SCZ Judgment No. 48/2014

IN THE SUPREME COURT OF ZAMBIA APPEAL N0. 17/2003

HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

EMC TRUCK CENTRE ZAMBIA LIMITED 1ST APPELLANT

CLIFFORD CHOTA MULENGA 2ND APPELLANT

AND

ACCESS BANK (ZAMBIA) LIMITED RESPONDENT

Coram: Hamaundu, Wood, JJS and Kaoma, Ag.JS.

On the 13th of August, 2014 and 29th October, 2014

For the Appellant: Mr. L. Linyama, Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners.

For the Respondent: Ms. A.D. Theotis, Messrs Theotis, Sampa and Mataka Legal Practitioners.

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. *Shilling Bob Zinka v The Attorney General (1990-1992) Z.R.73.*

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2. *Zambia National Holdings Limited and United National Independence Party v The Attorney General (1993 – 1994) Z.R. 115.*
3. *Nkhata and Four others v The Attorney-General of Zambia (1966) Z.R. 124.*
4. *Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises (1999) Z.R. 27.*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court, 1999 edition.*
2. *Statute of Frauds (1677).*

OTHER MATERIALS REFERRED TO:

1. *Halsbury's Laws of England, Volume 20, 4th Edition.*
2. *Chitty on Contracts, General Principles Volume 1, 28TH Edition (1999).*
3. *Odgers on Civil Court Actions, 24th Edition.*

This is an appeal against a decision of the High Court entering judgment in favour of the respondent in the sum of K2, 709,609.48, arising out of a bank guarantee and an overdraft facility granted to the 1st appellant and guaranteed by the 2nd appellant. The appeal is also against the dismissal of a

counterclaim for damages for loss of business opportunity and damages for inconvenience, exemplary damages and costs.

The brief facts giving rise to this appeal are that in December 2008 the respondent, a commercial bank, availed the 1st appellant a bank guarantee in favour of Iveco (Proprietary) South Africa Limited

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("Iveco") for the sum of US$250,000.00 and an overdraft facility of US$160,000.00 guaranteed by the 2nd appellant in his personal capacity. The respondent alleged that in or around December, 2009, the bank guarantee was called in due to the 1st appellant's inability to make payment for the goods it had obtained on credit from Iveco. The respondent paid Iveco on the guarantee. The respondent then commenced an action in the High Court for recovery of the money paid on the guarantee in addition to moneys owed by the 1st appellant by virtue of the overdraft facility availed to the 1st appellant and guaranteed by the 2nd appellant.

The main argument articulated in the appellants' defence in the High Court was that while the appellants acknowledged that a bank guarantee of US$250,000.00 was issued and an overdraft facility of US$160,000.00 was provided, the bank guarantee issued in favour of Iveco was not acceptable on the basis that the respondent was not known by any bank that the guarantee was presented to in South Africa. This was communicated to the respondent and the respondent advised that it would try to rectify the situation. The situation was never rectified for the first six

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months of the guarantee's existence and this resulted in the 1st appellant having a debit balance of K1, 044,164.16. The appellants pleaded extreme negligence on the part of the respondent in the manner it had dealt with the guarantee and overdraft facility and stated that the respondent's conduct had affected the workings of the 1st appellant and placed it at a great disadvantage. In the circumstances, they were not liable and instead counterclaimed for damages for loss of business and opportunity and damages for inconvenience. They also counterclaimed for exemplary damages and costs.

The learned trial Judge considered all the evidence that was adduced and concluded that the 1st appellant had applied for a bank guarantee of US$250,000.00 and an overdraft of US$160,000.00. Both were approved and the respondent had paid Iveco the sum of US$250,000.00 which was guaranteed by the 2nd appellant. The learned trial Judge found that the overdraft facility was in debit by K1, 044,164.16. She also found, contrary to the appellants' assertions, that there was no waiver of a 20% advance payment on the value of the vehicles, to be made by prospective

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customers. She accordingly found that the appellants had failed to prove the loss of business for the six months that the guarantee was not operative as there was no proof of confirmed orders with the requisite 20% advance payment made by local purchasers as provided for in the facility letter.

On 5th November, 2013, the learned trial Judge delivered judgment in favour of the respondent for the sum of K2, 780,609.48 less K300.00, being the value of the unsold paneled van that the 1st appellant had handed over to the respondent, with costs to be taxed in default of agreement.

The appellants have now appealed against the said judgment and have filed three grounds of appeal. The first ground of appeal is that the learned trial Judge erred in law and fact when she held that there was no breach of a condition precedent when the respondent paid Iveco despite the fact that there was no written claim or demand for the payment of the guarantee. The second ground of appeal is that the learned trial Judge erred in law and fact when she made a finding of fact that Iveco had made a written

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demand, notwithstanding that there was no evidence on record to support the finding. The third ground of appeal is that the learned trial Judge erred in law and fact when she held that the plaintiff bank was not liable for negligence during the six months when the bank guarantee was not operational. Grounds one and two of the appeal were argued together.

With regard to the first two grounds of appeal, Mr. Linyama submitted that Clause 7.1.2 of the Facility letter dated 5th December, 2008 was a condition precedent that the respondent had to adhere to before payment was made to Iveco. Clause 7.1.2

which the appellants have relied on provided for instances when a default would occur. It reads as follows:

> *“7.1.An event of default will occur:*
>
> *7.1.2 Should the Borrower breach any term or condition of this Facility Letter or any other facility the Bank may grant to the Borrower or any other facility between the Borrower and Access Bank Plc Limited or any other subsidiary or associate company of the Bank and the Borrower fails to remedy the breach within 7 (seven) days of receiving written notice to do so; or…’*

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He also submitted that the respondent was in breach of the second agreement with Iveco because clause 7 of the second agreement required Iveco to serve upon the respondent a written claim or demand on or before the guarantee expired. Clause 7 reads as follows:

> *“7. The Bank is liable to pay the guarantee amount or any part thereof under this Bank Guarantee and only if the Beneficiary serves upon the Bank a written Claim or Demand on or before this guarantee expires.”*

He submitted that the respondent’s witness admitted that there was no written notice of the demand by Iveco and that this

was in breach of the condition precedent in clause 7 of the second agreement which required the beneficiary to make a written claim or demand. Mr. Linyama supported his argument with quotations from *inter alia* Paragraph 160 of Halsbury's Laws of England Volume 20, 4th Edition dealing with conditions precedent to a surety's liability. He also cited the case of *Shilling Bob Zinka v The Attorney General*[1] and the case of *Zambia National Holdings Limited and United National Independence Party v The Attorney General*[2] on the effects of a condition precedent at law. Both authorities point to the fact that in an agreement where there is a condition precedent,

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there is no duty on either party to render the principal performance before the occurrence of the condition. As such, the respondent was in breach of clause 7 of the second agreement.

Mr. Linyama then addressed the court on the question of negligence contained in the third ground of appeal. He submitted that the learned trial Judge erred in law and fact when she held that the respondent was not liable for negligence during the six

months when the one year bank guarantee was not operational. The evidence on record showed that the bank guarantee was not operational for the first six months because the respondent was not recognised by any South African Bank that the guarantee was presented to and a counter guarantee had to be issued by Access Bank Nigeria. During the first six months, Iveco could not do business with the 1st appellant as there was no functional guarantee in place, due to the respondent's negligence. Consequently, the 1st appellant could not operate, as it could not supply any vehicles to its clients without the existence of a working guarantee since the respondent was liable to Iveco for the debt of the 1st appellant. The respondent paid Iveco just before the

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guarantee was to expire without any written notice in accordance with the terms of the facility letter. The respondent should, therefore, take responsibility for the first six months the bank guarantee was ineffective. That was so because the parties had entered into a legally binding contract upon which the respondent did not perform as agreed.

Ms. Theotis, on the other hand, submitted that there was no breach of a condition precedent when the respondent paid Iveco despite the fact that there was no written claim or demand for payment of the guarantee, because the respondent was immediately liable to the full extent of its obligation without being entitled to require notice of default. Ms. Theotis argued that the appellants were not privy to the contract of guarantee, which was between the respondent and Iveco. As such, the second agreement, much as it was an accessory contract, did not confer any rights or obligations on the appellants so as to accord them *locus standi* in seeking to enforce the terms of the second agreement. Ms. Theotis contended that the demand was not a necessary ingredient in the action between the appellants and respondent by reason of the fact that

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the relationship of creditor and guarantor did not exist between the parties to the action.

Ms. Theotis submitted that the second ground of appeal was misconceived because the finding of the court below was that

Iveco called in the guarantee upon the appellants' default and there was no dispute as to the default. The finding of the court below was supported by the evidence and the learned trial Judge did not err in accepting the evidence that even if there was no written demand, Iveco had called in the guarantee. There was, therefore, no basis for reversing the findings made by the learned trial Judge.

Ms. Theotis further submitted that ground three was not properly before us. She contended that the learned trial Judge was not asked to determine whether or not the respondent was liable in negligence because the appellants did not plead negligence nor ask for damages for negligence. She argued that the issue before the court below was whether or not the respondent was in breach of the initial agreement and ought to be liable for losses counterclaimed

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by the appellants for the first six months that the guarantee was not operational.

We have considered the arguments of the parties on appeal. We shall deal with grounds one and two of the appeal together as they are related. In our view, what stands to be determined is the relationship of the parties prior to the action in the court below. It is necessary to do so in order to ascertain their *locus standi.* In our view, there were two distinct transactions prior to the action in the Court below. The first was that between the respondent, as creditor, and the 1st and 2nd appellants as principal debtor and surety, respectively, in the one transaction, which we shall call ("the first agreement"). The second was that of the respondent as surety, the 1st appellant as principal debtor and Iveco as beneficiary of a guarantee made in favour of Iveco at the request of the principal debtor, which we shall call the ("the second agreement"). The appellants were not party to the second agreement which gave rise to this appeal, but have appealed on the basis that even though they were not parties to the second agreement, they were entitled to sue on it because they were entitled to the benefit of it. This

argument seems to be supported by Paragraph 178 of Halsbury's Laws of England, Volume 20, 4th Edition which states that:

> *"A guarantee which is not addressed to anyone may be enforced by the party to whom or for whose benefit it was given.....".*

The same paragraph further states that:

> *"to entitle him to sue either of the contracting parties, he must possess an actual beneficial right which places him in the position of a beneficiary under the contract."*

Apart from stating that there was a breach, Mr. Linyama has not clearly explained what actual beneficial right the appellants had under the second agreement to enable them to sue on it. Added to this is the fact that the appellants' names do not appear as contracting parties, which does not satisfy Section 4 of the Statute of Frauds (1677) which stipulates that all the contracting parties must be named or sufficiently described as such in writing. Although the appellants feel very strongly about the fact that the respondent breached clause 7 of the second agreement which required Iveco to serve upon the respondent a written claim or demand on or before the guarantee expired, there was no need for such notice. This is in view of Paragraph 159 of Halsbury's Laws of

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England, Volume 20, 4th Edition, which states that it is not mandatory to give notice of the principal debtor's default to the surety. This is so because:

> *"...he is liable without being requested to pay, in the absence of a stipulation to the contrary, express or implied, or of circumstances rendering a demand upon him a legal obligation. It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay or to sue him, although solvent, unless this is expressly stipulated for..."*

We have examined the record of appeal and have found no such written demand by Iveco to the respondent. Ms. Theotis has also conceded in the respondent's heads of argument that there was no such written demand. There is, therefore, no doubt that the respondent did not comply with clause 7 of the second agreement which required Iveco to make a written claim or demand. We are, however, of the view that the failure by Iveco to make a written claim or demand does not make the respondent liable to the appellants as there was no privity between the respondent and the appellants in respect of the contract of guarantee. This view is also

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supported by Paragraph 103 of Halsbury's Laws of England, Volume 20, 4th Edition which states that:

> *"Although sometimes bound by the same instrument as his surety, the principal debtor is not privy to the surety's contract to be answerable to the creditor: there is not necessarily any privity between the surety and the principal debtor; they do not constitute one person in law and are not as such jointly liable to the creditor, with whom alone the surety contracts."*

We have also observed that Mr. Linyama has in the appellants' heads of argument made numerous quotations from decided cases without really explaining their relevance to the case at hand. It is not enough to pepper heads of argument with authorities and quotations which have no relevance to the issue at hand, as this only serves to muddy the waters even more. While we agree with the authorities Mr. Linyama has quoted on conditions precedent in a contract which state the principles involved, we do not find these authorities helpful to the case at hand. Further, Mr. Linyama has made reference to contingent conditions in a contract in his heads of argument by simply

stating that Clause 7.1.2 of the facility letter is a condition precedent that the respondent had to adhere to before payment was made to Iveco. He has not attempted to explain the

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relationship if any, between the facility letter, which is a contract between the 1st appellant and the respondent and the guarantee between the respondent and Iveco. It is also not clear from the memorandum of appeal or indeed the appellants' heads of argument, what the relevance of clause 7.1.2 in the facility letter is to this appeal as there is nothing in the pleadings or evidence which suggests that the respondent was in breach of Clause 7.1.2.

The second ground of appeal is a distortion of the record of appeal. The learned trial Judge did not make any finding of fact that Iveco had made a written demand notwithstanding that there was no evidence on record to support that finding. The learned trial Judge stated as follows at page 34-35 of the record of appeal:

> *"It is cardinal to state that the defendants herein do not dispute the default but merely contend that there was no written demand. Admittedly there is no documentary evidence adduced by the plaintiff*

bank to prove that there was demand by Iveco South Africa (beneficiary). However, the testimony of the plaintiff's witnesses is that they were aware that Iveco South Africa called in the guarantee."

A careful reading of the above portion of the judgment shows that the learned trial Judge did not use the words "written demand"

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but instead found as a fact that a demand of some description and not necessarily one in writing was made by Iveco, hence her reference to "basic logic" at page 35 lines 5 to 6 of the record of appeal. We are of the considered view that, even if there is no evidence of a written demand the beneficiary Iveco did call in the guarantee upon the defendant's default. The 1st appellant has not denied that it obtained motor vehicles from Iveco on the strength of the guarantee. It, therefore, defies logic that the respondent could have paid the guarantee in the absence of a demand.

Again, we accept the plethora of authorities Mr. Linyama has quoted extensively on when and how an appellate court should deal with findings of fact, the leading one of course being *Nkhata and Four others v The Attorney General of Zambia*[3]. All the cases

referred to by Mr. Linyama have followed the principle laid down in the Nkhata case, which is that a trial Judge can only be reversed on questions of fact if she erred in assessing and evaluating the evidence by taking into account some matter which she should have ignored or failing to take into account something which she should have considered. The learned trial Judge in the appeal at

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hand did not make any finding of fact that Iveco had made a written demand. The finding made by the learned trial Judge cannot, therefore, be said to come within the purview of the authorities cited by Mr. Linyama on setting aside a judgment on findings of fact. Grounds one and two of the appeal accordingly fail.

The third ground of appeal alleged negligence on the part of the respondent during the six months when the bank guarantee was not operational. The pleadings show that negligence was only referred to as “gross negligence” in the defence and counterclaim. The appellants neither gave the particulars in their

pleadings nor did they lead evidence to prove the alleged negligence. It is a requirement under Order 18 Rule 8 of the Rules of the Supreme Court, 1999 Edition, to give particulars of the alleged negligence if it is pleaded. Further the authors of Odgers on Civil Court Actions, 24th Edition, have stated the following in paragraph 8.32 at page 181:

> *"Pleadings must always be given of any alleged negligence, showing in what respects the defendant was negligent. The statement of claim should state the facts upon which the supposed duty is founded, the duty to the*
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> ***(1143)***
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> *plaintiff with the breach of which the defendant is charged, the precise breach of that duty of which the plaintiff complains and lastly, particulars of the injury and damage suffered."*

This is in consonant with the submission by Ms. Theotis that pleadings must always be given of any alleged negligence, showing in what respects the defendant was negligent. We have also stated time and again that where an issue was not raised in the court below, it is not competent for a party to raise it on appeal. See *Mususu Kalenga Building Limited, Winnie Kalenga v Richmans Money Lenders Enterprises*[8]. As correctly submitted by Ms. Theotis, the issue before the learned trial Judge was whether

or not the respondent was in breach of the initial agreement and consequently ought to be liable for losses incurred by the 1st appellant for the first six months that the guarantee was not operational. The holding of the learned trial Judge, which we agree with, was that the respondent was not liable because the 1st appellant did not produce confirmed orders with the requisite 20% advance payment by local suppliers received during the six months in issue, as provided for in the facility letter. In our view, the third ground of appeal has no merit.

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It follows from what we have said above that there is no merit in all the grounds of appeal. The appeal is dismissed with costs to the respondent to be taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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A.M.WOOD	**R.M.C.KAOMA**
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**