IN THE HIGH COURT OF ZAMBIA **2019/HP/1203**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JACKSON LUNGU **PLAINTIFF**

AND

PULSE FINANCIAL SERVICES LIMITED **DEFENDANT**
(T/A Entrepreneurs Financial Centre)

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26th DAY OF MAY 2020

For the Plaintiff : *Mr J. Chimembe, JMC & Associates*

For the Defendant : *Ms Martha Msoni and Mr Joseph Shawa, In House Counsel*

JUDGMENT

CASES REFERRED TO:

1. ***Hadley v Baxendale 1854 9 Ex 341***
2. ***Victoria Laundry v Newman 1949 2 KB 528***
3. ***Construction and Investment Holdings Ltd v William Jacks and Co. (Zambia) Ltd 1972 ZR 66***
4. ***Zambia National Building Society v Ernest Mukwamataba Nayunda 1993 - 1994 ZR 29***
5. ***Mulendema v Zambia Breweries PLC Appeal No 7/2016 [2017] ZMCA (21 March, 2017)***
6. ***Appollo Enterprises Limited v Enock Percy Kavindele 2018 Special edition ZR 6***

LEGISLATION REFERRED TO:

1. ***The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***

OTHER WORKS REFRRED TO:

1. ***Halsbury's Laws of England, 4th Edition, Vol 20***
2. ***Cheshire and Fifoot, Law of Contract, 4th Edition***

The plaintiff commenced this action by way of writ of summons accompanied with a statement of claim on 31st July, 2019, in which he claims the following reliefs;

1. *Damages in the amount of K500, 000.00 for loss of business for the period of four (4) years, ie loss of lease, rent, and sale of the property due to lack of the original certificate of title.*
2. *Punitive damages.*
3. *Interest.*
4. *Costs.*
5. *Any other relief the court may deem fit.*

The claim as revealed by the statement of claim is that on or around the 25th November, 2010, the plaintiff deposited his certificate of title for Lot 3965/M with the defendant, as a guarantee for Christine Kasonde, the principal debtor. It is stated that on 8th August, 2014, the loan was fully settled by the principal debtor, and the plaintiff was thus discharged of his obligation, and he did not have any liability.

However, contrary to the agreement, the defendant did not hand over the certificate of title within forty eight (48) hours after settlement of the debt owed, and the defendant only informed the plaintiff of its negligence in losing the certificate of title, three (3) weeks after it was supposed to

hand it over to him. The averment is that it took the defendant four (4) years to issue the plaintiff with the certificate of title.

In the meantime, the defendant opted to issue him with certified copies, confirming loss of the certificate of title, which did not assist the plaintiff in any way to secure business contracts, as potential companies demanded for the original certificate of title. That by reason of this, the plaintiff suffered extensive loss and damage.

In the defence filed on 16th August, 2019, the defendant admits that the plaintiff deposited his certificate of title for Lot No 3965/M with it as guarantee for the loan that was obtained by Christine Kasonde. The defendant further admits that the loan was paid in full on 8th August, 2014, and that the plaintiff was therefore discharged of his obligations. The defendant also admits that it did not hand over the certificate of title to the plaintiff within forty eight (48) hours of the loan being settled in full.

It however denies that it only informed the plaintiff three (3) weeks later about the loss of the certificate of title, and that states that the delay in producing the duplicate certificate of title was not caused by the defendant entirely, but also by the institution that is duly responsible for producing such, and to some extent, the doing of the plaintiff.

The defendant also denies that it took four (4) years to issue the plaintiff with a certificate of title, and that it instead issued the plaintiff with certified copies, thereby confirming loss of the certificate title, and that the certified copies did not assist the plaintiff to secure business contracts, as potential companies demanded for the original certificate of

title. The defendant also denies that the plaintiff has suffered extensive loss and damage as a result.

At the trial, only the plaintiff testified as a witness for his case, and the defendant did not call any witnesses. In his testimony, the plaintiff stated that sometime in November, 2010, he deposited his title deed for Sub Div A3965/M with the defendant as guarantor for Christine Kasonde. Then between July and August 2014, the loan was repaid, and sometime in August, 2014 he demanded for his title deed from the defendant in writing to the Chief Executive Officer. However, the defendant did not give him the said title deed there and then.

He identified page 7 of his bundle of documents as the letter that he wrote to the defendant, stating that he wrote it after he made several requests that he be given back the title deed, as it was supposed to be returned within forty eight (48) hours, and two (2) weeks had passed. Continuing with his testimony, the plaintiff stated that the defendant wrote a *"To Whom it May Concern"* letter, which was at page 9 of the plaintiff's bundle of documents.

He told the court that the failure by the defendant to give him his title deed had affected his business, as he could not operate or borrow money from any institution to capitalize his business. In this regard, his testimony was that there were some tenders that were published, and he wished to participate in them.

The plaintiff referred to the advertisements that were placed by the Lusaka City Council, which are at pages 4-5 of his bundle of documents, as the tenders that he did not participate in. This was on account of the fact that the adverts had conditions in the second last paragraph that all

bids had to be accompanied by not less than two (2) percent bank certified cheques, and three (3) percent insurance of the bid sum. He explained that he could not afford the bid security without the certificate of title.

Further, that no bank could give him two (2) percent of the bid sum without collateral, and in this case, the certificate of title was the said collateral. Still on the opportunities that were lost, the plaintiff stated that he had sought to lease the land on long term, and companies and individuals approached him, and they viewed his land. He testified that a company known as INF Limited offered to rent the land after it had viewed it, with the offer that the company gave being identified as that at page 6 of the plaintiff's bundle of documents.

It was the plaintiff's testimony that the company had offered to rent his land for ten (10) years at US$2000 per month, payable yearly. The plaintiff testified that he was asked to provide the original title deed, and two (2) witnesses. He further stated that the company had proposed to build two (2) warehouses at a cost of K300, 000.00, which would remain as the plaintiff's property at the end of the lease.

It was also agreed that the company would pay a deposit of K100, 000.00, but the agreement did not go through on account of lack of the original title deed, despite him having presented a certified copy of the title deed. The plaintiff further in his testimony told the court that there was a Chinese who was looking for a place to set up their business, and upon discussing with them, the plaintiff had asked his lawyers to prepare an agreement for long lease of his premises, as the Chinese company wanted to construct warehouses, and do business there.

That like the previous potential tenants, they had also asked for the original certificate of title. When he produced a certified copy, he was told that the land was not his, and the agreement fell through. The plaintiff identified pages 19-25 of the plaintiff's bundle of documents as the minutes and the draft agreement, explaining that he dealt with four (4) Chinese persons, among them Mr Lee.

With reference to the letter from the Patents and Companies Registration Agency (PACRA) dated 18th February, 2020, at page 4 of the defendant's supplementary bundle of documents, the plaintiff testified that it states that there is no Chinese or Chinise company. He explained that when the Chinese approached him, he did not know if they were registered at the time.

The plaintiff also referred to an extract of the Lands Register at page 2 of his bundle of documents, testifying that Badiye Limited appears on it, as he has sold a portion of his land 3965/M/A to it, but that the sale did not affect the guarantee. The plaintiff prayed that he be granted the reliefs as claimed.

In cross examination, the plaintiff maintained that he could not participate in the tenders as his title deed was lost. It was his testimony when referred to the Lands Register at page 1 of the defendant's supplementary bundle of documents that at entry number 3, a caveat was registered on the property by Badiye Limited on 14th April, 2014, as intending purchaser. He agreed that he sold part of the land to Badiye Limited, but that he was not aware that Badiye Limited had placed a caveat on the property.

The plaintiff further in cross examination stated that even with the caveat in place, he could have still bid in 2014, as he would have had the title deed, and he would have taken it to the Bank, and he would have been given the security bond. When referred to the letter that INF Limited wrote to him on 15th August, 2014, which is at page 6 of the plaintiff's bundle of documents, on the proposed lease agreement, the plaintiff testified that when the said letter was written, there was a caveat on the property. He attributed the placing of the caveat as being due to the loss of the certificate of title.

He however testified that even in the face of the caveat being in place, he would have still leased the land, as the caveat would have been removed. The plaintiff testified that upon learning that there was a caveat on the property, he had confronted the caveator, and the caveat was withdrawn on 15th June, 2016. The plaintiff reiterated that he would have still done business, even with the caveat being in place.

Still in cross examination, the plaintiff testified that while pages 21-25 of his bundle of documents was the lease agreement, and page 4 of the defendant's bundle of documents the letter from PACRA, stating that the Chinese of Chinise company does not exist, his testimony was that the lease agreement was a draft, which the Chinese company would have looked at on viewing the property, and it would have corrected the said draft lease agreement. He clarified that the Chinese were promoters, who were looking for a place to set up.

He agreed that he had authored the letter which is at page 20 of the plaintiff's bundle of documents, and that he addressed it to Mr Lee. The plaintiff denied that his claims were just an afterthought to take advantage of the misplaced certificate of title.

I have considered the evidence and the submissions. It is common cause that the plaintiff deposited his certificate of title for the property known as Lot No 3965/M with the defendant sometime around November, 2010, as guarantor for the loan that Christine Kasonde obtained from the defendant. It is also not in contention that the said loan was paid in full sometime between July and August, 2014. It is also common cause that after the loan was paid in full, the defendant demanded the release of the title deed, and the defendant failed to give it him.

It is not in contention that the defendant was supposed to give back the certificate of title to the plaintiff within forty eight (48) hours of the loan being repaid. The question is whether the plaintiff is entitled to the reliefs sought?

The first claim is for damages in the amount of K500, 000.00 for loss of business for a period of four (4) years, as the plaintiff could not lease, rent or sell the property on account of lack of the original certificate of title. It has been seen that after Christine Kasonde paid back the loan in full to the defendant sometime around 8th August, 2014, the defendant did not give back the certificate of title that the plaintiff had deposited with it, as guarantor for the said loan.

The plaintiff submits that when the defendant failed to give him back the certificate of title, on 25th August, 2014, it wrote a *"To Whom it May Concern"* letter, which is at page 9 of the plaintiff's bundle of documents, confirming loss of the said certificate of title. The plaintiff relies on ***paragraph 101 of Halsbury's Laws of England, 4th Edition, Vol 20***, which defines a contract of guarantee as;

> ***"An accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability must exist or be contemplated".***

Further reliance is placed on ***Cheshire and Fifoot, Law of Contract, 4th Edition at page 25*** which states that;

> ***"A contracting party, unlike a tort feasor, is bound because he has agreed to be bound. Agreement however, is not a mental state, but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said, or written or done".***

The plaintiff submits that as a guarantee is a contract between a creditor and a surety, both parties are bound by the obligations under the contract. That this therefore means that upon full repayment of the loan, the surety should have been discharged, and the collateral that was provided under the agreement returned within the stipulated contract period. Thus, failure to return the collateral as agreed, amounts to breach of contract.

The defendant on the other hand concedes in the submissions that it misplaced the plaintiff's certificate of title. It however denies that the plaintiff is entitled to damages for loss of business opportunities by way of lease, rent or sale of the property, as the property for whose certificate of title was lost, was subject of a caveat.

Reliance is placed on ***Section 79 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***, stating that if provides for

the effect of a caveat on dealings on a property. The said section provides that;

"79. So long as a caveat in Form 8 remains in force, the Registrar shall not make any entry on the Register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such caveat:

Provided that nothing herein shall prevent the completion of the registration of an instrument which has been accepted for registration before the receipt of the caveat".

That this position was reiterated in the case of ***Construction and Investment Holdings Ltd v William Jacks and Co. (Zambia) Ltd*** [(3)]. The defendant submits that from 14th April, 2014 to 18th May, 2016, the period under which the plaintiff claims loss of business opportunities, the property was subject of a caveat, and therefore no transactions could be registered on the property.

The defendant further submits that in order for the plaintiff to claim damages for negligence, he has to show that he has suffered actual loss, damage or injury. In support of this submission, reliance is placed on the case of ***Mulendema v Zambia Breweries PLC*** [(5)] where the court of appeal stated as follows;

"Negligence alone does not give rise to a cause of action; it must be accompanied by damage or injury suffered as a result of that negligence....ingredients necessary to prove negligence namely, a duty to care owed, breach of that duty and the consequential damage must be proved, and are not separate from each other".

It is submitted that the defendant owed the plaintiff a duty of care to keep his certificate of title in safe custody. That while the defendant was negligent in losing the plaintiff's certificate of title, the plaintiff has not suffered loss, damage of injury as a result of that negligence, as the property was subject of a caveat, in any event, and the companies that the plaintiff purported to have lost business opportunities with do not exist, as shown at page 4 of the defendant's bundle of documents.

It will be noted that the plaintiff in his submissions states that his claim is anchored on breach of contract, as the guarantee that he executed is founded in contract, and not on the law of tort, as submitted by the defendant. The plaintiff argues that the defendant was under contractual obligation to release the certificate of title to him within forty eight (48) hours, upon Christine Kasonde, the principal debtor, repaying the loan with the defendant.

The defendant concedes that it did not do so. Therefore, it was clearly in breach of the contract of guarantee. While it may be true that loss of the plaintiff's certificate of title amounted to negligence, and which may have entitled the plaintiff to commence a suit based on negligence, he has founded his action in contract. The plaintiff has by his evidence and documents alleged that the loss of the original certificate of title for his land resulted in failed business opportunities.

He referred to the failure to take part in the bids that the Lusaka City Council had advertised, which are at pages 4-5 of his bundle of documents, dated 9th July, 2014 and 6th August, 2014 respectively. Both these adverts inviting tenders had conditions that a bid was to be accompanied by a bid security of not less than two (2) percent bank certified cheque and three (3) percent from insurance of the bid sum. The

bids were to be submitted not later than 7th August, 2014 and 3rd September, 2014 respectively.

The guarantor identification which is dated 24th November, 2010 is at pages 1-2 of the plaintiff's bundle of documents. At page 7 of the plaintiff's bundle of documents is a letter dated 21st August, 2014, which shows that Christine Kasonde repaid the loan on 8th August, 2014, and that the plaintiff had not be given back his certificate of title, within forty eight (48) hours of that date, as per the conditions of the defendant.

Therefore, in terms of the bids at the Lusaka City Council, the plaintiff may have had opportunity to participate in the second one, had the certificate of title been released within forty eight (48) hours after the loan had been repaid on 8th August, 2014.

As for the agreements to lease the plaintiff's land, the letter from INF Limited at page 6 of the plaintiff's bundle of documents is dated 15th August, 2014, and it makes reference to a meeting that the plaintiff held with that company on 9th August, 2014, over lease of the plaintiff's property for ten (10) years. The letter invited the plaintiff to go to INF Limited and sign a lease agreement, and that he was required to provide two (2) witnesses and the original certificate of title and his national registration card. The other terms of the agreement are also outlined on that document.

Then there is the draft agreement that the plaintiff had prepared in anticipation that a Chinese company would lease his premises, which is at pages 21-25 of the plaintiff's bundle of documents, with the covering letter at page 20, dated 18th March, 2017. That lease agreement also

proposed that the plaintiff's premises be leased for a period of ten (10) years, commencing 18th March, 2017.

The defendant argues that even if it had not lost the title deed, the plaintiff would not have been able to lease out the property, as the property was subject of a caveat that Badiye Limited had registered on the property on 14th April, 2014, as seen at page 1 of the defendant's supplementary bundle of documents.

Indeed, the Lands Register at page 1 of the defendant's bundle of documents shows that Badiye Limited on 14th April, 2014 placed a caveat on the plaintiff's property. This caveat as can be seen at page 2 of the said defendant's supplementary bundle of documents was withdrawn on 18th May, 2016.

At entry No 5, at page 2 of the said bundle of documents, an entry was made on 25th October, 2016 that the original certificate of title had been lost and a duplicate was issued, after advertisements had been placed in the Zambia Daily Mail on 25th and 26th August, 2014, and a gazette notice had been issued on 26th August, 2014.

Entry No 6 on the same page shows that the assignment between the plaintiff and Badiye Limited was registered on 15th July, 2015, for 3557 square meters, out of the 2.4620 hectares of the plaintiff's land. This translates into 0.3557 hectares. Therefore, Badiye Limited had bought only a small portion of the plaintiff's land, and had placed a caveat on the entire land.

There is no evidence on record to show whether at the time INF Limited viewed the plaintiff's property before it wrote the letter to the plaintiff on 15th August, 2014 which is at page 6 of the plaintiff's bundle of

documents, Badiye Limited was on the land. Even if Badiye Limited had been on the land, and INF Limited would have had notice of Badiye Limited being there, and if the plaintiff had discovered the caveat that Badiye Limited had placed on the property at the time that INF Limited wanted to lease the land, Section 81 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia provides for the procedure for the removal of a caveat.

Thus, Badiye Limited not having bought the whole of the plaintiff's land, the plaintiff had a right to deal with the rest of land. It has been shown that the defendant failed to give back the plaintiff the certificate of title which prevented the plaintiff from executing a lease with INF Limited.

The letter at page 6 of the plaintiff's bundle of documents shows that INF Limited had offered to rent the plaintiff's land for ten (10) years at US$2000, payable yearly, and it was also to construct two (2) warehouses on the plaintiff's property at a cost of K300, 000.00, which would become the plaintiff's property on expiry of the lease.

The plaintiff lost out on execution of that lease, and he has thereby shown that he suffered loss. In the case of ***Zambia National Building Society v Ernest Mukwamataba Nayunda*** [(4)] it was held in that;

> ***"The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched".***

In the case of ***Appollo Enterprises Limitedv Enock Percy Kavindele*** [(6)], the appellant was employed to construct a house for the respondent,

and there was serious delay in paying monies certified as due, and in reimbursing costs incurred by the contractor in importing certain materials on behalf of the respondent, who had only made available part of the requisite funds.

The appellant terminated the contract, and the respondent delayed to pay the sums due under the contract. The learned Judge awarded judgment to the appellant on the undisputed amount that was certified due under the contract, but without interest and ordered the return of the materials to the employer. The Hon Judge declined to award damages for late or non payment of money which was claimed, as direct losses in the amount of over ZMW100 million as computed by the appellant, against which there was an appeal.

On appeal, the Supreme Court referred to the rule in the case of ***Hadley v Baxendale*** *(1)* where it was stated that;

> ***"We think the proper rule in such a case as the present is this. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, as a probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract,***

which they would reasonably contemplate would be the amount of injury, which would ordinarily follow from breach of contract under the special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract".

Further reference was made in that case to the case of ***Victoria Laundry v Newman*** [(2)] where the Court of Appeal awarded damages to the plaintiffs who were launderers and dyers for loss of general business profits arising from the delay by the defendant to deliver a boiler he had sold them, the defendant being aware of the nature of the plaintiff's business, and their intention to put the boiler into use in the shortest possible time.

That it was held in that case that;

1. ***It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do, as if the rights had been***

observed. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This in contract at least, is recognized as too harsh a rule.

2. ***In cases of breach of contract, the aggrieved party is only entitled to recover that part of the loss actually as was at the time of the contract, reasonably foreseeable as liable to result from the breach.***

3. ***What was at the time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.***

4. ***For this purpose, knowledge possessed, is of two kinds; one imputed, the other actual. Everyone as a reasonable person, is taken to know the ordinary course of things, and consequently, what loss is liable to result from a breach of contract in that ordinary course of things. This is the subject matter of the first rule in Hadley v Baxendale 9 Ex 341, but to this knowledge, which a contract breaker is assumed to possess, whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the ordinary course of things of such a kind that a breach in those circumstances would be liable to cause more loss. Such a case attracts the operation of the second rule so as to make additional loss also recoverable.***

5. ***In order to make a contract breaker liable under either rule, it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of A/B Karlshamns Olijefabriker v Monarch Steamship Company Limited 1949 AC 196.***

6. ***Nor finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge, the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely to result. It is indeed enough to borrow from the language of Lord du Parcq in the same case at page 158, if the loss (or some factor without which it would not have occurred) is a serious possibility or a real danger".***

The Supreme Court stated that these cases have shown that liability can only go up to the extent of reasonable foreseeability, which in turn depends upon knowledge whether actual or reasonably presumed. That Lord Reid in the case of ***Hadley v Baxendale*** noted that the modern rule of tort is quite different from contract, and it imposes a much wider liability.

Thus, in tort, the defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen, even in the most unusual

case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it.

Lord Reid further observed in that case that in contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and then he need not stop to consider in what circumstances the other party will then be held liable to have accepted responsibility in that event.

However, in tort, there is no opportunity for the injured to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual, but nevertheless, foreseeable damage which results from his wrong doing.

The Supreme Court in the ***Appollo Enterprises Limited*** case found that it was not reasonably foreseeable that the delay in paying the contract sums would have lead to various consequences among them, the appellant's overdraft facilities not being available or reduced, thereby restricting the operations of the company, which had even earlier helped the respondent with the purchase of the imported materials.

Further, that the Supreme Court did not see anything that suggested that the respondent knew or must have known that the appellant was depending on him, almost entirely, for its operations in the fashion proposed. That to the contrary, the respondent took the appellant to be very sound in all respects, and that the court saw a lot of merit in the distinction between contract and tort whereby a defendant in tort must take a victim as he finds him (the egg shell skull principle), while a

defendant in contract must only be liable for the clearly foreseeable or contemplated results.

The Supreme Court accordingly found that the losses claimed in that matter were clearly too remote to be within the ambit of losses for which the law would hold the contract breaker liable. In this case, the claim for losses arising from the failure by the plaintiff to lease or indeed sell his property is due to the fact that upon Christine Kasonde paying back the loan that she had obtained from the defendant in November, 2010, and which was guaranteed by the plaintiff by way of deposit of his title deed with the defendant, on 8th August, 2014, the defendant did not give him back the title deed.

The plaintiff alleges that this was in breach of the contractual terms of the contract of guarantee. The defendant only availed the plaintiff a duplicate title deed in 2016. The actual contract of guarantee is not before the court, and I am therefore unable to determine what the parties actually agreed on with release of the title deed, upon the loan being repaid. However, the defendant does not dispute that it was supposed to release the said title deed within forty eight (48) hours of the loan being repaid.

There is no evidence as to whether there were any terms relating to loss of the title deed when it was in the defendant's possession, and what liability would result therefrom, as special conditions in the agreement. That being the position, can it be said that the defendant reasonably foresaw that loss would be occasioned to the plaintiff by its' failure return the title deed to the plaintiff, upon the loan being repaid by Christine Kasonde, within forty eight (48) hours?

The evidence on record shows that the plaintiff pledged the title deed as a third party for someone else's loan, for a period of close to four (4) years, and in my view, in the absence of any special conditions relating to the certificate of title in the guarantee agreement, this entails that the plaintiff was not dependent on the title deed for his business. Therefore, it is my finding that the failure to rent or sell the property as a result of the failure by the defendant to release the title deed promptly, after Christine Kasonde paid the loan, was not reasonably foreseeable.

The contract of guarantee entailed that the plaintiff would be discharged as a guarantor upon Christine Kasonde paying off the loan, entailing that the plaintiff would not be called upon to pay the loan in the event of Christine Kasonde's default to pay, and the property whose certificate of title he had deposited with the defendant being liable to be sold if there was default. The contemplation was not that the defendant would lose the certificate of title, and would be held liable as a result.

Thus, the defendant should not be held liable for the failure by the plaintiff to so lease or sell the property during the period that it failed to give him back the title deed. Further, the draft lease at pages 21-25 of the plaintiff's bundle of documents is dated 18th March, 2017, after the defendant had issued a duplicate title deed to the plaintiff. The plaintiff therefore had a title deed on that date, and he was not prevented in any way from contracting with the Chinese company for a lease.

The claim for the payment of damages in the amount of K500, 000.00 for a period of four (4) years fails, as it was not a loss that was within contemplation when the parties signed the contract of guarantee, and it fails. The claim having failed, it is dismissed, but looking at the

circumstances of the case, I order that each party bears their own costs of the proceedings.

DATED AT LUSAKA THIS 26th DAY OF MAY, 2020

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE