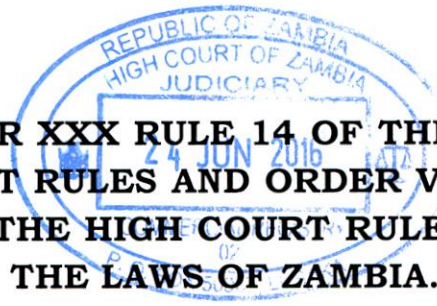


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**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**

**2015/HPC/0481**

**IN THE MATTER OF: ORDER XXX RULE 14 OF THE HIGH  
COURT RULES AND ORDER VI RULE  
2 OF THE HIGH COURT RULES, CAP  
27 OF THE LAWS OF ZAMBIA.**



**BETWEEN:**

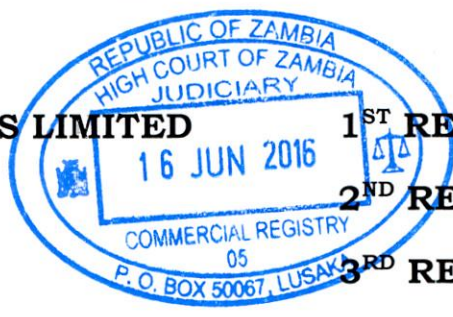
**DEVELOPMENT BANK OF ZAMBIA** **APPLICANT**

**AND**

**STALWART INVESTMENTS LIMITED** **1<sup>ST</sup> RESPONDENT**

**DERRICK MPUNDU** **2<sup>ND</sup> RESPONDENT**

**STELLA MPUNDU** **3<sup>RD</sup> RESPONDENT**



Before the Honourable Mr. Justice W.S. Mweemba at Lusaka in Chambers.

For the Plaintiff : Ms K. Lopa Chilekwa - Legal Officer,  
Development Bank of Zambia

For the Respondents : No Appearance

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**J U D G M E N T**

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**LEGISLATION REFERRED TO:**

- 1. Order 30 Rule 14 of the High Court Act, Cap 27 of the Laws of Zambia.*
- 2. Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.*
- 3. Conveyancing and Law of Property Act 1881.*

**CASES REFERRED TO:**

1. *Reeves Malambo V Patco Agro Industries Zambia Limited SCZ Judgment No. 20 of 2007.*
2. *Southern Cross Motors Limited V Nonc Systems Technology Limited (2012 Vol 1) ZR 524.*

This is an Originating Summons pursuant to Order 30 Rule 14 of the High Court Act, Cap 27 of the Laws of Zambia. The Applicant is claiming the following reliefs against the Respondent:

1. *Payment of the sum of ZMW 9,300,000.00 being the sum of loans extended to the 1<sup>st</sup> Respondent under the Facility Letters dated 11<sup>th</sup> November, 2013 and 13<sup>th</sup> May, 2014 respectively.*
2. *Interest as per Facility Letters dated 11<sup>th</sup> November, 2013 and 13<sup>th</sup> May, 2014 respectively.*
3. *Delivery up by the Respondents to the Applicant of the Mortgaged leasehold property namely Stand No.2486, Kitwe.*
4. *Order of Foreclosure*
5. *Order of Sale of the leasehold property*
6. *An Order of Sale in respect of the assets charged under the specific charge dated 3<sup>rd</sup> September, 2015*
7. *As further or alternative relief, an order against the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent as Guarantors for payment of the sum of ZMW9,300,000.00 plus interest accrued thereon*

8. *Costs*

9. *Any other relief the Court may deem just and equitable*

There is an Affidavit in Support of the Originating Summons sworn by Carol Kafunya Mwila the Manager in charge of Monitoring and Supervision in the Applicant Bank and filed into Court on 4<sup>th</sup> November, 2015. The Affidavit shows that the 1<sup>st</sup> Respondent was by a Facility Letter dated 11<sup>th</sup> November, 2013 (first facility letter), which was duly executed by both the Applicant and the 1<sup>st</sup> Respondent herein, extended a medium term loan in the sum of ZMW8,500,000.00 (the First Medium Term Loan).

The Affidavit also shows that it was agreed under the First Facility Letter that the loan was repayable in 48 equal monthly instalments after the expiry of a six months grace period. Moreover, that its applicable rate of interest was to be set at the Bank of Zambia Policy Rate plus a margin of 3% which the parties agreed was to be calculated daily on a 365 day year with monthly rests on a compounding basis.

It is also deposed that the security for the loan was a First Legal Mortgage over Stand No.2486, Kitwe, a Fixed and Floating Debenture over all existing and future moveable assets of the 1<sup>st</sup> Respondent, a First Legal Charge over equipment to be purchased, Assignment of Receivables, Joint and Several Guarantee of Shareholders namely Derrick and Stella Mpundu,

Tripartite Escrow Agreement and a signed Subordination Agreement.

Moreover that all except one of these securities was created and duly registered by the Applicant. Afterwards the Applicant disbursed the first medium term loan to the 1<sup>st</sup> Respondent.

Mrs Mwila went on to state that by another Facility Letter of 13<sup>th</sup> May, 2014 (the Second Facility Letter) the Applicant extended another medium term loan in the sum of ZMW800,000.00 to the 1<sup>st</sup> Respondent.

She then avers that it was agreed in Clause 4 of the Second Facility Letter that the Second Loan would be subject to the grace period on principal repayment given under the First Facility Letter and that the two grace periods would run concurrently.

It is also deposed that this second medium term loan was repayable in 48 equal monthly instalments after the expiry of the grace period. The interest rate on the second medium term loan was also set at the Bank of Zambia policy rate plus a margin of 9% and it was agreed that it would be calculated daily on a 365 day year with monthly rests on a compounding basis.

That the security for this loan was a Further Charge over Stand No. 2486, Kitwe, a Further Fixed and Floating Debenture, an Assignment of Receivables and further Joint and Several Shareholders Guarantees.

It is also averred that both facility letters stated that should the 1<sup>st</sup> Respondent fail to make any payment by the due date, the full amount of the facility then outstanding and all charges and interest accrued thereon would become due and payable.

Moreover, that despite the expiry of the grace period on principal repayments for both loans on 31<sup>st</sup> May, 2014 the 1<sup>st</sup> Respondent failed to meet its payment obligations.

Mrs Mwila also states that by a letter dated 2<sup>nd</sup> September, 2014 the Applicant made a final demand for payment on the 1<sup>st</sup> Respondent who did not reply. Further that a computation of the outstanding amount including interest on the First medium term loan as at 30<sup>th</sup> September, 2015 stood at ZMW 944,582.34.

That by virtue of the Specific Charge, the 1<sup>st</sup> Respondent charged all assets listed with the payment of the sums due to the Applicant. That in terms of the Shareholder's Guarantee Deeds that were duly executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the said Respondents guaranteed to the Applicant due payment of all principal monies and interest falling due from the 1<sup>st</sup> Respondent by virtue of the Facility Letters and that the said Respondents would in the event of default by the 1<sup>st</sup> Respondent, pay such monies to the Applicant.

It is also deposed that the liability of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents under the said Guarantee documents is clearly stated as one of the primary obligators and not merely as sureties.

Further that on the basis of the 1<sup>st</sup> Respondent's default, and the Shareholders Guarantees above referred to, the Applicant demanded payment from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and no response has been received.

It is lastly deposed that the Applicant was desirous of enforcing its rights under the security documents aforementioned.

There is also an Affidavit in Opposition sworn by Derrick Mpundu the 2<sup>nd</sup> Respondent and the Managing Director in the 1<sup>st</sup> Respondent Company and filed into Court on 25<sup>th</sup> November, 2015. He stated that sometime in November, 2013, the Respondents herein obtained the loan in the sum K8, 500,000.00 from the Applicant to finance the purchase of machinery and equipment, to refinance an outstanding loan and to finance working capital in the 1<sup>st</sup> Respondent Company.

He also states that on or about 13<sup>th</sup> May, 2014 the 1<sup>st</sup> Respondent further obtained a loan of K800,000.00 to invest in the growth of the Company bringing the total to ZMK9,300,000.00.

He further states that the 1<sup>st</sup> Respondent did not dispute owing the Applicant as it did obtain the loan but disputes the Applicant's computation of interest on the loan statement provided by the Applicant which shows that the loan amount now stood at ZMK11, 090,215.42 as it was highly exaggerated and

clearly did not take into account payments made by the Respondent.

Moreover, that the outstanding loan amount showed a highly exaggerated amount which showed a huge discrepancy from the 1<sup>st</sup> Respondent's computation of the outstanding loan amount as at 30<sup>th</sup> September, 2015 taking into account the amount paid so far aforesaid.

He also states that the Applicant ought to show and justify how it computed and arrived at the huge interest that led to the exaggerated amount being claimed. Further that the 1<sup>st</sup> Respondent was desirous of paying and liquidating the loan save for some current challenges precipitated by depreciation of the Zambian currency by over 100% which has led to unforeseen losses to the 1<sup>st</sup> Respondent on its contractual obligation as it had to source goods from abroad.

Further, that the 1<sup>st</sup> Respondent's main business activity has been to do contractual works with the Mines on the Copperbelt Province of Zambia, doing road construction which all entails procuring materials from abroad.

That the time the 1<sup>st</sup> Respondent was to start paying the loans sometime in May, 2014 the 1<sup>st</sup> Respondent's business was negatively affected when the Mines started slowing down their production and awarding contracts to third party Mine suppliers and Contractors which included the 1<sup>st</sup> Respondent.

Moreover that the massive load shedding also negatively impacted on the business activities of the 1<sup>st</sup> Respondent's realization of the cash flow projections as was initially anticipated.

It is also deposed that the equipment that had been procured is also to be used on road construction projects with the government which had not been able to honour its payment obligations on schedule.

That however the 1<sup>st</sup> Respondent has been committed to liquidate its liability towards the Applicant and has so far paid the total sum of ZMK402, 000.00 towards liquidating the loans.

He also stated that once the correct amount owed by the 1<sup>st</sup> Respondent was correctly computed, the 1<sup>st</sup> Respondent was willing to liquidate the amount owed through monthly instalments of K190, 000.00.

Further that the 1<sup>st</sup> Respondent shall comply with the proposed payments as these were within reasonable cash flow projections of the 1<sup>st</sup> Respondent based on the current economic challenges in the nation.

He also averred that he had been advised by Counsel that it was not the practice of this Court to foreclose on property where the



Respondent demonstrated that it was willing and capable to meet its obligations.

Lastly it is deposed that this Court should not grant an order of foreclosure, but rather order the Applicant to justify its interest computations and therefore allow the Respondent to meet its obligations in monthly instalments of K190,000.00.

There is also an Affidavit in Reply sworn by Chilombo Montah the Senior Portfolio Management Officer for the Applicant herein and filed into Court on 3<sup>rd</sup> February, 2016.

It is deposed that it is not disputed that the 1<sup>st</sup> Respondent was indebted to the Applicant in the sum of ZMW9,300,000.00.

He also deposed that as indicated the interest rates applicable to the loans contracted by the 1<sup>st</sup> Respondent were Bank of Zambia (BOZ) Policy Rate plus a margin of 3% calculated daily on a 365 day year on a compounding basis for the First Medium Term Loan and BOZ Policy rate plus a margin of 9% calculated daily on a 365 day year on a compounding basis for the Second Medium Term Loan.

Mr Montah also states that the pricing for the facility was dependent on the BOZ policy rate and accordingly the interest rate applicable to the loans was adjusted with each change to the BOZ Policy rate.

Further that at the time that the loans were contracted, the BOZ Policy Rate stood at 9.75%. It was subjected to further changes and was adjusted to 10.25% in March 2014 and 12% from April, 2014 to October, 2014.

Moreover that as at 30<sup>th</sup> September, 2015 the BOZ Policy Rate stood at 12.5% and accordingly the interest rate payable by the 1<sup>st</sup> Respondent stood at 15.50% for the First Medium Term Loan and 21.5% for the Second Medium Term Loan.

It is further averred that the loan amount outstanding of K11,090,215.42 had actually been under quoted as the actual loan amount stood at K11,090,628.79 as the BOZ Policy Rate stood at 15.5% as opposed to 15%.

In addition that the Respondents only made a payment of K100,000.00 on 11<sup>th</sup> November, 2015 which could not be included in the statement for the month ending 30<sup>th</sup> September, 2015.

Further that the facts alluded to concerning the reasons why the Respondents failed to liquidate the loan were extraneous to the 1<sup>st</sup> Respondent's obligations to repay the loans contracted under the facility Agreements.

It is also stated that the 1<sup>st</sup> Respondent had no desire to liquidate the loan as shown by its failure to respond to the Demand Notice from the Applicant dated 2<sup>nd</sup> September, 2014.

Moreover that in a letter dated 30<sup>th</sup> September, 2015 the 1<sup>st</sup> Respondent finally proposed to make monthly payments of ZMW200,000.00 towards dismantling the arrears payable on the loan.

It is also deposed that this proposal was rejected by the Applicant in a letter dated 8<sup>th</sup> October, 2015 as the Respondent was in arrant default of the terms of the facility letters. That similarly the Applicant was not agreeable to the proposal to liquidate the loan in instalments of K190,000.00 monthly due to the default of the 1<sup>st</sup> Respondent. Finally that such a mode of payment can only be ordered where sufficient cause had been shown.

Counsel for the Applicant filed Skeleton Arguments into Court on the 4<sup>th</sup> November, 2015. She made this application pursuant to Order XXX Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia.

It was also Counsel's submission that in seeking relief she was also relying on Section 65 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia which states that:

***“A mortgage of any estate or interest in land shall have effect as security and shall not operate as a transfer or lease of the estate or interest thereby mortgaged, but the mortgagee shall have and shall be deemed always to have had the same protection powers and remedies (including a power of sale, the right to take***

*proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them and, in the case of land held in leasehold, the right to receive any notice relating to the land the subject of the mortgage which under any law or instrument the mortgagor is entitled to receive) as if the mortgage had so operated as a transfer or lease of the estate or interest mortgaged”.*

She also relied on Section 19 of the Conveyancing and Law of Real Property Act of 1881 which sets out the powers of the Mortgagee as follows:

*“A mortgagee where the mortgage is made by deed, shall by virtue of this Act have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but no further:*

*(1) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale,*

***and to re- sell, without being answerable for any loss occasioned thereby...”.***

Further that Section 2 (iv) of the same Act defined a Mortgage as “any charge on any property for securing money or money’s worth.” On this basis Counsel contended that the Applicant relied on Section 19 above seeking to sell the property charged under the Specific Charge.

She went on to cite the case of **REEVES MALAMBO V PATCO AGRO INDUSTRIES ZAMBIA LIMITED (1)** where it was stated that:

***“A mortgagee is at liberty to exercise his right to foreclosure and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property; and that under a legal mortgage by demise, the mortgagee becomes an absolute owner of the mortgage term at law as soon as the day fixed for redemption has past”.***

On the basis of these authorities Counsel argued that the Applicant was entitled to sell the Mortgaged Property and the property charged under the Specific Charge in order to realise the amount secured plus any interest accrued thereon.

Counsel also pointed out the operative words of the Deeds of Guarantee executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the liability of the guarantors under the Deeds of Guarantee. She

contended that they had been described as one of the **“primary obligators and not merely as sureties”**.

She further relied on Paget’s Law of Banking under paragraph 33.2 at page 825 where a guarantee was defined as a promise to be liable for the debt, or failure to perform some other obligation of another.

She also asked this Court to observe that the Guarantees made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were all in writing and duly executed by each of them so in terms of the Statute of Frauds it was her contention that the Guarantee Deeds were enforceable against the said Respondents at the instance of the Applicant.

On this basis Counsel stated that the Applicant be granted the relief it was seeking.

The 2<sup>nd</sup> Respondent did not file any Skeleton Arguments into Court.

During the hearing on 11<sup>th</sup> February, 2016 Counsel for the Applicant, Ms Chilekwa relied on the Affidavit in Support and Skeleton Arguments filed on 4<sup>th</sup> November, 2016 and Affidavit in Reply filed on 3<sup>rd</sup> February, 2016. The Respondents were not present but this Court was able to proceed under Order 35 Rule 3 of the Rules of the High Court, Cap 27 of the Laws of Zambia.

I have considered the Affidavit evidence as well as the Skeleton Arguments filed into court.

The Affidavit evidence shows that the Applicant availed the 1<sup>st</sup> Respondent two credit facilities. The first being in the sum of ZMW 8,500,000.00 and the second in the sum of K800,000.00.

According to the agreed terms these loans were both repayable in 48 equal monthly instalments after the expiry of their grace period.

The interest rates applicable to the First Loan were set at the Bank of Zambia Policy Rate plus a margin of 3% which the parties agreed was to be calculated daily on a 365 day year with monthly rests on a compounding basis.

The interest rates applicable to the Second Loan were set at the Bank of Zambia Policy rate plus a margin of 9% and it was agreed that the same would be calculated daily on a 365 day year with monthly rests on a compounding basis.

The security in respect of the First Loan was a First Legal Mortgage over Stand No.2486, Kitwe, a Fixed and Floating Debenture over all existing and future moveable assets of the 1<sup>st</sup> Respondent, a First Legal Charge over equipment to be purchased, Assignment of Receivables, Joint and Several Guarantee of Shareholders namely Derrick and Stella Mpundu, Tripartite Escrow Agreement and a signed Subordination Agreement.

The security for the Second Loan was a Further Charge over Stand No. 2486, Kitwe, a Further Fixed and Floating Debenture, Assignment of Receivables and Further Joint and Several Shareholders Guarantees.

I find that the grace periods on principal repayments of both loans expired on 31<sup>st</sup> May, 2014 and the 1<sup>st</sup> Respondent had failed to meet its payment obligations as set out in the facility letters.

The Applicant having done a computation of the outstanding amount including interest on the First Medium Term Loan as at 30<sup>th</sup> September, 2015 stated that the debt stood at K11,090,215.42 whilst that of the Second Loan as at the same date was ZMW 944, 582.34.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their Affidavit evidence have not disputed having obtained the loan facilities from the Applicant. The 2<sup>nd</sup> Respondent has only stated that the 1<sup>st</sup> Respondent disputed the Applicant's computation of interest on the loan statement provided by the Applicant which shows that the loan amount owed by the 1<sup>st</sup> Respondent now stands at K11,090,215.42 as it is highly exaggerated and does not account for payments made by the Respondent.

The 2<sup>nd</sup> Respondent also proposed that once the correct amount owed was calculated the 1<sup>st</sup> Respondent was ready to liquidate the loans in monthly instalments of K190,000.00.



The 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein have admitted obtaining the Loan Facilities of K8,500,000.00 and K800,00.00. They clearly admit that the 1<sup>st</sup> Respondent owes the Applicant the principal sum of K9,300,000.00.

What is in dispute in this matter is whether the interest on the principal debt was properly calculated and if the Respondents have shown this Court sufficient cause to be granted an order to pay instalments of K190,000.00 monthly to liquidate the loan.

The Applicant on the issue of interest averred that the interest rates applicable to the First Loan were set at the Bank of Zambia Policy Rate plus a margin of 3% which the parties agreed was to be calculated daily on a 365 day year with monthly rests on a compounding basis.

Whilst the interest rates applicable to the Second Loan were set at the Bank of Zambia Policy rate plus a margin of 9% and it was agreed that the same would be calculated daily on a 365 day year with monthly rests on a compounding basis.

A perusal of both Facility Letters on the record, CKM1 and CKM9 shows that these were the actual agreed rates of interest by the Applicant and the 1<sup>st</sup> Respondent.

Further the Affidavit in Reply filed into Court by the Applicant also shows the correct computation of the outstanding amounts

including interest on both loans as at 30<sup>th</sup> September, 2015 which stood at K11,090,628.79 and K944,582.34 as shown by the loan statements exhibited as “CM1” and “CM2.”

In the same Affidavit in Reply it has been deposed that the computation of the interest payable was only wrong to the extent that the calculation was based on 15% as opposed to 15.5% which was the BOZ policy rate of interest as at 30<sup>th</sup> September, 2015.

It was also shown that the 1<sup>st</sup> Respondent only made a payment of K100,000.00 towards liquidation of the loans on 11<sup>th</sup> November, 2015 which could not be included in the statement of the month ending 30<sup>th</sup> September, 2015. I therefore find that this payment should be deducted from the principal sum on the date of payment.

From all the evidence brought before Court, I find that the interest calculated by the Applicant was that which was agreed to by the 1<sup>st</sup> Respondent in the Facility Letters and is correct.

Regarding the proposal to pay the outstanding debt by monthly instalments of K190,000.00 to the Applicant, I find that the Respondents have not shown this Court sufficient reason for such an order to be granted. I am guided by Order 36 Rule 9 of the High Court Rules, Cap 27 of the Laws of Zambia which states that:

***Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid in instalments, with or without interest”.***

I am also guided by the case of **SOUTHERN CROSS MOTORS LIMITED V NONC SYSTEMS TECHNOLOGY LIMITED (2)** on considerations to contemplate in an application for instalments where it was held that:

***“This requires evidence to be adduced such as the Applicants income, nature and value of his property, as well as details of indebtedness to other persons apart from the judgment creditor For only then can the court make an informed decision as the proper balance between the needs of the judgment debtor to be granted a stay and order to pay in instalments and the needs of the Judgment Creditor to obtain due and prompt satisfaction of his judgment debt”.***

Based on these authorities I find that the Respondents have failed to show sufficient reason for this Court to exercise its jurisdiction to allow an order to liquidate the judgment debt in instalments.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent having clearly admitted owing the Applicant Bank the principal sum of K9,300,000.00 I am of the

considered view that this is a proper case to enter Judgment on Admission.

I have also found that the interest calculated by the Applicant Bank was that contractually agreed by the parties and is correct.

For the foregoing reasons, I hereby enter Judgment on Admission in favour of the Applicant Bank against the Respondents for the payment of the sum of K11,090,628.79 being amount due as at 30<sup>th</sup> September, 2015.

It is ordered that the sum of K11,090,628.79 be paid with interest as contractually agreed in the Facility Letters from date of Originating Summons to date of Judgment. Thereafter interest to be at the Bank of Zambia lending rate.

The said sum of K11,090,628.79 from which the sum of K100,000.00 paid by the 1<sup>st</sup> Respondent on 11<sup>th</sup> November, 2015 is to be deducted, shall be paid within 60 days from date hereof. In the event of failure to pay, the Applicant Bank shall foreclose, have possession of the Mortgaged Property namely Stand No. 2486 Kitwe and shall exercise its statutory power of sale.

The Applicant Bank shall also take possession and sell the assets charged under the Specific Charge. The Applicant Bank shall render an account of the proceeds of sale of the Mortgaged Property and the charged assets.

In the event that the proceeds realised from the sale of the Mortgaged Property and the Charged assets are not sufficient to expunge the debt owing, the Applicant shall be at liberty to execute on the personal Guarantees of the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent. It is trite law that the guarantor's liability is secondary and as such the contention by learned Counsel for the Applicant Bank that under the Deeds of Guarantee herein the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were primary obligators and not merely sureties is misconceived. For avoidance of doubt the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents liability herein only arose because the 1<sup>st</sup> Respondent as principal debtor is in default.

Costs are awarded to the Applicant to be taxed in default of agreement.

Leave to Appeal is granted.

Delivered in Chambers at Lusaka this 16<sup>th</sup> day of June, 2016.



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**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**