

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**

**APPEAL NO. 015/2016**

*(Civil Jurisdiction)*



**BETWEEN:**

**FINANCE BANK ZAMBIA LIMITED**

**APPELLANT**

**AND**

**DEVELOPMENT BANK OF ZAMBIA**

**RESPONDENT**

**CORAM: MUSONDA, DCJ, WOOD AND KABUKA, JJS**

**On 2<sup>nd</sup> October, 2018 and 22<sup>nd</sup> April, 2020**

For the Appellant: Mr. J.P Sangwa, SC, Simeza Sangwa & Associates

For the Respondent: Mr. J. Zimba, Makebi Zulu Advocates on instructions  
by Messrs Eric Silwamba, Jalasi & Linyama

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**J U D G M E N T**

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**MUSONDA, DCJ, delivered the Judgment of the Court.**

**Cases referred to:**

- 1. *Guy Pell - v - Foster: (1930) 2 Ch. 169***
- 2. *Bank of Baroda -v- Panessar: [1986] 3All. ER 751,***

**Legislation referred to:**

1. **Section 102 of the Companies Act, Chapter 388 of the Laws of Zambia (Repealed)**
2. **Section 66(1) Companies Act, Chapter 388 (repealed)**
3. **Sections 48(1) and 45(1) of the repealed companies Act, CAP. 388**

**Other Works referred to:**

1. **Furmston, Michael, Cheshire, Fifoot and Furmston's law of contract, 14<sup>th</sup> edition (London: Butterworths, 2001)**
2. **David Warne and Nicholas Elliot Q.C, Banking Litigation, (2005: Sweet & Maxwell: London).**
3. James R. Lingard: **Bank Security Documents,**

**1.0. Introduction**

*The delay in having this judgment delivered is hugely regretted.*

- 1.1 This appeal arises from the refusal by the court below (Makungu, J, as her ladyship then was) to enforce a contract of indemnity involving USD3 million which had been entered into or had arisen as between the appellant and the respondent.

**2.0. History and Background**

- 2.1 Having regard to the nature of the dispute which arose between the two protagonists in this litigation and the manner in which the two had articulated or fashioned their

respective positions in their pleadings, we find it both necessary and inevitable to give a full or detailed account of the background issues which were at play and how litigation became unavoidable.

2.2 Sometime in the year 2007, a private limited company known as Mine Air Services Limited which was operating as ‘Zambian Airways’ approached Investrust Bank Plc. (“Investrust”) with a view to securing a USD5,500,000.00 facility which it intended to apply towards purchasing two Boeing 737-200 aircraft and dedicate the balance towards the company’s working capital. For convenience, we shall alternately continue referring to Zambian Airways either by this name or as “the airline”.

2.3 Having regard to the amount of the facility which Zambian Airways was looking to secure, Investrust was unwilling or unable to avail the huge amount we have alluded to above to the airline alone. Consequently, an arrangement was crafted in terms of which Investrust was authorized by Zambian Airways to arrange a syndicated bank loan for the purpose of

raising or contributing the amount which the airline was seeking.

- 2.4 Having assumed the role of ‘syndication leader’, Investrust brought together three banks, namely, the respondent (also referred to in this judgment as “DBZ”) Intermarket Banking Corporation Limited (“Intermarket Bank”) and itself which, together, raised the USD5,500,000.00 which was subsequently availed to *Zambian Airways* under a single loan agreement.
- 2.5 The syndication referred to in the preceding paragraph became the subject of a syndicated loan agreement (*“the loan Syndication Agreement”*) involving *Zambian Airways* (as Borrower) on the one hand, and Investrust, Intermarket Bank and DBZ of the other (also together referred to in this judgment as “the Lenders”).
- 2.6 Among other terms and conditions, the Loan Syndication Agreement provided that *Zambian Airways*, as borrower, was to avail, by way of security, the following for the purpose of securing its borrowing as set out above:

2.6.1 a fixed debenture over two Boeing aircraft owned

by the borrower and bearing registration numbers  
9CJ, JCN and 9CJ JOY;

2.6.2 a fixed and floating debenture over all the assets  
of the borrower;

2.6.3 subordination of shareholder loans to the  
Lenders;

2.6.4 assignment of the borrower's receivables to the  
Lenders;

2.6.5 personal guarantee by Mr. Mutembo Nchito for  
the full borrowed sum of USD5,500,000.00; and

2.6.6 Keyman Insurance in respect of Mr. Mutembo  
Nchito.

2.7 We pause here to mention that one issue which typically characterizes a loan syndication arrangement such as had arisen here between the Borrower and the Lenders is the securitisation arrangements for the borrowing involved. For this reason, the Lenders and the Borrower involved in this matter addressed this matter by way of executing a Security Sharing Agreement. In this judgment, we propose to continue

referring to this Security Sharing Agreement either by its full description or simply as “the Security Agreement”.

2.8 Among other terms, the Security Sharing Agreement identified the moneys which each lender had agreed to avail to the Borrower as follows:

2.8.1 USD3,292,000.00 (Investrust);

2.8.2 ZMK5,000,000,000.00 (Intermarket Bank); and

2.8.3 USD3,000,000.00 (DBZ).

2.9 The securities which were the subject of the Security Agreement were identified in that Agreement as follows:

2.9.1 The Debenture Charges over all free standing fixed and floating assets of Zambian Airways to secure USD5,500,000.00;

2.9.2 An assignment of receivables in favour of Investrust Bank Plc, such assignment to, at all times, cover USD1,500,000.00 plus interest;

2.9.3 A fixed charge over Boeing 737-244 aircraft Serial Number 22584, Engine Serial Numbers JT8D-17A 709528 and JT8D-17A 708806 duly registered in favour of Investrust Bank Plc;

2.9.4 A fixed charge over Boeing 737-244 aircraft Serial Number 22588, Engine and Serial Numbers JTD8D-17A 702798 duly registered in favour of Investrust Bank Plc;

2.9.5 An undertaking from the Department of Civil Aviation to

Investrust Bank recognizing the interest of the Bank in the aircraft identified above and agreeing not to authorize disposal or alteration of title without the express authority of the Bank; and

2.9.6 Full hull and passenger liability insurance in the Insurance Policy of the subject aircraft from an insurer acceptable to Investrust Bank and noting the Bank as first loss payees.

2.10 Two of the core purposes which the Security Sharing Agreement sought to achieve were:

2.10.1 to secure each of the Lenders to "... *irrevocably [cede]* and [transfer] to the others any preferential rights which [each] hitherto had or could at any time ..." acquire in respect of all the securities which the Borrower had availed to each one of the Lenders on account of its indebtedness to each such lender; and

2.10.2 to have each lender undertake to and with the others that, in the event that a lender decided to assign or transfer its security rights or interests, such assignment or transfer could only arise subject to and in accordance with the terms and conditions of the Security Sharing Agreement and that the assigning or transferring lender had to ensure that its assignee or transferee bound itself

to the terms and conditions of the Security Sharing Agreement.

- 2.11 Under the terms of the Security Agreement, neither the Borrower nor any of the Lenders was at liberty to or, indeed, could assign or transfer any rights or delegate any responsibilities under the Agreement without the express and prior written consent of the others.
- 2.12 We must pause here again to emphasise that the background narrative we have given thus far is important because it has a bearing upon the events which followed in this matter and, indeed, the litigation which was triggered in the court below.
- 2.13 To return to the background narrative, the record reveals that the funds which had arisen in Zambian Airways' favour through the syndication could not, unfortunately, completely resolve the airline's financial woes. In particular, the airline failed to meet its obligation to the lenders.
- 2.14 For their part, the Lenders became increasingly anxious as two of the three syndicate members, namely, the



respondent and Intermarket Bank, felt let down by what the duo perceived to have been unsatisfactory performance on the part of Investrust, the leader of the syndicate. This state of affairs prompted the respondent (DBZ) to assume leadership of the syndicate.

2.15 The record further reveals that, Zambian Airways' continuing financial woes, inspite of the USD5,500,000.00 injection by the syndication, meant that more funds were required to rescue the airline whose dire circumstances had reached a crisis.

2.16 As the airline's crisis was approaching its crescendo, a meeting involving Hon. Ng'andu Magande, Minister of Finance at the time and officials from the respondent, the appellant and Zambian Airways took place on 15<sup>th</sup> July, 2008 the gist of which was summarized by the respondent's letter dated 21<sup>st</sup> July 2008 which partly read as follows:

*"21<sup>st</sup> July 2008*

*Hon. Ngandu P. Mangande  
Minister of Finance and National Planning  
P.O BOX 50062  
Ridgeway  
Lusaka*

Dear Hon. Minister

**Zambian Airways Limited**

Our meeting with you, Finance Bank Zambia Ltd (FBZ) and Zambian Airways Limited (ZA) held on 15 July 2008 refers.

Development Bank of Zambia (DBZ) would be willing to look at all possible options to find a solution to the cash flow challenges that ZA is facing. DBZ has also taken note of the proposal tabled by the promoters at the meeting referred to above. In DBZ's understanding, ZA is proposing the following:

1. Zambian Airways indicated that the company was faced with an emergency, where urgent help was required to finance fuel and Finance Bank was ready to do that. The Company's request was that Government, through DBZ, should help the airline by converting the DBZ debt into equity. This would reduce the debt burden and at the same time enable Finance Bank have access to the collateral held by DBZ and therefore be in a position to provide the much needed finance for working capital, fuel in particular. ZA indicated that BP, the fuel suppliers, was not able to give any fuel to the Airline without advance payment. Without this immediate intervention by Finance Bank, the ZA planes would be grounded the following day.

A summary of the ZA proposal at the meeting is as follows:

- DBZ should write to Ministry of Finance and National Planning indicating the position of the ZA facility and that DBZ is willing to convert the debt to equity if MOFNP would support this financially. MOFNP needs to receive a request from DBZ before they can take any action.
- MOFNP should in turn write to DBZ indicating that the support would be forthcoming.
- DBZ to convert the amount outstanding on the ZA facility to equity. This would release the DBZ portion of the security given to the Syndicate.

- *On the basis of this, FBZ would pay off the amounts due to the remaining two members of the Syndicate. This would release the entire security to FBZ.”*

2.17 The narrative which we captured from the record suggested that, at the time of the meeting referred to in 2.16 above, only the appellant was willing to avail further funding to *Zambian Airways* and yet the airline had no collateral to avail to the appellant for the purpose of securing any borrowing from this bank. By reason of this predicament, *Zambian Airways*' proposal was to have the syndicate members free up some of the assets which were being held by them as security for the purpose of availing them to the appellant in order to secure the additional borrowing which the airline was seeking from the latter.

2.18 After further interactions and correspondence involving *Zambian Airways* and its shareholders on the one hand and the appellant and the respondent on the other, a position appears to have been reached by the respondent which culminated in the letter, by the respondent, to *Zambian Airways* which was dated 6<sup>th</sup> October, 2008 and which partly read as follows:

*“The Directors*

*Mine Air Services Limited t/a Zambian Airways  
Plot No. 917/M15A, Lusaka International Airport  
P O Box 310277  
LUSAKA*

*Attn: The Managing Director*

*Dear Sir*

***Common Stock Equity***

*The Development Bank of Zambia (hereinafter referred to as the Bank) offers to restructure and convert the medium term loan granted by it to Mine Air Services Limited, t/a Zambian Airways, Registration Number 000261 (“the Company”) into a majority common stock equity participation (hereinafter referred to as equity facility) subject to the terms and conditions set out herein and in the Shareholders Agreement to be signed between the Bank and the current shareholders of the Company.”*

2.19 On the same date, that is, 6<sup>th</sup> October, 2008, the respondent wrote the following letter to the appellant:

*“06 October 2008*

*The Director of Credit  
Finance Bank Zambia Limited  
Finance House  
Lusaka*

*Dear Sir,*

**RELEASE OF SECURITY**

*The Development Bank of Zambia has approved, in principle, to take up an equity stake in Mine Air Services Limited, t/a Zambian Airways, our mutual customer, by converting the medium term loan granted by the Bank to the company, into a majority common stock equity participation subject to the fulfillment, by the Company, of certain terms and conditions and the signing of the Shareholders' Agreement between the Bank and the current shareholders of the Company.*

*The taking up of equity means that the Bank will be in a position to discharge the security assets it holds in respect of the loan and deliver it to you to secure short term financing facilities already approved by yourselves on account of Zambian Airways, once the latter fulfills the condition precedent to the Bank's equity participation.*

*This letter, therefore, serves as an undertaking by the Development Bank of Zambia that we will relinquish our interest in the security assets and forward to you the discharge documents to enable you register your security once formalities have been completed.*

*We trust that you will now be in a position to allow Zambian Airways access to the short-term financing facilities. In this regard, please be advised that any disbursement requests relating to these facilities shall be authorized jointly by the Development Bank of Zambia and Zambian Airways. No disbursements are to be made without prior clearance by the Development Bank of Zambia.”*

2.20 On 13<sup>th</sup> October, 2008, the appellant responded to the respondent's letter of 6<sup>th</sup> October, 2008 in the following terms:

*"The Managing Director  
Development Bank of Zambia  
Development House  
Katondo Road  
P O Box 33955  
Lusaka*

*Dear Sir,*

*Re: Proposed credit facility to Zambian Airways*

*We acknowledge receipt of both your letters dated the 6<sup>th</sup> instant over the above subject matter. We have since had occasion to study them and we reply as follows to your request:*

- i) We as a bank can avail Zambian Airways of the requested facility as long as the relevant security documents that your Bank is holding are discharged and released to Finance Bank Zambia Limited.*
- ii) In the alternative we would request your Bank to make an unequivocal undertaking that it shall cover/indemnify Finance Bank Zambia Limited for any disbursements that will be made to Zambian Airways as per your request in your letter headed "clearance of Zambian Airways Payments for Week End 10<sup>th</sup> October, 2008".*

*The other contents in your letter are equally noted but we are of the view that the above stated are of utmost importance.*

*Yours faithfully,  
(signed)*

*I. Ali  
Executive Director – Credit"*

2.21 On 13<sup>th</sup> October, 2008, the respondent replied to the appellant's letter of 6<sup>th</sup> October, 2008. That reply was expressed in the following terms:

*"Private and Confidential*

*13th October 2008*

*The Executive Director – Credit*

*Head Office*

*Finance Bank Zambia Limited*

*P.O Box 37102*

*Lusaka*

*Attn: Mr. Irshad Ali*

*Dear Sir,*

***RELEASE OF SECURITY TO FINANCE BANK OF ZAMBIAN AIRWAYS***

*We refer to your letter of even date, which was in reply to our letter to you of 6 October 2008.*

*The Development Bank of Zambia (DBZ) undertakes to release its interests in the security assets of Zambian Airways and forward to Finance Bank the discharge documents to enable you register your security, as soon as possible. In the interim, DBZ undertakes to indemnify Finance Bank against all payments cleared by us in writing based on Zambian Airways' weekly cash flows against intended payments. The Indemnity will cease to have any legal*

*effect and become null and void upon the said securities being handed over to Finance Bank.*

*Yours faithfully,*

*(signed)*

*Abraham Mwenda (Dr.)  
MANAGING DIRECTOR  
FOR AND ON BEHALF OF  
DEVELOPMENT BANK OF ZAMBIA*

*Hephzibah S. Beyani  
MANAGER-CREDIT  
FOR AND ON BEHALF OF  
DEVELOPMNT BANK OF ZAMBIA*

*CC: The CEO, Mines Air Services Limited t/a Zambian Airways”*

2.22 On 16<sup>th</sup> October, 2008, the appellant responded to the respondent’s letter of 13<sup>th</sup> October, 2008. The appellant’s response was expressed in the following terms:

*“The Managing Director  
Development Bank of Zambia  
Development House  
P. O. Box 33955  
Lusaka*

*14th October, 2008*

*Dear Sir,*

*Re: RELEASE OF SECURITY TO FINANCE BANK ON ZAMBIAN  
AIRWAYS*

*We acknowledge receipt of your letter dated the 13th instant and note the contents therein.*



*We would like to acknowledge the fact that we are in agreement with the first part of your letter wherein you agree to release the security documents as soon as possible. We are however not very comfortable with your latter arrangement as regards the indemnity for the interim payments. Instead of the proposed arrangement where all payments are cleared with you, we would like to suggest that we offer Zambian Airways a facility for US\$3,000,000.00 (Three Million United States Dollars). Development Bank of Zambia will in turn indemnify Finance Bank Zambia Limited up to this amount inclusive of interest.*

*As stated in your letter this indemnity will fall away once the securities are handed over to Finance Bank*

*We thank you in anticipation.*

*Yours faithfully,*

*(signed)*

*Irshad Ali*

*Executive Director – Credit”*

2.23 On 17<sup>th</sup> October, 2008, the respondent authored a letter to the appellant whose subject matter was indicated as *‘Release of Security to Finance Bank on Zambian Airways’* and which was expressed in the following terms:

*“We refer to our letters to you of the 13<sup>th</sup> and 14<sup>th</sup> instant.*

*We write to confirm that Development Bank of Zambia has no further claim in the security assets of Zambian Airways. Finance*

*Bank Zambia Limited is therefore free to register its interests on the same.*

*Following this confirmation from us, please note that DBZ's indemnity to you for Zambian Airways' new facility of USD3 Million has ceased with immediate effect."*

2.24 On the same date, that is, 17<sup>th</sup> October 2008, the respondent wrote to Intermarket Bank in the following terms:

*"17th October 2008*

*The Managing Director*

*Intermarket Banking Corporation (Zambia) Limited*

*Farmers House, Central Park*

*Corner Cairo Road/Church Road*

*P.O. Box 35832*

*Lusaka*

*Attn: Mr. Chrispen Handina – Head, Branch Operations*

*Dear Sir,*

***RELEASE OF SECURITY TO FINANCE BANK ON ZAMBIAN AIRWAYS***

*We write to confirm that Development Bank of Zambia has no further claim in the security assets of Zambian Airways and has relinquished the same to Finance Bank Zambia Limited, who are free to register their interests on the same.*

*This is in support of the on-going restructuring of Zambian Airways, to support Finance Bank's new Facility of USD3 million to the Company, which is intended to provide the much needed working capital for the Airline's operations.*

*Yours faithfully,  
(signed)*

*Abraham Mwenda (Dr.)  
MANAGING DIRECTOR  
FOR AND ON BEHALF OF*

*Andrew Musukwa  
LEGAL COUNSEL  
FOR AND ON BEHALF OF*

*DEVELOPMNT BANK OF ZAMBIA DEVELOPMNT BANK OF ZAMBIA*

*CC: the CEO, Mines Air Services Limited t/a Zambian Airway"*

2.25 On 20<sup>th</sup> October, 2008, the respondent wrote to Investrust Bank in the following terms:

*"27th October 2008*

*The Managing Director,  
Investrust Bank Plc  
Freedom Way  
Lusaka*

*Attention: Mr. James Kapesa, Head of Corporate Finance and  
Credit*

*Dear Sir,*

**RELEASE OF SECURITY OF FINANCE BANK ON ZAMBIAN  
AIRWAYS**

*Reference is made to the telephone discussion between Mr. Richard Phiri, the Managing Director in your bank and the undersigned, Dr. Abraham Mwenda, on Monday, 20th October, 2008*

*We write to confirm that the Development Bank of Zambia is agreeable to relinquish its claim in the security assets of Zambian Airways to Finance Bank Zambia Limited. This is in support of the on-going restructuring of Zambian Airways to support Finance Bank's new facility of USD 3 million to the Company, which is intended to provide the much needed working capital for the Airline's operations.*

*Therefore, in accordance with the Syndication Agreement as read together with the Security Sharing Agreement, the Development Bank of Zambia is hereby giving seven (7) days notice of its intention to relinquish its claim in the said security and to that effect cease to be a part of the syndicate.*

*Yours faithfully,*

*(signed)*

*Abraham Mwenda (Dr)*

*MANAGING DIRECTOR*

*FOR AND ON BEHALF OF*

*DEVELOPMENT BANK OF ZAMBIA*

*Andrew Musukwa*

*LEGAL COUNSEL*

*FOR AND ON BEHALF OF*

*DEVELOPMENT BANK OF ZAMBIA"*

2.26 On 22<sup>nd</sup> October, 2008, the appellant responded to the respondent's letter of 17<sup>th</sup> October, 2008. The respondent's letter was expressed in the following terms:

*"The Managing Director*

*Development Bank of Zambia*

*Development House  
Katondo Road  
P O Box 33955  
Lusaka*

*22nd October, 2008*

*Dear Sir,*

*RELEASE OF SECURITIES TO FINANCE BANK ON ZAMBIAN  
AIRWAYS*

*We are in receipt of your letter dated the 17th instant and note the contents therein.*

*Our immediate reaction to its contents is that we noticed certain silent features. We have not been informed as what type of tangible securities DBZ was holding in respect of Zambian Airways. Further it would also help us if your institution had handed over the available tangible security documents along with the required discharges to us. This would enable us register our interests immediately. We therefore still hold your institution to the guarantee it had undertaken until a proper handover of securities is done.*

*In conclusion we are of the opinion that the “handover” was done rather in haste without having taken into account what we have mentioned above. We would highly be appreciative if the above concerns are addressed. We thank you in anticipation.*

*Yours faithfully,*

*(signed)*

*Irshad Ali*

*Noyoo Noyoo*

*Executive Director – Credit*

*Assistant Legal Counsel”*

2.27 On 23<sup>rd</sup> October, 2008, the respondent replied to the appellant’s letter of 22<sup>nd</sup> October, 2008 in the following terms:

*“23<sup>rd</sup> October 2008*

*The Managing Director  
Finance Bank Zambia Limited  
Finance House Cairo Road  
P.O. Box 37102  
Lusaka*

*Dear Sir,*

***RELEASE OF SECURITY TO FINANCE BANK ON ZAMBIAN AIRWAYS***

*Your letter dated 22 October 2008 refers.*

*We shall refer you to your letter dated 18<sup>th</sup> December 2007 to Zambian Airways, on which basis the Development Bank of Zambia accepted to become an equity holder in the Airline. In particular we refer you to paragraph 8 on Security.*

*We further refer you to the Meeting on 15<sup>th</sup> July 2008 called by Zambian Airways and yourselves held at the Ministry of Finance and National Planning with the Minister, Honourable Ng’andu Magande. Finance Bank was represented by Mr. Ali Barkat. The matter was discussed at length.*

*Finance Bank has taken over the portion of the security that was previously held by the Development Bank of Zambia in the Loan Syndication to Zambian Airways involving Investrust Bank Plc and Intermarket Banking Corporation Limited. The security of the syndication comprises the following:*

- (i) *Debenture over company's fixed and floating assets*
- (ii) *Debenture creating a fixed charge over two Boeing 737-200 aircraft*
- (iii) *Assignment of receivables*

*It would be in your interest to execute your securities in Zambian Airways. Upon request we may be able to facilitate the process with the other syndicate members. We have already converted our facility to equity and consequently cannot accept to keep in existence the indemnity after relinquishing our security to yourselves.*

*In that regard, it would be prudent for all parties to re-focus efforts into sustaining the viability of Zambian Airways.*

*Yours faithfully,*

*(signed)*

*Abraham Mwenda (Dr)  
MANAGING DIRECTOR  
FOR AND ON BEHALF OF  
DEVELOPMENT BANK OF ZAMBIA*

*Andrew Musukwa  
LEGAL COUNSEL  
FOR AND ON BEHALF OF  
DEVELOPMENT BANK OF ZAMBIA"*

2.28 On 28<sup>th</sup> October, 2008, the respondent wrote to the appellant surrendering the security documents which had been held by the lenders on account of their lending to Zambian Airways, as follows:

- (a) Security Sharing Agreement
- (b) Assignment of Receivables
- (c) Debenture creating a fixed charge in respect of 1 Boeing 737-244 ADV Series
- (d) Debenture – creating a fixed charge in respect of 1 Boeing 737-

200 ADV Series

(e) Debenture – creating a fixed and floating charge over all the fixed and floating assets of Zambian Airways.

2.29 On 31st October, 2008, the appellant wrote to the Managing Directors of the lenders seeking to be furnished with the following:

2.29.1 Copies of amended articles of Association of Zambian

Airways evidencing the respondent's shareholding in the airline together with all relevant Board resolutions;

2.29.2 Board Resolutions of the Post Newspapers limited

confirming the fact of this company having taken over Zambian Airways' indebtedness to Investrust Bank and Intermarket Banking Corporation; and

2.29.3 Duly executed memorandum of Discharge and satisfaction

discharging the security sharing Agreement, Debenture and Assignment of receivables duly filed.

2.30 For completeness, the appellant was seeking the documents in 2.29.3, so that it could perfect its fresh securities.

2.31 On 20<sup>th</sup> November, 2008 Zambian Airways wrote to the appellant forwarding an executed deed of debenture and specific charge which the latter had earlier sent to the



airline for execution. In that accompanying letter, Zambian Airways confirmed that the respondent had surrendered their security rights in respect of Zambian Airways' assets to the appellant.

2.32 On 5<sup>th</sup> December, 2008 the appellant wrote to the respondent and, *inter alia*, maintained that the contract of indemnity which had arisen between the duo was still subsisting.

2.33 On 26<sup>th</sup> November, 2008, the appellant registered the debenture which Mine Air Services Limited (T/A Trading as Zambian Airways) had created in its favour. According to the appellant, this debenture related to the old debts, being USD4, 300,000.00 and K500,000,000.00, which the appellant had availed to the airline but did not include the USD 3 million which became the subject of the contract of Indemnity.

2.34 For its part, the respondent insisted in its reply dated 8<sup>th</sup> December, 2008 that the relinquishing of its portion of the security in the global security which had been held by the

syndicate members on account of the lending to Zambian Airways still stood and that it had no further claim to the security in question after the same were transferred to the appellant.

2.35 On 9<sup>th</sup> December, 2008, the appellant wrote to the respondent forwarding copies of the *Pari Passu* Agreement on securities which it had prepared and requested the respondent, as leader of the syndication, to facilitate the execution of the same by the other syndication members.

2.36 On 11<sup>th</sup> January, 2009, Zambian Airways wrote to the respondent, the appellant, Intermarket Bank and Investrust Bank for the purpose of informing the quartet that the company had suspended all operations until further notice. In its letter, Zambian Airways sought to know (from the quartet) “... *the way forward in the light of the security that the [appellant] was not even aware of the type of security that the [respondent] was going to offer so we asked for tangible security [they held]*”.

2.37 On 14<sup>th</sup> January, 2009, the appellant wrote to the respondent demanding to be “*indemnified to the extent of US\$3,000,000 in respect of funds disbursed to Zambian Airways ...*”. The appellant made it clear that it was making its demand “*... following the ... events obtaining at Zambian Airways...*”

### **3.0 The Court Action –Pleadings**

3.1 Sometime during the month of July, 2009, the appellant took out a writ of summons against the respondent seeking the recovery of USD Three Million on account of the “*indemnity or guarantee or surety*” given by the respondent to the appellant.

3.2 In its statement of claim, the appellant pleaded, *inter alia*, that:

*“In consideration of the [appellant] giving [Zambian Airways] a **short term financing facility** in the sum of US\$3,000,000.00 without [Zambian Airways] providing security for the facility the [respondent] would indemnify the [appellant] and keep the [appellant] indemnified up to the tune of US\$3,000,000.00 from and against all liability or*

*damage incurred or to be incurred by the [appellant under the terms of the agreement entered into by the [appellant] with [Zambian Airways]”. (emphasis ours)*

3.3 The appellant further pleaded that, *“in line with the said agreement (in 3.2 above) the [appellant] duly advanced the sum of US\$3,000,000 to [Zambian Airways].”*

3.4 The appellant further alleged that, wrongfully and, in breach of the agreement referred to in 3.2 above, the respondent had failed or neglected to:

- (a) take up equity in Zambian Airways by converting its medium term loan to Zambian Airways; and
- (b) to indemnify the appellant to the tune of US\$3,000,000.00.

3.5 In its re-amended defence, the respondent effectively admitted that a ‘purported’ contract of indemnity did arise as between itself (the respondent) and the appellant. The respondent, however, averred that the indemnity which was the subject of the agreement in question was to cease to have any effect upon delivery, by the respondent (to the appellant) of security documents relating to the security which Zambian Airways

had created in the respondent's favour on account of the latter's lending to the airline. The respondent also pleaded that, once it had delivered the security documents in question to the appellant it was to be duly released from the indemnity.

3.6 The respondent further pleaded in its defence that the appellant duly accepted the security documents from itself (the respondent) in satisfaction and discharge of the appellant's 'purported' indemnity and that, upon the occurrence of the aforesaid, the appellant accepted Zambian Airways as its debtor for the USD3 million which had been the subject of the contract of indemnity in question.

3.7 The respondent also pleaded in its defence that Zambian Airways subsequently executed a debenture and specific charge in favour of the appellant to secure USD4,300,000.00 and ZMK500,000,000.00 which was duly registered. By reason of the foregoing, the respondent averred that the contract of indemnity was discharged adding that any loss which the appellant had suffered, if at all, was not a result of

any breach on its part but the appellant's own default as it ought to have conducted the requisite due diligence in respect of Zambian Airways' assets prior to availing the USD3 million short term facility to the airline.

3.8 The respondent further averred that all documents of sufficient materiality were furnished to the appellant.

#### **4.0 THE TRIAL AND THE PARTIES' RESPECTIVE CONTENTIONS**

4.1 The matter was tried in the usual manner with each party calling two witnesses who testified on their behalf.

4.2 The appellant's first witness ("PW1") was Maureen Phiri.

4.3 PW1 opened her testimony by telling the court below that Zambian Airways had been a long time corporate customer of the appellant and that the airline had been borrowing from the bank even before the events which culminated in the litigation which was escalated to this court.

4.4 The witness further testified that on 6<sup>th</sup> October, 2008, the respondent wrote to the appellant seeking to have the latter avail a sum of USD999,091.49 to Zambian Airways for the purpose of having the airline meet its operational

requirements for the week ending 10<sup>th</sup> October, 2008, on condition that Zambian Airways met or satisfied the appellant's disbursement conditions.

4.5 P.W.1 further testified that, on the same date mentioned in the preceding paragraph (i.e. 6<sup>th</sup> October 2008) the respondent indicated to the appellant that it had approved, in principle, to have the loan which it had availed to Zambian Airways converted into equity, subject to the fulfillment, by the airline, of certain terms and conditions which conditions included the execution of a shareholders' Agreement between the respondent and the then existing shareholders of the Zambian Airways.

4.6 It was PW1's further evidence that, in the same letter of 6<sup>th</sup> October, 2008, the respondent made an undertaking to the effect that once it had successfully taken up equity in Zambian Airways in the manner disclosed above, it was to discharge the security then held by it on account of its own lending to Zambian Airways and surrender or deliver the documentation relating thereto to the appellant for the purpose of having the latter use the same to secure its own

short term financing to the airline which the appellant had since approved.

- 4.7 The witness also testified before the trial court that, prior to the appellant's interactions with the respondent up to that point, the appellant had been unwilling to extend any further financing facilities to the airline owing to the fact that it had reached maximum exposure adding that the appellant only became interested in availing a fresh facility to Zambian Airways as a result of the respondent's offer to guarantee the new facility and to take up equity in the airline.
- 4.8 PW1 further testified that, by a letter to the respondent dated 13<sup>th</sup> October, 2008, the appellant confirmed having decided to avail a facility to Zambian Airways on condition that the respondent was going to release the security documents which were then held by it to the appellant as earlier explained. In the alternative, the appellant sought to have the respondent undertake to indemnify the appellant on account of any disbursements by the latter to Zambian Airways.



4.9 PW1 also told the trial court that, on the same date referred to in the preceding paragraph, the respondent wrote to the appellant confirming that it was going to relinquish its security interest in the assets of Zambian Airways in order to facilitate the registration of the appellant's security interests in the same assets at the earliest possible time. In the same letter, the respondent undertook to indemnify the appellant on account of all payments by the appellant to the airline which would have been cleared by the respondent save that the indemnity in question was to cease upon the securities earlier mentioned being handed over to the appellant.

4.10 The witness further testified before the court below that, following further discussions between the appellant's representatives and the respondent's, an agreement was reached whereby the appellant disbursed a sum of USD3,000,000.00 to Zambian Airways and that it was this amount, together with interest, which became the subject of the respondent's undertaking to indemnify the appellant.

4.11 In concluding her evidence in chief, PW1 told the lower court

that, on 17<sup>th</sup> October, 2008, the respondent wrote to the appellant and advised the latter that it (the respondent) had relinquished its security interest in the assets of Zambian Airways and that the appellant was at liberty to proceed and register its own interest in the said assets.

4.12 The witness further testified that, arising from the development in 4.11, the respondents indicated that its undertaking to indemnify the appellant to the extent of USD3 million had fallen away.

4.13 PW1 also told the court below that although the respondent had taken the position which has been adverted to in the preceding paragraph, the appellant had not, by 17<sup>th</sup> October, 2008, received the securities nor did it know the values of the same. In her own words, PW1 told the trial court that:

*“By the time the defendant [now respondent] was writing the letter of 17<sup>th</sup> October, 2008, we had not received the securities and we did not even know the values of those securities.*

4.14 According to PW1, the respondent’s position that the indemnity had been discharged in the circumstances we have set out above is what formed the genesis of the dispute

which had birthed the litigation which has now been escalated to this court.

- 4.15 Under cross-examination, PW1 testified that no evidence had been placed before the court below to confirm that the respondent was a shareholder in *Zambian Airways*.
- 4.16 The witness further testified that, by December, 2007, the appellant was aware about *Zambian Airways*' borrowing from the lenders (as earlier identified) and the fact that the airline had availed its assets to secure its borrowing.
- 4.17 According to PW1's further cross-examination testimony, inspite of the appellant's knowledge about the matters alluded to in 4.16, it only became aware of the existence of the Security Sharing Agreement involving the airline on 23<sup>rd</sup> October, 2008 when it received a letter bearing that date from the respondent.
- 4.18 The witness further confirmed that, when the contents of the Security Sharing Agreement were examined on behalf of the appellant, the following matters became clear to the appellant:
- 4.18.1. that, all the assets of *Zambian Airways* were collectively

held as security by the lenders;

4.18.2. that, the security interests of the lenders in the airline's assets ranked *pari passu*:

4.18.3 that, in terms of clause 2.1.4 of the Security Sharing Agreement, each of the lenders [had] irrevocably [transferred] to the others any preferential rights it [then had or which it was to acquire] in respect of all the securities [which had been] provided by the [airline] and;

4.18.4 that, under the terms of the Agreement, Investrust Bank had been appointed as the lead bank which also held the securities which had been availed by the airline on behalf of the lenders.

4.19 PW1 closed her cross – examination testimony by telling the trial court that no evidence was placed before the trial court to confirm that the three lenders or syndicate members had consented to having the respondent release its security interest in the assets in question to the appellant and that, in consequence, the appellant was never at liberty to register its security interest in these assets because they were still encumbered and had not been discharged.

4.20 The appellant's second witness (PW2) was Alfred Roberts who had served as its Assistant Director and Legal Counsel at the material time.

4.21 PW2 opened his testimony by telling the trial court that, sometime after 17<sup>th</sup> October, 2008, the appellant's Executive Director in charge of credit referred the letter of 17<sup>th</sup> October, 2008 referred to in 4.11 above which had originated from the respondent to him for his legal opinion. For convenience, we would reiterate that the gist of the respondent's message in that letter was that it had relinquished its security interest in the assets of *Zambian Airways* and that the appellant was at liberty to register its own security interest in the assets in question.

4.22 According to PW2's further testimony, on 22<sup>nd</sup> October, 2008 he prepared a legal opinion for the appellant after examining the respondent's letter of 17<sup>th</sup> October, 2008.

4.23 The opinion which PW2 gave the appellant was that the respondent did not do what was legally required of it for the purpose of discharging its role.

4.24 According to PW2, the discharge of its proper role required the respondent to surrender the original security documents and a duly executed memorandum of discharge and

satisfaction as was required under section 102 of the Companies Act, (then Chapter 388 of the Laws of Zambia)

4.25 In PW2's opinion, anything short of what we have set out in 4.24 was not sufficient for the purpose of achieving what the respondent had claimed to have achieved via its letter of 17<sup>th</sup> October, 2008.

4.26 Arising from the matters in 4.23 and 4.25, PW2's opinion to the appellant was that the respondent's obligation to indemnify the appellant remained undisturbed.

4.27 According to the record, the gist of PW2's testimony was expressed in the following terms;

*"[the respondent] did not surrender the original security documents to the [appellant]. Secondly and most importantly, the [respondent] did not surrender to the [appellant] a duly signed/executed .... memorandum of discharge and satisfaction of their securities as [required] under the companies Act. The said documents were important to the appellant because the indemnity given by the [respondent] to the appellant was on condition that*

*[the same] would be valid in the interim period up to the point of the [respondent] discharging its security and releasing the same to the [appellant]. The discharge had a material bearing on the indemnity for USD3 million. It was important for the [respondent] to hand over the documents to the [appellant] so that the [appellant] would take the place of the [respondent] in what we came to know as a tripartite Security Sharing Agreement;*

4.28 PW2 further testified that;

*“At this point, the [appellant] was not even aware of the type of security that the [respondent] was going to offer so we asked for tangible security .... [The respondent] simply reiterated that they had surrendered their security [The appellant] never dealt directly with the other [lenders]”.*

4.29 PW2 also testified that the appellant was not in a position to register its own security over the assets of Zambian Airways owing to the fact that the assets were the subject of existing security involving the lenders.

4.30 In his further evidence, PW2 referred to various provisions of the Security Sharing Agreement which provided that

Investrust had been appointed as the lead bank under that Agreement. The witness also confirmed that a key provision of the Security Sharing Agreement was clause 9.17 which provided that no party to that Agreement could assign any of its rights without the written consent of the others. According to him, he understood this clause to mean that if the respondent was to surrender the securities to the appellant it had to secure the written consent of the other lenders. PW2 also confirmed that, in all its dealings, the appellant only interacted with the respondent.

4.31 PW2 further testified that, on 31<sup>st</sup> October, 2008 he wrote the letter we referred to at 2.29 above to which he received no response and that on 2<sup>nd</sup> December, 2008 he wrote another letter to the respondent in which he indicated that, unless they received the sealed memorandum of discharge and satisfaction the appellant would hold the respondent fully responsible on the indemnity in question.

4.32 PW2 also told the trial court that on 3<sup>rd</sup> December, 2008 the respondent replied to the appellant's letter of 2<sup>nd</sup> December, 2008. In its said letter of 3<sup>rd</sup> December, 2008, the



respondent maintained that the indemnity had been discharged.

4.33 PW2 ended his evidence in chief by telling the trial court that in early January, 2009 Zambian Airways suspended its operations. Following this development, the appellant made a demand for US\$3million from the respondent on account of the indemnity.

4.34 Under cross-examination, PW2 testified that, as at 18<sup>th</sup> December, 2007, the plaintiff was aware about the syndicated loan to Zambian Airways by the lenders. The witness, however, confessed that he did not know how a debenture which is the subject of a syndicated loan is discharged.

4.35 PW2 closed his cross-examination evidence by telling the court below that the debenture and specific charge which Zambian Airways had executed in the appellant's favour related to the USD4.3 million and K500 million facilities which the airline received from the appellant and that the USD3 million which was the subject of the indemnity was disclosed much later.

4.36 The conclusion of PW2's testimony marked the closure of the appellant's case in the court below.

4.37 As we earlier noted, the respondent also called two witnesses who testified on its behalf.

4.38 The respondent's first witness ("DW1") was Musenga Andrew Musukwa who opened his evidence by telling the trial court that he was, at all times relevant to this matter, serving as the respondent's Bank Secretary and Legal Counsel.

4.39 This witness also confirmed that, in his capacity as the respondent's Bank Secretary and Legal counsel, he was the custodian of the respondent's formal documentation relating to the transaction or arrangement which had formed the genesis of the dispute which became the subject of the court action in the court below.

4.40 DW1 further testified that he had been the custodian of the respondent's Board's minutes which had approved the loan facility to Zambian Airways as well as the minutes of the Board's credit committee which had approved the conversion of the respondent's debt to the airline into equity. This witness also confirmed that he kept the syndication

documents which had been executed by Investrust Bank (as the leader of the syndicate at the time), Intermarket Banking Corporation and the respondent.

4.41 DW1 further confirmed that, aside from the documents which have been identified in 4.40 above, he had also been the custodian of the Security Sharing Agreement which had involved the parties we identified in the said paragraph numbered 4.40 above. In terms of this Security Sharing Agreement, Zambian Airways created a floating charge over its planes together with all its other assets while Investrust was constituted as the security agent of the other syndicate members. For the avoidance of doubt, Investrust, in this capacity as the security agent and, on its own behalf, it (the bank) held the security in question on behalf of the other two syndicate members.

4.42 DW1 further informed the trial court that, apart from the security sharing Agreement having stipulated the rights and obligations of the parties to it, it had also defined how each syndicate member could access the syndicated security.

- 4.43 DW3 also testified that, at some point during the life of the syndication in question, the respondent and Intermarket Banking Corporation were not happy with the manner in which Investrust was leading the syndicate. Consequently, an agreement was reached between Intermarket Banking Corporation and the respondent for the purpose of having the latter take over the leadership of the syndicate.
- 4.44 Following the syndication leadership change alluded to in 4.43, Investrust passed on copies of the syndication documents, namely, the Security Sharing Agreement and some vital correspondence which had passed between Investrust and Zambian Airways in relation to the syndicate to the respondent.
- 4.45 In his further testimony, DW1 informed the lower court that although he received copies of the syndication documents we have referred to above, Investrust Bank had technically remained as the syndicate security agent of the syndicate members as earlier noted.
- 4.46 DW1 also informed the court below that the respondent's role as a leader of the syndicate subsisted until its debt to

Zambian Airways was converted into equity.

4.47 According to DW1's further testimony in the court below, sometime around June, 2008, Zambian Airways found itself in serious financial problems and was in dire need of working capital.

4.48 By reason of the difficulties highlighted in 4.47, discussions ensued which involved the respondent, Hon. Ng'andu Magande, the then Minister of Finance, and Zambian Airways. These discussions were also attended by a representative of the appellant and were intended to identify or secure a solution to the financial challenges which Zambian Airways was facing.

4.49 DW1 further testified that the discussions referred to in 4.48 above culminated in having the respondent convert the debt which it was owed by Zambian Airways into equity as a condition for the availing of working capital to the airline by the appellant.

4.50 According to DW1's further evidence, the conversion of the airline's indebtedness into equity in favour of the respondent was duly finalized save for the issuance of the relevant share

certificates and finalization of some administrative issues. The witness also informed the trial court that soon after the respondent and Zambian Airways resolved the debt for equity swap, the respondent advised the appellant and the other syndicate members that it(the respondent) had ceased being a creditor in relation to Zambian Airways. The witness also informed the court below that the continuing syndicate members were further advised that the respondent had ceased being a member of the syndicate.

4.51 DW1 made it clear in his evidence that the respondent's withdrawal from both the syndication agreement and the Security Sharing Agreement were done in accordance with the provisions of the two instruments.

4.52 According to DW1'S further evidence, following the developments in 4.50 and 4.51, all the parties who had an interest in the syndication agreement and the Security Sharing Agreement were happy. The witness confirmed in this regard that the appellant took over the security which was previously held by the respondent and secured the

execution of the security instruments (the deed of debenture and specific charge) by *Zambian Airways*.

4.53 DW1 also testified that there were differences of opinion between the appellant and the respondent with regard to the respondent's position that it had withdrawn from the syndicate and had surrendered or relinquished its security interests in the assets of *Zambian Airways* in favour of the appellant. DW1 explained to the lower court what steps the respondent had to undertake in order to effectively withdraw from the syndicate and to give up its security interest in the assets in question as earlier explained.

4.54 According to DW1, once the respondent had ceased being a member of the syndicate and relinquished its security interests in the assets of *Zambian Airways* in favour of the appellant, it was up to the appellant (which was joining the syndicate) to take necessary steps to be made a party to the syndication and the associated security documentation. The witness also confirmed that the respondent had, indeed, agreed to indemnify the appellant on account of the facility which the latter had availed to *Zambian Airways* but added

that the indemnity ceased to have any effect once the respondent had fulfilled the terms or conditions upon which the same had been given.

4.55 Under cross examination, DW1 testified that the three banks which had formed the syndicate availed the total facility of USD5.5 million to *Zambian Airways* as a group. He also confirmed that even the security which *Zambian Airways* availed to the three syndicate members was held collectively and was treated as indivisible but that this security was the subject of the Security Sharing Agreement which set out the manner in which the security was to be shared in the event of default on the part of the airline.

4.56 DW1 further testified under cross examination that it was in the interest of the respondent to keep *Zambian Airways* afloat because it (the respondent) stood to lose a lot of money if it did not do so. The witness also informed the court below that the respondent had undertaken to release “securities” to the appellant once the latter gave *Zambian Airways* a short term loan.



- 4.57 It was DW1's further evidence that the respondent became an equity shareholder in Zambian Airways after paying K14 billion.
- 4.58 Under re-examination, DW1 testified that the appellant was informed by the respondent that it (the appellant) had taken over the security interest which the respondent had held when it was still a member of the syndicate.
- 4.59 The witness reiterated that, in a syndicated loan scenario which also involves a security sharing agreement, no formalities existed with respect to joining or leaving the syndication. For this reason, all that the respondent needed to do at the time of leaving the syndicate was to inform the remaining or continuing members of the syndicate so that they could arrange to execute a new agreement as between themselves (as lenders) and the borrower (i.e Zambian Airways).
- 4.60 With regard to the instrument discharging of the security which the appellant was insisting on, DW1 testified that there could be no such instrument in a syndicated security scenario. The witness emphasized that the respondent

could not discharge the security in question because it was not held in its name but in the name of Investrust Bank, the security agent.

- 4.61 The second witness who testified on behalf of the respondent in the trial court was Hibziba Similenda Namingwa Beyani (“DW1”).
- 4.62 DW2 opened her testimony by confirming that the respondent was part of a syndicate of banks which had availed a loan facility to Zambian Airways.
- 4.63 The witness further testified that it was the responsibility of each syndicate member to undertake its own due diligence prior to availing its portion of the facility to the borrower.
- 4.64 DW2 also confirmed that a number of documents had to be executed by the syndicate members including the syndication agreement itself and the Security Sharing Agreement while the borrower, Zambian Airways, also executed the relevant security instruments being a debenture as well as a fixed and floating charge.
- 4.65 The witness further testified that, given its huge financial exposure to Zambian Airways, the respondent wanted to

secure a sustainable long term solution to the problems which had afflicted the airline. DW2 went on to tell the trial court that the circumstances in which Zambian Airways found itself were such that it also required an immediate injection of working capital.

4.66 According to DW2's further evidence, the appellant had approved a facility for the purpose of addressing Zambian Airways' working capital requirements. The witness emphasized, however, that for the appellant to avail the facility to the airline it required security.

4.67 DW2 further testified that, owing to the dire situation in which Zambian Airways found itself, the airline's representatives arranged a meeting involving the Hon Minister of Finance, the respondent's Managing Director and his team, the appellant's Deputy Managing Director, Mr. Mutembo Nchito, the Chief Executive Officer of the airline and Mr. Fred M'membe from the Post Newspapers Limited. At this meeting, the Zambian Airways team tabled a plea to have the Government of the Republic of Zambia (GRZ) salvage the airline from collapse by way of causing the

respondent to convert its loan to *Zambian Airways* in to equity.

4.68 The witness also informed the court below that after some further discussions, the respondent's Board of Directors approved the proposal to have the respondent's debt to *Zambian Airways* converted into equity and, simultaneously, the respondent also agreed to relinquish the security which it had held on account of its exposure to *Zambian Airways*.

4.69 According to DW2, following the developments in 4.68, the respondents informed the other syndicate members.

4.70 DW2, further testified that, because of *Zambian Airways'* urgent need for working capital which the appellant was willing to avail, an arrangement was entered into whereby, the respondent agreed to indemnify the appellant up to the sum of USD3 million pending the releasing, by the respondent, of the collateral which the latter had received on account of its lending to *Zambian Airways*.

4.71 According to DW2's further evidence, the indemnity in question was going to lapse upon the respondent

surrendering the collateral earlier mentioned to the appellant.

4.72 The witness went on to testify that, on 4<sup>th</sup> October, 2008 the respondent wrote to the appellant for the purpose of advising the latter to take over the collateral which the former had previously held on account of Zambia Airways' indebtedness to it. DW2 also confirmed in her further evidence that, upon advising the appellant as to the availability of the collateral in question to it (i.e the appellant) the indemnity which the respondent had given to the appellant fell off.

4.73 DW2 further testified that the security which the respondent passed on to the appellant was shared security and that the originals of the security documentation involved were kept by Investrust Bank which had been the security agent for all the syndicate members.

4.74 According to DW2, once the respondent had relinquished its security interests in the collateral which Zambia Airways had availed to the syndicate members, the onus was upon

the appellant to take steps to protect its interest in the security in question.

4.75 In her cross-examination testimony, DW2 reiterated before the court below that the respondent did not have to avail discharge documents relating to the security in question to the appellant.

4.76 DW2 however admitted that, in the absence of a discharge, the appellant was not in a position to register its own interest in the security in question.

4.77 The witness also testified that *Zambian Airways* did not have any immovable properties adding that had there been such properties, the respondent could have prepared a mortgage.

4.78 It was DW2's further cross-examination evidence that the assets which *Zambian Airways* owned were collectively held as security by the three Banks which were members of the syndicate.

4.79 The witness also informed the trial court that the security Agreement which the syndicate members had entered into had defined the rights of the three syndicate members vis-à-

vis the security which had been availed by *Zambian Airways* for the purpose of securing the lending in question.

4.80 DW2 further testified that the debenture which *Zambian Airways* had issued for the purpose of securing the loan in question was registered at the Patents and Companies Registration Agency (PACRA) on 24<sup>th</sup> August, 2007.

4.81 It was DW2's further evidence that, at some point, *Zambian Airways* was in desperate need of USD3 million which the appellant was willing to avail.

4.82 It was DW2's further testimony that in order to facilitate the availing of the USD 3 million referred to in 4.81, the respondent agreed to avail an indemnity to the appellant which, the witness added, was of the nature of interim security to the appellant which was to subsist "... until the portion of the security which the respondent held in the syndication was transferred to the appellant".

4.83 Upon being re-examined, DW2 told the trial court that the respondent could not avail a memorandum of discharge in respect of the security in question to the appellant because the original security was being held by Investrust Bank as

the leader of the syndicate. The witness explained that the debenture in question was being held by Investrust as syndicate leader on behalf of all the syndicate members.

4.84 DW2 further testified in her re-examination evidence that following the agreement to have the appellant avail the USD3 million to *Zambian Airways* as earlier indicated and the respondent's associated agreement to avail an interim indemnity, the respondent took steps to surrender its portion of the security in the collective security by simply writing letters to the other syndication members to the effect that it, the respondent, had surrendered its portion of the security in the collective security in favor of the appellant. In addition, the respondent had to write to the appellant on the one hand and the other syndication members on the other authorizing the former to replace the respondent as holder of the relevant security interest previously held by the respondent.

4.85 According to DW2, after the respondent had done its part, it was up to the appellant to take necessary steps to have the appropriate legal documents amended with a view to having



the appellant take the place which the respondent previously held in the syndicate.

4.86 Following the closure of the defence, the trial court invited Counsel involved to file their respective submissions.

## **5.0 TRIAL COURT'S CONSIDERATION OF EVIDENCE, AND SUBMISSIONS AND DECISION RENDERED**

5.1 Following the filing of the parties' respective submissions, the learned trial Judge proceeded to consider the evidence which had been laid before her in the context of the relevant pleadings and Counsel's submissions.

5.2 In the course of delivering her judgment, the learned trial Judge made a number of significant observations and findings of fact.

5.3 The first finding of fact which the trial court made was that, on 6<sup>th</sup> October, 2008, the respondent wrote two letters to the appellant. Of specific relevance to this appeal was the letter in which the respondent informed the appellant that it had decided to have the loan which it had extended to Zambian Airways converted into equity. This letter also made it clear

that, by taking up equity, the respondent was going to give up the security which it held on account of the loan (which had been converted into equity) with a view to having the released security taken up by the appellant for the purpose of securing short term financing facilities by the appellant to *Zambian Airways*.

5.4 According to the learned trial Judge, the respondent had even proceeded to make an undertaking to relinquish its interest in the security in question and forward the relevant discharge documents to the appellant for the purpose of enabling the appellant register its interest in the said security once relevant formalities had been completed.

5.5 The learned Judge went on to observe that, in the said letter referred to in 5.3 above, the respondent urged the appellant to “... *allow Zambian Airways [to] access ... the short term financing facilities*” earlier mentioned.

5.6 The trial Judge further noted that, at all the material times, *Zambian Airways* was, to the knowledge of all concerned parties, not only “*on the verge of collapsing*” but hugely

indebted to the appellant, the respondent, Investrust Bank and Intermarket Banking Corporation.

5.7 According to the trial Judge's further findings, Zambian Airways' desperate circumstances had even attracted the concern of the Zambian Government whose officials proceeded to hold meetings with the appellant, the respondent, Zambian Airways itself and other stake holders for the purpose of saving the airline from imminent collapse.

5.8 The trial Judge further observed that, having regard to the extent of Zambian Airways' debilitating indebtedness at the time, it ought not to have been allowed to incur further borrowings from the appellant particularly in the light of the fact that the airline had no assets to secure any such additional indebtedness.

5.9 After noting that Zambian Airways owed the respondent and the syndicate members millions of dollars, the lower court went on to observe that, on 13<sup>th</sup> October, 2008 the appellant agreed to avail Zambian Airways the facility which the airline had sought on condition that the respondent was going to

discharge and release the security which it had been holding on account of its own lending to the airline to the appellant.

5.10 The court further observed that, on the same date referred to in the preceding paragraph (that is, 13<sup>th</sup> October, 2008), the respondent made a written undertaking to “*release its interest (sic) in the security assets of Zambian Airways and forward to the appellant the discharge documents to enable the [latter] register its security as soon as possible*”.

5.11 The learned Judge went on to observe that “*... in the interim the [respondent] undertook to indemnify the [appellant against all payments [to Zambian Airways] cleared by it ....*” save that the indemnity [was to] cease to have any effect and [rendered] null and void upon the said securities being handed over to the [appellant]”

5.12 The trial Judge also noted that the amount which the respondent “*... agreed to indemnify the [appellant was] up to USD3 million only*”.

5.13 The learned Judge further observed that, on 17<sup>th</sup> October, 2008 (that is to say, three days after the date mentioned in 5.10 above), the respondent wrote to the appellant advising

that they no longer maintained any claim in the security assets of the airline and that, in consequence, the contract of indemnity earlier alluded to stood discharged.

5.14 It is worth pointing out (and the lower court so found) that, at the time when the respondent took the position which has been captured in 5.13, the appellant had neither received the securities in question nor did it know what the values of those securities were.

5.15 The lower court also observed that, by reason of the matters in 5.13 and 5.14 above and, having regard to the fact that the appellant had availed the USD3 million to Zambian Airways as had been sought by the latter, the appellant insisted on having the respondent surrender to it (the appellant) the original security documents and a duly executed and sealed memorandum of discharge and satisfaction as required under section **102 of the companies Act, Chapter 388 of the Law of Zambia** (since repealed and replaced).

5.16 The court below further noted that, by a letter dated 23<sup>rd</sup> October, 2008 the respondent informed the appellant that it

- the respondent- was not in a position to discharge the securities in question because it had ceased being a member of the syndicate following the conversion of its loan facility into equity and that, by reason of this transaction, the contract of indemnity had been discharged.

5.17 The court also noted that, on 31<sup>st</sup> October, 2008 the appellant wrote to the respondent and the other two syndicate members seeking to have them furnish the appellant with documents which indicated that the respondent had acquired equity in *Zambian Airways*. The trio did not, however, react to the appellant's request.

5.18 The trial court then made reference to clauses 9.2.2 and 9.17 of the Syndication Agreement and observed that, according to those clauses, the responsibility to substitute one syndicate member with another lay with the existing syndication members and that, such substitution was to be undertaken with the prior consent and to the satisfaction of the members who were required to express such satisfaction and consent in writing.

5.19 The lower court then noted, as having been indisputable, the fact that, as at 18<sup>th</sup> November, 2007, the appellant was aware about the debenture which Zambian Airways had created in favour of the syndicate members and the syndicated loan involved.

5.20 With regard to the Security Sharing Agreement, the trial court observed that its existence was only drawn to the attention of the appellant when the respondent wrote to the former on 23<sup>rd</sup> October, 2008.

5.21 The lower court further noted that no cogent evidence had been placed before it to demonstrate that the respondent had taken necessary steps in the way of securing consent and approval from the other syndication members to have itself the respondent substituted with the appellant in the syndicate.

5.22 With respect to the respondent's avowed equity participation, the trial court concluded, on the basis of the totality of the evidence which had been placed before it, that the large number of the conditions precedent which had been set for the purpose of securing the same together with the

attendant relinquishing of the respondent's security in favour of the appellant could not have been delivered within the three day period that had been available to the parties.

5.23 The lower court also noted that, by a letter dated 28<sup>th</sup> October, 2008, the respondent forwarded the security documents earlier alluded to the appellant and that, on 26<sup>th</sup> November, 2008, the debenture which Zambian Airways had created in the appellant's favour was duly registered. According to the learned trial Judge, that debenture was created for the purpose of securing the airline's old indebtedness and not the USD3 million which became the subject of the indemnity earlier mentioned.

5.24 The trial court noted, however, that, inspite of its conclusion in 5.23 above, it was clear to that court that the assets which had been availed to secure the airline's old indebtedness were the same assets which the airline had availed to secure the USD3 million indebtedness.

5.25 According to the trial Judge, the conclusion which she had reached in 5.24 (and the related finding) was informed by the fact that of the new (subsequent) debenture having been



registered (in favour of the appellant) over the same assets and the evidence of DW2 which clearly indicated that registration of the subsequent debenture could not have been possible had the assets in question been encumbered by reason of any prior charge.

5.26 We pause here to observe that, although the trial Judge accepted that the appellant's subsequent debenture had been successfully registered at the Patents and Companies Registration Agency (PACRA), the trial Court's judgment revealed that the lower court still remained skeptical as to how the same assets which had been the subject of the syndicated security earlier mentioned could have been the subject of a debenture which had been successfully registered but to which the syndicate members had not been parties and in the absence of clear evidence that the earlier debenture had been discharged.

5.27 It seems to us that it was in the light of the observation we have made in 5.26 that the lower court noted that both parties to this appeal acted "*impetuously and made a lot of mistakes*"

5.28 With respect to taking up of equity in the airline by the respondent, the trial judge observed that this action alone did not operate to discharge the syndicated security whose very nature dictated that it was shared security.

5.29 Having regard to the totality of the evidence which had been placed before her, the trial judge concluded that, by the time the appellant was demanding payment of the USD3 million on 14<sup>th</sup> January, 2009, (that is to say, some two months after the appellant's 26<sup>th</sup> November, 2008 debenture had been registered and about four months before Zambian Airways was placed under receivership) the contract of indemnity in question stood discharged.

5.30 In the view which the trial judge took, once the appellant had accepted the security which had been availed to it on account of the USD3 million lending, it became duty bound to engage the syndicate members for the purpose of ensuring that its own position was properly secured.

5.31 Applying the principle which was enunciated in the English case of ***Guy Pell – v – Foster*** <sup>(1)</sup>; the trial Judge observed that the appellant had lost its right under the contract of

indemnity by its own conduct noting that the appellant's successful registration of the debenture which had been created in its favour "brought the contract of indemnity to an end". The trial judge accordingly concluded that the appellant had failed to discharge its burden of proof and dismissed the claim in its entirety with costs.

## **6.0 APPEAL TO THIS COURT AND GROUNDS THEREFOR**

The appellant was not satisfied with the dismissal of its claim in the court below and mounted this appeal on the following grounds:

- 6.1. That the court below erred both in law and in fact by holding that the Respondent had done enough to be considered as one that had become an equity holder in Mine Air Service T/A Zambian Airways, notwithstanding that it had no share certificate.***
- 6.2 That the Court below erred both in law and fact by holding that on a preponderance of probabilities the security assets were discharged.***
- 6.3 That the court below erred both in law and in fact by holding that the Appellant lost the right under the contract for indemnity by its own conduct.***
- 6.4 That the court below erred both in law and in fact by holding that registration of the debenture by the Appellant brought the contract for indemnity to an end.***

**6.6 That the court below erred both in law and fact by holding that the actual performance by the Respondent satisfied the standard prescribed by the contractual provisions defining the obligations.**

**6.7 That the court erred both in law and in fact by holding that the appellant had failed to discharge its burden of proof.**

## **7.0 THE PARTIES' RESPECTIVE ARGUMENTS/CONTENTIONS ON APPEAL**

7.1 At the hearing of the appeal, Mr. J.P Sangwa, SC, learned Counsel for the appellant, informed us that Heads of Argument had been duly filed on the appellant's behalf and that it was his desire to rely upon those Arguments.

7.2 On the other hand, Mr. Jonas Zimba of Makebi Zulu & Co. informed us that he was appearing on a brief from Messrs Eric Silwamba, Jalasi and Linyama, the respondent's Counsel on record and that he was a bearer of a message in the way of an apology from Mr. E. Silwamba S.C, who was unable to attend court.

7.3 Mr. Zimba further informed us that he had been instructed to seek an adjournment as well as leave to enable the respondent file its Heads of Argument out of time. According

to Mr. Zimba, the instructions which he was conveying had been discussed between Mr. Silwamba, SC and Mr. Sangwa, SC.

7.4 After listening to Mr. Sangwa, SC's disposition relative to Mr. Zimba's instructions, we informed the duo that we were not inclined to grant either of what Mr. Zimba had sought before us.

7.5 Upon announcing our position in 7.4, Mr. Sangwa SC, informed us that he was entirely relying upon the appellant's filed Heads of Arguments and only wished to make brief comments upon the judgment of the lower court the high point of which was that the lower court's conclusions in its judgment were not backed by its own findings of fact and that, in consequence, the lower Court's judgment was liable to be reversed or set aside and judgment entered for USD3 million plus interest in favour of the appellant.

7.6 For his part, Mr. Zimba informed us that, notwithstanding the respondent's failure to file its Heads of Argument, his instructions were to support the correctness of the lower court's judgment.

7.7 The appellant's written Heads of Argument opened with an introduction which is of the nature of a generalized assault against the lower court's 'conclusions' and 'holdings' in its judgment.

7.8 Counsel for the appellant contended that almost all the trial court's conclusions and holdings in its judgment were at variance with both that court's own findings of fact as well as the evidence before it. Learned Counsel further posited that the trial court's findings of fact actually favoured the appellant's position.

7.9 Turning specifically to the individual grounds of appeal, the appellant's Counsel contended, in respect of the first ground of appeal, that no evidence was placed before the lower court to support that court's conclusion that the respondent had acquired equity (or shares) in *Zambian Airways*.

7.10 According to learned State Counsel Mr. Sangwa, the issue as to whether or not the respondent had, as a matter of law and, in fact, acquired equity in *Zambian Airways*, called for a definitive resolution by the court below, particularly in the

light of the fact that the respondent was not in possession of share certificates in respect of any shares in that company.

7.11 Mr. Sangwa, SC, further argued that, under the agreement which the appellant had entered into with the respondent, the latter was required to secure the conversion of the medium term loan which it had granted to *Zambian Airways* into shares in this company.

7.12 Learned State Counsel criticised the trial judge below for having taken the view that the respondent had *done enough* to be considered as an equity holder in *Zambian Airways*.

7.13 According to Counsel, the trial court had not been called upon to determine whether or not the respondent had '*done enough*' to be considered as an equity holder in *Zambian Airways* but rather, whether or not, it- the respondent- had secured the conversion of its loan to *Zambian Airways* into equity or shares in the latter company.

7.14 It was further contended on behalf of the Appellant that, several conditions precedent (numbering 22) were required to be satisfied (by *Zambian Airways*) before the respondent could convert its loan into equity and that, in point of fact,

the trial court had taken the position that it was impossible to fulfill these conditions within the short period of three days that had been availed for the exercise.

7.15 In concluding his arguments around the first ground of appeal, the appellant's Counsel reiterated that, quite aside from the fact that the respondent had no share certificates, no evidence had been deployed before the trial court to support that court's conclusion that the respondent had become an equity holder in *Zambian Airways*.

7.16 Accordingly, we were urged to interfere with the lower court's judgment to the extent that the same encapsulated the conclusion we have alluded to in paragraph 7.15 and that, in place of that conclusion, we should find that the respondent did not convert its debt to *Zambian Airways* into equity and that, in consequence, the respondent had breached the indemnity agreement which had birthed the dispute which became the subject of this litigation.

7.17 As earlier noted, no Heads of Argument were filed on behalf of the respondent.



7.18 We are grateful to the appellant's Counsel for his helpful exertions around the first ground of appeal which we have considered in the context of the judgment of the trial court and the record of appeal involved.

7.19 To start with and, with the greatest respect to the learned Counsel for the appellant, we have somewhat been at a loss to appreciate what value this first ground and the arguments which have been canvassed around it bring to this appeal.

7.20 As shall become evident when we interrogate the three or so grounds of appeal which we consider to be more germane to the kernel of the dispute between the two protagonists in this appeal later in this judgment, the gist of the dispute, in point of fact, the real dispute in this appeal, was whether or not the respondent had breached the contract of indemnity which had arisen between itself and the appellant such as had exposed the former to the liability of indemnifying the latter in accordance with the terms of that contract.

7.21 In arriving at the position we have projected in 7.20 above, we have reminded ourselves that a contract of indemnity such as had arisen between the appellant and the

respondent is not anything amorphous but has a definite characterization. For the removal of any doubt, Furmston Michael, the author of the legendary, **Cheshire, Fifoot and Furmston's Law of Contract**, has defined a contract of indemnity in the following terms (at P. 209):

***“A contract of indemnity is one in which a person A (the indemnifier) agrees to make good any legal liability which another person B (the indemnitee) is held to be under. The liability may be one which B is under to a third party C or which B is under to A”.***

7.22 In the context of the dispute at hand, it is our considered view that the relevant contract of indemnity between the two protagonists was hatched through and evidenced by the various correspondence which was exchanged between the two and which we referred to earlier on in this judgment in the paragraphs numbered 2.18 to 2.22 above.

7.23 The nature and form of the contract of indemnity in question was captured both in the parties' respective pleadings as well

as the evidence which was subsequently laid before the trial court.

7.24 As we gleaned from the record and, specifically, the correspondence referred to in 7.22 above, that contract of indemnity envisaged the following:

7.24.1 That the appellant was to avail short term financing facility in the sum of USD 3,000,000.00 to Zambian Airways subject to the respondent giving up its security interests in the assets of the airline in favour of the appellant.

7.24.2 In consideration of the appellant availing the facility in 7.23.1 to Zambian Airways without the latter availing security, the respondent agreed to indemnify the appellant to the tune of USD 3,000,000.00; and

7.24.3 The indemnity alluded to in 7.23.2 was to cease to have effect and the respondent was to stand discharged from the contract of indemnity upon the respondent giving up or surrendering its security interest in the assets of Zambian Airways in favour of the appellant.

7.25 It is worth pointing out here that an arrangement which was associated with the indemnity contract was that the respondent's huge debt to Zambian Airways was going to be converted into equity or shares. In other words, the money

which the airline owed the respondent was going to be 'paid' by way of the former issuing shares to the latter.

7.26 Our examination of the record also revealed that the arrangement in 7.24 was necessitated by *Zambian Airways'* desperate need for cash which only the appellant was willing to avail upon the conditions earlier alluded to, among others.

7.27 Perhaps we should also observe here that, strictly speaking, the fact of the respondent having its debt to *Zambian Airways* converted into equity did not afford anything in the way of securing the huge financial exposure which the appellant was imminently exposing itself to particularly in the light of the appellant's own knowledge that *Zambian Airways* was facing certain collapse unless the Government of the Republic of Zambia intervened.

7.28 Indeed, the appellant was fully alive to the fact that the only real security that it could muster or secure to *Zambian Airways* was the indemnity which the respondent had offered and the security which was going to arise by way of the

respondent giving up or surrendering its security interest in the assets of *Zambian Airways* in its favour.

7.29 In truth and, thus far, we have found no value in the first ground and are in no difficulty to discount the same.

7.30 Perhaps, more poignantly, we could close our reflections around the first ground of appeal by discussing it in the context of the law which governs (or governed) share certificates and the holding of shares in companies in this country, namely, the Companies Act, chapter 388 of the Laws of Zambia (being the relevant law in force at the material time) to the extent that this ground projects the notion that having a share certificate is, without more, proof that the holder of such a certificate holds shares in the company to which the certificate relates.

7.31 Although, in terms of section 68 of the repealed Companies Act, *Chapter 388 of the Laws of Zambia*, a share certificate constituted “.... *prima facie* evidence of the title to the shares of the person named therein as the registered holder ....”, this certificate did not constitute conclusive evidence that the

holder of such a certificate held or owned shares in the company to which the same (the certificate) related.

7.32 It is also worthy of note here that **section 48(1)** of the repealed **Companies Act, Chapter 388** of the Laws of Zambia as read with **section 45(1)** of the same statute defined being a 'shareholder' in a company by reference to whether or not one's name was entered in the register of members which every company was legally required to maintain as opposed to holding a share certificate.

7.33 Although, therefore, **Section 66(1)** of the repealed **Companies Act, CAP 388** required limited companies having a share capital to issue share certificates in favour of all registered holders of shares in such companies, holding a share certificate did not, of itself, evidence shareholding or share ownership in the company or companies to which such share certificates had related. Needless to say, even the very definition of a shareholder in **sections 48(1)** as read with **section 45(1)** of the repealed companies **Act, CAP. 388** did not envisage that such a person should hold a share certificate.

7.34 A final observation which can, perhaps, be made in the context of the preceding discourse and the trial judge's observation in the judgment under attack that ***"the [respondent] had done enough to be considered as [having] become an equity holder in Zambian Airways; notwithstanding that it had no share certificate"*** is that we would defer to the wisdom of the lower court to the extent that its statement could well be interpreted to mean that, in relation to the subject debt-to- equity conversion, failure on the part of the Respondent and Zambian Airways to complete all the legal formalities relating to the Respondent's share ownership in Zambian Airways did not serve or operate to discount or negative the fact that what had transpired as between the respondent and Zambian Airways did, ***in equity***, entail that the former had become entitled or was acknowledged by the latter to hold shares in the latter. In any event, given that Zambian Airways clearly acknowledged the Respondent's shareholding in this company, the onus was upon the Appellant to prove its

assertion to the contrary. The first ground was doomed to fail. And we so pronounce.

7.35 Under the second ground, the appellant has contended that the lower court fell in error both at law and in fact, when it held that, on a preponderance of probabilities, the security assets which were owned by Zambian Airways and availed to the respondent to secure the latter's lending to the former had been discharged.

7.36 According to learned counsel for the appellant, this ground was triggered by the following passage from the judgment of the lower court now under attack:

***“On the preponderance of probabilities, the security assets were discharged. It was not the defendant’s fault that the [appellant] did not register [the] debenture for the sum of USD3 million facility in question. Upon accepting the security document, the plaintiff became obliged to engage other syndicate banks in order to secure the said loan”. (P. 60, lines 2 – 7 of the record).***



7.37 Counsel went on to argue that it was necessary for the assets of *Zambian Airways* to be discharged so that the same could be availed to the appellant for the purpose of securing the appellant's USD3 million short term loan adding that this exercise (of discharging the assets) should have happened simultaneously with the taking up of equity in *Zambian Airways* by the Respondent.

7.38 The appellant's Counsel further contended that it was most startling for the lower court to have taken the view that the assets in question had been discharged without pointing out when this happened and what it was that the respondent had done to effect the discharge.

7.39 Learned Counsel then turned to another passage from the judgment of the court below. That passage, which occurs at pages 57 to 58, lines 15 – 23 and 1 - 7 of the Record, reads as follows:

***“I have construed the indemnity agreement in order to ascertain the nature of the obligation. I have also considered whether the actual performance measures up to the obligations and whether the defendant performed exactly what it undertook to.***

***The nature of the defendant's obligation was to release its interest in the security assets of Zambian Airways and deliver discharge documents to the plaintiff. I find and hold that the taking up of equity in Zambian Airways would not have enabled the defendant to totally discharge the securities held in respect of the syndicated loan because the securities were to be shared amongst the syndicate banks***" (Counsel's underlining for emphasis).

7.40 Counsel went on to argue that the conversion of the respondent's debt to Zambian Airways into equity was not the only condition precedent to the freeing up of Zambian Airways' assets for the purpose of availing the same to secure the appellant's USD3 million loan.

7.41 According to Counsel, the other conditions precedent were:

7.41.1 The taking over of Zambian Airways indebtedness to Investrust Bank Plc by the Post Newspapers; and

7.41.2 The taking over of Zambian Airways' indebtedness to Intermarket Bank by the Post Newspapers.

7.42 Counsel went on to argue that only after the exercises in 7.41 had been completed was it going to be possible to have Zambian Airways' assets totally freed for the purpose of

making them available to the appellant to secure its USD3 million lending to *Zambian Airways*.

7.43 The appellant's Counsel further argued that since *Zambian Airways* had been a beneficiary of a syndicated loan, the airlines' assets could not have been discharged without securing the concurrence of all the syndicate members. By reason of the foregoing, learned counsel posited that there was no basis for the trial court to have opined that *Zambian Airways*' assets had been discharged.

7.44 Concluding his arguments around what the appellant's Counsel opined to have constituted factual misdirections on the part of the trial court, Counsel made reference to correspondence which alluded to restructuring and loan take over arrangements involving the *Post Newspapers Limited*, *Investrust Bank* and *Intermarket Bank* and argued (p. 12 of Heads of Arguments):

*"There is therefore .... no evidence to support the holding of the court below that the assets of *Zambian Airways*, which served as collateral for the syndicated loan were ever discharged by the syndication members .... The conditions for the discharge of the assets were never met. The*

*respondent failed to convert its debt into equity and the Post Newspapers did not take over the debts of Intermarket Bank and Investrust Bank”.*

7.45 The appellant’s Counsel then turned to a letter which the respondent had authored to the appellant on 17<sup>th</sup> October, 2008 and in which the respondent had advised the appellant that it, the respondent, had relinquished its security interest in the assets of Zambian Airways in the appellant’s favour and that by reason of its said action, the indemnity had lapsed.

7.46 According to learned Counsel, the appellant did not, by its letter to the respondent dated 2<sup>nd</sup> December, 2008 accept the position which the respondent had taken via its said letter of 17<sup>th</sup> October 2008 stating that:

*“As far as we are concerned, your letter of 17<sup>th</sup> October, 2008 is simply a letter which in itself cannot legally discharge the indemnity you gave in our favour because you have not served us with duly executed memorandum of discharge and satisfaction duly filed with the Registrar of Companies as required by section 102 of the Companies Act No. 26 of 1994”.*

7.47 The appellant's Counsel further argued that the respondent did not secure the legal discharge of the securities which Zambian Airways had created in its favour in accordance with section 102 of the **Companies Act** adding that even the debenture which Zambian Airways had created in favour of Investrust had remained undischarged and that, in fact, it was on the strength of its debenture that Investrust had placed Zambian Airways under receivership on 2<sup>nd</sup> April 2009.

7.48 Learned Counsel then went on to conclude his arguments around the second ground by contending that, in point of law and fact, there had been no discharge of the securities which Zambian Airways had availed to the syndication members and that the learned trial Judge's conclusion that Zambian Airways' security assets had been discharged was legally and factually flawed.

7.49 The foregoing represented learned counsel for the appellant's arguments around the second ground of appeal. We express our gratitude to learned Counsel for the appellant for his

passionate and perspicuous arguments around the second ground.

7.50 We have, indeed, been left in no doubt about the appellant's firm position that the assets of *Zambian Airways*, which the appellant had desired to secure its USD3 million short term lending to the airline, were never legally and factually discharged for the purpose of making them available to secure that lending.

7.51 What we have also unequivocally gathered from learned counsel for the appellant's detailed arguments around the second ground of appeal and the judgment of the lower Court was that, the issue of discharging or freeing up of the assets of *Zambian Airways* for the purpose of making the same available to secure the appellant's USD3 million lending to the airline was not the exclusive preserve or domain of the respondent.

7.52 The appellant, through its Counsel, amply acknowledged that the *Zambian Airways'* assets in question had been the subject of the syndicated security which had been availed to

secure the loans which the syndication of banks earlier referred to in this judgment had availed to *Zambian Airways*.

7.53 We also entertain no doubt (and we have so discerned from Counsel for the appellant's arguments) that, when the contract of indemnity involving the appellant and the respondent emerged, the two parties to this contract were fully aware of the position which has been alluded to in 7.52 above. For the avoidance of any doubt, in his cross examination testimony, PW1 confirmed the fact that the security which *Zambian Airways* had availed to secure its borrowings from the syndication members was collectively held by these syndication members and that this security was fully governed by the terms and conditions which were contained in the Security Sharing Agreement.

7.54 To complete the narrative in 7.52 and 7.53, it is worthy reminding ourselves that, unlike the performance or otherwise of the contract of indemnity which rested solely with the two contracting parties to the same, namely, the Appellant and the Respondent, the discharge or otherwise of the syndicated security was, to the appellant's knowledge,

something that went beyond the disposition of or what the respondent could alone do.

7.55 The learned authors, David Warne and Nicholas Elliot Q.C, in their discussion of the subject of loan syndication in their book entitled ***Banking Litigation***, have stated that:

***“... Many of the issues which arise [in relation to syndicated lending] should be addressed [carefully] and an understanding of the various duties which are owed between the many parties involved is an important element in any [participating] bank’s risk assessment of the transaction and ... in its consideration of potential sources of redress should [a] default [arise]”. (at P. 153).***

7.56 We have deliberately taken the trouble of discussing syndicated lending and its companion, namely, syndicated securitization because the two subjects represented the context in which the contract of indemnity or, at any rate, the performance of the respondent’s obligations under that contract which, in turn, birthed the dispute which is the subject of this litigation, arose. Indeed, even the ground of



appeal which we are interrogating cannot itself sensibly be divorced from that context.

7.57 It will also be recalled that in her judgment, the learned trial Judge, in agreeing with the position which the respondent had taken in relation to the discharging of the securities in question in favour of the appellant accepted that it, that is, the respondent, *'had done enough'* in the way of performing its obligations under the contract of indemnity. In this sense, the lower court effectively accepted the respondent's position that it had performed and had thereby been discharged from performing any further obligations under the contract of indemnity in question.

7.58 The appellant, for its part, insisted that the respondent did not factually and legally discharge the securities in question for the purpose of facilitating the registration of the appellant's security interest in relation to the same. In this sense, the appellant considered that the respondent had not performed its side of the bargain under that contract of indemnity.

7.59 We observed, early on in this judgment, that one of the key features which had characterised the subject of syndicated lending and its associated securitisation was the notion of what we described as the Security Agreement or, the Security Sharing Agreement

7.60 We, similarly, also noted early on in this judgment that the security Agreement not only defined the security rights of each of the syndication members but their obligations and interests as well in relation to the syndicated security.

7.61 A key feature of the Security Sharing Agreement which we noted was the requirement that any transfer of a particular lender's security rights or interests in the syndicated security could only be effected subject to and in accordance with the terms and conditions of that Agreement.

7.62 One of the issues which the appellant's Counsel highlighted in their Heads of Arguments was the fact that the assets of Zambian Airways, which had constituted the syndicated security which the airline had availed for the purpose of securing its syndicated borrowing was incapable of being

discharged without the concurrence of all the lenders (the respondent being one of them).

7.63 Having regard to our observation in 7.62, it stands to reason that the appellant was well aware that the respondent could not, acting alone, discharge the security in issue for the purpose of facilitating the registration of the appellant's interests in relation to the same. This fact was well known to the Appellant, the Respondent and *Zambian Airways* from as far back as 15 July, 2008 when, according to a letter on record dated 21 July, 2008, officials from the Appellant, the Respondent and *Zambian Airways* held a meeting with the then Minister of Finance, Honourable Ng'andu Magande, for the purpose of finding a solution to the financial woes which had beset *Zambian Airways*.

7.64 Having regard to what we have momentarily alluded to above, we can safely say that, to the knowledge of the two parties to the contract of indemnity in question, the same did not lend itself to performance in the manner which the appellant was insisting upon, namely, to have the respondent discharge the security in question.

7.65 Given what we have adumbrated in the two or so preceding paragraphs, the trial court's conclusion that "*...the [respondent failed to discharge] its obligations under the contract of indemnity of 23<sup>rd</sup> October, 2008*" scarcely surprised us.

7.66 However, inspite of the conclusion which the trial court reached as we noted a moment ago, the lower court did arrive at the critical conclusion that;

*"By the time [Zambian Airways] was put in receivership [on 2<sup>nd</sup> April, 2009] the [appellant] had received .... the security documents [from the respondent] which were enclosed in the letter of 28<sup>th</sup> October, 2008".*

7.67 The court went on to say:

*"On 26<sup>th</sup> November, 2008, the [appellant] registered a debenture between [Zambian Airways] and itself [relating] to [the airline's] old debts by USD4,300,000.00 and K500,000,000.00 [but] not the USD3 million in issue".*

7.68 According to the lower court, the assets which were the subject matter of the security which the appellant had registered on account of the debts referred to in paragraph

7.67 were the same assets which Zambian Airways had availed to secure the USD3 million lending.

7.69 It is also worthy of note that, according to the lower court's finding, the appellant's demand to be paid USD3 million on account of the contract of indemnity in question arose,

*“ two months after the debenture of 26<sup>th</sup> November, 2008 [had been] registered and about four months before Zambian Airways was put in receivership”.*

7.70 In the light of the above finding, the trial court opined that, although it was not possible for the respondent, acting alone, to discharge the security in question, the respondent duly performed its obligation under the contract of indemnity and that, consequently, the same was brought to an end,

*“... upon [the appellant] accepting the security documents”  
[and upon] the registration of the [same] by the [appellant]”.*

7.71 Having regard to the trial court's findings of fact in relation to the handing over of the deed of debenture to the appellant and that debenture's subsequent registration by the appellant, we cannot lightly interfere with the lower court's

conclusion that the contract of indemnity had come to an end.

7.72 In making the observations which we have made in 7.71 above, we call to mind the fact that, under the relevant contract of indemnity which was embodied in the respondent's letter to the appellant which was dated 13<sup>th</sup> October, 2008 "*the indemnity*" was to "*cease to have any legal effect and become null and void upon the [securities] being handed over to the [Appellant]*". In this regard, although Counsel for the Appellant fervently contended that there had been no discharge of the securities involved, the fact of the same having been registered by the appellant carried the implication that no other reasonable conclusion or inference could be drawn from this fact other than that the same had been freed from any prior encumbrances. Needless to say, the foregoing development had the consequential effect of discharging the respondent from the obligations which it had committed itself to under the contract of indemnity. In making these observations, we are indeed reminded that, in its letter dated 13<sup>th</sup> October, 2008,

the Respondent advised the Appellant that the contract of indemnity which had arisen between the two would cease to have any effect and become null and void once the securities have been “*handed over to [the Appellant]*”. In its reply to this letter which was dated 14<sup>th</sup> October, 2008, the Appellant said:

*“As stated in your letter, this indemnity will fall away once the securities are handed over to [the Appellant]”.*

7.73 In the premises, we are unable to fault the lower court for having reached the conclusion that, by the time the appellant was demanding payment of the USD3 million on 14<sup>th</sup> January, 2009, (that is to say, some two months after the appellant’s 26<sup>th</sup> November, 2008 debenture had been registered and about four months before *Zambian Airways* was placed under receivership) the contract of indemnity in question stood discharged. In point of fact, according to the evidence on record, in its letters to Intermarket Bank and Investrust Bank which were respectively dated 17<sup>th</sup> and 27<sup>th</sup>

October, 2008 (and which were copied to Zambian Airways), the Respondent informed the two Banks that it had relinquished its security interest in the assets of Zambian Airways and that the appellant was at liberty to proceed and register its own interest in the said assets. For the removal of any doubt, neither the Respondent nor the Appellant (as the relevant parties to the contract of indemnity) could have realistically or reasonably been expected anything but a hand-over of the documentation or instruments that had evidenced the securities in question as opposed to the physical assets which had constituted the security. We dismiss the second ground of appeal.

7.74 We now turn to consider the third and fourth grounds of appeal which we propose to deal with together as we are of the view that the two grounds share a common theme.

7.75 Counsel for the appellant opened his arguments around the third ground of appeal by reviewing some portions of the judgment now being assailed before setting out to discount the trial court's conclusion that, once the appellant had received and accepted the security documents relating to the



assets which Zambian Airways had availed to secure the USD3 million lending, the onus was upon the appellant to take steps, including engaging the syndicate members earlier identified, so as to ensure that its security interests in the assets in question were properly secured.

7.76 According to learned Counsel for the appellant, the contract of indemnity to which the appellant and the respondent were the only parties did not envisage nor require the appellant to engage the syndication members as the other parties who had security interests in the same assets which Zambian Airways had availed to the appellant for the purpose of securing the USD3 million borrowing. Accordingly, Counsel submitted that it was an error for the lower court to have reached the conclusion which is being complained about via this ground.

7.77 Under the fourth ground of appeal, the appellant's Counsel's basic contention was that the lower court erred both in law and in fact when it took the view that the contract of indemnity came to an end or was effectively discharged when the appellant accepted the deed of debenture which had

embodied the appellant's security and proceeded to register the same.

7.78 The appellant's counsel then went on to use the fourth ground of appeal as the setting for canvassing the contention that the lower court's conclusion as alluded to a short while ago was at odds with the court's own findings of fact adding that the debenture which the appellant registered had nothing to do with Zambia Airways' USD3 million borrowing of October, 2008.

7.79 The appellant's Counsel reiterated his earlier contention that the debenture which the appellant had registered on 26<sup>th</sup> November, 2008 was intended to secure the US\$4,300,000 and K500 million loans to Zambia Airways and not the USD3 million adding that the trial court's conclusion that the contract of indemnity came to an end when the debenture earlier alluded to was registered on 26<sup>th</sup> November, 2008 constituted a grave error. According to counsel for the appellant's further arguments around the fourth ground of appeal,

*“[The] obligation of the respondent which was never discharged, was to free the assets of Zambian Airways which were the subject of the syndicated loan by converting its debt to Zambian Airways into equity and for the debts of the other syndicate members to be taken up by the Post Newspapers. None of these ever occurred”*

7.80 We are grateful to counsel for the appellant for his clear arguments around the third and fourth grounds of appeal. As earlier noted, we propose to consider the two grounds together as they raise issues which are closely connected or interrelated.

7.81 As we begin our reflections around the third and fourth grounds of appeal, we cannot help but make the general observation that, from the disposition and arguments of counsel for the appellant, there is a ringing tone which suggests that, by entering into the contract of indemnity in question with the appellant, the respondent had, thereby, assumed both the borrower’s (i.e, Zambian Airways’) and the appellant’s obligations under the primary contract which the borrower and the appellant had entered into.

7.82 As we intimated early on in this judgment, both the appellant and the respondent were, at all relevant times, fully aware about *Zambian Airways'* circumstances (that is to say, the extent of the airline's borrowing and the fact that it had no assets to secure any borrowing beyond its then existing indebtedness, etc).

7.83 It can also not be doubted that, at the time when the contract of indemnity arose, the two parties to it knew the fact that *Zambian Airways* was a beneficiary of a loan syndication involving several banks and that this loan syndication was the subject of syndicated security which was governed by a Security Sharing Agreement.

7.84 Further, the appellant was also well aware that the respondent was part of the syndication alluded to in the preceding paragraph and the associated syndicated security.

7.85 Needless to say, and as earlier noted, the appellant was also aware that the security which it- the appellant- had targeted for the purpose of securing its USD3 million additional lending to *Zambian Airways* was not anything distinct from or independent of the syndicated security earlier mentioned.

Put differently, both the appellant and the respondent well knew that the contract of indemnity which had arisen between them had done so with specific reference to the respondent's security interests which, for the removal of any doubt, had been embedded in the syndicated security which *Zambian Airways* had availed to the syndication members.

7.86 It cannot also be doubted that the contract of indemnity in question was of the nature of a conditional agreement which was to cease to have any legal effect upon the occurrence of a future specified event. As previously observed, the subject contract was worded thus (leaving out what is not relevant):

***“The Development Bank of Zambia (DBZ) undertakes to release its interests in the security assets of *Zambian Airways* and forward to Finance Bank the discharge documents to enable [Finance Bank] register [its] security as soon as possible. In the interim, DBZ undertakes to indemnify Finance Bank against all payments cleared by us .... The indemnity will cease to have any legal effect and become null and void upon the said securities being handed over to Finance Bank”.***  
*(Underlining ours, for emphasis).*

7.87 It is quite evident from the terms of the contract which have been reproduced in 7.86 above that the same (i.e. the contract of indemnity) was an interim one in that it was only to subsist during the pendency of some specified event, namely, the relinquishing of the respondent's security interests in the assets of *Zambian Airways* in favour of the Appellant.

7.88 It cannot also be doubted from the evidence which was placed before the lower court that the respondent did relinquish its security interest in the assets in question in favour of the appellant and advised the other members of the syndicate accordingly. Indeed, and as the lower court found, it was as a result of what the respondent did that the appellant managed to register the security instrument (debenture) which had been created in its favour. In this regard, we would dismiss, with due respect, the appellant's Counsel's contention that the debenture which the appellant had successfully registered did not cover the USD3 million indebtedness but only secured the airline's earlier debts as discussed early on in this judgment.

7.89 In this regard, quite apart from the fact that the security interest which the respondent had relinquished in favour of the appellant related to the **same assets** which were the subject of the debenture in question (as the trial court correctly found) the deed of debenture itself contained what, in banking nomenclature, is known as an ‘*all moneys*’ debenture via the following clause (*P. 242 of the record*):

“1. The company [i.e. Zambian Airways] will pay to the [appellant] on demand all money ***which now is or at any time hereafter may become due*** or owing to the [Appellant] or for which the company may be or become liable to the Appellant on any current (emphasis ours).”

7.90 The effect of an ‘*all moneys*’ clause in a deed of debenture such as we momentarily alluded to above was the subject of discussion in the English case of ***Bank of Baroda –v- Panessar*** <sup>2</sup>. In this case, two companies had given an ‘*all moneys*’ debenture in respect of the moneys which had been owed by both companies to a bank. The debenture was in common form and provided for the repayment of all the moneys thereby secured. The instrument read:

“[The company] undertakes to pay on demand all moneys which are now or may from time to time hereafter be owing or remain unpaid to the bank”.

7.91 Having regard to the above wording of the debenture, Walton J, made the following observations;

**“I cannot see any reason why the creditor should not do precisely what he is, by the terms of his security, entitled to do, that is to say, to demand payment of all the moneys secured by the debenture”.**

7.92 In relation to the matter at hand, it cannot be doubted that the security interest which the respondent had relinquished in favour of the appellant was of an ‘all moneys’ genre and, consequently, had the effect of securing the USD3 million *in addition to* the US\$4,300,000 and K500 million loans which had been existing at the time when the USD3 million loan arose.

7.93 Clearly, it was within the contemplation of Zambian Airways and the Appellant at the time when the security in question was created in the latter’s favour that future indebtedness such as the USD3 million which the Appellant had availed to



Zambian Airways was to be targeted by the security which was evidenced by the debenture in question.

7.94 Perhaps we should also take this opportunity to discount the appellant's Counsel's apparent suggestion, as earlier intimated, that, by entering into the contract of indemnity in question with the respondent, the appellant was entitled to sit back while the former assumed the role of the primary obligor in relation to the underlying transaction which had arisen between the appellant and the airline on the one hand and the contract of indemnity involving the appellant and the Respondent, on the other. The foregoing was clearly borne out by the following evidence:

7.94.1 The evidence of the Appellant's first witness (PW1) who informed the trial Court in her evidence-in-chief that by the time the defendant [now respondent] was writing its letter of 17<sup>th</sup> October, 2008, the Appellant had not received the securities and that the Appellant did not even know the values of those securities. For the avoidance of doubt, it was in this letter that the Respondent had first informed the

appellant about the contract of indemnity having been discharged.

7.94.2 The evidence of the Appellant's second witness (PW2) who, in his evidence in chief, not only confirmed that, in all its dealings concerning the contract of indemnity in question, the appellant only interacted with the Respondent and that as of 17<sup>th</sup> October, 2008, *the [appellant] was not even aware of the type of security that the [respondent] was going to offer....*

7.94.3 In contrast to the position which the Appellant had adopted, the Respondent had advised the Appellant that, once it, the Respondent, had ceased to be a member of the syndicate and relinquished its security interest in the assets of Zambian Airways (which, according to evidence on record, the Appellant had done), it was up to the appellant to take steps not only to join the syndicate but to become a party to the Security Sharing Agreement.

7.95 Having regard to what we have discussed above, we have been left in no doubt that the respondent had discharged its obligations under the contract of indemnity as borne out by the fact that the Appellant had successfully registered its interests in the assets which, Zambian Airways, as the borrower and primary obligor, had availed to secure its borrowings from the Appellant. For the avoidance of doubt, these borrowings extended to the USD3 Million which had been the subject of the contract of indemnity. We are, indeed, in no doubt that the contract of indemnity was discharged by performance upon the appellant receiving/accepting the security in question from the Respondent and proceeding to register the same for the purpose of protecting its own security interests in relation to the same. This action, by the Appellant, of securing the registration of the security which had been created in its favour was in addition to the fact, as revealed by the Record, that on 9<sup>th</sup> December, 2008, the Appellant wrote to the Respondent forwarding the *pari passu Agreement* which the Appellant had prepared in respect of the securities in question and requesting the Respondent, as then

syndication leader, to facilitate the execution of the subject Agreement by Investrust Bank and Intermarket Bank. In truth, the lower court did not err nor did it misdirect itself, whether in law or in fact, when it took the view that the contract of indemnity which had generated the dispute which became the subject of this litigation came to an end or was effectively discharged when the appellant accepted the deed of debenture which had embodied the appellant's security and proceeded to register the same.

7.96 Having regard to the preceding discussion, the third and fourth grounds of appeal are bound to fail. And they do.

7.97 Turning to the fifth ground of appeal, the appellant's basic contention under this ground was somewhat linked to its contentions around the first ground.

7.98 The appellant's basic complaint under the fifth ground was that the respondent had failed to secure the conversion of its medium term loan to *Zambian Airways* into equity and that this failure resulted in the assets of *Zambian Airways* remaining unavailable to secure the Appellant's US\$3 million

lending on account of the fact that the assets had not been freed by the syndication members.

7.99 According to the appellant's Counsel, the conversion of the respondent's debt to *Zambian Airways* into equity would have served to trigger the taking over of the loans which Investrust Bank and Intermarket Bank had availed to *Zambian Airways* by the *Post Newspapers Limited* and that this action would have facilitated the freeing up of the assets in question for the purpose of making them available to secure the appellant's US\$3 million debt.

7.100 With great respect, Counsel for the appellant's contentions around the fifth ground of appeal neither appeal to us nor do we find ourselves attracted to them.

7.101 To start with, in their arguments seeking to buttress the second ground of appeal, it was contended on behalf of the appellant that the lower court had fallen in error when it concluded that the assets of *Zambian Airways* had been properly discharged for the purpose of availing the same to the appellant to secure the USD3 million lending.

7.102 According to learned Counsel for the Appellant, the assets of  
Zambian Airways had remained shackled to Investrust Bank  
and Intermarket Bank because the loans of the duo to  
Zambian Airways were not taken over by the Post Newspapers  
Limited so as to discharge the loan syndication agreement  
and thereby secure the freeing up of the subject assets for the  
purpose of availing them to the appellant.

7.103 As we intimated a short while ago, we have been at pains to  
appreciate the link which the appellant created between the  
contract of indemnity which was a stand-alone contract  
which was entered into between the appellant and the  
respondent and the loan syndication agreement which had  
involved Investrust Bank, Intermarket Bank and the  
respondent as the lenders on the one hand and Zambian  
Airways as the borrower on the other. This loan syndication  
agreement was closely linked to the Security Sharing  
Agreement. Each one of these formal agreements bound the  
parties to the same.

7.104 James R. Lingard has suggested, in his text entitled: **Bank  
Security Documents**, that (at P 211);

**“One of the cardinal principles of syndicated lending is that every [participating] bank must make its own [independent] assessment and not rely on the syndicate leader”. This is the case because loan syndications do present peculiar difficulties with respect to a number of matters including securitisation, repayment etc.**

7.105 Having regard to the foregoing, we find it difficult to accept that binding arrangements existed involving the loan syndication participants we identified above on the one hand and the contract of indemnity, being the subject matter of this appeal, on the other. We would dismiss the fifth ground as being totally misconceived.

7.106 With respect to the 6<sup>th</sup> and last ground of appeal, we really are in great difficulty to accept that the trial court erred both in law and, in fact, when it reached the conclusion that, overall, the appellant had failed to discharge the burden of proof which rested with it, namely, that the respondent had breached the contract of indemnity which was the subject of the proceedings which were escalated to this court.

7.107 In our view, the preceding discourse around each of the six grounds which are the subject of this appeal has amply demonstrated that the trial Judge cannot be faulted with regard to the manner in which it had exercised its discretion and reached its key conclusions. The 6<sup>th</sup> ground must inevitably join the earlier ones in sharing the latter's fate.

**8.0 Conclusion**

All the six grounds of appeal having failed, the whole appeal stands dismissed with costs.



**M. MUSONDA**

**DEPUTY CHIEF JUSTICE**



**A.M. WOOD**

**SUPREME COURT JUDGE**



**J.K. KABUKA**

**SUPREME COURT JUDGE**