

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

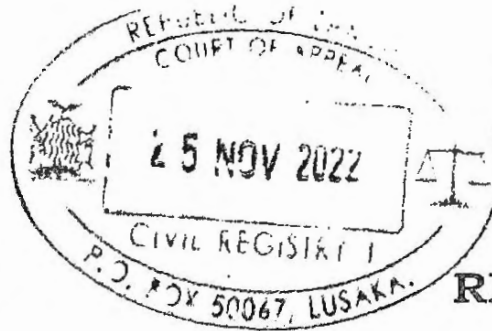
Appeal No. 125/2021

BETWEEN:

RACHAEL MUDIYO BANDA

AND

STANBIC ZAMBIA LIMITED



APPELLANT

RESPONDENT

Coram: Makungu, Sichinga and Ngulube JJA.

On the 16th day of June, 2022 and the 25th day of November, 2022.

For the Appellant: Mr. L. Yeta- Messrs Central Chambers

For the Respondent: Mr. A. Siwila- Messrs Mambwe Siwila and Lisimba Advocates

JUDGMENT

MAKUNGU JA, delivered the Judgment of the Court.

Cases referred to:

1. MTN Zambia Limited v. Investment Bank PLC SCZ Appeal No. 155/2015
2. Nkolongo Farms Limited v. Zambia National Commercial Bank and Two Others SCZ Appeal No. 101/2004
3. Attorney General v. Achiume (1983) ZR1
4. Wilson Masauso Zulu v. Avondale housing Project [1982] ZR 174
5. Thomas Sinkala v. Engen Petroleum Zambia Limited CAZ Appeal No, 208 of 2019
6. Access Bank Zambia Limited v. UPEO Zambia Limited CAZ Appeal No. 93/2020
7. African Banking Corporation v. Plinth Technical Works Limited selected Judgment No. 28 of 2015

Legislation referred to:

1. High Court Act, Chapter 27 of the Laws of Zambia
2. Rules of the Supreme Court of England, 1997 Edition
3. Court of Appeal Act, No. 7 of 2016

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of I. Z. Mbewe, J, of the Commercial Division of the High Court delivered on 30th September 2020, against three respondents including the appellant herein who was the 1st respondent. The other respondents in the action were namely; Lyaliwe Banda Kalawa as 2nd respondent and Optimum Travel Limited as 3rd respondent. The matter involved issues relating to facility documents, bank guarantee, mortgage, further charge and foreclosure.

2.0 BACKGROUND

2.1 The Respondent herein commenced an action against the above mentioned respondents by Originating Summons pursuant to **Order 30 Rule 14 of the High Court Act¹** as read together with **Order 88 of the Supreme Court Practice.²** The claims were as follows:

- i. Payment of the sum of K2, 210, 403.35 plus interest due under Third Party Mortgage and Further Charge;

- ii. Delivery up of possession of subdivision 4506 of Lot No. 1052/M Lusaka, Lot No. 27017/M Lusaka, Lot No. 1052/M Lusaka and Lot No. 27017/M Eastern Province;
- iii. Costs and any other relief.

2.2 The affidavit in support of the motion shows that by Facility Letter dated 27th June 2013, the respondent bank availed the 3rd respondent- Optimum Travel Limited, the sum of K1, 532, 000. That as security for the credit facility availed to the 3rd respondent, the appellant herein surrendered her Certificate of Title relating to subdivision 4506 of No. 1052/M Lusaka for purposes of creating a Third Party Mortgage. That the appellant herein executed a Third Party Mortgage Deed which was subsequently registered to secure the respondent bank's interest.

2.3 It was deposed further that as additional security for the credit facility, the 1st respondent executed a Deed of Guarantee. By Facility Letter dated 11th November, 2013, the respondent bank availed the 3rd respondent another credit facility for the sum of K550, 000. The appellant then executed a Further Charge Deed on her property, which was equally registered.

2.4 The deponent stated further that the respondent bank availed the 3rd respondent a credit facility for the sum of K950, 000 by Facility Letter dated 23rd April 2014. The 2nd respondent surrendered her Certificate of Title relating to Lot No. 27017/M Eastern Province and to this effect, she executed a Third Party Mortgage and the same was registered. As additional security for the credit facility, the 2nd respondent executed an Unlimited Deed of Guarantee.

2.5 That by Facility Letter dated 16th June, 2014, the respondent bank availed the 3rd respondent a credit facility for the amount of K300,000 for which the 2nd respondent executed a Further Charge Deed which was registered.

2.6 It was further deposed that contrary to the terms and conditions of the credit facilities, the 3rd respondent had not been servicing the debts regularly, as a result, the total balance as at commencement of the action stood at K2,218,483.35 and continued to rise due to interest charges.

2.7 The appellant herein filed an Affidavit in Opposition to the Originating Summons on 16th December, 2015 and therein stated that she is the proprietor of Subdivision 4506 of Lot 1052/M Lusaka and that the 2nd respondent, who is the

managing director and majority shareholder in the 3rd respondent company, is her niece.

2.8 That in June 2013, the 2nd respondent proposed to redeem her property from a financial institution which was holding the title as security for a debt of K62,234. In exchange, the appellant was to permit the 2nd respondent to use the said property to obtain a bank guarantee required for her ticketing business with the International Air Transport Association (IATA). Her understanding was that the Certificate of Title would only be required for a period of one year, which would be the validity period of the Bank Guarantee.

2.9 That on 13th June, 2013 a Memorandum of Understanding was executed between the appellant and the 2nd and 3rd respondents to allow the 2nd respondent to borrow the title relating to the appellant's property for purposes of securing the bank guarantee.

2.10 She and the 2nd respondent executed a document which she believed was for purposes of securing a bank guarantee in favour of the respondent, and not for a cash advance, but she found out later that it was a Third Party Mortgage. That the said

Third Party Mortgage was not availed to her on execution and as such she did not read or understand its contents.

2.11 The appellant denied executing or authorizing someone to execute on her behalf, a Deed of Guarantee and Further Charge.

2.12 The appellant further claimed that the 2nd respondent acted in bad faith and that the bank knew or ought to have known this.

That as such, the bank should not be granted the relief sought.

3.0 DECISION OF THE HIGH COURT

3.1 The learned High Court Judge found that there was no evidence that the respondent made a false or misleading assertion on the bank guarantee with intent to deceive. Further that the prior arrangements between the appellant and the 2nd respondent cannot be used against the respondent bank, as the appellant executed the Third Party mortgage with knowledge of the nature of the transaction:- as security for banking facilities in favour of the 2nd respondent. As such, the learned Judge was of the view that the appellant failed to show misrepresentation by the respondent as a basis to vitiate the Third Party Mortgage of 22nd July, 2013.

3.2 As regards the appellant's argument that the respondent bank ought to have advised her as to the nature and effect of the Third Party Mortgage before she executed the same, the lower Court held that the appellant was no stranger to mortgages as she had previously pledged the same property to Entrepreneurs Financial Centre Zambia (EFC) as can be discerned from her monetary benefit from the 2nd respondent's undertaking to pay off her debt with a previous lender in exchange for the 2nd respondent's use of the appellant's Certificate of Title.

3.3 That the appellant is an adult of full capacity and knowledge on the effect and implications of a mortgage, having previously executed a similar document with a lending institution. The Judge therefore declined to set aside the Third Party Mortgage.

3.4 Further, the learned trial Judge found that the appellant is liable, on demand by the respondent, to settle the 3rd respondent's indebtedness to the respondent bank. The respondent having made a demand, the Court found in favour of the respondent in the claimed sum of ZMW2,218,483.35.

4.0 APPEAL

4.1 The appellant lodged this appeal, advancing the following grounds:

1. *The Court below erred in law and fact by holding (at page J17-J18) that the appellant had failed to demonstrate that the applicant, 2nd and 3rd respondents misrepresented facts to her leading to the execution of the third-party mortgage dated 22nd July, 2013 despite the fact that the Court actually made a finding of fact that the purpose of the facility and/or mortgage was to serve as security for a bank guarantee (by performance) to IATA.*
2. *The Court below erred in law and fact by holding (at page J17-J18) that 'I decline to set aside the third party mortgage dated 22nd July 2013 on the basis that the applicant did not advise the 1st respondent to seek independent legal advice despite the fact that the respondent herein did not deny not having performed its duties in advising the appellant of the consequences of executing a bank guarantee to IATA.*
3. *The Court below erred in law and fact by holding (at page J17-J18) that the appellant cannot escape the snares of the third party mortgage of 22nd July,*

2013 which she executed with a limit of ZMW1,500,000, leaving a balance of ZMW 32,000 which the Court did not take note of.

5.0 APPELLANT'S ARGUMENTS

5.1 In support of the appeal, the appellant caused to be filed heads of argument on 8th June, 2021. The thrust of the argument in support of the first ground of appeal is that in ascertaining the propriety of the lower Court's finding that there was no misrepresentation on the part of the respondent in the events leading to the appellant's execution of the Third Party Mortgage, the question we ought to ask ourselves is; what was the purpose and effect of the Facility Letter to which the appellant, as surety, executed a Third Party Mortgage? The appellant contends that the Facility Letter dated 27th June 2013, was meant to facilitate the enhancement of an existing bank guarantee from USD36,000.00 to ZMW1,532,000 in favour of IATA.

5.2 It was submitted in furtherance of this argument that the effect of the bank performance guarantee was that the respondent merely made a promise to IATA to pay the association in the event that its customer Optimum Travel Limited failed to

account for its tickets acquired in a separate contract as a travel agent. That as such, the respondent was not entitled to give the 2nd and 3rd respondents cash advances in the form of loans but only to pay IATA as the entitled beneficiary on demand, in the event that the customer failed to perform its contractual obligations. In support of this argument, the appellant cited the case of **MTN Zambia Limited v. Investment Bank PLC**¹ where it was stated:

“The contract of guarantee itself should be strictly construed in favour of the surety. The main reason, in our view, for such an approach is that the surety is entering into liability, not for himself but for a third person. It is, therefore, the duty of the creditor to see that the obligation of the surety is couched in clear terms so that both the surety and the creditor have a common understanding of the liability assumed by the guarantor.”

5.3 It was the appellant's argument, based on the principle outlined in the cited case, that the respondent misrepresented the nature and effect of the bank guarantee to her, which induced

her into executing a third party mortgage and that the said representations turned out to be false, as the bank paid out cash to the 2nd and 3rd respondents instead of IATA. That therefore, the Facility Letter dated 22nd June, 2013 should have been strictly construed in favour of the appellant as she was the surety.

5.4 The appellant further cited the case of **Nkolongo Farms Limited v. Zambia National Commercial Bank and Others**² where the Supreme Court referred to **Credit Lyonnais Bank NV v. Burch** and stated that the Court placed responsibility on the bank lending money to take reasonable steps to explain to the surety the nature, extent and implications of the transaction as well as to ensure that the surety sought independent legal advice before committing to the transaction. The Court in that case held that it was not sufficient for the bank to just have a casual contract with the guarantor.

5.5 On this premise, the appellant contended that the lower Court's finding that misrepresentation was not proved was based on a misapprehension of law and facts because on the strict construction of the bank guarantee in favour of the appellant, the respondent's action of turning the Facility Letter into a loan

agreement and paying it directly to the customer was proven misrepresentation in itself. That if the Facility Letter dated 27th June, 2013 was meant to be a direct loan agreement to the 2nd and 3rd respondents, it should have been termed as such. That the misrepresentation was in writing and by conduct.

5.6 In support of the second ground of appeal, the appellant contended that the lower Court's view that she is an adult of full capacity and knowledge on the effect of a third party mortgage was premised on the misapprehension of facts as outlined in the arguments in support of the first ground of appeal. That even though the appellant knew at the time what a mortgage is, the duty being contested by the appellant is the duty of the respondent to advise her as to the nature and consequence of the bank guarantee executed by the 2nd and 3rd respondents in the lower Court, to which the third party mortgage related.

5.7 The case of **Attorney General v. Achiume**⁴ was cited to persuade us to reverse the lower Court's finding that the appellant was knowledgeable about mortgages and knew what she was signing up for, as this finding was according to the appellant made in the absence of relevant evidence. That there is no evidence that the appellant had ever executed a bank

guarantee or that she knew the nature of the document and how it worked, especially that the third party mortgage was subject to the conditions set out in the Bank Guarantee and/or Facility Letter. The appellant's counsel urged us to invoke **section 24(1)(a) of the Court of Appeal Act²** to vary the judgment of the lower Court.

5.8 In support of the third ground of appeal, which is an alternative to the first two grounds, the appellant argued that although the bank guarantee was only valid for a period of one year, the respondent only released the sum of ZMW1,532,000 on 14th April, 2015. That notwithstanding this, the record shows that the 2nd and 3rd respondents made payments amounting to ZMW1,500,000 to the respondent, leaving a balance of only ZMW32,000.

6.0 RESPONDENT'S ARGUMENTS

6.1 In response to the first ground of appeal, the respondent supports the finding by the lower court to the effect that there was no proven misrepresentation on the part of the respondent. Our attention was drawn to page J17 of the judgment appealed against where the learned trial Judge made the following findings:

“Importantly, I find no evidence showing any false statement that induced the 1st respondent to surrender her Certificate of Title to the applicant, leading to the Third Party Mortgage of 22nd July 2013. After all, the 1st and 2nd respondent had a prior agreement on what the 1st respondent’s Certificate of Title would be used for.”

- 6.2 In this vein, the respondent argued that there is no basis upon which the preceding findings can be reversed in accordance with **Wilson Masauso Zulu v. Avondale Housing Project**.⁴
- 6.3 As regards the appellant’s assertion that on a strict construction of the Bank Guarantee, the respondent made statements as to the effect of the Bank Guarantee or its nature which induced the appellant into executing a Third Party Mortgage, the respondent argued that this is incorrect, as the respondent understood the nature and consequences of the Bank Guarantee and was thus not induced into executing the Third Party Mortgage. To fortify this, we were referred to the appellant’s Affidavit in Opposition to the Originating Summons for Foreclosure, where she stated at page 14:

“That the reason I agreed to allow the 2nd respondent to use my property to secure a bank guarantee is that the arrangement was relatively low risk because it is unlikely that the bank can pay out the maximum amount guaranteed because the bank will only pay out if the customer defaults on its mandatory monthly remittance to IATA. It is inconceivable that the default in one given month could be to the maximum extent of the Guarantee.”

6.4 The respondent argued further that the issue for consideration is not the construction of the Bank Guarantee but the purpose of the Facility Letter, which the Court below properly articulated as the enhancement of the existing bank guarantee in favour of IATA.

6.5 As regards the allegation that the respondent issued a cash advance instead of a Bank Guarantee, the respondent argued that this is contrary to what the appellant stated as to why she handed over her Certificate of Title. That this argument is an afterthought by the appellant to escape liability after having surrendered her Certificate of Title and executed a Third Party

Mortgage and Deed of Guarantee as security for the credit facility availed to the 3rd respondent.

6.6 In response to the second ground of appeal, learned counsel for the respondent advanced the argument that in declining to set aside the Third Party Mortgage, the lower Court relied on **Thomas Sinkala v. Engen Petroleum Zambia Limited**,⁵ where the Court of Appeal stated that the duties owed to a Mortgagor in a Third Party Mortgage transaction by a creditor are limited to disclosing to the prospective Mortgagor any matter peculiar to the transaction such as facts which the third party mortgagor cannot reasonably be expected to know. On this basis, the lower Court concluded that the appellant was of full knowledge and capacity as she was no stranger to mortgage transactions, as can be discerned from the arrangement she had with the 2nd respondent where she received a pecuniary benefit when the 2nd respondent paid off her debt with a previous lender in exchange for the use of her Certificate of Title.

6.7 Responding to the appellant's contention that the respondent bank had a duty to advise the appellant as to the nature and consequences of the Bank Guarantee executed by the 2nd and

3rd respondents, to which the Third Party Mortgage related, the respondent argued that according to the Facility Letter dated 27th June, 2013, the Bank Guarantee was issued by the bank in favour of IATA and thus could not have been executed by the 2nd and 3rd respondent as alleged. That moreover, according to affidavit evidence on record, the appellant had an intimate understanding of the nature and consequences of the Bank Guarantee, as can be deciphered from part of her Affidavit in Opposition to the Originating Summons referred to earlier.

6.8 In response to the third ground of appeal, the respondent stated that the 3rd respondent, on or about 12th June, 2015, paid a sum of K1,500,000 towards an outstanding sum of K2,106,093.92, leaving a balance of K606,093.92 and not K32,000 as alleged by the appellant. That the statement of account shows that as at 31st July, 2015, the outstanding sum of K614,571.78 continued accruing interest and was limited to the sum of K1,532,000 plus accrued interest from the date of judgment as ordered by the court below.

6.9 Overall, the respondent argued that the lower court was on *terra firma* to have held that the respondent was entitled to foreclose on the mortgaged property.

7.0 OUR DECISION

7.1 Having read the record of appeal and the arguments advanced on behalf of both the appellant and the respondent it is our evaluation that the first and second grounds of appeal are inter-related and we opt to address them collectively.

7.2 In this regard, the questions for us to answer are, firstly, whether we can reverse the findings made by the lower court that the respondent bank made no misrepresentation to the appellant in order to induce her to execute the Third Party Mortgage and secondly, whether the Third Party Mortgage can be set aside on the basis that the respondent did not advise the appellant to seek independent legal advice.

7.3 The reasons advanced by the appellant as to why the said findings should be reversed are that they were based on a misapprehension of facts; that if the lower court had construed the Bank Guarantee strictly in favour of the appellant, it would have found the respondent's action of turning the Facility Letter into a loan agreement and making

payment directly to the customer Optimum Travel Limited to be proof of misrepresentation.

- 7.4 The appellant's suggestion that the lower Court ought to have construed the bank guarantee in her favour is premised on the case of **MTN Zambia Limited v. Investment Bank PLC**¹ where the court stated *inter alia* as follows:

“We understand the liability of a surety under a guarantee to be a matter primarily of construction or interpretation of the guarantee itself and not necessarily the contract or agreement from which performance is guaranteed. The contract of guarantee itself should be strictly construed in favour of the surety. The main reason, in our view, for such an approach is that the surety is entering into liability, not for himself but for a third person. It is, therefore, the duty of the creditor to see that the obligation of the surety is couched in clear terms so that both the surety and the creditor have

***a common understanding of the liability
assumed by the guarantor.”***

7.5 We have carefully read the aforementioned precedent which clearly gives guidance on the nature and extent of the liability of a surety under a payment guarantee. The circumstances of the said case bear a resemblance to the present case to the extent that, the Supreme Court in that case was equally called upon to reverse findings of fact relating to the liability of a surety arising out of a bank guarantee. To this extent, we will subject ourselves to the guidance given in this case as much as it is applicable.

7.6 The guarantee limited to the sum of K1,532,000, which is in question in this appeal, was made by the respondent bank to IATA with effect from 24th June, 2014 up to 30th June, 2015.

7.7 The other guarantee dated 14th November, 2013 at pages 226 – 229 of the record was made by Optimum Travel Limited and Racheal Banda for the sum of ZMW2,085,000.00 together with interest thereon at the current rate from the date of demand for payment. This guarantee was signed by the appellant. It was made in consideration of the respondent bank granting or continuing advances or otherwise giving credit or affording

banking facilities or other accommodation for as long as the bank thought fit.

7.8 In our considered view, on a proper construction of both guarantees, the appellant's liability as mortgagor with regard to the Third Party Mortgage arose specifically from the contract that the mortgage refers to; that is the Facility Letter dated 27th June, 2013.

7.9 The obligation assumed by the appellant in this case is stated in the Third Party Mortgage as follows:

“AND WHEREAS the Customer has requested the Bank to grant to the Customer banking facilities which the Bank has agreed to do upon having the security hereinafter appearing, subject to such terms and conditions as are contained in the Facility Letter dated 27th June, 2013 and executed between the Customer and the Bank (hereinafter called The Facility Letter).”

7.10 We are of the view that the Third Party mortgage is clear as regards the extent of the appellant's obligation as the

mortgagor and that was to give security for the facility subject to the terms and conditions in the said Facility Letter. A reading of the Facility Letter shows that the type of facility was a "Guarantee by Bank – Performance," the purpose of which was to "facilitate the enhancement of an existing Bank guarantee from USD36,000 to ZMW1,532,000 in favour of IATA."

7.11 The Facility Letter in paragraph 2 reads as follows:

2.2 The bank shall be under no obligation to verify or monitor the utilization of any amount borrowed pursuant these facilities.

3.1 The facilities are repayable strictly on demand, in which event the relevant facilities shall immediately become due and payable and the Bank shall not be obliged to give any notice in making, or prior to, demand.

7.12 We therefore hold that strictly speaking, the appellant cannot be considered to be a surety but a mortgagor as she was not the guarantor of the ZMW1,532,000.00 in favour of IATA but the respondent bank.

7.13 Furthermore, the Facility Letter provided in no uncertain terms that the bank could lend money to Optimum Travel Limited; the bank would not monitor the utilization of the amount borrowed and that the facilities were payable on demand. We further hold that the creditor (respondent) was under no legal obligation to explain the implications of the said mortgage and the granting of loans to Optimum Travel Limited was based on the same facility letter.

7.14 In our understanding, in a performance guarantee, the guarantor is the bank which undertakes to make good the beneficiary's loss in case of non-performance, short performance or default in performance of a contract see **Access Bank Zambia Limited V. UPEO Zambia Limited.**⁶ Therefore the appellant's submission that as a general rule IATA was supposed to be paid directly by the bank in case of default by Optimum Travel Limited was only partially correct because in this case, the Facility Letter of 27th June, 2013 provided for both a performance guarantee and for credit facilities to be given to Optimum Travel Limited. This seems unusual but we hold that it is not illegal.

7.16 The lower court rightly found that the respondent did not make any false misrepresentation that induced the appellant to surrender her Certificate of Title to the bank and to sign the Third Party Mortgage of 22nd July, 2013.

7.17 The court had analysed the MOU between the appellant and her niece, the 2nd respondent, for the benefit of the 3rd respondent Optimum Travel Limited before determining further that the 1st and 2nd respondent had prior agreements on what the 1st respondent's Certificate of Title would be used for.

7.18 As stated by the respondent's advocates, the appellant showed in the affidavit in opposition to the originating summons that she understood the nature of both the bank guarantees made by the respondent and by herself and therefore there was no misrepresentation made by the respondent to induce her to execute the third party mortgage even though she did not have the advantage of seeing the bank guarantee dated 27th June, 2013.

7.19 By the appellant's own evidence, we find that there was no question or ambiguity as to the extent of the appellant's liability

which would have warranted engagement of independent legal counsel. The appellant knew that she was pledging her property as security for a pecuniary advantage of a third party in the amount of K1,532,000 and more in the further charge and that is what transpired. In fact, she financially benefited from the transactions and arrangements she had made with her fellow respondents as her loan with another financial institution (EFC) was cleared by them in order for her to redeem the title deed and pledge it as security for the mortgage in question. The lower court is upheld for rightly applying the case of **African Banking Corporation v. Plinth Technical Works Limited**⁷ where the Supreme Court held that:

“From the evidence and even if there was no evidence that the appellant had advised the 1st respondent to seek independent legal advice, it is discernable that the 1st respondent is an adult of full capacity, who is well exposed to having executed similar contracts or mortgages...”

7.20 Our decision in the **Thomas Sinkala v. Engen Petroleum Zambia Limited**⁵ was also aptly applied to the facts of this case by the lower court. In that case, we held inter alia as follows:

“There is a duty imposed on creditors to explain to a surety the effects, implications and consequences of execution of a mortgage or guarantee transactions. As well advising the surety to seek independent legal advice especially where no pecuniary benefits are being received or derived by the surety. The duties owed to a mortgagor in a third party mortgage transaction by a creditor are limited to disclosing to the prospective mortgagor any matter peculiar to the transaction, such as facts which the third party

*mortgagor cannot reasonably be
expected to know.”*

7.21 Under the third ground of appeal, the appellant, though challenging the lower Court's finding that she cannot escape the snares of the third party mortgage, admitted that the outstanding debt owed by Optimum Travel Limited to the respondent bank had not yet been fully settled at the time the action was commenced and at the date of the High Court Judgment.

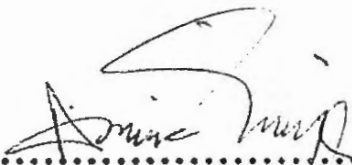
7.22 The learned High Court Judge determined that the respondent is entitled to foreclose on the mortgaged property should the 3rd respondent (Optimum Travel Limited) fail to settle the debt. The award made by the lower court was for the principal of K1,532,000.00 plus accrued interest and we cannot fault her for this was based on the respondent's evidence. The debtor is free to request the bank for a statement of account or reconciliation of the account so that any payments made towards the debt can be accounted for.

8.0 CONCLUSION


- 8.1 For the aforementioned reasons, we dismiss this appeal with costs to the respondent, to be taxed in default of agreement.

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C.K. Makungu
COURT OF APPEAL JUDGE

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D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

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P.C.M. Ngulube
COURT OF APPEAL JUDGE