SCZ Judgment No. 44 of 2014

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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO135/2009**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

INTERMARKET BANKING CORP ZAMBIA LTD **APPELLANT**

AND

PRICILLA KASONDE **RESPONDENT**

CORAM: Chibesakunda, Ag. CJ, Lisimba and Kaoma, Ag. JJS

On the 6th of May, 2014 and 23rd October, 2014

For the Appellant: No Appearance

For the Respondent: Mr. J. Phiri of Mwaki Associates

JUDGMENT

Kaoma, Ag JS, delivered the Judgment of the Court

Cases referred to:

1. **Davy v Garret (1878) 7 CH 473**
2. **Sablehand Zambia Ltd v Zambia Revenue Authority (2005) Z.R 109**

3. **Patel & another v Monile Holding Company Ltd (1993-94) ZR 20 P1033**

4. **Mazoka and others v Mwanawasa and others (2005) Z.R 138**
5. **Nkongolo Farms Ltd v Zambia National Commercial Bank & others (2007) Z.R 149**
6. **Barclays Bank PLC v O'Brien (1993) 4 ALL ER 417**

Other Works referred to:

1. **Halsbury's Laws of England 4th Edition, Volume 32 para 36**
2. **Rules of the Supreme Court, 1999 Edition Order 18 r. 12(1)(a**

This is an appeal against the ruling of the High Court of 25th June, 2009 dismissing the appellant's claim for repayment of K162,542,085.72 (unrebased) and US$155.00 plus interest advanced to TCM Enterprises Limited and/or foreclosure on the respondent's property used as security for the monies advanced.

The case for the appellant was that TCM Enterprises Limited (the 1st defendant in the court below, and hereinafter referred to as the company) applied for overdraft banking facilities from the appellant on various dates between 26th June, 2005 and 5th January, 2006. The appellant afforded the company the overdraft facilities on condition that as security an equitable mortgage be created in favour of the appellant by way of deposit of Certificate

of Title No. L8052 relating to Subdivision No. 77 of Subdivision A of

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Farm No. 378a Lusaka in the name of the respondent. The company deposited the said Certificate of Title with the appellant. The transactions were facilitated and authorised by the company's Managing Director, Mr. Lavy Chakulya who was the respondent's husband.

On 18th February, 2006 the appellant and the company executed a banking facility letter affording the latter a short term loan facility of K100,000,000 (unrebased) to be repaid by 31st January, 2007 with interest of 40% per annum. Clause 7 of the said facility letter provided that the security offered for the loan was Subdivision No. 77 of Subdivision A of Farm No. 378a Lusaka. The Certificate of Title was already in the appellant's possession.

According to the appellant, on 20th September, 2007, the company and the respondent executed a Memorandum of Deposit of Title Deeds (hereinafter referred to as Memorandum of

Deposit) in favour of the appellant relative to the said property thereby verifying that the property was pledged as security for the loan advanced. As

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at 18th August, 2008, the company's indebtedness to the appellant had risen to K162,542,085.72 and US$155.00 and the company failed to make good the sums owed to the appellant.

Consequently, the appellant commenced an action by originating summons under Order 88 of the RSC against the company and the respondent seeking for payment of all monies and interest due under the various covenants in the Memorandum of Deposit and/or that the equitable mortgage may be enforced by way of foreclosure and delivery up of vacant possession of the mortgaged property.

The respondent's case was that she never offered her certificate of title as security for the loan between the appellant and the company; that the appellant granted the financial facility to the company on 18th February, 2006 and the purported

Memorandum of Deposit is dated 20th September, 2007 several months after the facility was granted; and that whilst the appellant disclosed that the company deposited the certificate of title, it did not show when it

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was done and how it was done when the certificate was not in the company's name.

It was further the respondent's assertion that the appellant accepted her certificate of title without verifying with her, which was irregular as she was not a shareholder or director of the company; and that she did not take part in the negotiation for the loan as she was not part of the company and she did not sign any document offering her title as security for the loan.

The learned trial judge dismissed the appellant's claim against the respondent. The appellant now appeals on one ground that the court below erred in law and fact when it ruled that the signature on the Memorandum of Deposit was not that of the respondent, without the latter alleging, pleading or establishing fraud.

At the hearing of the appeal counsel for the appellant did not appear, but he had earlier on filed heads of argument which we have taken into account in our judgment. Counsel for the respondent equally relied on his filed heads of argument.

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It was argued, for the appellant, that the evidence and pleadings before the court did not support a finding that the signature on the Memorandum of Deposit was not for the respondent. That the appellant deposed in para 9 of its affidavit in support, that on 20th September, 2007, the company and the respondent executed the Memorandum of Deposit of title over the property in issue in favour of the appellant and annexed a copy. That the Memorandum of Deposit shows that it was signed by the respondent and her husband, Livay Chakulya who was in fact the Managing Director of the company and by a witness.

It was also submitted that the respondent did not, in her affidavit in opposition, specifically deny signing the Memorandum of Deposit, nor make a specific reference to it, nor state that the signature thereon under her name was not hers or that the

signature is fraudulent. But she has inferred it by her general denial that she did not sign any documents for the loan; an argument premised on the fact that she is neither a shareholder nor

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a director in the company. However, this is a flawed argument as the security is a third party security which is permissible at law.

To buttress the argument, counsel cited **Davy v Garret**[1], which he argued, provides that any charge of fraud or misrepresentation must be pleaded with the utmost particularity and that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. He also relied on para 36 of Halsbury's Laws of England, 4th edition.

It was also submitted that the respondent did not plead fraud in relation to the custody of her title deeds by the company nor has she explained why or how her title deeds were in the custody of the company in which her husband was the Managing

Director. We were referred to **Order 18 r. 12(1)(a) RSC 1999** and to **Sablehand Zambia Limited v Zambia Revenue Authority**[2], **Patel & another v Monile Holding Company Limited**[3] and **Mazoka and others v Mwanawasa and others**[4], where, in essence, we held that fraud

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must be pleaded specifically and that the standard of proof is higher than on a mere balance of probabilities.

It was further submitted, for the appellant, that the lower court erred by placing reliance on the respondent's statement in para 9 of her affidavit, disregarding the facts in the appellant's affidavits; that the court failed to properly apply the law which requires that fraud must be specifically pleaded and proved to a higher standard than the balance of probabilities; and that no evidence was led to prove that the signature on the memorandum of deposit of title deeds was not that of the respondent, so the learned judge was not justified to conclude as he did. We were urged to uphold the appeal with costs.

On the other hand, Mr Phiri, counsel for the respondent submitted in brief, that the appeal is based on the legal requirement that an allegation of fraud must be particularly pleaded, but the learned judge's holding was much broader than the single reason given in the ground of appeal. That the judge placed a lot of weight on the respondent’s statement that she had never been part of the

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negotiation with the appellant nor had part in the company nor signed any document to offer her title as security for any loan.

It was further argued that the court was on firm ground when it ruled that it did not believe that the Memorandum of Deposit was presented to the appellant by the respondent even though it bore her signature; and that the judge’s findings are justified by the irregularities on record which brought out an inference of fraud and undue influence. Counsel argued that the Memorandum of Deposit shows that it was made by the company, but the certificate of title is in the names of the respondent who was neither a shareholder nor director in the company. He

questions the capacity in which the company was proposing the security for its loan to be the respondent’s title deed and depositing the same.

Counsel further argued that para 9 of the appellant’s affidavit in support shows that the Memorandum of Deposit was only executed on 20th September, 2007, almost a year after the granting of the security. That this was an attempt by the appellant to normalise the security agreement for the loan which was initially

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granted unsecured to the company, unfortunately, the appellant accepted security in a third party's name without seeking consent or explaining the consequences of offering such a security or the need for her to seek independent legal advice.

It was further counsel's submission that in the face of these glaring irregularities, fraud could be inferred. To support the argument, he quoted **Nkongolo Farms Limited v Zambia National Commercial Bank & others**[5] and argued that there is no evidence to show that the appellant took steps to question the

directors of the company as to why they were offering security in a third party's name despite accepting that the Managing Director of the company was the respondent's husband.

It was also argued that where there is a relationship between the borrower, or its representative, and the surety, care on the part of the receiver of surety must be taken to eliminate the possibility of the registered owner of the property being unduly influenced. Counsel relied also on **Barclays Bank PLC v O'Brien**[6] and submitted that the appellant knew that the respondent was married

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to the director of the company which was offered a loan facility, but failed to take steps as set out in the above mentioned case and so should be fixed with constructive notice of undue influence.

He further argued that the law places a duty on the creditor, to take reasonable steps to satisfy themselves that they entered into the obligation freely and with knowledge of the true facts, or else they would be unable to enforce the surety's obligation

because they would be fixed with constructive notice of the surety's right to set aside the transaction, and that it is immaterial for the creditor to plead that the documents were duly signed by the surety. We were urged to dismiss the appeal.

We have examined the ruling the subject of this appeal and the arguments of both parties. Two issues arise for decision in this appeal. The first is whether fraud can be inferred even if it was not pleaded by the respondent. The second is whether an enforceable third party mortgage was created over the property in question.

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As regards the first issue, the law is well settled on the need to plead fraud and the standard of proof required in such cases. The cases cited by counsel for the appellant, such as **Davy v Garret**[1] and **Sablehand Zambia Limited v Zambia Revenue Authority**[2], indeed, lay down the principle that where fraud is an issue in the proceedings, then the party wishing to rely on it must ensure that it is clearly and distinctly alleged and, at the trial, he

must lead evidence, so that the allegation is clearly and distinctly proved.

In **Nkongolo Farms Limited v Zambia National Commercial Bank Limited and others**[5] the appellant had sued the respondents in the High Court seeking, inter alia, a declaration to set aside a third party mortgage and a guarantee and in the alternative damages for negligence by the 1st respondent as bankers in the execution of the guarantee, in respect of the credit facility offered and advanced to the 2nd respondent under and by virtue of the 3rd respondent's misrepresentation and undue influence on the appellant's directors. However, fraud was not specifically alleged in the statement of claim. On appeal we said as follows at p. 172**:**

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> **"We agree that the appellant did not plead fraud or misrepresentation with sub heads stating particularities of fraud or misrepresentation as provided under Order 18 rule 8(16) of the Rules of the Supreme Court, which states that, "misrepresentation should always be pleaded with proper particularity". However, looking at the five (5) paragraphs of the statement of claim quoted above, we hold the view that these paragraphs brought out sufficient details of fraud and misrepresentation in line with the Halsbury's Laws of England 4th Edition which**

> **states: “the court had never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of a statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is a special duty to disclose it...."**

In this case, we agree with counsel for the appellant that the respondent’s affidavit in opposition does not specifically allege fraud. However, it is our view, upon a close scrutiny of paragraphs 5 to 9 of the said affidavit that it does reveal some evidence of fraud.

In particular, the respondent denied that she offered her certificate of title as security for monies advanced to the company, or that she took part in the negotiation for the loan as she was not a shareholder or director of the company or that she signed any document offering her title as security for the loan. Furthermore,

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she asserted that the Memorandum of Deposit is dated 20th September, 2007 well over one year from the time the facility was granted, but the appellant accepted her certificate of title without

verifying with her, which was irregular as she was not a shareholder or director of the company.

It is clear to us that in dismissing the appellant's claim, the learned trial judge was not satisfied that the respondent's certificate of title was deposited with the appellant with her consent. He also noted that the Memorandum of Deposit was not presented to the appellant by the respondent although it bore a signature which she had disputed to be hers.

The learned judge accepted the respondent's assertion that she had never been a part of the negotiation with the appellant, and that she had no part in the company and did not sign any document to offer her title as security for any loan. In our view, by accepting that assertion, the learned judge in effect believed that the signature on the Memorandum of Deposit was false.

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On the basis of all the aforementioned, we do not agree with the appellant that there was no evidence to entitle the learned judge to make a finding that the signature on the Memorandum of

Deposit of certificate of title was not for the respondent or that the respondent did not deny signing the memorandum of deposit as it is clear that she denied. We find merit in the respondent's argument that the affidavit in opposition contains some allegations of fraud which can be relied on, though not specifically alleged.

We now turn to the second issue of whether an enforceable third party mortgage was created between the appellant and the respondent. It is true as argued by counsel for the appellant that an equitable mortgage by deposit may be created notwithstanding that the legal title is outstanding in some person other than the depositor, and in the vast majority of cases a customer who signs a bank guarantee or charge cannot get out of it.

However, mere possession by a creditor of his debtor's title deeds is not sufficient to create an equitable mortgage without evidence as to the manner in which such possession originated. The

creditor must show that the title deeds were in fact deposited with him by the debtor, and that the purpose was to create a charge, but if the deposit is proved, the purpose may in the absence of an express charge be inferred from the circumstances. Prima facie a deposit of title deeds creates an equitable charge on all the property comprised in them.

Nonetheless, the law requires that before accepting a third party's security, where there is a relationship of trust and confidence between the borrower and the surety, a creditor must take steps to eliminate undue influence or misrepresentation.

In **Barclays Bank Plc v O'Brien**[6], cited by counsel for the respondent, a married couple granted the bank a second charge over the family home as security for the overdraft facility of a company in which the husband had an interest. The wife signed the document without reading it on the strength of her husband's misrepresentation that the liability to the bank was limited and that the exposure under the arrangement would only last for three weeks. In truth it was an unlimited guarantee. The bank took no

steps to have the documents explained to the wife nor did it suggest that the wife should take independent legal advice. The company failed to meet its obligations. The bank sought an order for possession of the home. The wife sought to set the charge aside on the ground that it was the result of the husband's misrepresentation and undue influence.

Lord Wilberforce when discussing undue influence stated that:

> **"..... On the facts, the bank knew that the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security documents of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank"**.

It is clear to us from this case that a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors; (a) the transaction is on its face not to

the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that in procuring the wife to act as

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surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

Further still, a creditor would have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice and in exceptional circumstances, where the lender knows of circumstances that make the exercise of undue influence probable rather than merely possible, the lender will need to ensure that the wife is separately advised.

We applied these principles in **Nkongolo Farms Limited v Zambia National Commercial Bank Limited and others**[5] which we have referred to above, when we held, inter alia as follows:

5. **The law imposes on a creditor a duty to take steps to ensure that not only does a borrower or debtor not exercise undue influence and or make false representation to a surety, but also that the creditor has a duty to ensure that a surety has adequate understanding of the nature and effect of the transaction in question.**

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6. **The creditor has the obligation to inform itself as to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that relationship. The Bank has the further obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor.**

In this case, the respondent denied that she offered her certificate of title as security for the loan advanced to the company or that she signed the Memorandum of Deposit and it seems to us that there was no proof that the signature on the document is hers. The appellant explained that the certificate of title was deposited to secure the overdraft facilities granted to the company, but again there was no evidence that the respondent was aware of the deposit of her certificate of title for that purpose.

Even if we were to accept the appellant’s argument that the respondent signed the Memorandum of Deposit in relation to the facility letter securing the loan of K100,000,000.00, we find no

evidence, on the record, to demonstrate that the appellant, as creditor or lender, took steps to establish that the respondent had adequate information about the nature of the transaction, or that she understood the implications of her offering the security for the

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debts of the company, or that the company did not exert undue influence on her, particularly that the company's Managing Director was her husband, or that she was advised to seek independent legal advice before signing the Memorandum of Deposit, especially that the certificate of title was already in the appellant's possession.

We conclude, applying **Nkongolo Farms Limited v Zambia National Commercial Bank & others**[5] and **Barclays Bank PLC v O'Brien**[6], that as the appellant failed to do any of the above, it cannot be permitted to retain the benefit of the transaction or charge over the respondent's property as it had constructive notice of undue influence by the husband who was the company's Managing Director.

We also observe that whilst the certificate of title at p. 19 of the record, shows that Subdivision No. 77 of Subdivision A of Farm No. 378a Lusaka is situate in Woodlands, the facility letter at p. 23 shows that the property is in Avondale. It seems that the appellant did not even have accurate information concerning the property it was accepting as security for the loan advanced to the company.

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On the basis of all the foregoing, we find that the third party mortgage or charge is unenforceable and we set it aside. The learned judge was on firm ground when he dismissed the claim. We find no merit in the appeal and we dismiss it with costs.

L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

M. LISIMBA
ACTING SUPREME COURT JUDGE

R. M. C. KAOMA
ACTING SUPREME COURT JUDGE