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SCZ Judgment No. 47/2014

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 102/2007
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MUSAKU MUKUMBWA	**APPELLANT**
AND	
RODY MUSATWE	**1ST RESPONDENT**
NORTHERN BREWERIES LIMITED	**2ND RESPONDENT**
KAILANDE TRADING LIMITED	**3RD RESPONDENT**

Coram: Chibesakunda, Ag. CJ, Wanki, JS and Lengalenga, Ag. JS, on 10th July, 2014 and 31st October, 2014

For the Appellant:	No appearance
For the 1st Respondent:	No appearance
For the 2nd Respondent:	Mr. L. Zulu of Messrs. Tembo Ngulube and Associates
For the 3rd Respondent:	No appearance

J U D G M E N T

Chibesakunda, Ag. CJ, delivered the Judgment of the Court.

Cases referred to:

1. ***Russell v. Russell (1783) 1 Bro. C.C. 269;***
2. ***Zambia National Commercial Bank Limited v. Dismass Mwila, Appeal No. 94 of 1999;***
3. ***Paul v. Nath Saha (1939) 2 All ER 737;***
4. ***Dunlop v. Selfridges (1915) A.C 847;***
5. ***Attorney-General v. Achiume (1983) ZR 1;***
6. ***Wise v. Harvey Limited (1985) ZR 179;***

7. ***Gadsen v. Vincent Joseph Chila, SCZ Appeal No. 15 of 1992;***
8. ***Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172; and***
9. ***Re Wallis & Simmonds (Builders) Ltd [1974] 1 All ER 561.***

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Legislation referred to:

1. ***Companies Act, Chapter 388 of the Laws of Zambia.***

Works referred to:

1. ***Coote on Mortgages (9th edn, 1927) Vol 1, p 86; and***
2. ***Halsbury's Laws of England, (4th edn), Volume 32.***

This is an appeal from a decision of the High Court delivered on 17th May, 2006. This followed an action by the Appellant commenced by way of a Writ of Summons and a Statement of Claim.

The facts that are not in dispute, in this matter, are that the Appellant is the legal proprietor of house number 10942/181, Kuomboka, Chawama West, Lusaka (hereinafter called "the property"). That the 1st Respondent is a businessman and majority shareholder in the 3rd Respondent. That sometime in 1996, the Appellant and the 1st Respondent entered into a business partnership whereby they started obtaining beer, from the 2nd Respondent, on credit, for resale.

The Appellant's case, as can be gathered from his Statement of Claim and testimony before the trial Court, is that on or about 8th March, 1996, the 1st Respondent borrowed his Certificate of Title relating to the property. That the 1st Respondent used the

Certificate of Title as security for a personal loan from the 2nd Respondent. That the said loan was in form of crates of beer.

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It is the Appellant's case that, notwithstanding the fact that he has never had any business dealings with either the 1st Respondent or the 2nd Respondent, the duo has refused to give him back his Certificate of Title. That as a result, he has suffered loss amounting to K40, 000,000.00 per annum totaling K200, 000,000.00 as at October, 2001. Accordingly, he claimed for, *inter alia,* a declaration that he is the legal owner of the Certificate of Title in question and an order for its immediate restoration to him.

Contrary to what he said in his Statement of Claim, his *viva voce* evidence was that he was involved in a business partnership, with the 1st Respondent, as agents for the 2nd Respondent. That the 2nd Respondent used to sell beer, to the 1st Respondent, on credit. That subsequently, the 1st Respondent pledged his Certificate of Title as security for a consignment of beer obtained from the 2nd Respondent. That he permitted the use of his Certificate of Title on the agreement that the two would share profits realised from the beer sales.

As for the 1st Respondent, he was the sole witness, on his own behalf and on behalf of the 3rd Respondent. The gist of his evidence was that when he entered into the business partnership

with the Appellant, they agreed that they would be sharing profits equally. That later on, the Appellant informed him that he wanted to start another business. That he did not know how the Appellant's Certificate of Title found itself with the 2nd Respondent.

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The 1st Respondent proceeded to testify that at one time he went to the 2nd Respondent, with the Appellant, where they were told that they owed the 2nd Respondent some money. That he disputed the said debt on the ground that the 2nd Respondent did not produce any bounced cheques, as required by their prevailing agreement, at the time.

The 2nd Respondent filed an amended Defence and Counter-claim where it stated that, at the time it started doing business with the Appellant and the 1st Respondent, the duo had held themselves out as Shareholders and Directors in the 3rd Respondent Company. That the Appellant and the 2nd Respondent jointly applied for, and were given, a credit facility for the supply of 500 cases of beer valued at K37,453,650.00, by the 2nd Respondent. That, as consideration for the said credit facility; they pledged the Certificate of Title in issue as collateral. That as at 30th November, 2000, the Appellant and the 1st Respondent owed the 2nd Respondent K37, 453,650.00.

Accordingly, the 2nd Respondent filed a counter-claim for K37, 453,650.00 against the Appellant. During trial, it did not call any witness.

On the evidence before him, the learned trial Judge held that House No. 10942/181 Kuomboka, Lusaka, is the property of the Appellant. With regard to whether or not the 2nd Respondent was

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wrongfully holding the Appellant's Certificate of Title, the trial Court held that the Appellant, the 1st Respondent and the 3rd Respondent owed the 2nd Respondent K37, 452,650.00. That accordingly, the 2nd Respondent was legally holding the Appellant's Certificate of Title as security for the said debt.

On the 2nd Respondent's counter-claim, the Court below entered judgment, against the Appellant, in the amount of K37,453,650.00, with interest, from the date of accrual of the said amount, to the date of judgment at short term bank deposit rate, and thereafter, at bank lending rate until full payment.

The Appellant has appealed, against the judgment of the trial Court, on the following grounds:

1. **that the learned trial Judge erred in point of fact and in point of law in that the learned trial Judge failed to see that the truth of the matter was that the Appellant never dealt in any business of trading in beers with the 2nd Respondent;**

2. **that the learned trial Judge erred in point of law and in point of fact in that the learned trial Judge failed to see the fact that the business of trading in beers which existed in the present case was only that between the 1st and 3rd Respondents and the 2nd Respondent in which the Appellant was not a part;**

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3. **that the learned trial Judge erred in point of law and in point of fact in that the learned trial Judge totally exempted and excluded the 2nd Respondent from giving any viva voce evidence during the hearing of this matter;**
4. **that the learned trial Judge did not decide upon the issues raised by the pleadings in the present case; and**

5. **that the learned trial Judge erred in point of law and in point of fact when the learned trial Judge held that there was a "joint business venture" between the Appellant and the 1st Respondent in liquor distribution business on a 50/50 sharing basis to be conducted through the 3rd Respondent and the joint venture secured a credit facility in the line of its business from the 2nd Respondent.**

In support of the foregoing grounds of appeal, Counsel for the Appellant, Messrs. Kasonde and Company, filed written heads of argument on 21st October, 2009. However, when the matter came up, before us, for hearing, neither the Appellant nor his lawyers appeared.

Counsel for the Appellant argued grounds one and two together. The gist of Counsel's argument was that the Appellant never dealt in any business of beer trading with the 2nd Respondent. Counsel maintained that there was no evidence on the record of appeal to support the learned trial Judge's finding that the

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Appellant and the 1st Respondent operated under a joint business venture. Counsel contended that accordingly, the deposit of the Appellant's Title Deeds could not have created an equitable mortgage. In Counsel's view, for an equitable mortgage, by way of deposit of Title Deeds, to be created, the borrower must deliver Title Deeds relating to his or her own land and not the land of a third party. To reinforce the foregoing arguments, Counsel referred us to the cases of ***Russell v. Russell*****(1)**; ***Zambia National Commercial Bank Limited v. Dismass Mwila*****(2)**; ***Paul v. Nath Saha*****(3)**; and ***Dunlop v. Selfridges*****(4)**.

On ground three, Counsel contended that the learned trial Judge misdirected himself when he exempted the 2nd Respondent from giving any *viva voce* evidence during trial. According to

Counsel, by exempting the 2nd Respondent from giving *viva voce* evidence, the learned trial Judge showed incredible bias in favour of the 2nd Respondent. To reinforce his arguments, Counsel referred us to this Court's decision in ***Attorney-General v. Achiume***[(5)].

Coming to ground four, Counsel argued that the Defence filed on behalf of the 1st and the 3rd Respondents, in the Court below, was shallow and did not disclose any reasonable defence. Relying on the authority of ***Wise v. Harvey Limited***[(6)], Counsel asked this Court to strike out the 1st and the 3rd Respondents' Defence. Counsel also cited ***Gadsen v. Vincent Joseph Chila***[(7)]**,** to further augment his submissions.

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With regard to ground five, Counsel contended that contrary to the finding, by the learned trial Judge, there was no evidence to establish that there was a joint business venture between the Appellant and the 1st Respondent. According to Counsel, the expression 'joint business venture' was only introduced by Counsel for the 2nd Respondent in their submissions before the Court below.

On the basis of the foregoing submissions, Counsel has asked this Court to allow the appeal.

The 1st and 3rd Respondents did not appear before us when this matter came up for hearing. Their Counsel, too, did not appear. They did not equally file any heads of argument.

Counsel for the 2nd Respondent, Mr. Zulu, filed written heads of argument. When he appeared before us, he indicated that he would entirely rely on his heads of argument. In opposing grounds one and two, Mr. Zulu argued that the Appellant's own testimony, before the Court below, shows that the Appellant and 1st Respondent operated a business partnership whereby they obtained beer, on credit, from the 2nd Respondent.

On ground three, Mr. Zulu argued that the learned trial Judge did not exempt the 2nd Respondent from giving evidence in the Court below. He maintained that there is nowhere on the record of appeal where the learned trial Judge made such an order. According to Counsel, the 2nd Respondent simply opted to rely on

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the documentary evidence before the trial Court. Counsel, therefore, distinguished the facts of the ***Attorney-General v. Achiume***[5] case from the facts of the instant case.

Coming to ground four, Mr. Zulu submitted that the learned trial Judge comprehensively decided on the issues raised in the Appellant's pleadings.

Lastly, on ground five, Mr. Zulu repeated his arguments in opposition to grounds one and two. On the authority of section

203(3) of the Companies Act, Cap 388, Counsel added that since the Appellant had held himself out as a director of the 3rd Respondent; he was liable to pay the debt incurred by the 3rd Respondent.

We have painstakingly considered the evidence on the record of appeal and the arguments advanced by both Counsel for the Appellant and Counsel for the 2nd Respondent. We have also studied the judgment appealed against. We propose to start by deciding on grounds one, two and five, together, because they have raised interrelated issues. We will then deal with grounds three and four seriatim.

In support of grounds one, two and five, Counsel for the Appellant have argued that, contrary to the findings by the Court below, the Appellant never dealt in any business of trading in beers with the 2nd Respondent. Counsel has faulted the trial Court for

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having found that there was a joint business venture, between the Appellant and the 1st Respondent, for the sale of beer obtained from the 2nd Respondent.

We must state from the outset that grounds one, two and five, in our view, have attacked the learned trial Judge’s findings of fact. This Court has, in a plethora of cases, pronounced itself on the grounds on which we can reverse a trial Judge, sitting

alone without a jury, on findings of fact. Before this Court can overturn findings of fact, made by a trial Court, we would have to be satisfied that the said findings were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial Court, acting correctly, could reasonably make. (See ***Wilson Masauso Zulu v. Avondale Housing Project Limited***[(8)], at page 176).

It is our firm opinion that, in the instant case, there are no grounds upon which we can reverse the trial Court's findings of fact, attacked by the Appellant, in grounds one, two, and five. The evidence on the record of appeal, in our view, clearly establishes that the Appellant and the 1st Respondent entered into a business partnership whereby they obtained beers from the 2nd Respondent for resale. They may not, themselves, have called it 'a joint business venture' but, in our view, it actually was.

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Our holding, that there was a joint business venture between the Appellant and the 1st Respondent, is well founded on the Appellant's own testimony before the Court below. At page 31 of the record of appeal, in response to a question as to whether he knew the 1st Respondent and the 2nd Respondent, the Appellant stated that he knew them because he did business with them. That he and the 1st Respondent worked together, as agents for

the 2nd Respondent, in reselling beer obtained on credit, by the 1st Respondent, from the 2nd Respondent.

A further examination of the Appellant's testimony establishes that his business partnership with the 1st Respondent was based on an agreement that the duo would share profits realised from the beer sales. In response to a question by the learned trial Judge, the Appellant unequivocally said, at page 32 of the record of appeal, that he and the 1st Respondent surrendered his Certificate of Title, to the 2nd Respondent, in the hope that the 2nd Respondent would supply beer to them.

From the foregoing, we find it very difficult to appreciate Counsel for the Appellant's contention that the Appellant never dealt in any business, of selling beer, in partnership with the 1st Respondent. On the basis of the Appellant's own testimony, we are inclined to agree with the trial Court that he operated a joint business venture, with the 1st Respondent, by which they obtained beer, on credit, from the 2nd Respondent. We further agree, with

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the Court below, that the Certificate of Title in question was deposited, with the 2nd Respondent, as security for the credit facilities advanced by the 2nd Respondent to the joint business venture.

In fact, a further examination of the record of appeal establishes that the Appellant had earlier, in an application for a credit facility from the 2nd Respondent, held himself out as a Director in the 3rd Respondent. The said application appears on page 204 of the record of appeal. A cursory look at that application establishes that it listed the Appellant and the 1st Respondent as Partners/Directors in the 3rd Respondent. That the Certificate of Title was forwarded to the 2nd Respondent under the said application.

On 4th December, 1996, the 2nd Respondent wrote a letter, addressed to the Appellant, where it acknowledged receipt of the Certificate of Title. An examination of the record of appeal establishes that there is no evidence to prove that the Appellant, at any time, questioned why the 2nd Respondent had addressed the 4th December, 1996 letter to him.

From the foregoing, we are of the view that the Appellant indeed held himself out to the 2nd Respondent, as a Partner/Director in the 3rd Respondent Company. It is trite law that where a person holds himself or herself out, or knowingly allows

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himself to be held out, as a director of a company, that person shall be deemed to be a director for the purposes of all duties and liabilities imposed on the directors. (See section 203(3) of the ***Companies Act, Cap 388***).

In the premises, the learned trial Judge's conclusion, that the Appellant operated a joint business venture with the 1st Respondent, through the 3rd Respondent Company, was solidly founded on the evidence before him. It follows that the submission by Counsel for the Appellant, that there was no valid equitable mortgage created by the deposit of the Appellant's Certificate of Title, is untenable. It is trite law that an equitable mortgage is constituted merely by the deposit of title deeds as security. The nature of a lien created by the deposit of title deeds is described in ***Coote on Mortgages (9th edn, 1927) vol 1, p 86,*** in a passage cited by Templeman J in ***Re Wallis & Simmonds (Builders) Ltd***[(9)] at page 564, as follows:

> **"A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit, operates as an equitable mortgage or charge, by virtue of which the depositee acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have**
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> **this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the Court would infer the**

intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown and the delivery would be sufficient part performance of such agreement….”

Even assuming that the debt, in relation to which the Certificate of Title was deposited with the 2nd Respondent, was solely owed by the 1st Respondent, we still hold that the deposit created an equitable mortgage. This is so because in his statement of claim and *viva voce* evidence, the Appellant clearly testified that he gave the Certificate of Title, to the 1st Respondent, so that he could use it to obtain beer on credit from the 2nd Respondent.

Evidently, therefore, the Appellant was aware that his Certificate of Title would be used as security to obtain beer from the 2nd Respondent. It is settled law that where a third party provides his or her Title Deeds, to be used by another person as security for a debt obtained by that other person, an equitable mortgage is created. The owner of the Title Deeds cannot, therefore, renege and claim the Deeds before the debt secured thereby has been fully paid. To this effect, the authors of ***Halsbury’s Laws of England, (4th edn), Volume 32***, have said, in paragraph 419, that-

> **“A good security in equity may be created by the deposit of title deeds of freehold or leasehold property. <u>The deposit may be to secure the debt of a third person</u>.”** (Emphasis ours).

A case in point, in this regard, is the celebrated English case of ***Re Wallis & Simmonds (Builders) Ltd***[(9)], where W, a director of W Ltd, told P, a director of P Ltd, that W Ltd was in desperate financial straits and had been refused a loan by its bankers on the security of certain property (‘the London Road property’) owned by W Ltd. Subsequently, it was agreed between W and P, subject to contract, that P Ltd would purchase certain other property (‘the Fareham property’) for £20,000. That P Ltd would immediately pay a deposit of £10,000 towards the purchase price and that the title deeds of the London Road property would be lodged with P Ltd’s solicitors until the sale of the Fareham property had been completed or the £10,000 repaid to P Ltd.

The title deeds were duly deposited with the solicitors. The Fareham property was not in fact owned by W Ltd but by another company, H Ltd, of which W was also a director and which was closely associated with W Ltd. P Ltd paid the £10,000 by a cheque drawn in favour of W Ltd’s bank. The cheque was handed to W, on the understanding that it would be treated as the £10,000 deposit payable to H Ltd for the Fareham property and that, by the direction of H Ltd, the £10,000 would be paid into W Ltd’s bank

account. The sale of the Fareham land was not completed and W Ltd went into liquidation. It was common ground that the £10,000 was owed to P Ltd by H Ltd and not by W Ltd. On a summons by the liquidator of W Ltd, P Ltd claimed, *inter alia*, that since that debt was owed by H Ltd and not by W Ltd, the deposit of the deeds by W Ltd did not create an equitable charge but merely a lien on the deeds themselves.

Delivering his judgment, Templeman, J said the following:

"But in my judgment what I am now being asked to do is not to make an extension of the doctrine; in my view the doctrine is that as a general rule a deposit of title deeds to secure a debt creates a charge on the land; it does not make any difference whether the debt is owed by the debtor or whether it is owed by somebody else….

Then counsel for the Pinhorn Company says there is no authority which clearly shows that the doctrine applies not only to a debt of the owner providing the deposit, but also the debt of a third party. He referred me to passages in Coote on Mortgages where the editor refers to debts owed by a person who deposits the title deeds, but that of course is usually what happens; it is more common for a man to deposit title

deeds for his own debt than for the debt of anybody else. The fact that there is no case which

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directly decides that the general rule applies when title deeds are deposited to secure a debt no matter who is the principal debtor, may be explained by the fact that it was too obvious; and as from the close of this case, there will be authority. So I reject counsel's first submission."

Taking a leaf from Templeman, J's decision in the ***Re Wallis & Simmonds (Builders) Ltd***[(9)] case, and in view of the evidence we have already discussed supra, we hold that Counsel for the Appellant has not established any ground upon which we can reverse the learned trial Judge's findings of fact, attacked by grounds one, two and five.

Accordingly, grounds one, two and five must immediately fail.

Let us now consider ground three. Counsel for the Appellant has argued that the trial Court misdirected itself when it exempted the 2nd Respondent from giving any *viva voce* evidence during the hearing of this matter. Counsel has submitted that the learned trial Judge thereby showed incredible bias in favour of the 2nd Respondent.

After painstakingly examining the record of appeal, we agree with Mr. Zulu that there is no order or other like directive, by the trial Court, exempting the 2nd Respondent from adducing *viva voce* evidence. Indeed even Counsel for the Appellant has not pointed us to any portion of the record of appeal from which we can deduce an

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order, by the learned trial Judge, exempting the 2nd Respondent from calling its witnesses.

In the premises, we do not see any merit in ground three. We hold that the allegations of bias, against the learned trial Judge, are unfounded. Ground three, too, therefore, must fail.

With regard to ground four, Counsel for the Appellant has submitted that the learned trial Judge did not decide on the pleadings. We find it very difficult to appreciate this ground of appeal. We are mindful of what we said in the ***Wilson Masauso Zulu***[8] case, when we guided trial Courts, at page 176 of our judgment, that they must 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 to finality. In view of what we have already decided under grounds one, two and five, we are of the view that the Court below adequately complied with this Court's guidance in the ***Wilson Masauso Zulu***[8] case.

Accordingly, ground four equally lacks merit and we dismiss it forthwith.

Notwithstanding the fact that we have dismissed all the five grounds of appeal, we are of the considered opinion that the final decision of the trial Court, that the debt owed to the 2nd Respondent must be paid by the Appellant alone, was perverse. The evidence on record, and the learned trial Judge's own findings of fact, clearly

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establish that the debt of K37, 453,650.00 was accrued by, not only the Appellant, but also the 1st Respondent.

We have already held, elsewhere in this judgment, that the Appellant and the 1st Respondent operated a joint business venture through which they obtained beer, on credit, from the 2nd Respondent. In his evidence, the 1st Respondent accepted that he worked in partnership with the Appellant in the said beer selling business. He told the trial Court that they used to obtain beer, from the 2nd Respondent, on credit. In cross-examination, at page 61-62 of the record of appeal, the 1st Respondent told the trial Court that the application for a credit facility from the 2nd Respondent was made in the name of his company, the 3rd Respondent. That, although the Appellant did not have any shares in the 3rd Respondent, they agreed that they would be sharing profits equally.

A study of the learned trial Judge's judgment establishes that on the evidence before him, he found that the 1st Respondent was evasive on the question as to whether the debt owed to the 2nd Respondent was discharged before his joint business venture with the Appellant ended. The trial Court, therefore, found that the business venture failed to discharge the credit facility and that as at December, 2000, the outstanding amount was K37, 453,650.00.

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From the foregoing, we are of the firm opinion that sustaining the trial Court's holding, on the 2nd Respondent's counter-claim, would occasion serious injustice to the Appellant. It would also lead to undue enrichment on the part of the 1st Respondent.

Accordingly, we reverse the learned trial Judge's order on the counter-claim. Instead, we order that the debt of K37, 453,650.00 must be paid, by both the Appellant and the 1st Respondent, in equal proportions. The said debt shall accrue interest, from the date of the counter-claim to the date of this judgment, at the average short term Bank deposit rate. Thereafter, up to date of settlement, we award interest, at the current lending rate, as determined by the Bank of Zambia.

In the circumstances of this case, we order each party to bear their own costs for this appeal.

L. P. Chibesakunda
ACTING CHIEF JUSTICE

M. E. Wanki
SUPREME COURT JUDGE

F. M. Lengalenga
AG. SUPREME COURT JUDGE