IN THE SUPREME COURT OF ZAMBIA SCZ No. 20 OF 2006

HOLDEN AT LUSAKA Appeal No.139/2004

(Civil Jurisdiction)

BETWEEN:

JANNICE ELIZABETH REEVE	**1st Appellant**
GLADYS CATHERINE PIETERSE	**2nd Appellant**
AND	
LORRAINE CHALCRAFT	**Respondent**

CORAM: Sakala, CJ., Silomba and Mushabati JJS

17th November 2005 and 11th May 2006

For the Appellants: Mr. J. Banda of A.M. Wood and Company with Mr. M. Mwenye of Sharpe Howard and Mwenye Legal Practitioners

For the Respondent: Mr. S. Sikaulu of Jitesh Naik Advocates

JUDGMENT

Sakala, CJ., delivered the Judgment of the Court.

Cases referred to:

1. **Re Trundle [1960] IW.L.R. 1388**
2. **Zambia Safaris Ltd V. Jackson Mbao [1985] ZR1**

3. **Mumba V. Zambia Publishing House [1982] ZR 53**
4. **Bernard Leigh Gadsen SCZ Appeal No.15 of 1992**
5. **Attorney-General for Hong Kong V. Reid and others 1994 1ALL ER 1 at page 4**
6. **McPhail V. Doluton [1970] 2 ALL ER 228 at page 247, [1971] AC 424 at page 457**
7. **Bailes V. Charles Antony Stacey and America Simoes [1986] ZR 83 at page 88**
8. **Zulu v. Avondale Housing Project Ltd [1982] ZR 172**
9. **Attorney-General V. Marcus K Achiume [1983] ZR 1**
10. **Lumus Agricultural Services Co. Ltd and another V. Gwembe Valley Development Co. Ltd (In Receivership) SJZ No 1 of 1999**

This is an appeal against the judgment of the High Court awarding the respondent the sum of £50,548.18 with interest. There is also a cross appeal by the respondent that the judgment, the subject of this appeal, be varied to the extent and in the manner upon the grounds as set out in the respondent's notice of the cross appeal.

For convenience, we shall refer to the 1st appellant and the 2nd appellant as the 1st and 2nd defendants and to the respondent as the plaintiff, which designations they were in the Court below.

The facts of the case as pleaded and testified were that the plaintiff and the defendants are daughters of the late Mr. Hendrick Van Eck. Sometime in 1998, Mr. Van Eck executed a Trust, known as No. 210295, with Ermitage Trustees Limited (now known as Connor Clark Trustees Limited) of Jersey in the Channel Islands. He placed his Insurance Policy in Royal Life Insurance International Limited in the said Trustees. In the Trust, it was provided that upon his death, the Trust funds be for the maintenance of his wife during her life time and that upon her death, the Trust funds be distributed equally to his five daughters.

It was not in dispute that Mr. Van Eck had named all his five daughters in the Trust. It was further not in dispute that Mr. Van Eck had left a Will in which he excluded the plaintiff from benefiting by reason of the fact that he had already given her £100,000.00. It was common cause that before Mr. Van Eck died, he had given instructions to the representative of the Trustees, Mr. Simon Burgess, to cancel the Trust and transfer the monies into Mr. Van Eck's personal account. It was also common cause that by a letter dated 27th February 2001, the daughters agreed to an undertaking and consented that the Trust funds be paid to HSBC Bank Account No. 42433257 in the Isle of Man in the names of the defendants and a Mr. J.F Hicky. It was also common cause that the Trust funds had not been transferred as per Mr. Van Eck's instructions before he

died on 26th December 2000. But the money, in the sum of 33,209.10 Pounds Sterling was only paid into Mr. Van Eck's account on 2nd May, 2001. And on 8th May 2001, the Trust was terminated.

It was also not in dispute that the plaintiff was not given her share in the Trust funds on the ground that the funds had formed part of Mr. Van Eck's estate and that the plaintiff was not entitled to a share under Mr. Van Eck's Will because the plaintiff had already received the sum of £100,000.00 during the life time of Mr. Van Eck.

The case for the plaintiff, as pleaded and testified was that as a result of the defendants' refusal to pay her, her share of the Trust funds, she had suffered damages and loss.

On the other hand, the defendants pleaded and testified that the plaintiff had no right to the share in the funds in the sum of 50,548.18 Pounds Sterling because at the time the deceased wrote his last Will and Testament, he had already issued instructions to his Trustee to close the Trust and transfer the funds into a personal account. Subsequently, by the terms of his Will, the plaintiff was no longer a beneficiary of the Trust funds. It was further contended, on behalf of the defendants, that the Trust monies were, at the time of the death of the deceased, no longer monies in Trust No. 210295 with Connor Clark Trust Limited but were rather monies in an off

shore Bank account directed by the deceased to be divided between the four daughters and for the up keep of his wife.

The learned trial Judge considered the pleadings, the oral and documentary evidence as well as the submissions by learned Counsel on behalf of the parties. The learned Judge found that the evidence on record did not show that Mr. Van Eck executed or signed a Trust document; that the Trust document was signed in the Isle of Man by the Trustees; that there was no Trust in existence executed and or signed by the late Mr. Van Eck; and that there was no Trust Deed in existence at the time of his death. But the Court accepted that the deceased had expressed a wish in writing to create a Trust, and that he had also expressed a wish to cancel his Trust and to transfer his Insurance Policy proceeds in the sum of £296,755.39 to the Trust thereby increasing the original property of £150.

The Court then proceeded to make an assumption that if the Trust did exist, on the basis of the provisions in the Trust Deed relating to increasing its property; it could only be done by an **addendum** under the hand of the Trustees which in this case was not done. The trial Judge found that the Trust Deed was executed outside Zambia and was not authenticated as required by the Zambian laws and that, therefore, the Trust Deed would have been found to be ineffectual and unenforceable if it existed.

In relation to the Will, the Court found that it was not in dispute that the plaintiff was expressly excluded from benefiting under it; and that even if the plaintiff was expressly excluded from its benefits, it did not state that its property included the funds transferred from the Trust, assuming the Trust did exist. According to the Trial Judge, the Will made no mention of the Trust funds, and yet the disputed Trust included the plaintiff as one of the beneficiaries.

According to the trial Judge, the logical place in which the supposed Trust funds were to be put was the "**residue property**" under the Will. After considering the relevant provisions in the Will, the Court found that the plaintiff was one of the five children entitled to participate in the sharing of the proceeds of the "**residue property**" and the remainder of the estate upon the deceased's death. The Court found that under clause 10 of the Will, the plaintiff was entitled as one of the beneficiaries. In the end, Court entered judgment in favour of the plaintiff in the sum of £50,548.18 and made various orders on interest.

The defendants appealed to this Court. They filed a memorandum of appeal containing three grounds:

1) that the Learned Trial Judge misdirected himself on a point of mixed law and fact when he held that the reference to the Bank accounts in Mr. Van Eck's Will did not include funds transferred from the purported Trust;

2) that the Learned Trial Judge misdirected himself on a point of mixed law and fact when he held that the purported Trust funds formed part of the 'residue property' mentioned in the Will of the late Mr. Van Eck's Will, a point which was also not pleaded nor was it a point of contention between the parties; and

3) that the Learned Trial Judge misdirected himself on a point of both mixed law and fact when he disregarded the evidence on record as regards Mr. Van Eck's declared wishes and intentions and failed to impute a Constructive Trust and to apply the equitable principle that states that equity considers to be done that which ought to have been done in respect of the late Mr. Van Eck's instruction to transfer funds to his bank account.

The plaintiff filed a cross appeal based on four grounds, namely:

1) that the Court below erred in law and in fact when it held that there was no Trust Deed in existence at the time of Mr. Van Eck's demise;

2) that the Court erred in law and in fact when it held that there was no addendum;

3) that the Court below erred in law and in fact when it held that the Trust would have been ineffectual and unenforceable; and

4) that the Court below erred in law when it held that the Defendants' witness, Ms Nichola Sharpe-Phiri, DW2, could not be cross-examined on any question of the Trust.

Both learned Counsel filed written heads of argument based on the grounds of appeal and the grounds of the cross-appeal, supplemented by brief oral submissions.

The gist of the written arguments on ground one of appeal is that it was common cause that in his Will, Mr. Van Eck bequeathed all his monies standing to his credit at all his personal bank accounts wheresoever and including the treasury bills with Barclays Bank Zambia Ltd to the defendants and two other sisters and that the plaintiff was excluded from a share in the said monies; and that the evidence in the Court below showed that The Royal Bank of Canada confirmed receiving the monies from the surrender of the Testator's insurance policy as early as the 22nd of November 2000, a date over two weeks before the execution of the Testator's Will and over a month before the Testator's death.

It was submitted, from the foregoing, that on the authority of the case of **Re Trundle**[1], which decided that the phrase "money in the Bank" included uncashed travelers cheques, the phrase "monies at my bank accounts" as stated in clause 7 of the Will should have been interpreted to include insurance monies which were received by The Royal Bank of Canada in November, 2000. And that it was, therefore, a misdirection on the part of the trial Judge to have held that the reference to "Bank accounts" in Mr. Van Ecks Will did not include funds transferred from the purported Trust.

In the oral submissions, Mr. Banda pointed out that according to Clause 7 of the Testator's Will at page 97 of the Record, their argument was that at all time before the Testator's death, the money was in the bank account, meaning that in terms of the Will, the plaintiff was excluded.

Mr. Mwenye in his oral submissions on ground one argued that the manifest error was that not much thought was put to wording in Clause 7 of the Will.

The short summary of the written arguments on ground two of appeal is that a litigant in a case is restricted to what is contained in the pleadings; and that a Judge cannot decide upon issues which the parties have not raised and upon which

there is no contention. In support of these arguments the case of **Zambia Safaris Ltd V. Jackson Mbao**[2], in which this Court rejected a radical departure from the pleaded case was cited. Also cited were cases of **Mumba V. Zambia Publishing House**[3] and **Bernard Leigh Gadsen**[4] and **Halsbury's Laws of England, 4th ed. Vol. 17, para 21.**

It was submitted that the issue as to whether the purported Trust funds formed part of the "residue property" mentioned in the Will of Mr. Van Eck was never pleaded. It was further submitted that the trial Judge erred when he held that the purported Trust funds formed part of the "residue property". In the oral submissions Mr. Banda repeated the submission that the issue of "residue property" was not pleaded.

On ground three of appeal, the upshot of the arguments is that the trial Judge found as a fact that Mr. Van Eck had written (see page 9 of record) canceling the Trust; and that this was confirmed by the Trustees' letter of 15th February 2002 (see page 114). It was submitted that the letter of 15th February established that the Trustees had received Mr. Van Eck's instructions to transfer his money to his designated bank account two months before his death; and that the evidence showed that the Trustees proceeded to execute the instructions of the Testator.

It was pointed out that by letter dated 28th February 2002, (page 116) of the record the Royal Bank of Canada clearly stated that:

> ***"With regard to your final question we had no direct correspondence with your father at the time but on October 31, 2000 we sent an acknowledgement to verifying that we had received his letter and were proceeding towards termination of the trust."***

It was also pointed out that by an electronic mail to the 1st defendant, (see page 110), the Trustees confirmed that they intended to honour the Testator's wish contained in his letter of 19th October, 2000 (page 90 of the record); that the plaintiff agreed in cross-examination that the Testator intended to close and cancel the Trust to have the money in his bank account; and that the plaintiff in fact also admitted that the Trustees had agreed to honour the Testator's wishes to distribute his assets through his bank account.

It was submitted that the evidence established beyond doubt what the intentions of the Testator were; that the circumstances as shown by the evidence infact went further to show that as far as the Testator was concerned the Trust had been liquidated and the money was sitting in his account; that in cross-examination, PW2, Simion Burgess stated that the document dated 30th November 2000, at page 92 of the record of

appeal was hand written made by the Testator referring to the Trust money; and that DW2, Nichola Sharge-Phiri, testified to drafting the Testator's Will and that his instructions to her were that the Trust had been cancelled. It was submitted that having declared the Trust deed void, the trial Judge should have construed a resultant Trust because the Royal Bank of Canada held the proceeds of the cancellation of the Testators Insurance Policy as a constructive Trustee.

It was argued that the surrounding circumstances of the case showed that the intention of the Testator was to cancel the Trust and his settled mindset was that the Trust had in fact been cancelled and that the money held in Trust had been transferred to his account. On surrounding circumstances, Counsel cited the learned author of **Theobold Wills, 12th ed., volume, at page 423** where it is stated:

> ***"The court has not only to construe the will as a piece of English, it has also to apply it to the existing facts. It has to ascertain who the objects of the testators bounty are, and in the case of specific gifts what the subject matter of these gifts is. For this purpose the important distinction must be borne in mind between evidence of the testators intention – for instance declarations by him as to what he meant and surrounding circumstances from which his intentions***

can be inferred. The former evidence is hardly ever, the latter is in most cases admissible."

It was also argued that the evidence on record showed that the Trustees received the Testator's money from the surrender of his insurance as early as November 2000. It was submitted that as constructive Trustees, they should have proceeded to pay the money received to the Testator's account as early as November, 2000, which they did not do contrary to the Testator's declared wishes and intentions.

Other arguments advanced on ground three are that Trusts fall under the realm of equity and equity considers to be done that which ought to have been done; and that the Trustees ought to have transferred the proceeds of cancellation of the insurance policy as early as November, 2000 and their failure to do so caused hardship and equity should come in to consider the transfer of funds to have been done when it was supposed to be done. **Paragraph 752 of Halsbury Laws of England 4th edition volume 48,** was cited in support of these arguments where it is stated:

> ***"Equity looks on that as done which ought to have been done or which is agreed to be done ... The Rule in all cases of the first kind is that what ought to be have been done shall be taken***

> ***as done, a rule so powerful as to change the very nature of things."***

Also the case of **Attorney-General for Hong Kong V. Reid and others** (5) was cited in which it was stated that:

> ***"Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured."***

Further cases cited were **McPhail V. Doluton** (6) in which it was stated:

> ***"... the court, if called on to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions"***

and in **Annie Bailes V. Charles Antony Stacey and America Simoes** (7) where the Court stated:

> ***"The constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience."***

It was submitted that on the evidence before the trial Court, the Court should have imputed a constructive Trust and should have applied the equitable doctrine that equity considers

to be done that which ought to have been done; and that the Court should also have given due regard to the evidence of the surrounding circumstances, which in fact showed that the Testator's view was that the reference to the bank accounts in Clause 7 of the Will included proceeds from the cancellation of his insurance policy.

In the oral submissions, Mr. Mwenye pointed out that the Court should have imputed equitable principles.

In response to ground one of appeal, the summary of the written respondents heads of argument is that the trial Judge did not misdirect himself when he held that reference to Bank Accounts in Mr. Van Eck's Will did not include funds transferred from the Trust; and that by creation of a Trust, a settler or creator of the Trust grants the Trustees the legal ownership of the property placed into the Trust and names beneficiaries who have beneficial ownership. The Book on The Law of Trusts, 4th ed., by D.J. Hayton was cited in support of the submission in which Trust is described as follows:

> ***"For there to be a trust, property must be subject to a trust, so the property will be owned by a trustee or trustees (who may be individuals or companies) or by a nominee on behalf of the trustee..."***

It was further submitted that the legal ownership of the money in the insurance policy which was placed into the Trust

was held by the Trustees; that the fact that the policy was surrendered and money placed from the policy into a bank account did not change the fact that the money was held in Trust and would only cease to be held in Trust upon termination of the Trust; that the bank account in which the money was placed into was an account of the Trustees and not the account of Mr. Van Eck; and that the defendants recognized the fact that the money was still held in Trust after the surrender of the insurance policy by their letter of 6th June 2001, (page 61 of the record of Appeal) when they stated:

> ***"This is to confirm that we have received the sum of GBP303 289.10 into our bank account <u>as payment of the proceeds of this Trust</u>"***

It was pointed out that the further evidence of the defendants recognizing the money as being held in the Trust is in their letter of 27th February 2001, where they stated:

> ***"We the daughters of Mr. Van Eck understand that the trustees of the above named trust have indicated their willingness to distribute <u>the funds in the trust</u> to us. In this event we hereby submit our consent to the transfer of <u>the funds in the Trust</u> to the following account ...."***

It was submitted that the defendants are estopped from claiming that the money was in Mr. Van Eck's Bank Account; and that the case of **Re Trundle** [1] was not applicable to the facts of the present case.

The gist of the written response to ground two is that the trial Judge did not misdirect himself when he held that the Trust Funds formed part of the residue property mentioned in the Will of Mr. Van Eck; that the defendant's Defence clearly pleaded that the funds were no longer subject to the Trust but to the Will of Mr. Van Eck; that paragraphs 8 and 9 of the Defence brought the last Will and Testament of Mr. Van Eck into issue and subject to interpretation; that in paragraph 9 of the Defence, it was clearly stated that the plaintiff was not entitled to the money under the Will as she was specifically excluded; and that the 2nd defendant testified at length on the Will of Mr. Van Eck and therefore, the Court had every right to adjudicate on whether the money formed part of Mr. Van Eck's overseas bank accounts as claimed by the defendants. For the foregoing submissions Counsel relied on the case of **Zulu v. Avondale Housing Project**[8] in which this Court stated:

> ***"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or***

want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."

It was submitted that the case of **Zambia Safaris Ltd V. Jackson Mbao**[2] did not apply as the defendants failed to establish a radical departure from the pleadings; and that a Defence forms part of the pleadings and therefore the Court was on solid ground in making its determination on residue property.

The summary of the written response to ground three is that the trial Judge did not misdirect himself when he disregarded the evidence of Mr. Van Eck's declared wishes and intentions and did not impute constructive Trust and did not apply equitable principles; that Mr. Van Eck's letters at pages 90 and 91 were mere requests to the Trustees to cancel the Trust; and that the Trust was not cancelled by those letters as Clause 18 of the Trust Deed at page 83 of the Record of appeal provided that "The Trust shall be irrevocable."

It was submitted that Mr. Van Eck had no power to terminate the Trust and therefore equity could not consider as done that which ought to have been done.

In the short oral submissions, Mr. Sikaulu highlighted what is contained in the written responses that the Trust was

executed by the Trustees; that Mr. Van Eck executed the letters of wishes; that the Trust was irrevocable; that the Court was entitled to look at the Will which was pleaded in the Defence; and that Mr. Van Eck's letter canceling the Trust before his death had no effect.

The foregoing concludes the summary of the arguments on the grounds of appeal. We now turn to summarize the written heads of argument on the cross-appeal.

The summary of the written heads of argument on ground one of the cross-appeal is that the Court below erred when it held that there was no Trust Deed in existence at the time of Mr. Van Eck's demise; that the Trust Documents exhibited at pages 50 to 55, and 77 to 84 of the Record of appeal formed the basis of the Trust and were valid and still in subsistence at the time of the death of Mr. Van Eck; that the fact that Mr. Van Eck did not sign the Deed on pages 82 to 84 of the Record of Appeal did not invalidate the Deed or make it non-existent; and that it is not in dispute that Mr. Van Eck executed the letter of wishes which must be read with the Deed as being part of the documents that create the Trust.

It was submitted that there is reference to the Trust Deed in the Trustees letter dated 1st December, 2000 (page 93) never disputed by the defendants who responded by a letter of 27th February 2001 at page 56. It was further submitted that after

dismissing the existence of a Trust Deed, the Court contradicted itself by referring to Clauses 3(f) and 18 of the "Trust Deed." It was contended that a Court cannot assume what exists and that the court made further contradictions by reference to Trust Funds. It was submitted that if no Trust existed, the Court would not have made reference to Trust Funds and that the only reason for making reference to Trust Funds was because a Trust existed and money was being held in the Trust. It was submitted that the finding was so perverse that it ought to be set-aside on the authority of the case of **Zulu V. Avonndale Housing Project Ltd** [8]

The oral arguments merely made references to all the documents on the Record of Appeal pertaining to the existence of the Trust and when the Trust was terminated.

The summary of the other arguments on ground one is that having established that a Trust Deed existed, it continued to exist at the time of Mr. Van Eck's death and was an irrevocable Trust as Mr. Van Eck had no power to terminate it.

On ground two of the cross-appeal, the gist of the arguments is that the Court erred when it held that there was no **addendum** as there was no evidence to support this finding; and that the finding must be reversed on the authority of the **Attorney-General V. Marcus K. Achiume,** [9] in which this Court held that an appeal Court will reverse findings of fact

made by a trial Judge if "made in the absence of any relevant evidence or upon misapprehension of the facts." It was submitted that although it was not in dispute that no **addendum** was produced in evidence, it was clear from the facts that the Trustees were holding in Trust in excess of 303,289.10 Pounds Sterling which was released to the defendants.

It was pointed out that it is trite law that civil matters are decided on a balance of probability; and that having established the existence of a Trust holding in excess of 303,289.10 Pounds Sterling, the balance of probability should be tilted in favour of the plaintiff that an **addendum** was done for the Trustees to be holding the said funds. It was submitted that in any case the **addendum** was not in issue and not pleaded. In the short oral submission it was pointed out that the issue of **addendum** was not pleaded by either party.

On ground three of the cross-appeal, the short submissions were that the Court erred when it held that the Trust would have been ineffectual and unenforceable; that the cause of action was not to enforce the Trust but to recover monies released by the Trustees to the defendants; and that the case of **Lumus Agricultural Services Co. Ltd and another V. Gwembe Valley Development Ltd (in receivership)**[10] was of no relevance to this action as the Trustees were not party to this action and the action was not for enforcement of the Trust which had been enforced in the Isle of Man and terminated. It

was also submitted that the duty of the Court was to determine whether the Trust Funds were indeed received on the plaintiff's behalf by the defendants for which the defendants had refused to pay; that whether the Trust was valid or not for use in Zambia is and was irrelevant as the property in the Trust was not held in Zambia or intended to be held in Zambia; that the Trustees did not operate in Zambia and did not intend to enforce or operate the Trust in Zambia or under Zambian law; and that the Trust Deed was not created for use in Zambia.

It was pointed out that paragraph 17 of the Trust Deed at page 83 of the Record of appeal clearly stated that the applicable law shall be the law of the Isle of Jersey. It was submitted that the Trust could only be invalidated under the laws of the Isle of Jersey; that the defendants made no attempt to invalidate the Trust or challenge the powers and authority of the Trustees; and that the defendants had infact recognized the Trust and the powers and authority of the Trustees and were therefore estopped from claiming that it was invalid. The oral submissions repeated the written heads of argument.

The brief written argument on ground four of the cross-appeal is that the Court erred in holding that DW2 could not be cross-examined on any question of the Trust. It was submitted that by calling DW2 to give evidence, the defendants waived the

privilege and the plaintiff was entitled to cross-examine the witness on all matters pertaining to the action.

In response to the arguments on the cross-appeal, Mr. Mwenye submitted that on ground one the trial Judge was on firm ground by holding that there was no Trust Deed in existence at the time of Mr. Van Eck's death.

On ground two of the cross-appeal, Mr. Mwenye pointed out that the actual Trust Deed was for £150 Pounds Sterling and could only have been increased by a written **addendum** which was never produced.

On ground three of the cross-appeal, Mr. Mwenye pointed out that the defendants' position was that there was a Trust by operation of law and not by reason of the Trust Deed.

On ground four of the cross-appeal, Mr. Mwenye pointed out that the Court's refusal to have DW2 cross-examined was an interlocutory order of which the plaintiff was at liberty to appeal but waived her right by not appealing and that at the time DW2 was testifying, the Testator had died and could not therefore waive privilege.

We have addressed our minds to the oral and documentary evidence on record as well as to the detailed written arguments and oral submissions on behalf of the parties on the grounds of appeal and the cross-appeal.

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On ground one of appeal, the complaint is that the trial Judge misdirected himself when he held that reference to Bank Accounts in Mr. Van Eck's Will did not include funds transferred from the purported Trust. The existence of a Will which excluded the plaintiff in the share of the monies standing to the credit of Mr. Van Eck's personal bank accounts was common cause. The arguments of the defendants were that the evidence on record showed that the Royal Bank of Canada confirmed receipt of monies from the surrender of Mr. Van Eck's Insurance Policy as early as the 22nd of November 2000, a date over two weeks before the execution of the Will and over a month before the death of Mr. Van Eck. It was submitted that the existence of a Bank Account and the receipt of the money by The Royal Bank of Canada was beyond dispute. It was contended that on the authority of the case of **Re Trundle**[1] the phrase "monies at my bank accounts" in the Will of the late Mr. Van Eck should have been interpreted to include insurance monies received by The Royal Bank of Canada in November.

The arguments by the plaintiff were that the fact that the policy was surrendered and money from the policy paid into a bank account did not change the fact that the money was held in Trust and would only cease upon termination of the Trust.

Clause 7 of Mr. Van Eck's Will was couched in the following words:

> ***"I HEREBY GIVE all monies standing to my credit at all my personal bank accounts wheresoever and including my Treasury Bills with Barclays Bank of Zambia Limited to the following persons namely Gladys Catherine Pieterse, Janice Elizabeth Reeve, Irene Gwendolene Naylor and Rosemary Peake."***

This Will is dated 14th December, 2000. Mr. Van Eck died on 26th December, 2000. By a letter dated 15th February 2002, The Royal Bank of Canada stated as follows:

> ***"Mr. Van Ecks letter dated 19 October, 2000 requesting the trustees to terminate the trust was received here on 25 October. The trustees took step to liquidate the insurance policy held and GBP296,755.39 was received on 22nd November.***
>
> ***During the period to 2 May 2001 interest of GBP5,933.71 was received on the Bank account. We debited the account with GBP400 in respect of legal costs and our fees for* termination."**

From the foregoing documentary evidence, we are satisfied and agree with the submissions on behalf of the defendants that the phrase "monies at my bank accounts" in Mr. Van Eck's Will should have been interpreted to include insurance monies received by The Royal Bank of Canada on 22nd November 2000 before Mr. Van Eck executed his Will and before he died. It was

therefore a misdirection on the part of the trial Judge to hold that the reference to the Bank accounts in Mr. Van Eck's Will did not include funds from the purported Trust. We therefore allow ground one of appeal.

Ground two of appeal criticizes the finding that the purported funds formed part of the "residue property" mentioned in the Will of Mr. Van Eck. The defendants' arguments were that the issue was not pleaded and was not in contention. The position of the plaintiff on the other had was that the defendants in paragraphs 8 and 9 of their Defence brought the Will into issue and therefore subject to interpretation and adjudication. We agree with this argument. But in dealing with the Will the trial Judge had this to say:

> ***"As regards the Will, it is not disputed that the Plaintiff was expressly excluded from benefiting under it. However, even if the same expressly***
>
> ***excludes the Plaintiff from its benefits, it does not anywhere state that its "property" included the Funds transferred from the Trust – assuming the Trust did exist. The Will makes no mention of the Trust Funds. It will be observed that in the "disputed" Trust, the Plaintiff was included as one of its beneficiaries. If, by excluding the Plaintiff from the benefits under the Will, Mr. Van Eck meant her not to also benefit from the Trust fund, in which he had included her as one***

of the beneficiaries, he would have expressly stated in the Will. It had been argued by the Defence that the reason why the Trust Funds were not specifically mentioned in the Will was because Mr. Van Eck was under the impression (wrongly or otherwise) that the Trust Funds had been transferred to his Bank Account and therefore formed part of his estate under the Will. As the evidence revealed, this was not so because the trust Funds were transferred to his Bank Account five months after his death on 26th December 2000. Clearly therefore, the Trust Funds were still lying in the Trust Fund, assuming that the Trust was in existence, at the time of his death. This being the position therefore, the only logical place in which to put the supposed Trust Funds is the "residue property" which was lying somewhere at the time of Mr. Van Eck's demise and under the control of the Trustees."

What comes out from the above is that even at this stage, despite the ample documentary evidence; the trial Court still doubted the existence of the Trust. But the trial Court preferred to refer to the Trust as "disputed." The Court then went on to point out that the Will made no mention of the Trust Funds. It is correct, as observed by the trial Judge, that the reason the Trust Funds were not specifically mentioned in the Will was because the Trust Funds had, according to the wishes and

intention of Mr. Eck, been transferred to the Bank Account and formed part of the estate under the Will. The Trust Funds could not be mentioned in the Will because, rightly so, the Trust had been terminated by the time of the Will according to Mr. Eck.

In our view, the doubt by the trial Judge, of whether the Trust existed or not led the trial Judge to place the "supposed Trust Funds in the "residue property."

For the avoidance of any doubt, we must state at this juncture that on the evidence on record, both oral and documentary, we accept that the Trust had been created, but signed not by Mr. Van Eck but by his agents. We also accept that the Trust was cancelled through Mr. Van Eck's instructions to his agents but before he died. His monies went into his bank account and became part of his estate. The issue of authentication of the Trust Document as alluded to by the trial Judge did not arise because the money was outside Zambia and was being administered outside Zambia.

We are satisfied that although the issue of the Will was raised and pleaded in the Defence, the question of "residue property" was not in contention. Clause 7 of the Will excluded the plaintiff and Clause 16 explained why the plaintiff was excluded. The Clause in part stated:

"I add that the lack of share for my daughter Lorraine Chalcraft under this my last Will and

Testament is by way of recognition of the benefits already received by her prior to my death."

For the foregoing reasons we agree that the trial Judge misdirected himself in holding that the purported Trust Funds formed part of the "residue property" mentioned in the Will of Mr. Eck, a point which called for no determination. Ground two of appeal is therefore allowed.

On ground three, the complaint was that the Court misdirected itself when it disregarded the evidence on record as regards Van Eck's declared wishes and intentions and failed to impute a constructive Trust and apply the equitable principle that equity considers to be done that which ought to have been done in respect of the late Mr. Van Eck's instructions to transfer the funds to his bank account. From what we have discussed and accepted in grounds one and two, it becomes unnecessary for us to delve into great detail on the submissions on this ground. Suffice it to mention that the documentary evidence established beyond doubt the wishes and intentions of the Testator. In their submissions, the plaintiff have relied upon Clause 18 of the Trust which provided that:

"This Trust shall be irrevocable." It was submitted that Mr. Van Eck had no power to terminate the Trust. We do not understand the word "irrevocable" to mean that the Trust could not be terminated by the Testator but that it could not be changed or terminated by anybody else. In any case, a Testator

can terminate his Trust by substituting it with a new one. In the instant case, the Testator had specifically requested for the termination of his Trust before he died. These instructions were belatedly carried out.

We agree with the defendants' submission, that the Court having declared the Trust Deed void, which it was not, should have at least construed a resultant Trust because The Royal Bank of Canada held the proceeds of the cancellation of the Testators Insurance Policy as a constructive trustee.

Indeed, the surrounding circumstances of the case showed that the intentions of the Testator was to cancel the Trust and his mindset was that the Trust had been cancelled and money transferred to his account.

This, in our view, was a proper case in which the principles of equity should have been applied. **In Paragraph 752 of Halsbury's Laws of England, 4th Ed., Vol. 48**, it is stated:

> ***"Equity looks on that as done which ought to have been done or which is agreed to be done..... The Rule in all cases of the first kind is that what ought to have been done shall be taken as done, a rule so powerful as to change the very nature of things."***

We have no cause to depart from this maxim in this case.

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In **Attorney General for Hong Kong V. Reid and others,**[5] the Court stated:

> ***"Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured."***

In **Annie Bailes V. Charles Antony Stacey and America Simoes**[7] the Court stated:

> ***"The constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience."***

We accept these principles of equity. We agree that on the evidence before it, the Court should have imputed a constructive trust and should have applied the equitable doctrine that equity considers to be done that that ought to have been done. For the reasons stated, ground three of appeal is also allowed.

In conclusion, all the grounds of appeal having been successful, the whole appeal is allowed.

As to the cross appeal, it is clear from our discussion of the three grounds of appeal that had the Court properly directed itself on the evidence, it should have found that Mr. Eck had created a Trust which was signed by his agents; that the Trust

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was cancelled through his instructions before he died; and that money went into his Bank account and became part of his estate. Thus, although for wrong reasons, the Court did not err when it held that there was no Trust Deed in existence at the time of Mr. Eck's demise.

The first ground of the cross-appeal cannot, therefore, succeed. It is dismissed.

On ground two of the cross-appeal, the argument is that the Court erred in holding that there was no **addendum**. In dealing with the issue of addendum, the Court had this to say:

> ***"It has also been contended that Mr. Van Eck had expressed a wish to cancel his Trust and transfer his Insurance Policy proceeds - £296,755.39 to the Trust thereby increasing the "original property" of £150.00. Assuming that the Trust Deed, did indeed exist, did it indeed receive this sum of £296,755.39? The Defence Counsel has strongly argued that it did not and that if it did, then the transfer was void on account of the fact that there was no addendum to change the character of the Trust by increasing its property from £150.00. Indeed Clause 3 (f) of the Trust Deed states that:***
>
> *"The Original Property or other property which may hereafter be transferred or paid to or into the control of*

or otherwise vested in and accepted by addendum by the Trustee to hold on terms of this Trust".

Further, Clause 18 of the Trust Deed stipulates that "This Trust shall be irrevocable'. So, even if the Trust did exist as one created by Mr. Van Eck as the Settlor, same could only be effectively changed by addendum under the hand of the Trustees. This was not done."

On behalf of the plaintiff, the submission was that the **addendum** was not in issue as both the plaintiff and the defendants conceded by their pleadings that the money in issue was held in Trust; the only issue of contention, being whether the Trust was cancelled or not. On behalf of the defendants, it was also submitted that the issue of the **addendum** was not pleaded. The issue was, indeed, not pleaded. But on the evidence on record, **addendum** or no **addendum**, the Trust received the money in issue, which was subsequently released to the defendants. We agree that the Court erred in holding that there was no addendum.

Ground two of the cross-appeal is therefore allowed.

The third ground of the cross-appeal is that the Trust would have been ineffectual and unenforceable. We totally agree with the submissions on behalf of the plaintiff on this ground that the cause of action was not to enforce the Trust but to recover the monies released by the Trustees to the

defendants.. We also agree that the case of **Lumus Agriculatural Services Co. Ltd and another**[10] relied upon by the trial Judge in relation to the need for authentication of documents executed outside Zambia was irrelevant as the validity of the Trust was not in issue. Ground three of the cross-appeal is also allowed.

The fourth ground of the cross-appeal is that the trial Judge erred when he held that the defendant's witness, Ms. Nichola Sharpe-Phiri, DW2, could not be cross-examined on any question of the Trust. We agree that the plaintiff was entitled to cross-examine DW2. But the trial Court's judgment did not centre on the evidence of DW2. Above all, whether the plaintiff cross-examined or did not cross-examine DW2, they were still successful in the Court below. We find no merit in ground four. We are surprised that it should have been raised at this stage. It is dismissed

The cross-appeal is successful on grounds two and three relating to the findings on addendum and authentication of the Trust. It is unsuccessful on grounds one and four relating to the finding of non-existent of the Trust at the time of Mr. Van Eck's demise and to non cross-examination of DW2. However, the successful grounds of the cross-appeal do not go to root of the judgment cross-appealed and do not affect the outcome of the appeal. The cross-appeal is therefore dismissed.

The main appeal having been successful on all the three grounds, the judgment of the trial Court is accordingly set aside. The whole appeal is allowed.

On the facts of this case, and the plaintiff having been successful on two grounds, we make no order as to costs. Each party will bear its own costs.

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E.L. Sakala

CHIEF JUSTICE

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S.S. Silomba

SUPREME COURT JUDGE

.....

C.S. Mushabati

SUPREME COURT JUDGE