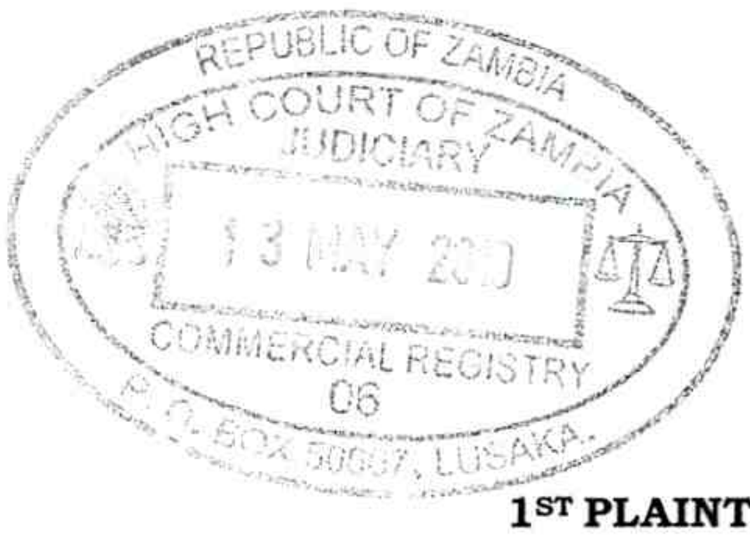
IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0243**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

QUEENS HILLS HOTELS LIMITED **1ST PLAINTIFF**
JM PROPERTIES IMPORT AND EXPORT LIMITED **2ND PLAINTIFF**

AND

FIRST NATIONAL BANK ZAMBIA LIMITED **DEFENDANT**

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

For the Plaintiffs: Mr. K. Nchito – Messrs Kapungwe Nchito Legal Practitioners.

For the Defendant: Ms G. Musyani & Mr. T. Gausi – In House Counsel FNB.

JUDGMENT

CASES REFERRED TO:

1. **Courtyard Hotel & Anr V First National Bank Zambia Limited & Anr Appeal No 006/2015.**
2. **Kanjala Hills Lodge Limited V Stanbic Zambia Limited Appeal No. 46/2010.**
3. **Attorney General v Sam Amos Mumba (1984) ZR 14.**
4. **Deny Mott and Dickson Ltd V James B Fraser & Co (1944) AC 272.**
5. **Taylor V Carldwell (1893) 3 B & S 826.**
6. **British Wetinghouse Electric & Manufacturing Co. V Underground Electric Rly C of London (1912) AC 673.**
7. **Tweddle V Atkinson (1861) 1 B S 393.**
8. **Foran V Wight (1989) HCA 51- 168 CLR 385;88 ALR 413.**

OTHER WORKS REFERRED TO:

1. **Paget's Law of Banking, 14th Edition "The Relationship Between the Banker and the Customer." (1996) London: Lexis Nexis Butterworths.**
2. **Edwin Peel Treitels "The Law of Contract." (2011) London: Sweet & Maxwell.**
3. **B.H.G Chitty on Contracts vol 1 28th ed. (1999) London: Sweet & Maxwell.**
4. **The Encyclopaedia of Banking Law. London: Lexis Nexis.**
5. **G. Monahan. Essential Contract Law 2nd Ed. (2001) Cavendish Publishing: Sydney.**

By Writ of Summons taken out on 31st May, 2017, the Plaintiff is claiming the following: -

(i) Immediate disbursement of the loan amount of K3,000,000.00;

(ii) Payment of K4,754,088.44 or whichever amount it will accrue on the overdraft account with Zambia National Commercial Bank;

(iii) Refund of K18,500.00 debited from the Plaintiff's account being valuation fees;

(iv) Refund of K18, 521.86 being the premium for insuring the security at Stand No.903 Mosi- O- Tunya Road Livingstone and Stand No. 5058, John Hunt Way Livingstone;

(v) Damages for breach of Contract;

(vi) Damages for loss of business;

(vii) Any other relief the Court may deem fit;

(viii) Costs.

According to the Statement of Claim, the 1st and 2nd Plaintiffs were sister companies and the 1st Plaintiff was refinancing an overdraft facility held by the 2nd Plaintiff with Zambia National Commercial Bank (Hereinafter referred to as ZANACO) by obtaining a loan from the Defendant.

By Facility Letter dated 27th November, 2013 the Defendant offered credit facilities for commercial property finance to the 1st Plaintiff with a limit of K3,000,000.00 (Three Million Kwacha only) to restructure and takeover an overdraft facility held by the 2nd Plaintiff with ZANACO in the sum of K2,681,343.99.

The 1st Plaintiff and the Defendant also entered into a Loan Agreement executed on 8th January, 2014.

The Defendant conducted a valuation of the properties securing the loan of Stand No. 903 Mosi- O- Tunya Road and Stand No.5058 John Hunt Way, Livingstone at a cost of K18,500.00 which it debited from the 1st Plaintiff's account.

The 1st Plaintiff insured the interests of the two properties at K3,000,000.00 and K6,400,000.00 respectively at a premium of K18,521.86. The Defendant's interests and respective rights were noted on the insurance policy as first loss payee.

On 7th January, 2014 ZANACO wrote to the Defendant informing them that the overdraft stood at K2, 681,343.99 as at 3rd January, 2014 and they undertook to release the original certificate of title relating to Stand 5058 Livingstone upon the receipt of the outstanding overdraft sum.

On 21st January, 2014 the Defendant wrote to the 1st Plaintiff and stated that it would only proceed with the application upon confirmation from ZANACO that it would release the original certificate of title for stand No. 5058 Livingstone upon receipt of K3,000,000.00 to settle the overdraft indebtedness of the 2nd Plaintiff with ZANACO.

On 1st July 2014, ZANACO wrote to the Defendant confirming its undertaking to release the Certificate of Title and that the memorandum of discharge relating to this would be released to the Defendant upon receipt of the K3,000,000.00 from the Defendant. On 11th July, 2014 the Defendant responded to this letter indicating that it would respond in due course.

Further on 2nd September, 2014 the Defendant wrote to the 1st Plaintiff informing it that the economic indicators at the time in the Banking and Financial Services sector were not favourable for the Bank to support the facility and returned the original certificate of title for stand No. 1492 Livingstone.

On 21st October, 2016 the Defendant responded to the Plaintiff's Advocates letter of 3rd October, 2016 requesting that funds be disbursed because the Plaintiff had performed their part of the agreement.

The Defendant responded by stating that it was unable to proceed with the facility due to changes in the economic indicators and that the Plaintiff's cash flows would not afford the facility earlier applied for.

It was further averred that in breach of the Loan Agreement entered into by the 1st Plaintiff and the Defendant, the latter failed to disburse the K3,000,000.00 despite the Plaintiffs having performed their part of the Agreement and ZANACO expressly stating that it would release the security to the Defendant upon the payment of K3,000,000.00.

Thus, the Plaintiffs had suffered loss and damages and had been unable to restructure the overdraft with ZANACO resulting into the interest on the overdraft increasing to K,754,088.44.

The Defendant filed in a Defence on 12th June, 2017. It stated that at the material time the intention of the parties was for the Defendant to take over the existing loan booked with ZANACO and not to advance a fresh loan to the Plaintiffs as alleged.

Further that the Defendant offered the 1st Plaintiff credit facilities as indicated with an intention to take over the existing loan held with ZANACO which offer was subject to meeting condition precedents.

Before taking this decision, the Defendant scrutinized the cash flow projections and other financial documents of the 1st Plaintiff to ascertain whether it satisfied the Defendant's affordability criteria at the time in about November, 2013.

Moreover, that a condition precedent to the pay out on this facility was that ZANACO was to provide an undertaking to release to the Defendant all security held with them once the loan was settled by the Defendant.

The Defendant requested a letter undertaking this and an indication of the settlement balances which revealed that the amount due to ZANACO by the 2nd Plaintiff was much higher than the K2,681,343.99 and therefore the K3,000,000.00 intended to be refinanced would not be able to settle the 2nd Plaintiff's loan.

In addition, that in January, 2014 the Defendant advised the 1st Plaintiff and ZANACO that the transaction would not proceed until the settlement balances were capable of being satisfied by the K3,000,000.00 intended as refinancing. ZANACO only issued the undertaking to release security in a letter dated 1st July, 2014 on the remittance of the said sum.

Moreover, as at November, 2013, the Monetary Policy Committee Rate (MPC Rate) was 9.75% and it was agreed that the facility would be charged at a margin of 5.25% bringing the total amount of interest to be charged on the facility to 15%.

However, by the time ZANACO delivered its letter of undertaking to the Defendant the Monetary Policy Rate had risen to 12% pursuant to a policy directive issued by the Central Bank of Zambia.

Following the rise in the MPC Rate and the tight liquidity in the market both issues beyond the Defendant's control, the 1st Plaintiff's cash flow projections, among other factors, could no longer accommodate the loan of K3,000,000.00 applied for at the interest rates prevailing in the market.

That the Defendant advised the 1st Plaintiff to submit a new application which would be subjected to the prevailing interest rates, which opportunity the 1st Plaintiff failed to take up.

It is also averred in Defence that prior to the letter of 2nd September, 2014 the Defendant wrote to the 1st Plaintiff on 11th July, 2014 informing it of the decision to rescind its offer based on the adverse shift in economic indicators, especially the rise in interest rates.

It is stated that prior to the letter of 3rd October, 2016 the 1st Plaintiff by a letter dated 23rd July, 2014 addressed to the Defendant and copied to the Central Bank, made a similar demand for disbursement of the K3,000,000.00.

In responding to this demand, the Defendant wrote a letter to the Central Bank on the 30th of July, 2014 setting out the facts of the matter and making an offer to the 1st Plaintiff to restructure the original offer based on the material circumstances prevailing at the time more particularly the prevailing interest rates. This offer was refused.

In response to this letter of 3rd October, 2016 the Defendant made another offer to restructure the original offer based on the material circumstances prevailing at the time of the interest rates which was also refused.

According to the Defendant this material change in circumstances made the Defendant rescind the offer as it could not proceed to refinance the ZANACO loan since the conditions precedent which were to be fulfilled by the 1st Plaintiff had not been fulfilled in good time. ZANACO only provided a satisfactory letter of undertaking 8 months after the facility was contemplated.

In any event, the Defendant made two offers to the 1st Plaintiff to restructure the facility based on the economic circumstances prevailing however, both offers were refused.

It is the position of the Defendant that the 1st Plaintiff did not suffer any loss since the Defendant was not advancing a new facility with fresh money over and above what was owed by the 2nd Plaintiff to ZANACO but was merely intending to take over an existing debt which the Plaintiffs would still be obliged to service whether it was held with ZANACO or the Defendant.

Further that the rise in the amount owed by the Plaintiffs to ZANACO was due to their failure to service the loan which they would have had to service with the Defendant if there had been no material change in circumstances which led the Defendant to rescind its original offer.

It is lastly stated that the Plaintiffs are not entitled to any of the claims in the Statement of Claim save for those on valuation and insurance which the Defendant was willing to refund.

The Plaintiff filed a Reply into Court on 4th August, 2017 where it is stated that the 1st Plaintiff was refinancing an overdraft facility held by the 2nd Plaintiff with ZANACO by obtaining a loan from the Defendant.

That by a facility letter dated 27th November, 2013 the Defendant offered the 1st Plaintiff a credit facility for commercial property finance with a limit of K3,000,000.00 to restructure and take over an overdraft facility of the 2nd Plaintiff with ZANACO of K2,681,343.99 and no new application had been submitted to the Defendant.

The Plaintiff maintained that ZANACO wrote to the Defendant on or about 7th January, 2014 informing them that the overdraft as at 3rd January, 2014 stood at K2,681.343.99 and ZANACO undertook to release the Original Certificate of Title relating to Stand No. 5058 Livingstone upon receipt of the outstanding overdraft sum.

It was averred that the Plaintiffs performed their part of the Loan Agreement whilst the Defendant failed to do so which made them suffer loss and damages. That they failed to restructure the overdraft with ZANACO resulting in the interest on the overdraft increasing to K4,754,088.44 which had since continued to soar.

According to the Plaintiff the Defendant unilaterally rescinded the original offer when the Plaintiffs had met the conditions set by the Defendant.

During Trial on 24th January, 2018, the Plaintiff filed one Witness Statement on record from **CAPTAIN JOHN MWAMULIMA** (Retired), the Chief Executive officer of both Plaintiffs **(PW1)**.

It was his evidence that the Defendant offered the 1st Plaintiff credit facilities on 27th November, 2013 for commercial property refinance with a limit of K3,000,000 to restructure and take over an overdraft facility at the material time held by the 2nd Plaintiff with ZANACO in the sum of K2,681,343.99.

Thus, the 1st Plaintiff and the Defendant entered into a Loan Agreement and the refinance loan was meant to restructure and take over an overdraft facility which at the time was held by the 2nd Plaintiff with ZANACO.

The Defendant also valued both properties Stand No.903 Mosi- O- Tunya Road Livingstone and Stand No. 5058, John Hunt Way Livingstone; which secured the loan and debited its account with the valuation fee of K18,500.00.

The Defendant also required the 1st Plaintiff to insure the interests under the two properties which was done at K3,000,000 and K6,400,000.00 respectively. This was done under policy number P05/1001/086532/2013 and the interests and respective rights of the Defendant were noted on the insurance as first loss payee and a sum of K18,521.86 as premium was debited from its account.

Thereafter on 7th January, 2014 ZANACO wrote to the Defendant informing them that the overdraft stood at K2,681,343.99 as at 3rd January, 2014 and

they undertook to release the original certificate of title relating to Stand No.5058 Livingstone upon the receipt of the outstanding overdraft amount.

Further that around the 21st of January, 2014 the Defendant wrote to the 1st Plaintiff informing them that they would only proceed with the application once they got confirmation from ZANACO that they would release the original certificate of title for stand No.5058 Livingstone upon receipt of ZMW3,000,000.00 to settle the overdraft indebtedness of the 2nd Plaintiff with ZANACO.

That on or about the 1st of July, 2014 ZANACO Bank wrote to the Defendant confirming that they were undertaking to release the certificate of title relating to Stand No. 5058 John Hunt Way Livingstone in the name of the 1st Plaintiff and that the Memorandum of discharge relating to this property would be released to the Defendant upon receipt of the K3,000,000 from the Defendant.

That on or about 11th of July, 2014 the Defendant wrote to ZANACO responding to their letter dated 1st of July 2014 informing them that they would respond in due course.

Further on or about 2nd of September, 2014 the Defendant wrote to the 1st Plaintiff informing them that the economic indicators currently in the Banking and Financial Sector were not favourable for the Defendant to support the facility and returned the original certificate of title in relation to Stand No. 903 Livingstone which they incorrectly referred to as Stand No. 1492 Livingstone.

So on about 21st October, 2016 the Defendant wrote to the Plaintiffs Advocates at the material time who had written to them on 3rd October, 2016 requesting that the funds be disbursed because the Plaintiffs had performed their part of the Agreement. The Defendants responded by stating that they had decided not to proceed with the facility based on the movements in the economic indicators and that the Plaintiffs cash flow would not afford the facility earlier applied for.

During Cross- examination, He testified that his dealings with FNB concerned the 1st Plaintiff and not JM Properties Import and Export the 2nd Plaintiff yet he brought proceedings against FNB in the name of the two Plaintiffs.

The Witness then stated that the first point of contact with the Defendant Bank was the facility letter he signed and that he did not owe ZANACO anything currently.

He also added that the facility letter was signed with an intention of moving the debt from one bank to another and there was no money paid to him as monies were paid to ZANACO in order for the debt to move there.

That as a form of security ZANACO was required to move the security documents it had to FNB so that it would take over the facility and this was one of the conditions precedent to FNB taking over the facility.

ZANACO was also required to give FNB a letter of undertaking that they would release documentation once the facility was paid off by FNB.

However, from the time the facility letter was signed, some months passed before the letter of undertaking was sent to FNB and as shown in the Facility Letter under Clause 4.1 the Bank reserved the right to adjust the interest rates.

It was also his evidence that by the time ZANACO provided the letter of undertaking dated 1st July, 2014the Monetary Policy Rate set by BOZ had increased and all the other Banks had to adjust their interest rates upwards.

Moreover, that FNB had no control of the Monetary Policy rate as it was based on market conditions and neither did it have control on the release of the letter of undertaking from ZANACO. According to **PW1** his initial assessment was based on his cash flows at the time he signed the facility so there was no need to reconsider his cash flows in the circumstances.

FNB was to take over a loan of 3 Million Kwacha from ZANACO and the conditions of takeover were based on the November, 2013 Facility Letter and that amount with that interest rate could be considered at the time.

Thus, due to increased interest rates and adjustment in pricing on the market the Bank was unable to take over a bigger amount and all these affected the affordability of the loans and were all beyond the control of FNB. The security documents at this point were with the 1st Plaintiff Company who was granted the facility.

That Clause 5 of the Facility Letter set out the Security required in this transaction and he had no evidence before court to show that the security with FNB had been perfected. He also added that prior to perfecting the facility there were conditions precedent set out in the clauses and even just the omission of one would not entitle FNB to disburse the monies to ZANACO.

According to the witness all the conditions precedent were satisfied although FNB had not received the documents from ZANACO. It was also his evidence that FNB was generous as it tried to give him another offer commensurate to the other one in their letter.

That as early as January, 2014 FNB was following up and the second letter of July, 2014 had clarifications of what was happening and there was no delay in responding to the letter of 7th January from ZANACO.

According to **PW1**, the letter was received by his Advocates at the time Messrs Besa Legal Practitioners and neither he nor his Advocates responded to the letter and that there was no other offer.

That he was unaware that at the time ZANACO wrote to FNB the interest rates had moved from 7.5 to 12% and his debt to ZANACO was not in fact higher than he had disclosed to FNB although he knew that the bank communicated to ZANACO on the issue.

At the time of the facility letter JM Properties owed ZANACO K6,700.00 million as at January, 2014 and it was a sister Company to the 1st one.

He went on to state that FNB could not make any payment before ZANACO released the documents as agreed and he was claiming breach of contract which was based on a contract whose conditions precedent had been met.

ZANACO availed the Security documents to FNB and he had been refunded the insurance and valuation costs by the FNB. That he had claimed damages for loss of business.

It was his evidence that 6 months was not reasonable and that the Monetary Policy Rate would not have affected the interest rates.

However, Clause 4 of the Facility Letter showed that Interest was a term of the facility and it was linked to the MPC Rate which affected the interest rates which was a material term of the facility.

When the witness was shown copy of the letter dated 21st October, 2016 from FNB in particular the suggestion by the Bank to relook the transaction subject to the current credit criteria and affordability at prevailing interest rates, valuation and current financial information he said he did not consider this to be a counter offer and he had not responded to this letter.

That he was proposing to repay the loan with FNB as indicated in the Loan Contract Agreement and a rise in the MPC was not corresponding to any rental rise on his side.

That the letter dated 7th January, 2014 from ZANACO in the last paragraph indicated ZANACO's undertaking to release the COT upon payment of monies agreed.'

He testified that since his facilities with ZANACO were not being serviced at the time, he sought a fresh facility from another bank with an intention to service it and affordability was part of the considerations taken by FNB as it was a

material term of the agreement. That affordability was not affected by a rise in the MPC rates.

He acknowledged that Interest accrued between November 2013 and September, 2014 since he was not paying anything.

In Re- examination **PW1** told the Court that JM Properties (the 2nd Plaintiff) was also a Claimant herein because at the time ZANACO recalled the loan, Queens Hill (the 1st Plaintiff) was required to find monies to assist it to pay ZANACO. Thus it approached FNB for K3 million.

That JM Properties were indebted to ZANACO in the sum of K6.7 million and at the time it borrowed, Queens Hill gave it its Certificate of Title to support the loan thus it needed to redeem its mortgage.

According to the Witness by 27th December, 2017 JM Properties had fully liquidated ZANACOs loan. Following the acceptance of the facility letter from FNB Queens Hill was required to provide collateral in form of 2 properties and upon payment to ZANACO FNB should have received the titles. The arrangements were between FNB and ZANACO and Queens Hill had no control over the facilitation of the COT.

Moreover, that he only required 3million from FNB because GRZ owed JM Properties 3.3 million Kwacha with interest until settlement. Thus ZANACO took advantage and prepared a Deed of Assignment to offset the debt and this left a shortfall of K3 million to offset the loan.

Thus in their application to FNB it was indicated that the loan was more than K3 million although K3 million was the only amount they required.

That conditions precedent to the loan were met because their company met all the requirements and the only thing that remained was implementation. That Certificates of Title did not move to FNB as the two banks created their own conditions. However the letters he could see showed that it was agreed that

ZANACO would release the COT in order to support their loan. Thus they completed the requirements of the loan contract agreement.

That there was no delay in communication between the two banks because the timeframe required by the two institutions was normal as he had no control in the matter.

It was also his evidence that the offer was accepted within the period provided and there were no material changes that can be referred to as a Counter Offer and the two Title Deeds in question are with JM Properties because FNB assessed the properties and the cash flow as at September, 2013 and was sufficient to cover the whole K6.7 million.

The business was able to repay the K6.7 million. As at 22nd December, 2017 the Company had paid back the loan without the help of FNB. It liquidated the loan with ZANACO.

He also added that his understanding with FNB was that change of circumstances would warrant that the borrower would be responsible in the duration of the contract. That it was not shown anywhere that if interest increased the loan would terminate.

That he did not respond to the letter from the Defendant dated 21st October, 2016 because the matter was closed and he maintained that it was not a counter offer since it was on Breach of Contract.

That there was no need for the bank to consider his cash flow because the loan contract did not state that when there was a change in interest rates then a revaluation would be necessary. Assessments should have been done prior to the agreement.

Loan agreement was only signed on 8th January, 2014.

That the capacity of the rentals from the Plaintiffs could not be affected by the minor changes in the MPC by BOZ.

That he was not servicing the ZANACO loan at some point because by 2nd January 2014 with the Deed of Assignment undertaking plus the possibility of FNB meeting their contract entailed that the ZANACO loan would have been liquidated completely which was the expectation of the Company and interest was still accruing.

The Defendant filed two Witness Statements. The First one was by **KAMBEU BANDA (DW1)** the Senior Manager for Commercial Banking and Specialised Financing with FNB. It was filed into Court on 7th September, 2017.

He testified in examination in chief that he was Manager in the Specialised Finance Department at the time of the transaction in issue between November, 2013 and July 2014.

That as Manager in the Specialised Finance Department, his role included but was not limited to sales and marketing on behalf of the Defendant of products such as commercial property finance, debtor finance and invoice discounting. That he also managed existing client portfolios and on- boarding potential clients.

Regarding the on boarding of potential clients, the first step in the process was to ascertain from the client the particular financial product and amount they required. Thereafter an assessment was conducted to determine the client's affordability.

According to him a potential client was expected to have a net income that supported a debt service cover ratio of 1.21 times over the proposed facility repayment amount in accordance with the Defendant's lending policies.

The facility repayment amount included both principal and interest. The latter was arrived at by adding the MPC rate set by the Central Bank, to the Defendant's margin. At the time of the 1st Plaintiff's application, the MPC rate was 9.75% while the Bank's margin was 5.25% that is a total of 15%.

Further that the 1st Plaintiff requested the sum of K3,000,000.00 to be used to liquidate facilities availed to the Plaintiffs by ZANACO. In order to ascertain whether the 1st Plaintiff was able to afford repayments, the Defendant requested audited financial records from the 1st Plaintiff dating back to 3 years, its financial projections up to 3 years from the time of the credit application, a schedule of its rental income, business profile, lease agreements and a physical visit to the site of the commercial property.

On receipt of these documents the 1st Plaintiffs application was assessed and found capable of meeting the repayments on a facility of K3,000,000.00 at 15%. The following conclusion was arrived at based on the calculations below:

Gross Income per month	90,249
Less provision for withholding tax (10%)	9,025
Less provision for expense (20%)	18,049
Less provision for vacancies (5%)	4,512
Net income per month	58,662

The rent income receivable could service a loan of K3,000,000.00 with a Debt Service Cover Ratio of 1.21 times.

	Monthly			
	Repayments	Net Income	Surplus/Shortfall	DSCR
At current occupancy at an interest rate of: Deal Rate	14%	K46,580	K58,662	K12,082	1.26

less 1.0%					
At current occupancy at an interest rate of : Deal rate	15%	K48,400	K58,662	K10,262	1.21
At current occupancy at an interest rate of: Deal rate plus 1%	16%	K50,254	K58,662	K8,408	1.17
At current occupancy at an interest rate of: Deal rate plus 1%	17%	K52,139	K58,662	K6,523	1.13

On the ascertainment of the 1st Plaintiff's affordability aforementioned, an official offer embodied in a Facility Letter dated 27th November, 2013 was made to the Plaintiff.

This offer detailed the terms and conditions of the proposed facility, its purpose as well as the conditions precedent to be fulfilled before disbursement of the K3,000,000.00. Despite stating the pricing at 15% the offer expressly stated that the Defendant reserved the right to adjust the interest chargeable in accordance with market conditions.

The purpose of the K3,000,000.00 loan which was to be paid directly to ZANACO was to take over the existing liability of the Plaintiffs with ZANACO. The 1st Plaintiff was not to receive any new monies or have any paid into its account for any other purpose. The Facility letter expressly stated its purpose under clause 2.

Under clause 5.1 of the facility letter, it was a condition of the offer that the 1st Plaintiff would execute the first Legal Mortgage Deeds in relation to Stand Nos. 5058 and 903 Livingstone in favour of the Defendant Bank.

Under Clause 6.2 it was a condition precedent to drawdown that; the funds would only be disbursed on the perfection of the aforementioned security, that is the registration of the Mortgage Deeds in contemplation. In light of this, the Defendant required from the 1st Plaintiff, the title deeds in relation to the aforementioned properties. It was at this point that the 1st Plaintiff informed him that the properties stood as security with ZANACO for the banking facilities the Defendant was meant to take over.

On 31st December, 2013 the 1st Plaintiff's Director sent him a letter from ZANACO confirming the balance of the overdraft facility via email. Owing to the fact that the Title Deeds to the properties required as security were held by ZANACO, the Defendant required from ZANACO an undertaking to release the title deeds and discharge the security held upon receipt of the K3,000,000.00.

On 7th January, 2014 ZANACO delivered to the Defendant another letter containing a settlement balance of K2,681,343.99 being the balance of the overdraft facility and K4,087,274.66 being the balance on the loan facility.

According to him there were letters from Messrs Besa Legal Practitioners and ZANACO confirmed in a material particular the veracity of the testimony in this regard. The said letters appear at pages 44, 101 and 102 of the Defendant's Bundle of Documents.

The total amount of the settlement balances advised by ZANACO was much higher than the K3,000,000.00 earlier agreed to be disbursed on the perfection of security, the Defendant wrote to ZANACO on 21st January, 2014 declining to disburse the funds until such a time that the balances were capable of being liquidated by the K3,000,000.00.

Following the query raised by the Defendant with regard to the settlement balances, ZANACO delivered a letter of undertaking dated 1st July, 2014 to release the title deeds on the receipt of the sum of K3,000,000.00. Copy of the letter appears at page 44 of the Defendant's Bundle of Documents.

That between the official offer of 27th November, 2013 and the receipt of a satisfactory letter of undertaking from ZANACO which was beyond the Defendant's control, there elapsed a period of circa eight calendar months and during this time there were movements with regards rising lending rates as the MPC rate escalated from the 9.75% existing in November, 2013 at the time of application for refinancing to 12% by the time ZANACO delivered a satisfactory letter of undertaking to the Defendant, these changes in economic circumstances were purely beyond the Defendant's control. Further the Defendant's margin which was affected by the MPC rate changes escalated from 5.25% in November, 2013 to 14% by the time ZANACO delivered a satisfactory letter of undertaking.

As a result of this upward adjustment in the MPC rate the net income of the 1st Plaintiff could no longer meet the affordability criteria even if the deal were still charged at the initial margin of 5.25% as demonstrated below:

Gross income per month	K90,249
Less provision for withholding tax (10%)	K9,025
Less provision for expense (20%)	K18,049
Less provison for vacancies (5%)	K4,512
Net income per month	K58,662

Month ly Repayments	Net Income	Surplus/Shortfall	DSCR

At current occupancy at an interest rate of: Deal Rate less 1.0%	14%	K46,580	K58,662	K12,082	1.26
At current occupancy at an interest rate of : Deal rate	15%	K48,400	K58,662	K10,262	1.21
At current occupancy at an interest rate of : Deal rate plus 1%	16%	K50,254	K58,662	K8,408	1.17
At current occupancy at an interest rate of : Deal rate plus 2.75%	17.75%	K52,615	K58,662	K6,047	1.11

Based on the change in the interest rate chargeable from 15% to 17.75% the client Debt Service Cover Ratio was below the minimum 1.21 required as per credit policy.

As a result of the 1st Plaintiff being unable to meet the criteria, the Defendant rescinded its offer on 11th July, 2014.

That the original offer provided for interest chargeable; further it reserved the Defendant's right to adjust the interest chargeable in line with market conditions. Thus had the loan been booked in November, 2013, the upward adjustment would have still affected the 1st Plaintiff adversely even if the initial margin of 5.25% was maintained and as demonstrated above the 1st Plaintiff would not have been able to meet its obligations in line with the rental income receivable as per calculations above.

On 30th July, 2014 the Defendant instead made another offer and proposed that the deal be relooked; taking into account the revised MPC Rate of 12% and the Bank's Margin of 14% meaning the Defendant would either disburse a sum less than K3,000,000.00 or extend the tenure of the Loan to run longer than the original offer. The 1st Plaintiff did not take up this opportunity as this offer was ignored.

Following the 1st Plaintiff's complaint to the Central Bank and a request by Central Bank on the matter, the Defendant provided an explanation to the Central Bank on 30th July, justifying its decision to rescind the offer to refinance the Plaintiff's facilities with ZANACO.

By a letter dated 21st October, 2016 the Defendant made a further offer to relook the transaction taking into consideration the interest rates prevailing at the time. This offer was again refused and or ignored.

In Cross Examination **DW1** told the Court that the two people that signed the facility letter were he and the Acting Head of credit at the time and the amount it was to disburse was K3 million as reflected in the loan agreement.

The witness added that the Mortgage was K2.6 million on Stand No. 158 so the K3 million loan was for purposes of taking over the facilities at ZANACO for a Commercial Property Finance.

He also averred that ZANACO wanted the indebtedness to be settled before they could give them title and the K3 million was not paid to ZANACO.

In Re- examination **DW1** stated that when a facility was being refinanced as was the case here the first thing to establish was whether the Customer had the ability to repay so an assessment of the cashflow from rentals of the property was necessary and once confirmation was received from the customer they went and saw the properties and found that there were 2 that made up the total rental income that was required to service the facility they were requesting.

After being satisfied they asked the customer to provide copies or originals of the COT and the customer advised them that he had one whilst the other was held by another bank.

The Customer advised that K3million was required to settle the facility with ZANACO. After doing this they approved the facility and an offer with conditions precedent was given to the client including perfection of securities being offered to them.

Upon confirmation that one of customer's property was with ZANACO correspondence from them was required and in it they advised the position.

Upon discovering that the property was being held by ZANACO they asked for a letter of undertaking that they would pay and Certificate of Title would be released to FNB. A property finance facility is tied to rent and actual property which entails that since ZANACO held on to property they would not pay without having the COT released to them.

Thus, a stalemate in the transaction arose after the Defendant bank discovered that the Customer actually had a bigger loan and could not afford to service it and a letter to decline was written to them.

The relevance of mentioning both figures K4 million and K2.6 million in the letter was to indicate that ZANACO needed to be paid.

That the letter of response from ZANACO to FNB only came 7 months later which was not a reasonable period of time.

The Second witness of the Defendant appeared under a *Sub poena dus tecum.*

DW2 was **MAKWEMBO KAMBELI CREDO** a Banker from ZANACO. He testified on 27th February, 2018 and 13th April, 2018. He stated that he had been with ZANACO for 28 years and he is currently the Head of the Portfolio Workout Department within the Risk Division which entailed that he is currently responsible for all corporate non-performing loans. He is responsible

for their recovery and where there is agreement for restructuring and putting in place some agreement that reflected the agreed restructuring terms.

Moreover, that he has held this portfolio for 12 months and prior to that he was in Special Assets Management which was similar but the scope was for all non- performing accounts. Thus with such a background, he had the authority to testify on behalf of ZANACO.

He went on to state that he wished to tender the Notice to Produce which contained a Facility Letter dated 10th December, 2012 as part of his evidence. He added that the 1st Plaintiff provided collateral in form of mortgages for credit facilities that were being enjoyed by the 2nd Plaintiff at ZANACO.

He testified that at the time they entered the business transaction a Facility Letter was signed and it indicated 2 things; an overdraft of K3,000,000.00 and a Loan of K3, 553,000.00.

In this matter there was a specific request from FNB to ZANACO for an undertaking to be provided to state that if an amount of K3million was paid by FNB to ZANACO then the latter was to release its mortgage over the said property in Clause 6.

That this letter of undertaking was not released because they indicated that the 2nd Plaintiff had debts beyond K3 million (about 6.7milllion) at ZANACO and it was indicated that the mortgage security could only be released once the total debt was liquidated.

The Defendant's Bundle of Documents at page 44 shows their response to FNB regarding their request for the letter of undertaking. Page 27 of Plaintiff's Bundle of Documents shows an earlier letter sent to FNB from ZANACO. After this they ZANACO engaged the 2nd Plaintiff who had raised concerns that they had refused to release the COT for Stand 5098 Livingstone to FNB despite having been assured that they would be paid K3 million for the same.

That the outcome of this intended takeover created a challenge in that securities were given to ZANACO as a composite package and no one title was specific to any single borrowing and it was because of that, that ZANACO couldn't release one title due to the outstanding debt that needed to be liquidated.

Eventually ZANACO agreed to release one COT upon receipt of the K3 million from FNB and it was that understanding that generated the letter of 1st July, 2014. That the delay in drafting the 2nd letter was due to engagements that were going on between ZANACO and the client.

That the ZANACO operations were independent from FNB who could not control what was going on with them. That there was no new cash on this refinancing facility. The K3million would have merely reduced the debt.

The Facilities were in default and not being paid according to agreement. That the facility letter was co- signed by himself and a Mr Lyempe Adi.

He also added that the Account of the 2nd Plaintiff had been closed and liabilities settled in 2018 as shown in the Loan Account Statements in the Bundle of Documents in the names of the 2nd Plaintiff and covered the period 29th August, 2012 to 31st December, 2018.

DW2 also stated that the 2 Plaintiffs were sister companies with common ownership and the first statement came out of their old system whilst the second which had a ZANACO logo came out of their current operating system and the period was from 19th December, 2012 to 9th January, 2018 with a balance of 0 which meant that the facility had been repaid completely.

ZANACO and the 2nd Plaintiff entered an agreement where it was agreed that if they paid K5,580,000.00 the balance would be written off. The Client did not necessarily benefit independently from the whole arrangement as they came to a compromise.

In cross examination he stated that he was the head of portfolio workout in ZANACO Bank and JM Properties had been their client for many years and it did not owe the Bank any money.

When shown the offer letter of 10th December, 2012 he stated that it confirmed that JM Properties borrowed from ZANACO under the terms and conditions therein and that they had paid.

He stated that the significance of the documents in the Notice to produce dated 26th February, 2017 he produced was to confirm the amounts that were outstanding to the Bank before this period. He also stated that the accounts had been closed and the matters settled.

The Witness identified the Facility Letter from the Defendant to the 1st Plaintiff in the sum of K3 million Kwacha.

Page 8 of the Plaintiff's Bundle of Documents is copy of a loan agreement between FNB and the 1st Plaintiff in the sum of K3million. Page 27 showed a letter of undertaking from the ZANACO Legal Counsel to that of FNB. The difference in in terms of the facility was that one was on an overdraft (K2,6 million) and the other on the loan account (K4, million 87)

He was also referred to page 32 of the Plaintiff's Bundle of Documents where he identified a letter of undertaking from ZANACO to FNB to release security of JM Properties and the Bank was asking for K3 million.

That page 33 showed a letter requesting to release the security by FNB to ZANACO. That FNB did not revert to ZANACO even after this letter and that FNB did not pay the K3 million requested and if they had done so ZANACO would have released the Certificate of Title to FNB.

It was also his evidence that the balance at that date of the letter when K3 million was requested was higher than this amount and the account continued to accrue interest. That the balance at the time of settlement was slightly over

K10million for both accounts and the actual cash they received was K5.8 million.

That other matters were brought into the settlement agreement in order to pay off the whole K10 million. The K5.8 million was not the principal sum but if it had not been paid the loan would have been much higher today and the figures that would have increased it was the interest.

In Re-examination he stated that he was responsible for corporate non-performing loans which also included overdrafts. That the 2nd Plaintiff was a client that was assigned to his portfolio because it was not performing on their loan which needed to be resolved.

He went on to state that the relationship between the two Plaintiffs was that the 1st Plaintiff came in to provide collateral for the borrowing of the 2nd Plaintiff so a mortgage was executed with the former.

The loan was not performing at the date of takeover. The letter of 1st July, 2014 from ZANACO to FNB did not indicate how the K3 million would be appropriated to ZANACO. The understanding was that if ZANACO got the K3 million it would let go of Stand No. 5058 John Hunt Way Livingstone from the other securities they held.

They did not let go of Stand No. 5058 Livingstone because they did not receive the K3 million and 7 months passed before they wrote the letter to FNB because there was a negotiated position between ZANACO and JM Properties on the understanding that once the K3 million was received title would be released.

ZANACO was subpoenaed to testify on the JM position with ZANACO and K5.8 million was paid in two instalments through Court the first being K4,300,000.00 on 28th December 2017 and the second instalment of K1,500,000.00 paid on 8th January, 2018.

Slightly over 3 years had passed before payment was received and in relation to the settlement of the K10 million only K5.8 under a settlement agreement which treated it as fully settled.

He also testified that he produced the Account statements since they spoke to the period under consideration and indicated the actual amounts outstanding between ZANACO and the 2nd Plaintiff.

The outcome of the discussions was that the letter of 7th January, 2014 showed that the full debt (K4 million on loan and K2.7 million on overdraft) ought to be paid before the Stand was released.

Whilst the 1st July, 2014 letter showed a negotiated position and if the K3 million had been paid they would have released it since they were holding other securities that would have managed the deficit.

He finally added that the K3million in January, 2014 could have swelled up with interest by July, 2014.

Counsel for the Plaintiff filed Written Submissions into Court on 16th October, 2018. According to Counsel, the facts that were not in contention were that the 2nd Plaintiff had a facility with ZANACO for K2,681,000.00 and K4,087,000.00. The K2,681,000.00 was an overdraft which the Defendant (FNB) agreed to refinance on condition that property number 5058 Livingstone was released to them by ZANACO.

Moreover, it was not in contention that ZANACO released the security and the Defendant refused to release the money.

In a letter dated 21st October, 2016 written to the Plaintiffs lawyers at the time, the Defendant in refusing to release the funds stated as follows:

"5. On account of the foregoing factors, a decision was taken by the Bank to withdraw from this deal after several months had elapsed owing to the changing circumstances in the banking environment

with regard to rising lending rates, MPC rates, and cost of deposits, overall market liquidity and overall affordability criteria which with the passage of time could not justify the refinancing. With the passage of time whose delay was not on the bank, interest rates and liquidity had totally changed from what was agreed..."

Counsel also cited the case of **COURTYARD HOTEL & ANOTHER V FIRST NATIONAL BANK ZAMBIA LIMITED & ANOTHER (1)** in discussing the case of **KANJALA HILLS LODGE LIMITED V STANBIC ZAMBIA LIMITED (2)** said the following:

"This appeal fails to be resolved entirely on the pronouncements we made in the Kanjala Hills Lodge case. In that case there were arguments on behalf of the Appellants that the trial court had erred when it heard and determined the action by Affidavit evidence when there had been serious contentious issues.

One of the contentious issues that the Appellant had pointed out was their contention that the Respondent had delayed in releasing the funds and that therefore, the Respondent should not have rushed to apply for foreclosure before the date for repayment of the final instalment was due....."

According to Counsel it was decided in this case that late disbursements of funds was not a defence to the failure to make the loan repayments on the agreed dates. According to him, that argument and reasoning could be extended to the facts of this case. The Defendant in terminating the Loan Agreement inter alia said the following:

"On account of the foregoing factors, a decision was taken by the bank to withdraw from this deal after several months had elapsed owing to the changing circumstances in the banking environment with regard to rising lending rates MPC rate, and cost of deposits,

overall market liquidity and overall affordability criteria which with the passage of time could not justify the refinancing. With the passage of time whose delay was not on the bank, interest rates and liquidity had totally changed from what was agreed."

Moreover, that in the Courtyard and FNB case it was decided that late disbursement of funds was not a defence to the failure to make loan repayments on the agreed dates, that argument and reasoning could equally be extended to the facts of the case in casu. The Defendant in terminating the Loan Agreement stated thus:

"On account of the foregoing factors a decision was taken by the bank to withdraw from this deal after several months had elapsed owing to the changing circumstances in the banking environment with regard to rising lending rates, MPC rate, and cost of deposits, overall market liquidity and overall affordability criteria which with the passage of time could not justify the refinancing. With the passage of time whose delay was not on the bank, interest rates and liquidity had totally changed from what was agreed upon."

That in the Courtyard and FNB case aforementioned, the Bank had delayed in disbursing the loan by several months and this resulted in the failure to meet the payments on the loan obligations. Courtyard pleaded that because time was of the essence and there was delay in disbursements, the delay was a defence against the failure to meet the loan repayments. The Supreme Court in dealing with the issue of late disbursement as page J13 inter alia said the following:

"...it is clear also that we were saying that even assuming that the issue had been properly brought on appeal, we would still have held that the late release of funds was not a valid excuse for default or failure to make timely repayments..."

Further the Supreme Court in dealing with the issue of late disbursement at page J14 said the following:

> **"...Again, in view of the foregoing principle the trial courts finding that the facilities provided for a drawdown of the loan in trenches was immaterial. And so is the trial courts view that disbursement of the loan over a period of 8months was reasonable. Such considerations were precluded by the principal that late disbursement of the loan was not an excuse for failure to make scheduled repayment instalments as agreed..."**

It was submitted that the Defendant was in breach of the Loan Agreement by terminating it owing to the several months which had passed in finalising the loan.

The principal in the **KANJALA** and **COURTYARD** cases should be applied in casu where a delay cannot be used as a basis upon which a party can escape its obligations under a loan Agreement.

In the case in casu, the Defendant made an undertaking that it would disburse the funds to ZANACO once it confirmed that it would release the original certificate of title for Stand No. 5058 Livingstone.

ZANACO having confirmed the same, the Defendant still failed to perform its side of the contract and it attributed its actions to the unfavourable economic indicators currently prevailing in the banking sector. The Defendant was in the circumstances contractually liable. Xxxxxxxx

It was submitted that the relationship between the Plaintiff and the Defendant was one in Contract. He relied on the book **Paget's Law of Banking, 14th Edition 96** under the heading **"The Relationship between the Banker and the Customer"** at page 96 where the following was stated:

(a)Introduction

4.7 The relationship of Banker and customer is one of contract. It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. *The essential distinction is between obligations which come into existence upon the creation of the banker customer relationship and obligations which were subsequently assumed by specific agreement*; or from the standpoint of the customer, between services which a bank is obliged to provide if asked. And services which many bankers habitually do, but are not bound to provide. Services such as bankers' drafts, letters of credit and foreign currency for travel abroad fall into the second category of services which the bank was not bound to supply, but this has not been judicially determined. A request for an unauthorised overdraft that was accepted probably also give rise to a special contract, although that contract was governed by the terms of the general contract.

He went on to state that the Defendant was in breach of the contract and that a breach was defined as follows by **Treitels the Law of Contract, 13th Edition by Edward Peel.**

> **"A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing. A breach of contract may entitle the injured party to claim damages, the agreed sum specific performance or an injunction, in accordance with the principles discussed in chapters 20 and 21. In appropriate circumstances he may be entitled to more than one of these remedies such as an injunction and damages. Breach may also give the injured party the right to terminate the contract in the circumstances which are discussed in Chapter 18..."**

Counsel then argued that on the basis of the authorities cited above by not releasing the money as agreed the Defendant was in breach of the contract and therefore liable to pay damages to the Plaintiffs.

Chitty on **Contracts volume 1, 28th ed**. edited by **H.G Beale** at page 1269 under the general heading damages and the specific heading nature and kinds of damages in general has said the following regarding damages:

"Subject to a few controls, the parties to a contract may themselves specify in their contract the remedy available to the innocent party following the others breach. In the absence of such "tailor made" clause on the remedy, the law on damages fills the gap which standard form provisions on the assessment of money compensation which apply to all types of contract. Damages for breach of contract committed by the Defendant are compensation to the claimant for the damage, loss or injury he has suffered through that breach. He is as afar as money can do it, be placed in the sane position as if the contract had been performed."

Counsel submitted that the 1st Plaintiff and the Defendant entered into a Loan Agreement in which the 1st Plaintiff was to restructure and take over an overdraft facility held by the 2nd Plaintiff with ZANACO. In this regard, the Defendant did not perform its obligations under the said contract and as a result the Plaintiffs have suffered great loss and damage. The Plaintiffs are therefore entitled to an award of damages for breach of contract and they should be placed in the same position as if the contract had been performed.

Counsel also cited the **Encyclopaedia of Banking Law** page 22 under the heading 'the banks duty to exercise reasonable care and skill states the following:

"(61) General

A bank has a duty under its contract with customers to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with its customer. The duty to exercise reasonable skill and care extended over the whole range of banking business within the contact with the customer. Thus the duty applied to interpreting, ascertaining and acting in accordance with the instructions of the customer. The standard of reasonable skill and care was an objective standard applicable to banks. Whether or not it has been attained in any particular case had been decided in the light of the relevant facts, which can vary almost infinitely."

Counsel submitted that in light of this law cited above, the Defendant in the circumstances of the case, by withdrawing from the deal on account of several months elapsing owing to the alleged changing circumstances in the banking environment did not exercise reasonable skill and care in carrying out its banking business with the 1st Plaintiff.

Thus, the Plaintiffs suffered loss and damage. The Defendant upon entering such a Loan Agreement could not negate owing to the changing economic circumstances. Further at the time when entering the Loan Agreement the Defendant ought to make projections on various economic indicators and anticipate such changes as such were common in the banking and financial markets.

In conclusion Counsel stated that the Defendant by withdrawing from the deal it had with the 1st Plaintiff breached the loan agreement and as a result of such breach, it suffered great loss and damage. Consequently, the Plaintiffs were entitled to an award of damages and it was their prayer that this Court grants judgment in its favour.

The Defendant's Counsel filed written submissions into Court on 20th June 2018. She began by identifying the following from the testimony of the witnesses:

1. That the Defendant had a contract only with the 2nd Plaintiff. (not 1st Plaintiff?)
2. There was no new money the Defendant was to advance to the 2nd Plaintiff under the refinance as it would have been a mere transfer of an existing debt from ZANACO to the Defendant.
3. Between November, 2013 and July 2014 there was eight months delay by ZANACO to provide an undertaking letter to the Defendant to release the security held, which letter would have enabled the Defendant to proceed with the refinance of K3,000,000.00 an issue beyond the Defendant's control.
4. That between January and July, 2014 there were market adjustments in interest rates which had an impact on the 2nd Plaintiffs affordability for the refinance.
5. That at the start of these proceedings on 31st May, 2017 the 2nd Plaintiff had not fully settled its indebtedness with ZANACO and this was only cleared by January,2018.
6. The 2nd Plaintiff had not disclosed the full extent of its exposure to the Defendant as a result the intended refinance could not take place as the security to be released was held by ZANACO for other exposure.
7. The Refinance was subject to fulfilment of conditions precedent to include release and perfection of security which did not take place.

Counsel for the Defendant Ms Musyani went to identify the following legal issues:

1. Whether the Plaintiffs were entitled to a disbursement of the loan of K3,000,000.00.

2. Whether the Plaintiffs were entitled to payment of interest accruing on the overdraft account with ZANACO.
3. Whether the Plaintiffs were entitled to a refund of Valuation fees and Insurance costs.
4. Whether the Plaintiffs were entitled to damages in breach of contract of contract and loss of business.

Regarding the first legal issue on whether the Plaintiffs were entitled to disbursement of the loan of K3,000,000.00 Counsel stated that they were not for the fact that the disbursement was subject to conditions precedent to be fulfilled by the 2nd Plaintiff prior to take over.

One certificate of title, the subject of the takeover could not be released by ZANACO to the Defendant as it was held for other exposure unconnected to the K3,000,000.00 overdraft. By July 2014 when the undertaking letter was sent by ZANACO to the Defendant the overdraft amount had risen on account of accruing interest.

The 2nd Plaintiff could not afford the increased facility based on the cash flows submitted earlier. The Defendant as shown at page 103 of the **DBD** had proposed to the 2nd Plaintiff to relook the transaction at prevailing interest rates, valuation and current financial information in a fresh application, which offer was not taken up. Accordingly, the Plaintiffs were not at all entitled to any disbursement of the K3,000,000.00 or any other amount or at all.

On the second issue of whether the Plaintiffs were entitled to payment of interest accruing on the overdraft account with ZANACO, it was submitted that they were not because the 2nd Plaintiff as a borrowing customer of ZANACO under the ZANACO Facility Letter disclosed that in 2012 it was offered two credit facilities for K3,000,000.00 and K3,553,000 which had accruing interest to be paid at 16.25% and 21.25% respectively with compound interest on unpaid interest. The facilities were still required to be serviced by the 2nd Plaintiff as a debtor pending the takeover. The overdraft facility was to expire

on 30th November, 2013 whilst the Term loan was to expire on 30th April, 2014. The Plaintiffs have stated that inability to refinance the overdraft resulted in the increase in the interest claimed, an allegation which was flawed.

According to Counsel the Plaintiffs by making a claim of this nature sought to pass their financial obligations under the Facility with ZANACO to the Defendant, an obligation which they were required as a debtor to service under the financial covenants contracted for.

The 2nd Plaintiff had an obligation under the Facility letter to make good repayments of principle and interest accruing on the facility unpaid or unmaintained.

Albeit, the refinance could not proceed due to changed circumstances beyond the fault of the Defendant.

Accordingly she urged this Court to find that the Plaintiffs were not entitled to payment of interest accruing on the overdraft account with ZANACO.

That the third issue had been overtaken by events considering that the Defendant had already refunded the monies that had been paid for the valuation fees as well as insurance costs.

The fourth and final issue was whether the Plaintiffs were entitled to damages. It was contended by Counsel for the Defendant that they were not entitled to any because firstly there was no Contract between the Defendant and 2nd Plaintiff to warrant bringing these proceeding for breach of contract.

Secondly the 2nd Plaintiff was already a debtor with ZANACO because the debt contracted with them in December 2012 was still outstanding and not fully settled. The Defendant was merely intending to refinance a facility contracted earlier with ZANACO.

Moreover, that refinancing was not replacing an existing overdraft with a new facility, a new facility was merely paying off a current debt, so that debt was

not eliminated under a refinance. There could be no loss of business under such circumstances.

In addition, *Clause 6 of the facility letter provided that the Defendant would only make the facility available to the 2nd Plaintiff subject to the fulfilment of conditions precedent, and perfection of security.* Further the facility was subject to an acceptable undertaking letter from ZANACO to allow the takeover, which did not materialize. The Defendant subsequently returned to the 1st Plaintiff the other title deed.

It therefore followed that non- fulfilment of these conditions by the 2nd Plaintiff rendered the contract repudiated due to changed circumstances. In addition, as there was no new cash injection under consideration there was no cash deprivation to warrant a loss of business claim.

In addition, the facility letter provided for material changes that varied the terms and conditions in the letter which were understood to be a counter offer.

Alternatively, Counsel argued that should this Court find that there was a breach of contract, which was denied, the 2nd Plaintiff would be entitled to nominal damages as it had not suffered any substantial harm. The 2nd Plaintiff had a duty to mitigate the damages suffered but did not produce any evidence to that effect. Nominal damages were minimal money damages awarded to an individual in an action where the person had not suffered any substantial injury or loss for which he or she must be compensated.

Counsel relied on the case of **ATTORNEY GENERAL V SAM AMOS MUMBA (3)** where it was held that **"Where loss of business formed part of a claim, it must be pleaded as special damages and strictly proved."**

Counsel went on to argue that Refinancing was a business concept widely practiced by financial institutions. That it was the process of replacing an existing loan with a new one. The new one paid off the current debt so that it was not eliminated upon refinance. However, the new loan would provide for

better terms or features that improved ones finances. The details of the refinance depended on the type of loan and one's lender.

Moreover, she contended that when a refinance was under reconsideration one often restarted the clock and there *was usually an extension on the amount of time it would take for one to repay; the new monthly payment should decrease, interest rate, payment schedule and terms of a previous credit agreement was revised causing potential savings on debt payments from a new agreement.*

The most common type of refinancing was called the rate and term where the original loan is paid and replaced with a new one requiring lower interest payments. Refinancing thus merely allowed one to shift the debt to a better place, the debt balance and collateral would usually not change. That was what was intended in this matter.

This refinance was explicitly stated on the loan purpose on page1 of the facility letter. The Defendant sought to refinance the 2nd Plaintiffs overdraft facility at ZANACO, the proposed refinance offered more favourable terms in terms of market rates on pricing and period repayment.

There were no new monies expected from the Defendant. The 2nd Plaintiffs original overdraft with ZANACO was intended to be repaid and replaced with a new overdraft by FNB with lower interest repayment for the facility under construction.

According to Counsel, a condition in a contract is a stipulation the breach of which gives rise to a right to treat the contract as repudiated. This is what transpired in casu when the 2nd Plaintiff failed to meet the conditions set out in the facility letter upon which the refinance should have been made available. Further that there were conditions precedent essential to the takeover taking effect. As at July, 2014 there were changed circumstances beyond the Defendant's control that delayed the intended take over and rendered the contract repudiated.

Counsel cited LB Curzon's Dictionary of Law at page 88 which defined a condition as ***"a declaration of circumstances essential to the occurrence of an event."*** Whilst condition precedent is defined as ***"one which delayed the vesting of a right until the occurrence of a particular event."***

Counsel went on to state that the record shows that the Defendant in November 2013 assessed the Plaintiff's application for refinance of an overdraft facility of up to K3,000,000.00 based on, *inter alia* financial projections, rental income existing and interest applicable at the time.

Meanwhile ZANACO had disclosed that the security, the subject of the refinance, could not be released as it was part of a composite package securing the 2nd Plaintiff's other exposures with ZANACO, namely a Term Loan of K4,087,274.66 which the 2nd Plaintiff had not disclosed to the Defendant and for which the Defendant was not able to take up based on the 2nd Plaintiff's affordability.

It was submitted that by the time the Defendant received the undertaking letter of 1st July, 2014 albeit late there were changed circumstances in the banking environment with regards to rising lending rates, MPC rate, costs of deposits and overall market liquidity which could not justify the refinancing as assessed earlier in November 2013.

Further the subsequent conditions precedent attached to the Facility letter took many months to be fulfilled rendering the deal unviable for the Defendant. The 1st Plaintiffs cash flows could no longer afford a facility of K3,000,000.00 earlier applied for and the transaction was considered closed.

Thus, these were material changes that varied the original terms and conditions of the facility letter.

The Defendant did however offer the 1st Plaintiff to relook the transaction which offer was never taken up.

Learned Counsel for the Defendant further submitted that following the execution of the Facility Letter there were events that occurred that prevented the attainment of the original purpose that the parties had in mind at a date of contract in November, 2013.

These events discharged the Defendant from any liability and there was no breach of contract since the contract was incapable of being performed due to no fault of the Defendant.

Counsel cited the learned author of Cheshire, Fifoot and Furmstone in Law of Contract 14th Edition at page 631 states:

> **"when the law casts a duty upon a man which through no fault of his, he is unable to perform, he is excused for non- performance."**

DENY MOTT AND DICKSON LTD V JAMES B FRASER & CO (4) AND TAYLOR V CALDWELL (5) reported in the same book held the principle that:

> **"If the further fulfilment of the contract was brought to an abrupt stop by some irresistible and extraneous cause for which neither party was responsible, the contract shall terminate forthwith and the parties discharged."**

The Facility letter at clause 15 provided that the offer would terminate by express or implication if inter alia there were any material changes that would vary the terms and conditions of the facility letter which changes would be understood to be a counteroffer.

It was her submission that there was a physical destruction of the subject matter of the Contract between the Defendant and the 1st Plaintiff before performance fell due. ZANACO could not undertake to release the certificate of title in January, 2014 as it was part of a composite package securing the 2nd Plaintiff's other exposures with ZANACO. When the undertaking letter was received in July, 2014 interest rates had changed with the passage of time. In

light of the circumstances of this case, the Defendant could allege that the Contract was impossible to perform and thus the parties were discharged from performing forthwith.

As regards Mitigation of damages Counsel submitted as follows:

That the learned author Cheshire, Fifoot and Furmstone in law of Contract 14th edition in referring to **BRITISH WETINGHOUSE ELECTRIC AND MANUFACTURING CO VS UNDERGROUND ELECTRIC RLY CO OF LONDON (6):**

> **"The Law does not allow a Plaintiff to recover damages to compensate him loss which would not have been suffered if he had taken reasonable steps to mitigate the loss."**

She further stated that the 2nd Plaintiff could have mitigated any loss of business by servicing their financial obligations under the loan documentation with ZANACO which obligations were contracted in 2012 way before the intended take over by the Defendant in November, 2013. At best the Plaintiffs ought to have paid off their facilities with ZANACO to reduce their loss. The 1st Plaintiff further ignored an offer for the Defendant to relook the facility, subject to prevailing lending criteria, interest rates and affordability.

It was further submitted that the 1st Plaintiff made no efforts to facilitate the early release of an acceptable undertaking letter from its bankers ZANACO upon which the Defendant awaited action. She submitted that the Plaintiffs could not recover damages which they would not have suffered had reasonable mitigation been taken.

The Defendant's Counsel also relied on the common law doctrine of Privity of Contract.

She contended that the 2nd Plaintiff was not a party to the facility letter entered between the Defendant and the 1st Plaintiff for proposed refinance and take-

over of an overdraft facility held with ZANACO. For that reason, the 2nd Plaintiff was not entitled to bring these proceedings with the Plaintiff.

In the case of **TWEDDLE V ATKINSON (7)** Wightman J stated:

> **"...it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."**

Counsel also relied on a statement on privity from Cheshire, Fifoot and Furmstone Law of Contract who state thus:

> **"Finally, we should note that the doctrine of privity of contract means only that a non- party cannot bring an action on the contract."**

It was Counsel's contention that generally, only the parties to a contract would have enforceable rights and obligations emanating from the contract.

By this action, the 2nd Plaintiff was attempting to enforce rights emanating from a contract it was not privy to. For that reason, the action herein by the 2nd Plaintiff must fail.

In conclusion she argued that the Plaintiffs had failed to prove their case and it ought to be dismissed.

I have considered the written submissions from both Counsel for the Plaintiffs Mr Nchito and Counsel for the Defendant Ms Musyani in light of the evidence on record.

I have found that the following facts are not in dispute:

1. That the 1st and 2nd Plaintiffs are sister companies and that **PW1** is the Chief Executive Officer of both.
2. That the 2nd Plaintiff had credit facilities with ZANACO and as at 7th January, 2014 these were an Overdraft Facility of K2,681,000.00 and a Loan of K4,087,274.66.

3. That by Facility Letter dated 27th November, 2013 the Defendant bank offered the 1st Plaintiff Commercial Property Finance by way of a loan in the sum of K3,000,000.00. The Facility Letter was executed by the 1st Plaintiff on 5th December, 2013 and thereafter the parties executed a Loan Agreement on 8th January, 2014.
4. Clause 2 of the Facility Letter states that the purpose of the Commercial Property Finance was to restructure and takeover of an Overdraft Facility then held with ZANACO.
5. The Facility Letter and the Loan Agreement referred to above do not state that the overdraft to be restructured and taken over by the Defendant bank was that held by the 2nd Defendant. However as the Legal Mortgage security to be taken by the Defendant bank included security securing the 2nd Plaintiff's Overdraft Facility with ZANACO it is clear that the 1st Plaintiff was obtaining a loan from the Defendant bank in order to settle the 2nd Plaintiff's Overdraft Facility held with ZANACO. This is also evident from the correspondence passing between the Defendant bank and ZANACO and between the Defendant bank and the 1st Plaintiff. Some of the letters appear at pages 22 to 24, 44 and 101 to 102 of the Defendant's Bundle of Documents.
6. The Facility Letter and Loan Agreement set out the terms and conditions on which the Defendant bank was prepared to make the loan of K3,000,000.00 available to the 1st Plaintiff. These terms and conditions included the fact that drawdown of the facility was to be effected strictly upon perfection of the Bank's collateral or security (see Clause 6.2 of the Facility Letter and Clause 2.2 and 2.2.2 of the Loan Agreement).

To achieve perfection of security the Defendant asked that ZANACO provides an Undertaking Letter to it to release the security relating to Stand No. 5058 Livingstone held by it, in order for the Defendant to pay K3,000,000.00 directly to ZANACO. The letter to this effect is dated 21st

January, 2014 and appears at page 28 of the Plaintiff's Bundle of Documents.

7. On 1st July, 2014 ZANACO wrote to the Defendant undertaking to release the Certificate of Title relating to Stand No. 5058 Livingstone, the registered Mortgage and Memorandum of Discharge directly to the Defendant upon payment of the sum of K3,000,000.00. The letter is at page 32 of the Plaintiff's Bundle of Documents.
8. Due to the passage of time between the execution of the Facility Letter dated 27th November, 2013 on 5th December, 2013 and the receipt by the Defendant of a satisfactory letter of Undertaking from ZANACO on 7th July, 2014 the Monetary Policy Committee rate had increased from 9.75% in November 2013 to 12% in July 2014. The Defendant's interest margin also increased from 5.25% in November 2013 to 14% in July 2014. There was therefore an upward adjustment in the interest rates and the Defendants resultant interest was 26% up from 15% in November 2013.
9. On 2nd September, 2014 the Defendant wrote to the 1st Plaintiff informing them that the economic indicators then in the banking and financial sector were not favourable for the Defendant bank to support the facility and returned the Original Certificate of Title in relation to Stand No. 1492 Livingstone.
10. The Defendant did not release or disburse to the 1st Plaintiff the sum of K3,000,000.00.

I now turn to identify the issues that I have found to be in dispute:

1. Whether the 1st Plaintiff proved that it was entitled to the immediate disbursement of the loan of K3,000,000.00.
2. Whether there was a breach of contract by the Defendant when it failed to disburse the loan facility to the 1st Plaintiff.

The gist of the 1st Plaintiff's case is as follows. That the 2nd Plaintiff had a facility with ZANACO on overdraft of K2,681,000.00 as well as a loan of K4,087,000.00.

FNB agreed to refinance the outstanding overdraft amount on condition that the Certificate of Title to Stand 5058 Livingstone was released to them as a form of security; in particular that a letter undertaking to release this title be sent to the Defendant.

Mr Nchito Counsel for the 1st Plaintiff relied on the principle in the **COURTYARD** and **KANJALA** cases aforementioned to contend that a party could not use a delay as a basis upon which to escape its obligations under a Loan Agreement.

It is also contended that the Defendant undertook to disburse the loan funds to ZANACO upon ZANACO confirming that it would release the original COT for Stand 5058 Livingstone to the Defendant.

However, when ZANACO confirmed this the Defendant did not perform its side of the contract and attributed this failure to the unfavourable economic indicators then prevailing in the banking and financial sector thus the Defendant was contractually liable and damages were due to the Plaintiffs on this basis.

The 1st Plaintiff argued that the Defendant unilaterally rescinded the original offer when the Plaintiffs had met the Conditions set out by the Defendant.

The Gist of the Defendant's case is that the original intention of the 1st Plaintiff and Defendant (the parties) as outlined in the Facility Letter and Loan Agreement was that the Defendant would take over the existing overdraft of K3,000,000.00 that the 2nd Plaintiff had with ZANACO.

The Defendant gave the 1st Plaintiff some conditions precedent to the fulfilment of this agreement. That before the Defendant could sign these agreements it

scrutinized the cashflow projections of the 1st Plaintiff as well as its financial documents in order to ascertain whether it satisfied its lending criteria as at November, 2013.

That one of the Conditions precedent, was for ZANACO to provide a letter of undertaking to release the security it held over Stand No. 5058 Livingstone once the overdraft held by the 2nd Plaintiff with it was settled by the Defendant and this letter was eventually written on 7th July, 2014.

The Defendant also considered the MPC Rate which was 9.75% at the time with a margin of 5.25%. It is contended that at the time the letter of undertaking was released by ZANACO the MPC Rate had risen to 12% and the Defendant's margin to 14%.

It is contended that these events discharged the Defendant from any liability and there was no breach of contract since the contract was incapable of being performed due to no fault of the Defendant.

On the aspect of Breach of Contract, it was argued that after the Facility Letter was executed, there were events that occurred which prevented the attainment of the original purpose that the parties had in mind at the date of the contract in November, 2013.

Counsel cited the learned author of Cheshire, Fifoot and Furmstone who state that ***"when the law casts a duty upon a man which through no fault of his, he is unable to perform, he is excused for non- performance".***

Counsel further submitted that the Facility Letter at Clause 15 provides that the offer would terminate by express or implication if inter alia there were any material changes that would vary the terms and conditions which changes would be understood to be a counteroffer.

Further that there was a physical destruction of the subject matter of the Contract between the Defendant and the 1st Plaintiff before performance fell due.

According to her, ZANACO could not undertake to release the Certificate of Title in January, 2014 as it was part of a composite package securing the 2nd Plaintiff's other exposures with ZANACO.

When the letter was finally received in July, 2014 interest rates had changed with the passage of time. In light of this it was contended that the Contract was impossible to perform and thus the parties were discharged from performing it.

Having outlined the gist of the 1st Plaintiff's case as well as the Defendant's case, I will now consider the legal issues that I identified as being in issue.

The first issue is whether or not the Plaintiff was entitled to the disbursement of the K3,000,000.00.

It is common cause that by Facility Letter dated 27th November, 2013 the Defendant offered the 1st Plaintiff credit facilities for commercial property finance in the sum of K3,000,000.00, to restructure and take over an overdraft facility held by the 2nd Plaintiff with ZANACO which at the material time stood at K2,621,689.69. The 1st Plaintiff accepted the offer when it executed the Facility Letter on 5th December, 2013. Thereafter the Defendant and 1st Plaintiff executed a Loan Agreement dated 8th January, 2014. Both the Facility Letter and Loan Agreement set out the terms and conditions on which the Defendant was prepared to make the loan or credit facility available to the 1st Plaintiff.

It is clear from the credit facility documents that the Defendant had a contract with the 1st Plaintiff and not the 2nd Plaintiff. The 2nd Plaintiff is not a party to the Facility Letter and Loan Agreement entered between the Defendant and the 1st Plaintiff despite the fact that the Commercial Property Finance of K3,000,000.00 was for refinancing and taking by the Defendant of an overdraft

facility granted to the 2nd Plaintiff and held with ZANACO. Whilst the contract between the Defendant and the 1st Plaintiff was made for the benefit of the 2nd Plaintiff, the 2nd Plaintiff was a stranger to the consideration of that contract. On the authority of the case of **TWEDDLE V ATKINSON (7)** the 2nd Plaintiff cannot maintain an action on the contract between the Defendant and the 1st Plaintiff.

I accept the Submission by Ms. G. Musyani learned Counsel for the Defendant that by this action, the 2nd Plaintiff is attempting to enforce rights emanating from a contract it is not privy to. That generally only the parties to a contract will have rights and obligations emanating from the contract. That persons who are not parties to a contract will not have enforceable rights or obligations from the contract.

The 2nd Plaintiff being a non-party to the contract herein, its action against the Defendant must fail.

The terms and conditions upon which the refinance could take place are contained in the Facility Letter and Loan Agreement.

A perusal of the Facility Letter dated 27th November, 2013 executed on 5th December, 2013 by the 1st Plaintiff and the Defendant indicates the following:

> **"FACILITY LETTER**
>
> **First National Bank Zambia Limited Registration Number 2008/72041 (hereinafter called the bank) offers to provide Queens Hills Limited Registration number 62555 (hereinafter called "the Borrower") with credit Facilities subject to the terms and conditions set out herein:-**
>
> .....
>
> **5. Security**

5.1 Security Required

In the name of Queens Hills Hotels Limited

1. **First Legal Mortgage of ZMK2,600,000.00 over Stand No. 5058 John Hunt Road Livingstone...**
2. **First Legal Mortgage of ZMK1,000,000.00 over Stand No. 903, Mosi- Oa- Tunya Road, Livingstone...**
3. **Unlimited Letter of Suretyship by John Mwamulima (Unsupported)**
4. **Unlimited Letter of Suretyship by J. M. Properties Limited (Unsupported)**

...

Conditions Precedent

"The Bank will make the facility available to the Borrower subject to the fulfilment of the following conditions precedent to the satisfaction of the bank.

6.1 up to date Certified copies of the borrowers Certificate of Registration or Incorporation and the Borrowers Articles of Association or Constitution or any other founding.

6.2 Drawdown of the facility to be effective strictly upon perfection of the Bank's collateral.

6.3 Property valuations to be undertaken by FNB Zambia approved valuator which valuation for both properties must remain a minimum value of ZMK 7,480,000.00."

Clause 15 on Acceptance also set out the mode of termination in the third paragraph.

...

It states that: "<u>This offer shall terminate by express or implication, if not accepted within the open of the offer and/or if there are any material changes that vary the terms and conditions in the letter which changes shall be understood to be a counteroffer.</u>" (emphasis mine).

The disbursement or release of the sum of K3,000,000.00 to ZANACO was subject to conditions precedents which had to be fulfilled by the 1st Plaintiff. One of these was that drawdown of the facility would be strictly upon registration of the Defendant Bank's security. The requirement was therefore that First Legal Mortgages of K2,600,000.00 over Stand No. 5058 Livingstone and of K1,000,000.00 over Stand No. 903 Livingstone had to be registered before the Defendant could release the loan sum of K3,000,000.00 to ZANACO.

The Certificate of Title relating to Stand No. 903 Livingstone was released to the Defendant by the 1st Plaintiff but the Certificate of Title relating to Stand No. 5058 Livingstone the subject of the takeover could not be released by ZANACO to the Defendant as it was held for other exposure unconnected to the K3,000,000.00 overdraft granted by ZANACO to the 2nd Plaintiff.

To facilitate the refinance of the overdraft held by the 2nd Plaintiff in the books of ZANACO and the takeover by the Defendant of security over Stand No. 5058 Livingstone, the Defendant required ZANACO to first provide an acceptable Letter of Undertaking to release the securities held over the said Stand No. 5058 Livingstone. On 7th January, 2014 ZANACO delivered to the Defendant a Letter of Undertaking which demanded settlement of the balances of K2,681,343.99 Overdraft Facility and K4,087,274.66 Term Loan Facility. As the settlement balances advised by ZANACO were higher than the K3,000,000.00 agreed to be refinanced the Defendant declined to proceed with settlement of the Overdraft until such time that the balances were capable of being liquidated by the K3,000,000.00. A subsequent Letter of Undertaking

from ZANACO confirming release of the Certificate of Title for Stand No. 5058 Livingstone was received on/or about 1st July, 2014.

It is not in contention that ZANACO agreed to release the Security it held over Stand No. 5058 Livingstone on 1st July, 2014 and the Defendant refused to release the money. What is in contention is whether the Plaintiffs are entitled to disbursement of the loan of K3,000,000.00.

The contract between the Defendant and the 1st Plaintiff to refinance the 2nd Plaintiff's Overdraft Facility held by ZANACO was subject to the fulfilment of conditions precedent to include release of Security held by ZANACO over Stand No. 5058 Livingstone and perfection of Legal Mortgage Security over the said Stand No. 5058 Livingstone and Stand No. 903 Livingstone which did not take place. As the Defendant Bank's collateral was not perfected the 1st Plaintiff was not entitled to disbursement of the loan of K3,000,000.00.

I now turn to the issue of whether there was a breach of contract by the Defendant when it failed to disburse the loan facility to the 1st Plaintiff after ZANACO on 1st July, 2014 provided an acceptable Letter of Undertaking that it would release to the Defendant the securities it held over Stand No. 5058 Livingstone upon the Defendant paying it the sum of K3,000,000.00.

Learned Counsel for the Plaintiffs Mr. K. Nchito at paragraph 32 of the Plaintiffs' written submissions states that:

> **"It is not in contention that ZANACO released the Security and the Defendant refused to release the money".**

This assertion is misleading because what ZANACO released to the Defendant on 1st July, 2014 was a Letter of Undertaking that the Defendant asked for by letter dated 21st January, 2014 and not the Security i.e. the original Certificate of Title, the Legal Mortgage and the Memorandum of Discharge relating to Stand No. 5058 Livingstone.

I am of the considered view that the Defendant having asked the 1st Plaintiff to get ZANACO to provide a suitable Letter of Undertaking to release the Certificate of Title relating to Stand No. 5058 Livingstone in January, 2014 the 1st Plaintiff ought to have engaged ZANACO to ensure that this was done within a reasonable time. The ZANACO Letter of Undertaking of 1st July, 2014 was provided to the Defendant after a period of six months following the 1st Letter of Undertaking of 7th January, 2014 which was not acceptable to the Defendant. Between 27th November, 2013 and 1st July, 2014 there was a seven months delay by ZANACO to provide the required Letter of Undertaking.

It is common cause that the Defendant sought to refinance the 2nd Plaintiff's Overdraft Facility at ZANACO. As submitted by the Defendant Bank refinancing is a business concept widely practiced by financial institution. Refinancing is the process of replacing an existing loan or advance with a new loan or advance. The new loan pays off a current debt so that debt is not eliminated upon refinance. There is usually an extension on the repayment period, the new monthly payment should decrease, interest rate, payment schedule and terms of a previous credit agreement are revised causing potential savings on debt payments and leading to lower interest payments. Given that the credit facility was a refinance it was necessary that it be effected quickly after the execution of the Facility Letter in order that interest rates payable do not increase. In *casu* the proposed refinance of the 2nd Defendant's Overdraft Facility at ZANACO offered more favourable terms in respect of market rates on pricing and period for repayment.

The Defendant adduced evidence showing that between the Facility Letter Offer of 27th November, 2013 and the receipt of a satisfactory Letter of Undertaking from ZANACO in July 2014 there were material changes in the pricing agreed in the Facility Letter and Loan Agreement. That during this period the Monetary Policy Committee rate escalated from 9.75% in November 2013 to 12% in July 2014. Further the Defendant's margin also escalated from 5.25% in November 2013 to 14% in July 2014.

It was submitted that as a result of this upward adjustment in the interest rates, the net income of the 1st Plaintiff as assessed in November, 2013 could no longer meet the Defendant Banks affordability criteria.

The Plaintiffs submitted that the Defendant was in breach of the Loan Agreement by terminating it owing to the several months which had passed in finalising the loan. It is contended that the principle in the cases of **KANJALA HILLS LODGE LIMITED V STANBIC ZAMBIA LIMITED (2)** and **COURTYARD HOTEL & ANOTHER V FIRST NATIONAL BANK ZAMBIA LIMITED (1)** should be applied in *casu* where a delay cannot be used as a basis upon which a party can escape its obligations under a Loan Agreement.

The KANJALA and COURTYARD cases relied on by the Plaintiffs do not apply to the facts herein and do not therefore aid the Plaintiffs. Those cases can be distinguished from the case in *casu* because in those cases loans were disbursed by the lenders albeit late and the issue was whether late release of funds is a valid excuse for default or failure to make timely payments by the borrowers. In this case the issue requiring determination is whether or not the borrower fulfilled the condition precedents contained in the Facility Letter and Loan Agreement and thus obligating the lender to disburse or release the funds.

The Record shows that in November 2013 the Defendant assessed the 1st Plaintiff's application for refinance of an overdraft facility of up to K3,000,000.00 based on inter alia financial projections, rental income and interest rates applicable at the time. At that time the 1st Plaintiff had not disclosed that Stand No. 5058 Livingstone was also security for a Term Loan of K4,087,274.66 which ought to have been taken into consideration when assessing the affordability of the refinancing requested by the 1st Plaintiff.

I note that the Clause on interest (Clause 4.1 of the Facility Letter and Clause 8.5 of the Loan Agreement) gave the Defendant Bank the right to review and amend the interest applicable and the method of calculating it at any time in

line with market conditions. On the evidence adduced by **Mr. Kambeu Banda (DW1)** I find that by the time the Defendant received the satisfactory Letter of Undertaking from ZANACO of 1st July, 2014, there were changed circumstances in the financial and banking environment with respect to rising lending rates, MPC rate, costs of deposits and overall market liquidity which could not justify the refinancing of the 2nd Plaintiff's Overdraft held at ZANACO as assessed earlier in November, 2013.

I further find that these changed circumstances were material changes that varied the terms and conditions of the Facility Letter dated 27th November, 2013 and the Loan Agreement dated 8th January, 2014.

I am of the considered view that the said changed circumstances must be understood to be a counteroffer in terms of Clause 15 of the Facility Letter. As the changes amounted to a counteroffer the Defendant offered to the Plaintiff to relook the transaction which offer was never taken up by the 1st Plaintiff. This offer is made in the letter from the Defendant's Legal Counsel to the Plaintiff's then Advocates Messrs Besa Legal Practitioners dated 21st October, 2016.

The evidence on record shows that the Defendant properly terminated the Loan Agreement with the 1st Plaintiff under Clause 15 of the Facility Letter dated 27th November, 2013.

Apart from the Defendant's Offer herein terminating by express or implication pursuant to Clause 15 of the Facility Letter, I accept the Defendant's submission that in light of the circumstances of this case, the Defendant can assert that the Contract was impossible to perform and the parties were discharged. I find that the 1st Plaintiff's failure to get ZANACO to provide a Letter of Undertaking to release its security over Stand No. 5058 Livingstone until 1st July, 2014, some 7 months after signing the Facility Letter by which time market conditions had changed substantially meant that the Contract was not capable of being performed due to no fault of the Defendant. I rely on the authorities cited by the Defendant's Counsel of the learned Author Cheshire,

Fifoot and Furmston in Law of Contract 14th Edition at page 631 for this position.

I have considered the pleadings and evidence and the view I take is that the Plaintiffs have failed to prove their claims on a balance of probabilities.

This therefore means that the other claims made by the Plaintiffs fall away. These include their claim for payment of interest accruing on the 2nd Plaintiff's Overdraft Account with ZANACO as well as the claim for damages.

As regards the refunds of K18,500.00 Valuation Fees and K18,521.86 Insurance Costs relating to Stand No. 903 Mosi-O-Tunya Road Livingstone and Stand No. 5058 John Hunt Way, Livingstone the 1st Plaintiff was refunded these costs and hence these claims were overtaken by events by the date of trial. Judgment on Admission was entered on 3rd October, 2017 by which the....

I therefore dismiss the Plaintiff's case in its entirety.

I award costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 13th day of May, 2019.

.....

WILLIAM S. MWEEMBA
HIGH COURT JUDGE