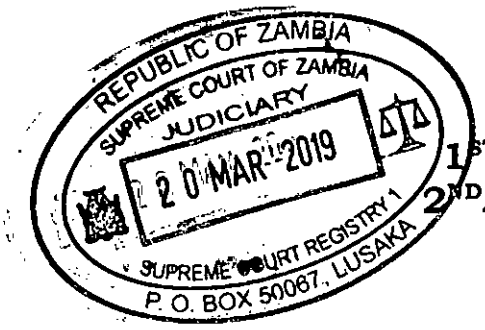
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.112/2010**
HOLDEN AT KABWE
(CIVIL JURISDICTION)



BETWEEN:

ANTHONY MBEWE **1ST APPELLANT**
LORRAINE MBEWE **2ND APPELLLANT**

AND

INVESTRUST BANK PLC **RESPONDENT**

CORAM: Hamaundu, Wood and Kaoma, JJS
On 9th April, 2014 and 20th March, 2019

For the 1st Appellant: Mr M.L. Sikaulu, Messrs SLM Legal Practitioners
For the 2nd Appellant: Messrs Kalokoni & Co
For the Respondent : Messrs Palan George, Legal practitioners

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JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Holme v Brunskill (1877-78) 3 QBD 495**
2. **Burnes v Trade Credits [1981] 2 All ER 126**
3. **Royal Bank of Canada v Samson Management & Solutions Ltd (2013) ONCA**
4. **Nkongolo Farms v Zambia National Commercial Bank [2007] ZR 149**
5. **Credit Lyonnais Bank Nederlands NV v Burch [1997] 1 All E.R. 144**

The two appellants appeal against a judgment of the High Court by which they were ordered to pay a sum of K1.5billion (unrebased), together with interest or lose their property by an order of foreclosure and sale. The facts in this case are these:

The two appellants are husband and wife. The couple owns jointly two properties known as Stand No. 8791 and Lot No. 12829 Lusaka. In 2004, a joint venture enterprise known as Tomorrow Emsworth Dartong Joint Venture Limited won a tender from the Government of Zambia to construct two hospitals in Shangombo, in Western Province. Before the Government could release to the joint venture company an advance payment towards the project in the sum of K2,200,192,163.40 (unrebased), it demanded that the said company provide an advance payment guarantee or bond in the like sum. The joint venture company approached Investrust Bank Plc, the respondent herein, for that guarantee. The respondent demanded that the joint venture company provide security for the guarantee. It is then that the joint venture company approached several third parties, including the appellants herein, to provide the security. The two appellants then executed two third party mortgages over their

two properties in favour of the respondent on 22nd September, 2004. Stand No. 8791 was mortgaged for K600,000,000 (unrebased) while Lot No. 12829 was mortgaged for K200,000,000 (unrebased).

There is no evidence on record to show that the two respondents executed a consent to issue the third-party mortgages. There is also no evidence on record to show that there was any direct dealing or engagement between the respondent bank and the two appellants. In fact, one of the averments by the 1st appellant in his affidavits was that the appellants only dealt with the borrower; and that the only document that the borrower showed them as regards what they were being asked to provide security for was the facility letter issued by the respondent bank to the borrower providing a guarantee for the sum of K2,200,192,163.40.

Between March, 2005 and April, 2006, while the guarantee was still in force, the joint venture company obtained a series of overdraft facilities from the respondent. As security for those, the joint venture company provided the same third-party properties. The two appellants did not execute further charges on their property for the overdraft facilities. The guarantee was discharged within the year 2006. However, it is on the overdraft facilities that the joint venture

company defaulted. In December, 2007, the respondent brought the matter to court, seeking payment of a sum of K1.5billion together with interest at 30% per annum or foreclosure on the mortgaged properties.

The 1st appellant's defence to the action was that, although he and his wife had executed a mortgage on the two properties as security for the Advance Payment Guarantee, they did not consent to the property being used as security for the overdraft facilities which were later given to the joint venture company. The 2nd appellant, while adopting her husband's defence, also argued that, in any event, Stand No. 8791 was a matrimonial property and, for that reason, the respondent should have inquired from her, as a spouse, to see whether she understood the implications of appending her signature to the mortgagee. She argued that, in this particular case, her husband had merely brought home the documents and told her to sign them.

The court below rejected the defence by the appellants that they had not consented to providing the property as security for the overdrafts, pointing out that the clauses in the mortgages that they signed provided that the security that they were giving was

continuous and that the respondent could increase the amount lent to the joint venture company without discharging the securities provided. The 2nd appellant's further argument was also rejected on the ground that she had earlier acquiesced to providing the property as security for the guarantee and that she had then agreed that the said property would be continuous security for future liabilities of the joint venture company. The court then ordered them to pay the sum claimed, failing which the respondent was at liberty to foreclose, take possession and sell the mortgaged property.

The appellants filed four grounds of appeal. These are as follows:

> **"(1) The learned judge misdirected herself on a point of law and fact when she adjudged that the appellants did pledge the properties to the respondent as security for the guarantee facility of K2.2billion granted by the respondent to Tomorrow Emsworth Datong Joint Venture Limited and when she failed to address the evidence on record that Tomorrow Emsworth Datong Joint Venture Limited is a separate and distinct company from the companies which contracted with the respondent as its customer namely Tomorrow Investments Limited, Emsworth Investments Limited and Datong Construction Limited by executing the facility letters and the Third Party Mortgages.**

2. **The learned judge misdirected herself on a point of law and fact when she adjudged that the security was a continuing security and the respondent and Tomorrow Emsworth Datong Joint Venture Limited did not need to obtain consent for use on the later facilities.**
3. **The learned judge misdirected herself on a point of law and fact when she failed to address the evidence on record that the third-party mortgages were void for having only been executed by the customers managing directors and not having been appended with the customers common seals.**
4. **The learned judge misdirected herself on a point of law and fact when she adjudged against the 2nd appellant's entitlement to special protection with the security being a matrimonial home and when she failed to address the legal obligation of the Respondent to advise the appellants to obtain independent legal advice".**

The only grounds that address the real issues in contention in this appeal are the second and fourth ground. The first ground raises issues that were not raised in the court below. The third ground on the other hand is completely unmeritorious because the mortgagors in this case were the appellants and not the borrowers. The borrowers, therefore, were not even supposed to sign on the mortgages. For that reason, their common seals were not supposed to be affixed onto the mortgage deeds.

On the second ground of appeal, the argument by the appellants is that the purpose for which the appellants provided consent was the guarantee of K2.2 billion and not the overdraft and temporary excess facilities which the borrower further obtained. The appellants argue that the overdraft is a fundamentally different facility from the guarantee for which they had consented to provide security. They submit that third party mortgages should be treated on the same footing as guarantees which are governed by the principle that, where fundamental changes are made in the terms of the agreement, a guarantor is discharged from his security to the agreement unless he consents to the changes. For the principle governing guarantees, we were referred to two cases; **Holme v Brunskill**[1], **Burnes v Trade Credits**[2].

The counter-argument by the respondent is; first, that the additional credit facilities of K750million, K100million and another K650million were in respect of the same project in Shangombo. Secondly, the respondent referred us to clauses 13, 14, 15 and 17, of the mortgage deed which, according to the respondent, show that the security was continuing and that it could cover increased credit to the customer. We were referred to some Canadian authorities

which deal with guarantees. We take particular note of the case of **Royal Bank of Canada v Samson Management & Solutions Ltd**[2] where the Court of Appeal of Canada held that, although increased loans and advances made to the borrower were material alterations to the principal loan agreement, the guarantor could not be discharged of them because the guarantor had contemplated the increases as manifest by the clear language of the guarantee.

We shall deal with this ground right away.

We can draw a parallel between the circumstances in this case and those in the case of **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Haruperi**[4]. We are mindful of the fact that the *Nkongolo Farms* case was pleaded on fraud and misrepresentation. We are not saying that there was fraud in this case; and, certainly, this case was not pleaded on those grounds. The similarity lies in the fact that both cases are about third-party mortgages and that, in the **Nkongolo Farms** case, as in this one, there was absence of contact or direct dealing between the lending bank and the third-party mortgagor. In both cases, the lending bank

only dealt with the borrower who furnished the bank with the signed third-party mortgages and the title deeds.

In the course of arguments by the parties in the *Nkongolo Farms* case we were referred to the case of **Credit Lyonnais Bank Nederlands NV v Burch**[5] among others. This is what we said regarding the decision in that case:

> **"Now the question is whether or not the 1st respondent shared in the wrong doings of the 3rd respondent. In the case of Credit Lyonnais Bank Nederlands NV v Burch, the facts already quoted and the ruling by the court which we already quoted, the court placed, the responsibility on the bank lending money to take reasonable steps to explain to the surety the extent and implications of the transaction and to make sure that the surety independently sought independent legal advice before committing itself to the transaction. In that same case, the court held that it is not sufficient for the bank lending money just to have casual contact with the guarantor. According to these English authorities, the bank had a duty to make sure that the surety sought independent legal advice. The ratio of this English case is that 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 an obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor.**
>
> **We are persuaded to follow that sound reasoning in the case before us. We hold that there was a relationship of trust and**

confidence between the appellant Company Directors as stated by PW1 and the 3rd respondent. There was evidence that at no time did the 1st respondent try to get in touch with the appellant company directors. The 1st respondent ignored the anomalies that we have referred to which would have put them on alert as to whether or not the appellant Company Directors voluntarily signed these documents and handed them over to facilitate a loan facility for the benefit of the 3rd respondent. The 1st respondent failed to discharge its duty to ensure that the appellant Company Directors sought the required legal advice before committing themselves to the transaction which ended to their disadvantage".

We hold the above sentiments in this case as well. The respondent bank certainly failed to discharge its duties. Going by the averments by the 1st appellant, it will not be far-fetched to say that the borrower in this case abused the trust between it and the appellants and went on to use the securities to secure further loans which did not have the blessings of the appellants. By ensuring that it discharged its duties, the respondent bank would have guarded against that situation. We, therefore, find merit in the second ground of appeal.

The success of the above ground means that the respondent cannot enforce the securities to secure money borrowed on the

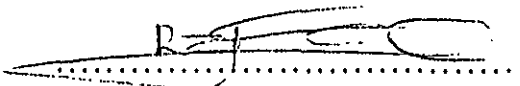
further facilities. Since the guarantee was discharged, it follows that the third-party mortgages ought to be discharged.

The fourth ground of appeal which is specifically in relation to the 2nd appellant would have only been meaningfully considered if we had held that the mortgages were properly charged for the further loans. Since our decision is that they were not, the ground has become redundant.

All in all, this appeal is allowed. The appellants will have costs, both here and in the court below.

E. M. Hamaundu
SUPREME COURT JUDGE

A. M. Wood
SUPREME COURT JUDGE



R. M. C. Kaoma
SUPREME COURT JUDGE