

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



BETWEEN:

FINANCE BUILDING SOCIETY

PLAINTIFF

And

**ZAMBIA TELECOMMUNICATIONS COMPANY
LIMITED**

DEFENDANT

***Before Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this
7th day of September 2016.***

For the Plaintiff : Mr. A. Roberts of Messrs Alfred Roberts & Company
For the Defendant : Mr. J. B. Malama, In-House Legal Counsel

J U D G M E N T

CASES REFERRED TO:

- 1) *John Reddy vs Guy Lachlan (2000) Lloyd's Report PN 858*
- 2) *Global Marine Drillships vs William La Bella & Others (2014)
EWHC 222*
- 3) *Zambia National Commercial Bank Limited vs Kapeka
Button Mhone (2000) ZR 138*

- 4) *Anderson Kambela Mazoka, General Christon Sifani Tembo and Another vs Levy Patrick Mwanawasa and 2 Others (2005) ZR 138*
- 5) *Base Chemicals Zambia Limited, Mazzonites Limited vs Zambia Air Force, Attorney-General SCZ Judgment No.9 of 2011*
- 6) *Bhanabhai & Burges vs Commissioner of Inland Revenue (2007) 2 NZRL 478*
- 7) *Lyons Brook Bond (Zambia) Limited vs Zambia Tanzania Road Services Limited (1977) ZR 317*
- 8) *Mundia vs Sentor Motors Limited (1982) ZR 66*
- 9) *Hans Wilfred Lorenz vs Zambia Revenue Authority SCZ/8/251/2010*

OTHER WORKS REFERRED TO:

- 1) *Lawyers Defence Group of England, "Giving an Undertaking"*
- 2) *Clyde & Co of England, "Solicitors' undertaking back in the spotlight" March 3, 2015*
- 3) *Chitty on Contracts Volume 1, 31st Edition*
- 4) *Black's Law Dictionary 9th Edition*
- 5) *Australia Office of the Legal Services Commissioner, "Solicitors undertakings - Dangers and Safeguards." March 11th 2011*

The Plaintiff commenced this action by way of Writ of Summons and Statement of Claiming for:

1. *Damages for breach of undertaking and for fraudulently transferring to a third party the property known as Farm No. 1523/A/1/314/CL/1/16 (also known as Flat 16, Poteco, Mwasumina Road, Itawa Ndola) pledged as collateral by the Defendant for a loan advanced to one Violet Sandala, an ex-employee of the Defendant without the consent or knowledge of the Plaintiff.*
2. *Payment of K47,003.87 as at 31st September 2015 and interest thereon at the Plaintiff's mortgage lending rate until settlement being monies unrecovered and due on the account of Violet Sandala as result of the failure by the Defendant to surrender the certificate of title of the property directly to the Plaintiff to register a mortgage on the property*
3. *Further or other relief*
4. *Costs*

The evidence of the Plaintiff's only witness Teza Silwamba (PW1), the Plaintiff's Manager, Credit Risk and Control, was that on 22nd September, 2005, the Plaintiff availed Violet Sandala, then an employee of the Defendant, a Loan in the sum of K25,000-00 on the strength of an undertaking made by the Defendant's Acting Chief Legal Officer to the Plaintiff dated 15th September, 2005. The witness referred to the letter at page 11 of the Defendant's Bundle of Documents as the "undertaking." The letter read as follows:

" September 15, 2005

*The Manager
Finance Building Society
P. O. Box 70249
NDOLA*

Dear Sir

RE: FLAT NO. 16 POTEKO, MWASUMINA ROAD, ITAWA - NDOLA

This serves to confirm that the above named flat was offered to Mrs Violet C. Sandala by Zamtel. Mrs. Sandala has since paid for the same in full and title deeds will be processed in her name.

Please be advised that Mrs Sandala has authorized us to surrender the title deeds to yourselves once they are ready. We hereby confirm that we shall forward the same to yourselves as requested by Mrs Sandala.

Yours faithfully

ZAMBIA TELECOMMUNICATIONS COMPANY LIMITED

(Signed)

S. LUWISHA (MRS.)

ACTING CHIEF LEGAL OFFICER

cc: Mrs V Sandala "

It was the evidence of PW1 that despite the “undertaking”, the Defendant did not forward the title deeds for Flat Number 16 Poteco, Mwasumina Road, Itawa Ndola (the property) to the Plaintiff and it later came to the knowledge of the Plaintiff through a letter dated 19th May, 2015 from a Law firm Messrs Chitabo Chinga Associates, Advocates for the new owner of the property, to the Plaintiff’s Debt Collectors that the property had been sold to a third party by Violet Sandala.

In cross-examination, PW1 stated that without the letter of undertaking, the Plaintiff would not have processed the loan of K25,000-00 to Violet Sandala. He further went on to state that the Defendant was the one to surrender the title deeds once ready to the Plaintiff and it was not Violet Sandala to do so. He stated that in the document titled “*Employment Verification Form*” at page 7 of the Plaintiff’s Bundle of Documents, the purpose for the loan to be availed to Violet Sandala by the Plaintiff was not disclosed and it was also not stated in the same document that the title deeds for the property were to be surrendered by the Defendant to the Plaintiff once processed.

PW1, conceded in cross-examination that it was an error to plead in paragraph 4 of the Statement of Claim that the referred to loan of K25,000-00 to Violet Sandala was for purchase of the property when in fact the loan was for improvements to the property. The witness further conceded that there was no fraud or collusion between the Defendant and Violet Sandala as the letter of undertaking disclosed that the title deeds would be processed in the name of Violet Sandala. PW1 also admitted that there was no agreement between the Plaintiff and the Defendant in which it was stated that if the Defendant gave the letter of undertaking, the Plaintiff would go ahead and release the title deeds to the Plaintiff.

In re-examination, PW1 insisted that the loan of K25,000-00 would not have been availed to Violet Sandala without the letter of undertaking. He also clarified that the *Employment Verification Form* referred to was proof that the Defendant was aware that Violet Sandala was about to get a loan from the Plaintiff.

The Defendant's only witness was Cassandra Chakanika (DW1), its In-house Legal Counsel. Her evidence was based

on documentation found on the file of the Defendant as she only joined the Defendant on 3rd August, 2015. Thus, she did not have personal knowledge of the material facts. But DW1 admitted in cross-examination that she did not know why the Defendant signed the *Employment Verification Form* at page 9 and why the letter of undertaking at page 11 of the Plaintiff's Bundle of Documents was written.

Learned Counsel for the Plaintiff and the Defendant filed Skeleton Arguments and List of Authorities and buttressed these with respective submissions.

Learned Counsel for the Plaintiff forcefully submitted that the letter of 15th September, 2005 referred to was an undertaking by a Lawyer for the Defendant to the Plaintiff. Further, that the Defendant was fully aware that its undertaking was a pre-requisite or condition to the Plaintiff availing the loan of K25,000-00 to the said Violet Sandala which the Plaintiff would rely upon in granting the loan. Yet, the Defendant failed to surrender the title deeds to the Plaintiff resulting in the non-perfection for the intended security or mortgage. Learned Counsel referred the Court to various cases on the concept of a Lawyer's undertaking

among them the England Court of Appeal case of **John Reddy vs Guy Lachlan**,¹ the case of **Global Marine Drillships vs Willian La Bella and Others**² and also **Zambia National Commercial Bank Limited vs Kapeka Button Mhone**.³ On the same concept, Counsel also referred to the following works: *Lawyers Defence Group of England*, “**Giving an Undertaking**” and *Clyde & Co of England* “**Solicitors’ undertaking back in the spotlight.**”

On the other hand, the Defendant’s Learned Counsel forcefully submitted that the Plaintiff ought to be held as to its pleadings and in paragraph 4 of the Statement of Claim, the Plaintiff had averred that it availed a loan of K25,000-00 to Violet Sandala for the purpose of purchasing the property on which the Defence filed was based and not for improvements to the property. Counsel then referred the Court to the case of **Anderson Kambela Mazoka, General Christon Sifani Tembo and Another vs Levy Patrick Mwanawasa and 2 Others**⁴ on the function of pleadings. Learned Counsel further submitted that the allegation that the Plaintiff loaned Violet Sandala K25,000-00 for purchasing the property on the strength of the letter of 15th September, 2005 from the Defendant was false because at the time of authoring the said letter, it was disclosed by the Defendant that the property had already been paid for in full.

On the Plaintiff's allegation of fraud, the Defendant's Learned Counsel submitted that the Plaintiff had failed to prove the allegation to the required standard and referred to a passage in the case of **Base Chemicals Zambia Limited, Mazzonites Limited vs Zambia Air Force, Attorney-General**⁵ where it was stated as follows:

"If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities."

Lastly, Learned Counsel for the Defendant submitted in the alternative that if this Court were to find that the letter of 15th September, 2005 was an undertaking, it was still unenforceable due to lack of consideration and cited **Chitty on Contracts and Black's Law Dictionary** as supporting the proposition.

I have given anxious consideration to the evidence adduced in this matter and the Skeleton Arguments, List of Authorities and Submissions filed on behalf of the respective parties. The questions that I have to determine are;

1. Whether the letter dated 25th September, 2005 was an undertaking from the Defendant's Lawyer to the Plaintiff, and if so,
2. Whether there was breach of undertaking to the Plaintiff, and if so,

3. Whether in the circumstances of this case, the breach of undertaking occasioned any damage to the Plaintiff.
4. Whether the allegation of fraud by the Defendant has been proved to the required standard.

Obviously, the second question only falls for determination if the first question is answered in the affirmative and the third question if the first and second questions are similarly answered in the affirmative.

With regards to the first question, the office of the Australian Legal Service Commissioner on the subject “**Solicitors’ undertakings – Dangers and Safeguards**” provides a simple definition of undertaking as follows:

“a promise made by a Solicitor upon which the recipient is entitled to rely and depending on the circumstances, which binds both the Solicitor or Solicitor’s client or both. Undertakings are obligations that Lawyers pledge themselves or their clients to honor.”

In the same article, the authors state, inter alia, that

“The use of the word undertaking is not considered essential. Therefore a Legal Practitioner who has accepted an obligation in his capacity as a Legal Practitioner may have given an undertaking without

expressly stating so. In order to determine whether or not a Legal Practitioner's promise is an undertaking, the Court will look at the scope of the promise, whether or not it is personal and the language of the promise."

Thus, in the Newzealand case of ***Bhanabhai & Burges vs Commissioner of Inland Revenue***,⁶ it was construed as an undertaking a promise given in the following terms:

"We are Solicitors for Golden Gates Holdings Limited. We have been instructed to settle the sale of the units in the development and undertake that on the settlement of those units (these are then specified), we will forthwith pay you the GST component of the sale consideration"

Also Clarke & Co. of England in an article on the subject "***Solicitors' undertaking back to the spotlight***" already referred to herein state as follows:

"The UK cases of Aldermore Bank and Kuit Steinart Levy vs Austin Law and Others (2014) and Global Marine Drillships vs William la Bella and Others (2014) have returned solicitors' undertakings to the spotlight. These cases reinforce the law that there are serious consequences for solicitors (and their professional liability insurers) if solicitors breach their undertakings"

In the ***Global Marine Drillships vs William La Bella and Others*** case cited by the Learned Counsel for the Plaintiff, it was held that a solicitor who released funds to third parties in breach of an undertaking had done so without authorization and it was no defence that the solicitor was under pressure from the client.

In this case, the pertinent part of the letter read as follows:

“ Please be advised that Mrs. Sandala has advised us to surrender the title deeds to yourselves once they are ready. We hereby confirm that we shall forward the same to yourselves as requested by Mrs. Sandala.”

PW1 testified that this was an undertaking by the Acting Chief Legal Officer of the Defendant to the Plaintiff. The Plaintiff contended that it matters not whether the word “undertaking” was expressly mentioned therein or not.

The Defendant had a different understanding; that the letter was a confirmation by the Defendant to the Plaintiff of the instructions given by Violet Sandala and not an undertaking. The author of the 15th September 2005 letter was not called as a witness for the Plaintiff. Ironically, however, in paragraph 10 of the Defendant’s Skeleton Arguments filed on 17th May, 2016, the Defendant refers to the letter as an undertaking as follows:

“My lord, the letter of undertaking (dated 15th September, 2005) was not supported by any consideration from the

Plaintiff to make it a legally enforceable agreement.”(emphasis mine)

The letter of 15th September, 2005 having been written soon after the Defendant had on 30th August, 2005 indicated on the *Employment Verification Form* at page 9 of the Plaintiff’s Bundle of Documents that it would deduct the loan instalments from the monthly salary of Violet Sandala and remit to the Plaintiff was in my view, and I find as a fact, an undertaking by the Acting Chief Legal Officer of the Defendant to the Plaintiff which was enforceable whether or not there was consideration.

On the second question, the short answer is that the undertaking was breached when the Defendant failed to surrender the processed title deeds for Violet Sandala to the Plaintiff.

The third question is whether in the circumstances of this case, the breach of undertaking occasioned any damage to the Plaintiff. I will determine this question from the point of pleadings.

In the case of ***Lyons Brook Bond (Zambia) Limited vs Zambia Tanzania Road Services Limited***,⁷ the Supreme Court of Zambia held on the functions of pleadings, inter alia, as follows:

“(VII). The functions of pleadings is to assist the Court by defining the bounds of the action, which cannot be extended without the leave of the Court and without

amending the pleadings.”

Similarly, in the case of **Anderson Kambela Mazoka, Chrispin Sifani Tembo and Another vs Levy Patrick Mwanawasa and 2 Others** cited by the Defendant, the Supreme Court held as follows:

“The function of pleadings is to give a fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the Court has to take them as such.”

The other cases in which the Supreme Court of Zambia has repeatedly stated the function of pleadings include **Mundia vs Sentor Motors Limited⁸** and **Hans Wilfred Lorenz vs Zambia Revenue Authority.⁹**

Now, in paragraph 4 of the Statement of Claim, the Plaintiff’s allegation was stated as follows:

“4. In consequence of the Defendant’s undertaking dated 15th September, 2005, the Plaintiff on 22nd September, 2005 availed the said Violet Sandala a loan of K25,000-00 (rebased) to purchase the property from the Defendant.”

In turn, the Defendant stated in paragraph 3 of the defence as follows:

“3. The contents of paragraph 4 of the Statement of Claim are in the peculiar knowledge of the Plaintiff. The Defendant shall further aver that at the time of writing the Plaintiff, the said Violet Sandala had already paid for the Flat 16, Poteco aforesaid.”

The Pleadings stood as they were filed without any amendment to the paragraphs referred to and the matter proceeded on that basis and I hold that the parties are bound by their pleadings. This means that the Plaintiff's claimable loss is K25,000-00 availed to Violet Sandala for purchasing the property. And yet, as revealed in the letter of undertaking dated 15th September, 2005, the property had been paid for in full as at the date of the letter of undertaking.

For the avoidance of any doubt, it cannot be said that the Defendant's Acting Chief Legal Officer as the maker of the undertaking knew or must be taken to have known at the time of making the undertaking that the Plaintiff's loss of K25,000-00 availed to Violet Sandala by the Plaintiff for the purported purchasing of the property was sufficiently likely to result from the breach of undertaking since, and I find as a fact, the Plaintiff never availed K25,000-00 to Violet Sandala for the purchasing of the property.

The net result is that the Plaintiff has failed to prove that it suffered damage because of the breach of undertaking by the Defendant through its Acting Chief Legal Officer.

As regards the allegation that the Defendant fraudulently concealed from the Plaintiff that it had surrendered the title Deeds to Violet Sandala, the Plaintiff did not adduce any evidence to support the allegation. Instead, PW1's evidence was that there was no fraud or collusion. I agree with the submission of the Defendant's Learned Counsel that this allegation is nothing short of startling. I do in fact observe that Learned Counsel for the Plaintiff did not make reference to the allegation of fraud in the Plaintiff's submissions.

The consequence is that the Plaintiff has failed to prove its case on a balance of probabilities. The action is accordingly dismissed with costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this ^{7th}.....day of ^{September}.....2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE