **That the learned puisne Judge erred in law and fact when she found that the Appellant was under a duty to explain the meaning and effect of the nature of the suretyship and ensure that the 2<sup>nd</sup> Respondent obtained independent legal advice, when in fact the same was not pleaded by the 2<sup>nd</sup> Respondent.**
- (ii) **That the learned puisne Judge erred in law and fact when she found that the Appellant was under a duty to explain the meaning and effect of the nature of the suretyship and ensure that the 2<sup>nd</sup> Respondent obtained independent legal advice when the agreement between the parties was not one of lender and borrower.**
- (iii) **The learned puisne Judge erred in law and fact when she held that the principles in the case of Nkongolo Farms v Zambia National Commercial Bank, Kent Choice (in**



**Receivership) and Charles Haruperi SCZ No. 19 of 2007<sup>2</sup>, Credit Lyonnais Bank Nederlands NV v Burch (1997) 1 All ER 144<sup>3</sup> and Thomas Sinkala v Engen Petroleum Zambia Limited, Appeal No. 208 of 2019/2020<sup>1</sup> were applicable to the case, when the cases are distinguishable from this matter which did not involve a Lender/Borrower Agreement or Mortgagee/Mortgagor relations.**

- (iv) The learned puisne Judge erred in law when she failed to decide on the issue of estoppel raised in relation to the 2<sup>nd</sup> Respondent signing the Reseller Agreement.**

4.2 The appellant filed Heads of Argument on 1<sup>st</sup> February 2022. The Court has not had sight of any arguments on behalf of the respondent.

## **5.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 In the Heads of Argument filed by the appellant on 1<sup>st</sup> February 2022, the appellant contended in its first ground that the trial Court fell into grave error by arriving at a decision based on facts which were not pleaded before the Court. The appellant referred to page 27 of the lower Court's judgment in which the Court below made consideration of facts relating to the appellant's obligations as a creditor to the 2<sup>nd</sup> respondent as surety or guarantor of the 1<sup>st</sup> respondent. The portion referred to was reproduced as below:

***“The question which then arises is whether the relationship between the Plaintiff and 2<sup>nd</sup> Defendant gave rise to a duty to explain the meaning and effect of the reseller agreement. Secondly, whether the Plaintiff had a duty to advise the 2<sup>nd</sup> Defendant as co-surety to seek legal advice.***

***.....***

***I find that the Plaintiff did not explain the effect and obligations of a co-surety to the 2<sup>nd</sup> Defendant at the time he signed the reseller agreement nor did the Plaintiff ask him to seek independent legal advice before signing the agreement as co-surety.”***

5.2 The appellant argued that the aforesaid fact taken into consideration by the trial Court was not only pleaded by the 2<sup>nd</sup> respondent as per defence pleading appearing at pages 40 to 41 of the Record of Appeal but that it was also self-contradicting on the part of the learned trial Judge, whose earlier ruling of 10<sup>th</sup> February 2021 appearing at pages 279 to 285 of the Record of Appeal was that the 2<sup>nd</sup> respondent’s witness statement be amended to take out the unpleaded matter.

5.3 It was further argued that it was a grave error on the part of the learned trial Court to make considerations in her judgment of 13<sup>th</sup> September 2021 of issues not pleaded by the 2<sup>nd</sup> respondent in his pleadings and as determined in her earlier ruling.



- 5.4 The appellant recited several authorities on the long-standing principle that a party cannot rely on unpleaded matters and that the primary function of pleadings is to assist the Court by defining the bounds of the action. Among the authorities cited was the Supreme Court case of **Mazoka and Others v Mwanawasa and Others**<sup>4</sup>. The appellant argued that the only exception to the said rule is when the other party does not object to the introduction of unpleaded matters.
- 5.5 It was argued that the foregoing authorities emphasize the long standing principle that a party cannot rely on unpleaded matters. The appellant argued that the Judge fell into grave error when she went on to make a determination on unpleaded issues despite her ruling of 10 February 2021. The case of **Attorney General v Roy Clarke**<sup>5</sup> was also cited.
- 5.6 The appellant argued grounds 2 and 3 together. It was contended that the learned trial Judge fell into grave error by holding that the appellant was under a duty to explain the meaning and effect of the nature of the suretyship and ensure that the 2<sup>nd</sup> respondent obtained independent legal advice when the agreement between the parties was not one of lender and borrower.
- 5.7 The appellant argued that the cases relied on by the trial Judge are distinguishable from the facts of this case. It was argued that the **Nkongolo Farms**<sup>2</sup> and **Credit Lyonnais**<sup>3</sup> cases refer to a lender/borrower and mortgagee/mortgagor relationship



while the **Thomas Sinkala**<sup>1</sup> case related to the issue of third-party mortgage. The appellant argued that the relationship of the parties in the case in casu is different as it is neither a lender/borrower nor mortgagee/mortgagor relationship and none of the parties herein could be said to have been in a superior bargaining position over the other. The appellant thus contended that the lower Court fell into grave error when it failed to give efficacy to the terms of the contract on account of the appellant's purported failure to explain its terms to the 2<sup>nd</sup> respondent.

- 5.8 The appellant concluded by submitting that in the absence of pleading any of the following defences, i.e fraud, misrepresentation, duress, undue influence or *non est factum*, the lower Court erred by absolving the 2<sup>nd</sup> respondent of liability under the written agreement which he had signed.
- 5.9 In arguing ground 4, the appellant submitted that the trial Judge fell into error when she failed to decide on the issue of estoppel raised in relation to the 2<sup>nd</sup> respondent signing the Reseller Agreement. It was argued that the lower Court did not address itself on the issue of estoppel as raised in the skeleton arguments appearing at pages 256 to 253, as well as in the appellant's submissions found at pages 289 to 312 of the Record of Appeal.

## **6. HEARING OF APPEAL**

- 6.1 The appeal was heard on 21<sup>st</sup> September 2022. The appellant was represented by Ms. T. Mulima-Putu and Mr. T. K. Maimisa of Messrs Theotis Mutemi Legal Practitioners. The 2<sup>nd</sup> respondent appeared on his own behalf and as representative of the 1<sup>st</sup> respondent. The appellant relied on the arguments filed before Court while the respondents opted not to make any submissions before Court.

## **7.0 DECISION OF THIS COURT**

- 7.1 We have carefully considered the evidence on record; the judgment being impugned and the arguments of the parties.
- 7.2 In ground 1, the appellant contends that the trial Court erred by holding that it was the appellant's duty to explain the meaning and effect of the nature of suretyship and ensure that the 2<sup>nd</sup> respondent obtained independent legal advice, which issue was not pleaded in the Court below.
- 7.3 It is evident that this issue was not raised as a defence by the 2<sup>nd</sup> respondent. We therefore accept the appellant's argument in ground 1 that the learned trial Judge misdirected herself when she held that the appellant owed a duty to the 2<sup>nd</sup> respondent to explain to him the implications of what he was signing or to have referred the 2<sup>nd</sup> respondent to seek

independent legal advice on the nature of the transaction in issue.

- 7.4 Similarly, when an objection was raised in the lower Court by the appellant in relation to this aspect being included in the witness statement without having been pleaded, the trial Court accepted the argument and rendered a ruling directing the 2<sup>nd</sup> respondent to amend his witness statement to remove statements on facts and issues which were not pleaded. Despite this, the trial Judge went ahead to consider this evidence in the judgment when this issue ought to have been expunged from the record by virtue of the earlier ruling of the Court. For the said reasons, we agree that the learned trial Judge erred on this point and ground 1 of the appeal therefore succeeds.
- 7.5 The appellant has argued grounds 2 and 3 together and we adopt the same approach. Given our determination in ground 1 above on the issue of the 2<sup>nd</sup> respondent signing the Reseller Agreement as surety, consideration of this ground has become academic.
- 7.6 We have agreed with the appellant in ground 1 that the trial Judge erred when she considered the issue of the appellant's duty to the 2<sup>nd</sup> respondent to explain to him the implications of what he was signing up for or to refer him to seek independent legal advice on the nature of the transaction in issue. Similarly, the argument in ground 3 distinguishing the



**Nkongolo** case from this one is academic in view of our decision in ground 1. We are therefore of the view that the contentions in ground 2 that the Judge erred when she found that the appellant was under a duty to explained the agreement to the respondent and ensure that the respondent obtained legal advice falls away.

7.7 In coming to address our minds to the arguments advanced in ground 4 of the appeal that the 2<sup>nd</sup> respondent must be estopped from escaping liability owing to the agreement and in fact executing the Reseller Agreement as surety of the 1<sup>st</sup> respondent, we do agree with the appellant upon consideration of the judgment of the lower Court that the issue of estoppel was not addressed in the Court below.

7.8 Given our determination in the preceding paragraphs, there is no contention that the Reseller Agreement exists and the 2<sup>nd</sup> respondent signed it as surety of the 1<sup>st</sup> respondent and agreed to be bound by the terms embodied therein.

7.9 The issue of estoppel was a point of reference in the case of **Jacques Chisha Mwewa V Attorney General**<sup>6</sup> where the Industrial Relations Court held as follows:

***“It is our considered view that the respondent extended the contract after expiry in 2004, by its previous conduct of renewing late. We opine that the respondent is barred by the doctrine of estoppel from disputing or denying extension of***

*the complainant's contract by its conduct. In the case of Freeman v Cooke (1), it was held:*

*'Where one by his words or conduct, with the intention that the belief which is induced should be acted upon, causes another to believe in the existence of a certain state of things, and induces him to act on that belief, the former is precluded from averring against the latter a different state of things as existing at that time'.*

7.10 We are mindful that this Court is not bound by the foregoing holding, but are persuaded thereby and take the view that the Court below should have held the 2<sup>nd</sup> respondent as being bound by the agreement which he stood as personal surety for the 1<sup>st</sup> respondent.

## 8.0 **CONCLUSION**

8.1 Given that the appeal has succeeded on the 1<sup>st</sup> and 4<sup>th</sup> ground of appeal as the lower Court considered issues which were not pleaded, we hold that judgment should be entered in favour of the appellant who had proved the existence of the Reseller agreement, thereby making the 2<sup>nd</sup> respondent liable to the appellant for the unpaid balance of the judgment sum.


8.2 We accordingly enter judgment against the 2<sup>nd</sup> respondent in favour of the appellant for the balance of the judgment sum owing, with interest as awarded by the lower Court on 21 September 2016.

8.3 The appeal being successful, we award costs of this appeal to the appellant to be agreed between the parties and in default to be taxed.

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**M.M. Kondolo, SC**  
**COURT OF APPEAL JUDGE**

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**C.K. Makungu**  
**COURT OF APPEAL JUDGE**

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**N.A. Sharpe-Phiri**  
**COURT OF APPEAL JUDGE**