IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 212/2016**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

STANDARD CHARTERED BANK ZAMBIA PLC **APPELLANT**

AND

KASOTE SINGOGO **RESPONDENT**

Coram: Hamaundu, Wood, Musonda JJS.

On 4th April, 2017 and 28th April, 2017.

For the Appellant: *Mr. S. Mwananshiku - Messrs M & M Advocates*

For the Respondent: *Mrs. M. M. Harawa - Messrs MC Mulenga & Company*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases referred to:

1) *William David Carlisle Wise v. E.F Hervey Limited (1985) Z.R. 179.*
2) *Clayton v Le Roy [1911] 2 K.B. 1031.*
3) *Eastern Co-operative Union v Yamene Transport Limited (1988/1989) Z.R. 128.*
4) *British Investing House Company v Underground Railways Company (1912) AC 673.*
5) *Zambian Breweries Plc v Betternow Family Limited SJ No. 48 of 2016 (Appeal No. 174/2016)*

6) *National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie (2000) Z.R. 154.*

7) *The Attorney General v Mpundu (1984) Z.R. 6.*

Works referred to:

1) *Bullen & Leake and Jacobs Precedents of Pleadings 12th Edition page 358.*

This is an appeal against a decision of the High Court which awarded the respondent K960,000.00 special damages for loss of a business opportunity, general damages, interest and costs.

The facts leading to this appeal are fairly easy to discern. The appellant and the respondent enjoyed a banker and customer relationship. In May, 2008, the respondent obtained a mortgage for K100,000.00 from the appellant and pledged Subdivision No. 2034 of Stand 7426, Kaunda Square Stage 1, Lusaka, which was his property, as collateral.

The respondent made regular payments to the appellant to liquidate the mortgage but at some point defaulted. The appellant tried to contact the respondent for the purpose of urging him to continue making his payments but could not succeed. The appellant then contacted the respondent's wife who was his referee as to his whereabouts. His wife instructed the appellant to debit

her account instead. This intrusion by the appellant infuriated the respondent because according to him it had *"serious marital implications which were difficult to articulate"* in his letter to the respondent.

On 7th October, 2013, the appellant issued a formal letter of demand to the respondent for an outstanding sum of K24,610.97 on the mortgage debt. The respondent was given fourteen days within which to make good the debt. He took umbrage at this letter of demand, paid the sum of K24,610.97 and, in an apparent tit for tat, demanded delivery of his certificate of title within fourteen days with effect from 9th October, 2013 so that he could seek *"...financial loan facilities with other more humane banks."*

A day after sending his letter of demand for the title deeds, the respondent entered into a Memorandum of Understanding with Leza Wa Lukundo Medical Centre ("Lukundo") in which he pledged his certificate of title which was still going through the formal motions of a discharge with the respondent, for a lump sum advance of K300,000.00 which was to be paid by Lukundo to him and also as security for further borrowing by Lukundo for a business expansion programme for a period of ten years. The

respondent was also going to lease the property to Lukundo for 120 months at K8000.00 per month. Time was expressed to have been of essence to the Memorandum of Understanding because the certificate of title was to be delivered to Lukundo on or before 28th October, 2013 without fail.

The certificate of title was not delivered by the appellant to the respondent on or before 28th October, 2013. On 29th October, 2013 Lukundo terminated the memorandum of understanding with the respondent and wished him well in his business plans.

On 17th March, 2014, the respondent issued a writ claiming "special damages for loss of business and use" in the sum of K960,000.00 together with interest and costs.

The appellant's defence to the claim was that the respondent's demand to the appellant to deliver the title deeds within fourteen days was unreasonable as it needed more time to discharge the mortgage. The appellant further pointed out that it was never approached by the respondent to provide a letter of undertaking to Lukundo so that it could release the certificate of title to it later to enable it to proceed with its transaction with the respondent. The appellant denied that it was responsible for any alleged loss

incurred by the respondent. In his reply, the respondent stated that he had written to the appellant that he needed the certificate of title for the transaction.

Mediation was attempted but failed. A short trial followed. The learned trial judge accepted that the certificate of title had been surrendered to the appellant as collateral. She further accepted that the appellant was well aware that the respondent needed the certificate of title urgently but the appellant took thirty days to deliver it to the respondent. She held that the appellant had admitted that it was possible in urgent cases to release the certificate of title within a day as long as payment had been acknowledged by the appellant. She therefore held that the failure to release the certificate of title within fourteen days was unreasonable and that this caused the respondent to lose a business opportunity which the appellant was well aware of. She reasoned that the respondent was entitled to be put in the position he would have been had the certificate of title been released in good time. She further reasoned, without pleadings to that effect or any evidence proving the fact, that the appellant ought to have appreciated that the delay in releasing the title deeds would bring

about undue stress, frustration and suffering on the part of the respondent. In her words," *The mental anguish, distress and inconvenience that the plaintiff went through in following up the certificate of title, only to see the opportunity to make money slip away from him cannot be overlooked."*

The learned judge then proceeded to enter judgment in favour of the respondent as follows:

"Order:-

1. *The Plaintiff having properly pleaded for special damages, which he particularized and proved at trial, the Defendant is liable to compensate the Plaintiff for loss of business opportunity and use of the sum of K960,000.00; as claimed.*
2. *I also order that the Plaintiff be awarded general damages for mental anguish, distress and inconvenience.*
3. *The amounts claimed in 1 and 2 above shall attract interest in terms of the Judgments Act No. 16 of 1997.*
4. *Costs follow the Cause, to be taxed in default of agreement."*

The appellant has advanced three grounds of appeal against the judgment. The first ground is that the learned trial judge erred both in law and fact when she held that the appellant's failure to release the certificate of title within fourteen days was

unreasonable. The second ground is that the learned trial judge erred both in law and fact when she failed to consider and determine the evidential value of the memorandum of understanding. The third ground is that the learned trial judge erred in law when she failed to consider the respondent's duty to mitigate his losses. There is a "fourth" ground of appeal which is now becoming commonplace in memoranda of appeal. It reads as follows:

> *"4. Such other grounds that may be furnished upon further perusal of the record."*

We shall, at the outset, dismiss the purported ground of appeal which was numbered "fourth", in the memorandum of appeal. This purported "fourth" ground of appeal is not a ground known to the Rules of this Court. Our rules with regard to filing memoranda of appeal do not make provision for *"...such other grounds..."* as a ground of appeal. Grounds of appeal must be specific and succinct and in the event that an amendment is desired an application to that effect should be made. We hope that practitioners and litigants will now refrain from the practice of promising future grounds of appeal as this practice serves no useful purpose.

We shall now deal with the real grounds of appeal in the order they appear in the memorandum of appeal.

The appellant has argued in its first ground of appeal that thirty days for the release of certificate of title relating to a mortgaged property cannot be considered to be unreasonable as the appellant had indicated that it was ready to give a letter of undertaking to Lukundo for the purpose of facilitating the respondent's transaction with that entity. The appellant argued that the respondent had never explained why the original certificate of title was needed in such a short time and why a letter of undertaking from the appellant would not be sufficient. The appellant went on to argue that the memorandum of understanding executed between the respondent and Lukundo was creating a landlord and tenant agreement. In the circumstances, the primary concern for any prospective tenant should have been to ensure that the property was unencumbered. It was, according to the appellant, highly irregular for a landlord to agree that the tenant would use his certificate of title to borrow money. Further, there was no explanation as to why the transaction for leasing the property could

not proceed while the respondent awaited the release of the original certificate of title.

The respondent's response to the appellant's first ground of appeal was that time was of the essence as the certificate of title had to be returned to the respondent within fourteen days from 9th October, 2013 in view of the respondent's commercial commitment with Lukundo. The respondent emphasized that what Lukundo was looking for was the certificate of title and not a letter of undertaking from the appellant. In addition to that, the appellant was not entitled to question the nature of the agreement between the respondent and Lukundo. The respondent argued that the appellant had not shown to this Court how the court below applied wrong principles in reaching its decision. The respondent further argued that the delay of thirty days in releasing the certificate of title was unreasonable as he needed it urgently for a business transaction.

It is quite evident from our reading of the proceedings in the court below, the memorandum of appeal and the arguments of both parties that the respondent was not at all clear as to what its claim was against the appellant and the appellant was equally not clear

as to what its defence was against the respondent. The endorsement to the writ of summons does not pass muster with the rules that govern pleadings as it was drafted rather mindlessly. The writ does not disclose a cause of action from whence the claim for damages emanates. A cause of action is defined in Order 15/1/2 R.S.C. as *"...every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court"* (see Read v. Brown (1888) 22 Q.B.D 128 or as was defined by Diplock L.J. in *Letang v. Cooper [1965] 1Q.B. 232* as *"simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person."* We adopted this meaning in *William David Carlisle Wise v. E.F. Hervey Limited*[2] when we held that *"a cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."* The endorsement to the writ of summons is couched in the following terms:

"The plaintiff's claim is for:

i. Special damages for loss of business and use at K960,000.

ii. Any order that the Court may deem fit.

iii. Interest on the sum claimed

iv. *Cost (sic) of this action."*

The endorsement does not specify whether the special damages being claimed arise out of a contract or a tort or any other branch of the law nor does the statement of claim meaningfully help in redressing the obviously fatal defects nor does it give clear particulars of the special damages claimed.

The statement of claim is simply a recital of the history of the claim and is not a proper pleading as it does not set out facts which disclose the respondent's cause of action and entitlement to support his right to judgment against the appellant for the sum of K960,000.00. *Bullen & Leake and Jacobs Precedents of Pleadings, 12th Edition at page 361* has a precedent for a claim for detention of a lease alleging special damage which should have easily been adapted to cover the respondent's claim. A close reading of the same edition of *Bullen & Leake and Jacobs* at pages 358 to 359 and the case of *Clayton v. Le Roy*[3] would have revealed that where there was neither demand nor wrongful refusal on the part of a party to

return property before the date of the issue of the writ, no action lay in detinue or trover.

On the evidence as disclosed in the record of appeal, this claim should have either been commenced as an action in detinue or trover but for the reasons explained in *Clayton v. Le Roy* would have collapsed because the appellant did not refuse to release the certificate of title to the respondent before the writ was issued. It is regrettable indeed that counsel for both parties do not seem to have realized that the dispute for which their professional input had been sought related to the release of the certificate of title and that what needed to be established first and foremost was whether the respondent had in fact made a demand for the certificate of title and once that was confirmed, to establish whether or not the appellant had refused to release the certificate of title. The evidence has without a doubt established that while a demand for the certificate of title was made by the respondent, the appellant did not at any time refuse to hand over the certificate of title but stated that it needed some time to attend to the formalities which were attendant to the discharge of the mortgage. The evidence also shows that the appellant had in fact surrendered the certificate of title to the

respondent on 5th November, 2013 long before the respondent issued the writ on 17th March, 2014 claiming the sum of K960,000.00 as special damages. When all this evidence is taken into account, it is quite clear to us that the respondent's claim should have been nipped in the bud by the appellant much earlier and should not have come this far.

The question of the letter of undertaking arose *ex post facto* and not when the respondent was vigorously pursuing the release of his title deeds. Both parties never raised the issue of the letter of undertaking in their letters of 9th October, 2013 and 10th October, 2013. A close reading of the respondent's letter of 9th October, 2013 shows that he was demanding the release of his title deeds so that he could *"...seek financial loan facilities with other more humane banks."* There is no mention of Lukundo at this stage. The memorandum of understanding with Lukundo was executed on the 10th October, 2013. There is no evidence to show that the appellant was aware of the Lukundo memorandum of understanding even after it wrote its letter of 10th October, 2013 to the respondent. There is also no evidence to show that the respondent had requested the appellant to provide him with a letter of undertaking,

which is normal banking practice, pending delivery of the title deeds. We do not therefore agree with the respondent's argument that the letter of undertaking would have served no purpose in the interim as a letter of undertaking issued by a bank does have legal effect and binds a bank in relation to its undertaking.

We do not agree with the appellant's argument that it is highly irregular for a landlord to agree that a tenant can use his title deeds to borrow money. Such borrowing is classified as a third party mortgage and there is no prohibition, unusual as it may seem, for a tenant to use its landlord's property to borrow money. In the appeal at hand, the respondent had an interest in the business venture with Lukundo and was not inhibited in any way from surrendering his title deeds to Lukundo to be used as collateral. We therefore agree with the respondent's argument that the appellant was not privy to the agreement between the respondent and Lukundo and as such could not challenge its terms and conditions.

The point we have, however, borne in mind is whether or not the fourteen days ultimatum which was given by the respondent was unreasonable. It is quite obvious from the correspondence

between the parties, although it has been denied in cross-examination by the respondent, that the relationship between the appellant and the respondent was badly frayed around the edges. We are therefore not surprised that the appellant was given fourteen days within which to release the title deeds. It seems to us that the fourteen days ultimatum was the trigger for what was to follow but it should not be considered in isolation. The ultimatum and subsequent alleged loss being claimed as damages should first be considered against the backdrop of when the respondent executed the mortgage in favour of the appellant. The evidence shows that this was a normal mortgage. No unusual conditions were attached to the borrowing nor does it appear to have been in the contemplation of the parties that the respondent would need his certificate of title post-haste upon payment of the mortgage for further borrowing and a business venture. The respondent's own letter dated 9th October, 2013 shows that he wanted the certificate of title so that he could seek financial facilities from what he had described as *"more humane banks."* We take the view that even though time was of the essence to the respondent in relation to the memorandum of understanding with Lukundo, this urgency should be balanced against the need by the appellant to properly and

legally discharge the mortgage by confirming that no money was outstanding as at the time of discharge; preparing, sealing and signing the memorandum of discharge and ensuring that the certificate of title and undischarged mortgage were available for release. In the context of a large public limited company such as the appellant, these formalities can take some time. We therefore think that in the context of this matter, thirty days is not an unreasonable period of time within which to complete all the formalities relating to the discharge of a mortgage. In any case, it is an accepted and recognized commercial practice that in cases where a certificate of title is needed urgently as security for borrowing elsewhere, a bank can be requested to write a letter of undertaking to the proposed lender to the effect that it would hold the certificate of title to the order of the proposed lender and release it together with the other security documents once the discharge formalities have been completed. A third party would then be able to proceed with its transaction with a mortgagor as there is an undertaking in place which can be enforced as against a bank as mortgagee. In short, this was a normal mortgage deed in which the parties anticipated a normal discharge of the mortgage in the ordinary course of business with the usual company seal being

affixed to an undated memorandum of discharge prior to surrender of the title deeds and mortgage deed to the respondent to register the discharge.

In the circumstances of this matter, we do not consider that a period of thirty days was an unreasonable delay. The first ground therefore succeeds.

In the second ground of appeal, the appellant questioned the evidential value of the memorandum of understanding. Much was said about the authenticity of the memorandum of understanding by both parties in their arguments. The respondent went to great lengths to argue about the authenticity of the memorandum of understanding and how a document is produced and proved in evidence in court and whether or not it is relevant. We do not think all these arguments by the respondent in respect of the second ground appeal are relevant to this appeal and for that reason we shall not address them.

The authenticity of the memorandum of understanding is not critical to whether or not the appellant is liable to the respondent for the damages being claimed. The argument should have been whether the appellant had refused to hand over the certificate of

title after the respondent demanded that it be delivered within fourteen days from the date of demand. Had that issue been addressed earlier the authenticity or otherwise of the memorandum of understanding would have fallen aside. We do not, therefore, think that it is relevant for us to address the absence of independent witnesses who should have been called to confirm the validity of the memorandum of understanding. We must however state that the appellant could have easily subpoenaed the directors or partners of Lukundo to testify in the court below which would have made a finding whether or not the parties had signed a memorandum of understanding. We are also of the view that nothing would be gained in dealing further with the question of the undertaking as this was being raised after the fact and has been dealt with earlier. The second ground of appeal therefore fails.

In its third ground of appeal, the appellant has argued that the learned trial judge erred in law when she failed to consider the respondent's duty to mitigate his loss. On the surface, this ground of appeal appears to be an admission on the part of the appellant that the respondent incurred some loss but had a duty to mitigate it. The question of mitigation of one's loss only arises if the loss is

admitted or can be traced to the party who is alleged to have caused it in the first place. The two cases of *Eastern Corporative Union Limited v Yamene Transport Limited*[6] *and British Investing House Company v Underground Railways Company*[7] both highlight the need for litigants to mitigate their losses as they should not expect courts to award damages which will be limitless both as to time and extent. In the appeal at hand, the respondent, in our view, had no loss to mitigate and the need to mitigate its loss does not arise. For these reasons, this ground of appeal fails as it is misconceived.

Even assuming that the appellant was liable in damages, the award of K960,000.00 was totally wrong in principle because this award represented the respondent's damages for the duration of the proposed ten year lease without any basis whatsoever. In the *Yamene* case, we held that six months was adequate to cover a loss arising out of an accident and that a party had a duty to mitigate any loss beyond the six months period. In the recent appeal of *Zambian Breweries Plc v Betternow Family Limited*[8] we held that damages for breach of a dealership agreement should be limited to a period of one month which was equivalent to the notice period in a proposed dealership agreement. We rejected the argument that

the respondent was entitled to damages equivalent to twelve months having been the duration of the dealership agreement. The case of *National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie*[9] also illustrates the point that damages are limited to the notice period and are not meant to cover the duration of a contract.

The order made by the court below awarded the respondent general damages for what it termed *"mental anguish, distress and inconvenience."* Although damages for mental anguish, distress and inconvenience may be awarded in appropriate cases, as was the case in *The Attorney General v Mpundu*[10] an award of such damages should only be considered where they are pleaded and proved. Nowhere in the writ of summons, statement of claim or evidence has mental anguish, distress or inconvenience been claimed. No evidence was led to prove mental anguish, distress or inconvenience. This claim should not have been awarded by the court on its own motion even under the omnibus head of *"any order that the court may deem fit"* in the statement of claim.

From what we have stated above, it is inevitable that this appeal must succeed as there was no basis for judgment being

entered in favour of the respondent for the amount claimed. The appeal is allowed and the judgment of the court below is set aside. In view of the fact that this court was forced, on its own and without any serious assistance from counsel, to dig deep and determine the real issues upon which the outcome of this appeal hinged, including the question of cause of action, there will be no order as to the costs of this appeal.

.....

E.M. HAMAUNDU

SUPREME COURT JUDGE

.....

A.M. WOOD

SUPREME COURT JUDGE

.....

M. MUSONDA

SUPREME COURT JUDGE