**IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 67/2008**

**HOLDEN AT NDOLA**

(Civil Jurisdiction)

**B E T W E E N:**

**ENERGOIVEST LIMITED 1ST APPELLANT**

**ENERGOINST (Z) LIMITED 2ND APPELLANT**

**AND**

**BANK OF ZAMBIA 1ST RESPONDENT**

**ATTORNEY GENERAL 2ND RESPONDENT**

**Coram: Chirwa, Ag/DCJ., Chibesakunda & Mwanamwambwa JJS.**

**1st December, 2009 and 29th May, 2012**

**For the Appellants: Mr M Musonda of Messrs M Musonda and Company.**

**For the 1st Respondent: Mr M Mundashi, SC and Mr B Mutale of Messrs Mulenga, Mundashi and Company.**

**For the 2nd Respondent: Mr M Lukwasa, Principle State Advocate.**

**JUDGMENT**

**Chibesakunda JS., delivered the Judgment of the Court.**

***Cases referred to:***

1. **TRADE KINGS LIMITED VS UNILEVER PLC AND CHESEBROUGH PONDS (Z) LTD AND LEVER BROTHERS (Z) LTD [2000] Z.R. 16.**
2. **ZULU V AVONDALE HOUSING PROJECT [1982] Z.R. 172.**
3. **ZAMBIA TELECOMMUNICATION CO. LTD V. MUTALE NGANGA AND CHULUMBU EPIPHANO: SCZ APPEAL NO. 143.99.**
4. **GALAUNIA FARMS LTD V NATIONAL MILLING CO. LTD & NATIONAL MILLING CORPORATION LTD: [2004] Z.R. 1**.
5. **PETER NG’ANDWE V REX NGOMA: SCZ APPEAL NO. 94 OF 2004.**
6. **INCAR ZAMBIA LTD VS K.N.G SOLANKI APPEAL NO. 77/2000**
7. **THE ATTORNEY-GENERAL V MARCUS K. ACHIUME: (1983)ZR1**
8. **MILLER V MINISTER OF PENSIONS**
9. **JOHN PAUL KANSENGELE AND 40 OTHERS V ZAMBIA NATIONAL COMMERCIAL BANK LTD SCZ APPEAL NO. 161 OF 1999**

**10. VAN BOXTEL V KEARNEY (1987) ZR**

1. **ATHENEON ENGINEERING COMPANY LTD V DANIEL LUFUNDA LUMAI SCZ APPEAL NO. 67 OF 2002**

**Other Works referred to**

1. **SMELLS PRINCIPLES OF EQUITY**

The late delivery of this Judgment is deeply regretted. This is due to a number of factors beyond our control.

This is an appeal against an assessment or determination by the learned Deputy Registrar of the debt due to the Appellants, after the parties entered into a consent Judgement, in a matter in which the Appellants had sued the Respondents, claiming that the amount due to them resulting from the transactions between ZESCO and Energoinvest Limited, was US$21,459,336.20.

In support of this claim of the amount due, the Appellants, through one witness, gave viva voce evidence before the Deputy Registrar and produced documents. The Appellants relied on document dated 22nd January 1996 “MB2” which document contained minutes of the meeting of 22nd January, 1996 and which minutes were signed by the Representatives of the 1st Respondent, ZESCO and the 1st Appellant. This document was to the effect that the reconciled amount due to the Appellants, as at 22nd January, 1996, was US$21,459,336.20 principal plus interest.

The brief history of this case is that the Appellants had sued the Respondents claiming an amount of US$21,459,336.20 as money which was owed by ZESCO to the 1st and 2nd Appellants for various electrification and electricity generation projects including electricity transmission line works pursuant to various agreements between ZESCO and the 1st Appellant. In consideration of the works carried out by the 1st Appellant, ZESCO made various deposits through the 1st Appellant’s bankers, Standard Chartered Bank Zambia Plc to the 1st Respondent’s pipeline account, to be remitted, in United States Dollars to the then Yugoslavia, the country in which the 2nd Appellant was resident and domiciled.

The proceedings before the High Court culminated in a consent Judgment dated 24th March, 2003. This consent Judgment was entered in favour of the Appellants and it says:

“**for such sums of money as (were to be mutually) agreed by the parties or, in default of such agreement, such money as (were to) be determined by the Court or the Honourable Registrar.”**

After this consentJudgment was entered into, the parties failed to meet to mutually agree as to the quantum of the Judgment debt as per the consent Judgment. The Appellants, in default of the agreement on the judgment debt, therefore applied to the Deputy Registrar to have the judgment debt assessed.

The Appellants’ position has been all along and even before the Deputy Registrar that the debt which was due to them had been known by the Respondents as being US$21,459,336.20. That this amount of debt was reflected in documents marked “MB2” and “MB4.” That the kwacha equivalent of this amount had been deposited into the 1st Respondent’s pipeline account by ZESCO Limited (the Judgment debtors) through the 1st Appellants’ bankers, Standard Chartered Bank, for services rendered for various electrification projects which had been undertaken by the 1st Appellant at the request and instructions of ZESCO. That “MB2” was a document which reflected the minutes of the reconciliation meeting on the amounts due to the 1st Appellant as at 22nd January, 1996. According to the Appellants, the reconciliation of the money due to them occurred well after “KN2” was written on the 30th August 1995. The document “MB2” was a record of the meeting held on 22nd January, 1996 specifically to reconcile the money owed to the Appellants. The minutes recorded in “MB2” read as follows:-

“**The members resolved on the 16th of January 1996 after the above amendments were effected that the reconciled figures of US$21,459,336.20 was the total debt in favour of Energoinvest Ltd. Energo-invest also wanted the issue of the advance payment of US$5.3 million authorised by the UN Security Council discussed.**

**The meeting resolved that the matter be brought to the attention of the Bank Governor.**

**Following the meetings it was agreed that the next step will be for the BOZ team to advise the Bank Governor of the out come of the reconciliation meetings and following his respone advise the creditor Energoinvest as to the next step which could include the negotiation of the settlement of the debt.**

**Attached are the various schedules referred to during the discussions.**

**SIGNED SIGNED SIGNED**

**BOZ ZESCO ENERGO-INVEST”**

This meeting was attended and chaired by Mr. P. S. Malambo, representative of the 1st Respondent. The others in attendance were:- Mr. A. Ng’ombe, another representative of the 1st Respondent, Ms. Sombe representing ZESCO, Mr. N. Vucinic and Mr. B. Blagojevic representing the Appellants. The meeting reconciled the amount held by the 1st Respondent in the pipeline as the debt owed by ZESCO to the Appellants. This reconciled figure of US$ 21,459,336.20 was even confirmed by Bank of Zambia (1st Respondent) as money owed to the 1st Appellants in a letter marked “MB4.” The 1st Respondent even proposed to settle this debt using the Paris Club Agreement of 11 cents for each US Dollar of the pipeline money. The Appellants rejected this proposed debt repayment arrangement. So the Appellants asked the court not to take KN2 as reflecting the correct amount of the Judgment debt as it had been overtaken by document MB2.

In response to cross examination, PW1, the only witness for the Appellants testified that KN1 was not connected to the judgment debt as it mentioned other figures (see page 376). PW1 also in examination in chief on KN2 told the court that KN2 talked about the balance of the debt being US$6,199,542.12 as at 30th August, 1995 plus contractual interest at 12.5% bringing the total sum to US$16,421,244.66. He further testified that according to the invoices issued after 9th March 1984, the total amount was US$34,418,415.91 which figure is different from the figure as the debt outstanding in KN2. BOZ produced 3rd schedules signifying new invoices issued after 9th March 1984, therefore US$3,165,962.21 did not form part of the rescheduled debt. According to PW1, six months later, this amount US$3,165,962.21 was included. His testimony was that US$6,199,452.12 was the unpaid balance.

The Respondents’ case on the other hand, is that the letter “KN2” dated 30th August, 1995, addressed to the Ministry of Finance and authored by Mr. Nikola Vucinic, the Director of the 2nd Appellant gave a breakdown of the debt owed by ZESCO to the Appellants. According to that letter, the total amount of money owed was US$6,421,244.66. The Respondents’ case further was that “KN3” was a reaction to “KN2” even though KN3 had an earlier date as it was dated 11th May, 1995 whereas, “KN2” is dated 30th August, 1995, (See page 40 of the record). In support of this position of the Respondents, five witnesses gave evidence.

Abraham Mwenda, DW1’s evidence before the Deputy Registrar was that he became Director in charge of the Financial Markets Department in January, 1996 in the Bank of Zambia. This department housed the Financial Division which was in charge of the external debt management. He confirmed that he was the author of the letter “MB4.” He testified that in his capacity as Director he wrote MB4 after he was advised by DW3, Mr Patrick Malambo, his junior officer in this department that that was the position of the pipeline debt owed to the Appellants by ZESCO. He confirmed that the letter exhibit “MB4” confirmed that the amount due to the Appellants, as at 16th January, 1996, was US$21,459,336.20. He also testified that when he assumed the portfolio of Director of Financial Markets Department, he was made aware of the claim by the Appellants against the Respondents and that there had been a process of trying to reconcile the amounts due to the Appellants in the pipeline. He further testified that to do so, it was proposed that a tripartite meeting be held. That tripartite meeting was held and the outstanding debt was arrived at as being US$21,459, 336.20. This was when he then authored “MB4” in which the 1st Respondent offered to settle the outstanding pipeline debt due to the Appellants by paying 11 cents in every dollar, as per Paris Club arrangement.

Under cross-examination, DW1 testified that, he on behalf of the 1st Respondent, had written to the 2nd Appellants MB4 because he had a report from DW3 relating to the reconciliation of the debt due to the Appellants before he authored BM4. He also in cross examination accepted that there was no dispute then on the amounts of the money owed to the Appellants. The dispute arose when the Appellants refused to be paid as per the proposed Paris Club Arrangement. According to DW1, the money paid by ZESCO due to the Appellants through the pipeline mechanism, was not remitted to the Appellants due to lack of foreign exchange Zambia was experiencing.

DW2, Betty Sombe, a former Director of Finance with ZESCO, testified that the money, which was being claimed, was the money which ZESCO had paid into the pipeline account at the Bank of Zambia, for various electrification projects, which the Appellants had undertaken, on the instructions of ZESCO, which was to be remitted to the 1st Appellant. She testified that she attended the meeting at the 1st Respondent’s office on 22nd January, 1996, at which there was the reconciliation of the debt ZESCO owed to the Appellants. The reconciled amount was US$21,459,336.20. She told the Court that ZESCO had by then paid the Kwacha equivalent of this amount through Standard Chartered Bank into 1st Respondent’s pipeline Account. According to her, there was no dispute that this amount of money had already been paid to the 1st Respondent in the pipeline, in kwacha equivalent and which money should have been remitted by the 1st Respondent to the 1st Appellants whenever the foreign exchange was available. She confirmed that at this tripartite meeting, the purpose was to reconcile the debt and that minutes were kept now reflected in document MB2. She explained that the Government, because of the shortage of foreign exchange, had created a medium of payment through the Bank of Zambia known as the commercial pipeline. Because of the shortage of foreign exchange, all the parastatal and private companies which had foreign debts, had to deposit Kwacha equivalent to debts owned to foreign companies and entities into the 1st Respondent’s pipeline Account and had to apply to the 1st Respondent through this pipeline for the 1st Respondent to make the foreign exchange available to pay these foreign creditors. She accepted that under this scheme the 1st Respondent was obliged to remit US$21,459,336.20 to the 1st Appellants when foreign exchange was available. According to her, at the meeting of reconciling the debt due on 22nd January, 1996, there was no mention of any copper export as part payment of this debt due to the 1st Appellants. She also told the Court that at this tripartite meeting at the Bank of Zambia, document “KN2” was not available. That ZESCO never asked the 2nd Respondent to bail it out as ZESCO had the ability to settle its own debts.

DW3, Patrick C Malambo, testified that yes there was this meeting on 22nd January, 1996. The sole purpose was to reconcile the amount due to the Appellants. He chaired this meeting. He was the in charge of the National debt office. The minutes of the meeting were as recorded in “MB2”. The meeting was between the 1st Respondent and ZESCO on one side and the Appellants on the other side. Government was not represented. The meeting was not aware of KN1 and the correspondence between the Appellants and Ministry of Finance. Mr. Vucinic was one of the representatives of the Appellants at the meeting on 22nd January, 1996. He did not bring to the attention of the meeting document KN2 nor even KN1. Mr. Vucinic was the author of KN2.

DW3 further testified that the Appellants had their money in the pipeline arising from transactions with ZESCO. According to this programme, money was being released by the 1st Respondent for onward remittance to such foreign creditors as indicated by the Zambian companies who owed money to such foreign companies or entities. It was a queuing process. DW3 testified that Zambia at the time had foreign exchange problems. That because of this problem, GRZ created a Foreign Exchange Commercial pipeline; a system by which monies owed to foreign creditors would be ‘***locked up’*** and only be remitted whenever foreign exchange was available. He confirmed that the 1st Appellants were one of such foreign creditors. So this debt by ZESCO had been ‘**locked up**’ in the pipeline. He told the Court that he was managing the national commercial debt at the time he chaired the tripartite meeting on the 22nd January, 1996. He was the Assistant Director from 1995 although the same position had changed names many times. He told the Court that the payment of foreign debts had serious fiscal and monetary implications to GRZ and as such GRZ had to monitor this activity very carefully. He also told the Court that GRZ had to rely on BOZ’s advice. He confirmed that as at 21 January 1996 the balance of the debt owed to the 1st Appellant according to the database at the 1st Respondent and ZESCO was US$21 459,336.20 and that the 1st Respondent acknowledged this debt in MB4. He also confirmed that ZESCO had paid the kwacha equivalent of this amount in the pipeline through Standard Bank into the 1st Respondent’s pipeline account. He further testified that, after this meeting of 22nd January 1996, the 1st Respondent wrote a letter to the Appellants confirming the debt and offering to pay using the Paris Club arrangement of 11 cents for every Dollar on behalf of ZESCO. The Appellants rejected this way of paying the debt. The Appellants were not obliged to accept to be paid 11 cents in every dollar. According to him, the Ministry of Finance was aware of this debt (see page 396). He testified that at the time of the meeting on the 22nd January, 1996, he was not aware of the existence of the rescheduling agreement KN1.

In response under cross examination, he testified that the Ministry of Justice wrote to the late Hon. Minister of Finance, Mr. Penza but the letter was never responded to. He testified that he was not told that US$21,459,336.20 owed to the 1st Appellants had been partially paid as per document “KN2”.

Also under cross-examination, DW3 testified that the 1st Respondent was created by an act of Parliament as an agent of GRZ in its operations. That the 1st Respondent was responsible for regulating the country’s monetary and fiscal policies. That the Governor of the 1st Respondent is appointed by the Republican President and that it is necessary for the Zambian Government to be represented on the Board of Directors of the 1st Respondent *“so that GRZ can oversee the operations of the 1st Respondent as a 100% GRZ entity.”* He conceded that, as at 22nd January, 1996, the 1st Respondent acknowledged that US$21,459,336.20 was owed to the Appellants by ZESCO as per document MB4. He further stated that the meeting of 22nd January, 1996, was a meeting to reconcile the debt owed by ZESCO to the 1st Appellant. That it was initiated by the Ministry of Legal Affairs. He also accepted that as such it was necessary to involve GRZ in the meeting more also because the domicile of the Appellants was under UN sanctions as UN had passed a resolution that foreign exchange was not to be remitted to Yugoslavia as that country was subjected to UN economic sanctions. He testified that at the meeting of 22nd January 1996 whose purpose was to reconcile the debt owed by ZESCO to the 1st Appellant, only ZESCO’s and BOZ’s data bases were used. He was not aware of KN1 which is dated 9th March, 1984. But according to him, **“whatever data base that exists at BOZ, the Ministry of Finance is aware”** DW3 further testified that the **Ministry of Finance** **has to be aware that a foreign creditor is owed US$21 million** **because paying US$21 million would have serious ramifications for the Zambian economy.** He accepted further that after this meeting at BOZ the 1st Respondent wrote letter to the Appellants proposing to settle the debt owed to them using Paris Club and the buy back arrangement. But he said that the reason for proposing the debt-buy back arrangement (Paris Club) was that GRZ had no capacity to pay back foreign debts in full.

According to DW3, had the Appellants accepted the 11 cents offer, the 1st Respondent would have made an electronic transfer of the monies to the Appellants, firstly to the United Nations (UN) because the 1st Appellant was under UN sanctions. DW3 also confirmed that had the 1st Appellant not being under UN sanctions, the 1st Respondent would have used whatever database, existing at Bank of Zambia, to pay the debt. Questioned on the claim as per documents KN1 and KN2 that the debt was partially paid through copper exports, he told the court at page 397 that **“I was surprised to learn about the repayment of part of the debt through copper sales as it should have been brought to our attention”.** He told the court that had they been informed of this partial debt repayment of US$21 million plus in copper sales, they would have adjusted the data base at BOZ. Also in cross examination, DW3 told the Court that the 1st Respondent never asked the 2nd Respondent to settle the debt. He further testified that it was **“most unusual”** that the 1st Respondent was not informed about the partial payment of US$21,531.02 debt through copper sales. He went on to say that the parties to KN1 were GRZ and Yugoslav International Bank.

DW4, Dr Ephraim Kaunga Permanent Secretary, testified that the debt owed to the 1st Appellant was in the range of US$34million although the reschedules reflected much lower figure. According to DW4, this amount of debt of US$34million owed to the 1st Appellant by ZESCO came about as a result of the reconciliation exercise between the Appellants on one side and the 1st Respondent and Ministry of Finance on the other side. He further testified that KN1 referred to the rescheduling agreement. This rescheduling agreement was to facilitate the liquidating the debts owed to Yugoslavian companies by Zambian companies with money held by the 1st Respondent in the pipeline Account due to serious balance of payment problems experienced by Zambia at the time. He testified that it is possible that KN2 was referring to a debt rescheduling agreement which is different from the one in KN1. That he was aware that there had been continuous efforts in trying to reconcile the debt owed to the Appellants. ZESCO had paid the equivalent of US$21million plus debt due to be remitted to the Appellants but this was paid in the pipeline and that debt was still queuing in the 1st Respondent’s pipeline Account. He explained that the pipeline mechanism at the Bank of Zambia was a queuing process and that GRZ in settling debts used to direct the 1st Respondent through this pipeline mechanism to settle debts owed by Zambian companies (parastatal and private companies). He testified that it was not economical for the country to pay its debts using copper exports in order to meet the external debt obligations. He went on to say that even where these were owed by different creditors, the 1st Respondent did not have to pay foreign debts without informing the Ministry of Finance.

The last witness DW5 Mr. Wally Derrick Musonda testified that after 1997, he retired from civil service. He had been a Director of Loans and Investments in the Ministry of Finance. His duties were to manage the debt rescheduling, servicing, and debt buy-back of both domestic and external national debt. He confirmed that he dealt with the debt concerning the Appellants and ZESCO. The 1st Respondent played a key role in the debt management as an Agent of 2nd Respondent. The procedure was that GRZ would issue document directing the payment of a debt and the documents would be sent to BOZ authorizing them to debit a particular debt account. Also as a general rule, GRZ guaranteed debts incurred by parastatals but that meant that creditors would have recourse to the guarantor in the event of the primary debtor failing to pay. He testified that the 1st Appellant would write to Ministry of Finance to authorise the 1st Respondent to pay the debt. Then that amount of debt would be debited. The Re-scheduling Agreement referred to in KN1 was the debt in the sum of US$37 million which GRZ had taken over. His understanding is that GRZ took over this debt although ZESCO was not unable to pay that debt and had in fact already paid kwacha equivalent to the BOZ in the pipeline. ZESCO did not default nor did it ask for a bail out from GRZ.

DW5 testified that in accordance with article I(b) of the rescheduling agreement KNI, GRZ made payments to the Appellants through copper sales directly although he was not able to state to the court the exact amount due to difficulties in externalisation of foreign currency. He further told the Court that, although the rescheduling agreement did not talk about other methods of paying the national debt, nonetheless, these other methods of payments were used for the purpose of settling the debts owed to Yugoslavian companies because of the serious balance of payment problems Zambia was facing. He went on to say that he was sure that the Appellants received payment because KN2 is evidence that they received payments. So the total debt due to the 1st Appellant as at 30th August, 1995 was US$16,421,244.66. So the total debt due for the 1st Appellant as at 30th August, 1995 was US$16,421,444.66 ie, US$6 million plus interest of 12.5%.

He conceded that according to KN2 the rescheduled amount was US$34,252,554.69 and that it is on record that it had been paid through copper sales. He also conceded in the cross examination that there were discrepancies in the figures given. He therefore, accepted that it was possible that KN2 could have been referring to a different agreement other than the one in KN1. He further accepted that there must have been another letter which yielded KN3. He further explained that as the 1st Respondent did not have access to the records at Ministry of Finance, it would have been ideal for the two Respondents’ representatives to have been present at the meeting or in the alternative to have had the 1st Respondent to have had access to GRZ’s data base.

Under cross examination, DW5 stated that neither the 1st Appellant nor ZESCO were parties to this Re-scheduling Agreement of 1984 but both were signatories to the statement on the Schedules. He told the court that the Re-scheduling Agreement did not refer to repayment of debts via copper exports to Yugoslavia although it was not unusual for GRZ to repay a foreign debt using copper sales from ZCCM even though a debt was owed by different entity. This is as per schedule 2 in the second last line of the Rescheduling Agreement. He further told the court that a parastatal debt is a public debt.

In his ruling on this evidence, the learned Deputy Registrar concluded with the following holdings:-

**“There has been no convincing testimony by the Plaintiffs to show that in fact, the rescheduled debt referred to in exhibit KN2 is totally different from the debt held in the Bank of Zambia pipeline. I am inclined to accept the defence position that it is actually one and the same debt.**

**I however, reject the defence attempt to apply the various Paris Club conditions whose effect would be to pay the Appellants an amount less than they are entitled to and in this case I am referring to exhibit KN3. I am, therefore, satisfied on the evidence that the reconciled amount of US$21,459,339.20 was arrived at without due regard to exhibit KN2.**

**I am further satisfied on a preponderance of probability that the correct amount owing to the Appellants is US$6,199,452.12 as acknowledged by Mr Nikola Vucinic in exhibit KN2 plus the interest thereon at short term deposit rate approved by the Bank of Zambia from the date of the Writ until Judgment and thereafter at the current Bank lending rate until final payment. I also award costs to the Plaintiffs to be taxed in default of agreement.”**

The Appellants aggrieved by this ruling have appealed to this Court raising 7 grounds of appeal:

1. **That the learned Assessing Deputy Registrar erred when he uncritically accepted that the debt which had been the subject of the proceedings in the Court below had been the subject of a debt Rescheduling Agreement between the Government of the Republic of Zambia and the Yugoslav Bank for International Cooperation. In the alternative, the learned Deputy Registrar erred when he failed to find that no reliable or credible or cogent or plausible evidence had been adduced before him to support or buttress the Respondents’ feeble allegation that the moneys which had been reconciled as due and owing to the Plaintiffs (now the Appellants) had been the subject of a Debt Rescheduling Agreement or that the subject moneys had been the subject of a settlement via copper exports.**
2. **That the learned Deputy Registrar’s view (or conclusion) that the Government of the Republic of Zambia (Ministry of Finance) was not aware of the amount of money which the Appellants were seeking to recover from the 1st Respondent on account of their ‘*Pipeline Debt’* was clearly at odds with the evidence which was adduced before the Court. In the alternative, the learned Assessing Deputy Registrar erred when he failed to make a definitive finding on whether or not the 1st Respondent was unaware of any alleged partial settlement of the debt in issue via copper exports. In the further alternative, the learned Deputy Registrar erred when he failed to find that the evidence which had been adduced before him could not support or was inconsistent with the said alleged unawareness on the part of the 1st Respondent**
3. **That the learned Deputy Registrar grossly erred in law when he formed the flawed or erroneous view that “ there has been no convincing testimony by the Plaintiff to show that, infact, the rescheduling debt referred to in the exhibit KN2 is totally different from the debt held in the Bank of Zambia pipeline” when the onus was clearly upon the Respondents to prove the assertion that the debt which was reconciled on 22/01/96 was the same debt which was or had been the subject of the Rescheduling Agreement dated 9th March, 1984.**
4. **That the learned Deputy Registrar erred when he based his determination of the moneys due to the Appellants solely and exclusively on one letter whose contents were clearly inconsistent with the totality of the evidence which had been adduced before him. In the alternative, the learned Deputy Registrar misdirected himself when he failed to find that a correct reading of the subject letter could not warrant the erroneous conclusion which the learned Registrar reached as regards the moneys which the subject letter had asserted as having been due to the Appellants.**
5. **That the learned Assessing Registrar misdirected himself when he glossed over all fundamental and fatal deficiencies/weaknesses which characterised the Respondents’ evidence thereby coming to a conclusion which could not reasonably be entertained.**
6. **That the learned Assessing Deputy Registrar erred when he devoted a substantial portion of his judgment only to an evaluation or consideration of evidence and submissions favourable to the Respondent while substantially ignoring both the abundant unfavourable evidence against the Respondents as well as the detailed Submissions which were filed on behalf of the Plaintiffs (now Appellants) which clearly demonstrated how the Deputy Registrar ought to have approached his determination of the moneys which were due to the Appellants.**
7. **That the learned Assessing Registrar grossly erred when he failed to consider or evaluate or assess all the evidence which was adduced before him and the cumulative effect thereof.”**

At the hearing of the appeal, Counsel for the Appellants relied on the filed heads of argument. In addition, he buttressed these filed heads of arguments with oral arguments.

On ground 1 Counsel argued that the learned Assessing Deputy Registrar’s analyzation of the connection between the debt referred to in a letter dated 30th August, 1995 (KN2) and the Debt Re-scheduling Agreement of 9th March, 1984(KN1), was flawed. He argued that GRZ did not takeover ZESCO’s debt because the Re-scheduling Agreement made no reference to the fact that GRZ took over that debt. Even the letter “KN2”, according to Counsel, did not say so. According to him, the learned Deputy Registrar relied solely on the letter appearing at page 40 of the record (KN2) and assumed that the Agreement of Re-scheduling Arrears, referred to in this letter KN2 and the Debt Re-scheduling Agreement which was signed on 9th March, 1984, KN1, were dealing with the same debt. He argued that this approach was flawed as there was no evidence from the Respondents’ witnesses to connect or even link these two debts. He argued that, there was no evidence before the Court to create the necessary or requisite nexus between the Debt Re-scheduling Agreement of 9th March, 1984 and the letter of 30th August, 1995. Augmenting this point, Counsel pointed out to the following points (1) DW1 did not refer to either the said letter of 30th August, 1995 (KN2) or the said Rescheduling Agreement of 9th March, 1984 KN1. (2) DW2 never knew of the existence of “KN2” until the date of hearing before the learned Deputy Registrar on 27th July, 2004. DW2 told the learned Deputy Registrar that:-

“....**I was not aware of the document (that is, the Rescheduling Agreement) at the (reconciliation) meeting in January (1996) at BOZ.... At the time of our meeting at BOZ, the letter (of 30th August, 1995) was not available and no mention of copper payment was made. The reconciled amount of US$21,459,336.20 was based on a Schedule at BOZ. (According) to the (letter of 30th August1995) the unpaid balance was US$6,199,452.12. There was no Ministry of Finance representative at the BOZ meeting. The Rescheduling Agreement was signed in 1984 and we had the meeting in 1996. There was a time lapse of 12 years. The practice in ZESCO is that documents older than 6 years are archived. That is why I did not see the (Rescheduling) Agreement until yesterday.”**

DW2 explained that “KN2” referred to payment of US$28,053,102.57 through copper sales and the balance outstanding was US$6,199,452.12.

She told the court that the only debt she was aware of as the debt of ZESCO still outstanding in the pipeline, at the meeting of January 1996, according to the schedules at ZESCO, and the database of the 1st Respondent was the one of US$21,459,336.20. DW2’s testimony was also that prior to January, 1996 meeting, ZESCO had made kwacha payments equivalent to US$21,459,336.20 into the 1st Respondent’s pipeline account according to the schedules at pages 318 up to page 319 of the record. These schedules at pages 318 up to 319 reflect the dates when such payments were made into the pipeline account. As far as ZESCO was concerned, the total debt was paid, so according to DW2, had the Appellants been a local company, they would have received payment from ZESCO in Zambian Kwacha. ZESCO paid its debts to the Appellants. She even told the Court below that she was not aware that there were some disagreements as to how much ZESCO owed the Appellants. (3) DW3 also told the Court inter alia that he was managing the national debt both domestically and externally since 1995 and was familiar with the debt owed to the Appellants up to 1998. That in this context, Government had created a mechanism called commercial pipeline. That this was a system where money owed to foreign entities which had dealings with Zambian private entities and parastatal companies, would be ‘**locked up**’ until the time when the 1st Respondent would have foreign exchange available to release to commercial banks for the banks to remit such money to meet contractual obligations. That settling foreign debts had serious fiscal and monetary implications for GRZ and as such, GRZ had to monitor these activities very carefully. That therefore, the key function of the 1st Respondent was to regulate GRZ monetary policies and serve as an advisor to the GRZ on fiscal policies. So GRZ relied on the 1st Respondent as its Advisor on financial policies and this is why DW3 was surprised that the partial payment of this debt by ZESCO was never brought to his attention. This is why according to him as at January, 1996, the balance of the debt owed to the Appellants by ZESCO through the pipeline at the Respondents’ Bank was US$21,459,336.20 which amount was acknowledged by the 1st Respondent in the letter document MB3. This figure was arrived at during the reconciliation meeting of the 22nd January 1996. This was why, even though Mr. Vucinic, the author of KN2 was present representing the Appellants at the meeting of January 1996, he never brought document KN2 to the attention of the other members of the meeting nor did he talk about KNI, according to Counsel because these two documents therefore were irrelevant. DW3 told the court that he signed the minutes of the meeting of 22nd January, 1996 confidently as he was sure that that record was a correct record of the reconciliation meeting. The Ministry of Justice had even written to the Appellants informing them about the need to have this meeting to reconcile the figures of the debt. Counsel’s position was that as per DW4’s evidence, the court should have accepted that the subject matter of this Rescheduling Agreement was the rescheduling of the debt due to the 1st Appellants in the sum of US$34,252,554.69. So the letter of 30th August, 1995 (KN2) could have been referring to another debt other than the one referred to in document KN1 dated 9th March, 1984 (see page 405).

On the argument that the Ministry of Finance did not know the amount of the debt which the Appellants were claiming, Counsel argued that the Ministry of Finance was fully aware of this debt. The Ministry of Finance was always aware of the Database at BOZ. Mr. Penza (Hon. Minister of Finance then) was written a letter by one Mr. Vucinic, a Director of the 1st Appellant although that letter was never responded to. Counsel further in support of this argument referred to DW3’s evidence that he had never been shown any document indicating that US$28,053,102.57 had been paid through copper sales to Yugoslavia as part payment of the judgment debt.

On the argument that the 2nd Respondent was not at the meeting on 22nd January, 1996, Counsel argued that that argument should be dismissed as it was the Ministry of Legal Affairs (the 2nd Respondent) which initiated this tripartite meeting. It therefore should have stood to reason that the Ministry of Justice and the Ministry of Finance should have been invited to this meeting. DW4 told the court that the Appellants wrote KN2 to the Ministry of Finance. DW4 also told the court that there was close intercourse between the 1st Respondent and the Ministry of Finance. That the 1st Respondent played a key role in the management of the national external debt as well as the national domestic debt. That the 1st Respondent was the 2nd Respondent’s agent. That GRZ’s payment of public debts had to go through the 1st Respondent and that it was never the practice of the 2nd Respondent to settle any debt without going through the 1st Respondent. So had the Ministry of Finance settled the debts even via copper exports, it would have informed the 1st Respondent accordingly (see page 404 of the record).

Counsel further pointed out that there was no documentary evidence brought to establish that the Appellants’ debt had been partially paid through copper exports. The evidence which was before the court on which there was common ground was that GRZ was aware of the Appellants’ claims as shown at page 405 of the record. Further in supporting this argument, Counsel argued that the Appellants’ witnesses failed to produce any unassailable nexus between the debt Rescheduling Agreement of March, 1984 (KN1) and the letter of 30th August, 1995(KN2) and the debt reconciled on 22nd January, 1996, Counsel submitted that there was no evidence establishing any relationship between these 3 debts. So he urged this court to hold that the learned Deputy Registrar should have disregarded any possible connection between KN1, KN2 and MB2. Counsel argued that there was no basis to hold that there was a nexus. Moreover, Counsel argued, the reconciled amount of US$21,459,336.20 at the 22nd January, 1996 meeting (MB2) was arrived at after examining all the relevant records which were available according to the data base of both ZESCO (as a primary debtor) and the 1st Respondent.

Counsel further referred to the last witness DW5 and submitted that even his evidence, like the earlier witnesses, did not establish unassailable connection between the letter of 30th August, 1995 and the debt rescheduling of 9th March 1984. Even DW5’s evidence did not establish any connection between the said agreement (on one hand) and the US$21,459,336.20 which was the judgment debt (on the other hand). In Counsel’s view, the following unassailable and impeached fact as testified by DW2 should have persuaded the Deputy Registrar to decide that the evidence of DW5 was clearly contradictory and unreliable. The lower court should have accepted DW2’s evidence that ZESCO had paid to BOZ the debts in the schedule marked “MB3” at pages 318 and 319 and that ZESCO had paid prior to January 1996 this judgment debt waiting for foreign exchange to be remitted to Energoinvest Limited through the pipe line. For avoidance of any doubt, the schedule which DW2 was referring to is one of the schedules which were being referred to in the last sentence of the minutes of the reconciliation meeting of January, 1996 (See pages 316 to 317 of the record). Counsel further pointed out that on the 9th of March 1984, the schedule at page 139 which was attached to the reconciliation Minutes, relating to the meeting of January, 1996 had highlighted Moneys which arose well after the signing of the Rescheduling Agreement of March, 1984 including (for the removal of doubt,) the following debts which were due.

**DATE AMOUNT (US$)**

12.05.84 25,200.00

16.05.84 8,400.00

07.07.84 724,506.14

25.01.85 38,447.84

22.02.85 176,979.11

19.04.85 1,117,770.10

24.09.85 1,080,092.40

**Total**  **US$3,171,395.59**

Also according to Counsel, this court should note that (i) The purpose of the tripartite meeting was (a) to establish the exact amount of the debt in the pipeline in favour of the Appellants (b) to include the omitted figures from the 1st Respondent that were appearing on the Standard Chartered Bank print-out. So as the Respondents’ witnesses testified, the reconciled amount of US$21,459,336.20 was arrived at after taking into account all the relevant records, (ii) The author of the letter of 30th August, 1995 (KN2) even at the time this letter was authored, had envisaged that the amounts stated were going to be subject to confirmation. Counsel submitted that despite this letter of 30th August, 1995 having invited GRZ to confirm the amounts for payments proposals, yet there was no evidence that GRZ acknowledged or followed up this suggestion. (iii) Indeed quite apart from the letter of 30th August, 1995 having been authored well before the reconciliation of January 1996, the Rescheduling Agreement of 9th March, 1984 did not take into account the debts which arose after that date: (iv) According to the letter of 30th August, 1995, KN2 the debt to be rescheduled was US$34,252,554.69 where as the debt to be rescheduled on 9th March, 1994 Agreement was US$37million plus. The evidence given by the witnesses for the Respondents established no connection between the two figures; (v) While the letter of 30th August, 1995 talked about the payment of the debt of US$28,053,102.52 in instalments of the amount as having been paid mostly by copper, there was no evidence that the debt rescheduling agreement of 1984 was connected to payment of the debt through copper exports.

Counsel further submitted that in support of his arguments, this court further should note that the Respondent’s witnesses acknowledged all these points and further told the Deputy Registrar that, the rescheduled agreement of 9th March, 1984 had not entitled GRZ to take over ZESCO’s debt of the Appellant. So Counsel argued that if infact, GRZ had repaid the said debt, how could ZESCO have continued to make payments towards the debt to the Appellants in the pipeline well after the debt rescheduling Agreement was entered into on 9th March, 1984.

According to Counsel as was held in **Trade Kings Limited Vs Unilever Plc and Chesebrough Ponds (Z) Ltd and Lever Brothers (Z) Ltd1** (where Ngulube CJ (*as he then was*) observed at page 18)

“**one point which immediately stands out and which emerged and which appeared to be common cause was that the learned trial Judge did not, in fact, adjudicate upon the action and the issues actually presented by the Respondents**.” and in the case of **Zulu v Avondale Housing Project**2 where this Court held inter alia that: “**The Court had a duty to adjudicate upon every aspect of the suit so that every matter in controversy is determined in finality**.”

the lower court left out all these issues unresolved. In addition, in Counsel’s view, there is nothing in the Ruling which suggests that the learned Deputy Registrar seriously considered and analysed both the oral and documentary evidence as well as submissions before he came to the conclusion which he made. According to him, the Court below misapprehended the facts before it and thus came to a conclusion which he did and which could not be supported by any evidence on record. He thus urged this court to hold that findings of the court below were not amply supported by the evidence on record. This is why the court below gave no reasons for preferring one set of evidence against the other (See the case of **Zambia Telecommunication Co. Ltd v. Mutale Nganga and Chulumbu Epiphano**3.

On ground 2, Counsel argued that it was clear from the ruling of the Court below that the learned assessing Deputy Registrar concluded that Ministry of Finance was not aware of the amount of money which the Appellants were seeking to recover from the 1st Respondent’s pipeline account. In support of this, Counsel quoted a portion of the Ruling at page 16 of the record which says:-

**“The position seems to be that there was correspondence between the Plaintiffs and the Ministry of Finance which the 1st Defendant did not have. It also seems to be the position that the rescheduling agreement in this case was a matter between the Government of Zambia and the Yugoslav Bank of International Cooperation without the involvement of the actual debtors and creditors. It is apparent in this case that neither ZESCO nor the Bank of Zambia were privy to the rescheduling agreement as the debtors and there is no indication of the involvement of Energoinvest as the creditors”**

Counsel attacked this approach by the lower court. He urged this curt to dismiss this ground because he argued that it was not possible for the parties to have entered into a reconciliation of the amount on the 22nd January 1996 without establishing the relevant amounts and without establishing the relevant data which was in possession of the debtor (ZESCO) and the creditor (the Appellants). In the alternative, Counsel argued that the learned Deputy Registrar erred when he failed to make a finding on whether or not the 1st Respondent was unaware of any partial settlement of the debts via copper exports. In the further alternative, Counsel argued that the learned Deputy Registrar erred when he failed to find that the evidence which was before him, could not support the alleged claim by the Respondents that the Ministry of Finance was not aware of the claim by the Appellants. He argued that this conclusion by the learned Deputy Registrar also raised questions on how the Deputy Registrar concluded that way when there was evidence by ZESCO that it deposited all the Kwacha equivalent of US$21,459,336.20 in the pipeline into the 1st Respondent’s bank later after the Rescheduling Agreement. That this evidence was uncontroverted and unimpeachable from PW1 as well as from the Respondent’s witnesses that the 1st Respondent and the 2nd Respondent were aware of the quantum of the debt in the pipeline. To illustrate this point, Counsel submitted that it is common ground that although the Ministry of Finance was not represented at the 22nd January 1996 meeting, but soon after the meeting, the 1st Respondent wrote to the Appellants offering to pay up to pay 11 cents in every dollar comprised in the reconciled debt of US$21,459,336.20. The Appellants out rightly rejected this offer. This letter of rejection was copied to three key Ministries (Ministry of Finance, Legal Affairs and Foreign Affairs), see page 373 of the record. After the rejection, the Appellants wrote to Hon. Penza, the then Minister of Finance seeking his intervention. The letter addressed to late Hon. Penza made it clear that the debt being demanded was US$77,901,792.47 which was US$21,459,332.20 plus the component of interest rate. This letter of Hon. Penza was copied to the Director in the Ministry of Finance, DW5 (see page 328). Counsel argued that even at this stage, the Respondents did not dispute the quantum of the debt in question. Counsel therefore, argued that this assumption by the Deputy Registrar is not supported by any evidence. Furthermore, Counsel referred to DW3’s evidence in cross examination where DW3 described the close relationship between GRZ and 1st Respondent. According to DW3, BOZ is owned by GRZ 100% (see page 394 and 396). He also referred to DW1’s evidence to prove that the Ministry of Finance was either directly or by necessary implication aware of the debt amount as it was always aware of the data base at 1st Respondent.

He referred also to DW5, whose evidence also confirmed that the 2nd Respondents were fully or by deduction aware of the quantum of the debt. His argument therefore was that had the 2nd Respondent done anything to reduce the reconciled debt, appropriate evidence, including documentary evidence would have been produced before the Court below.

On the assertion by DW3 that at the time of the meeting on the 22nd January, 1996, the officials of the 1st Respondent were not aware of the correspondence between the 1st Appellants and the Ministry of Finance, Counsel argued that this Court should regard such a statement as palpably porous and incredible. He anchored this argument on the fact that if an amount of US$28 million had truly been paid towards reducing the main debt, this sum of money claimed to have been paid towards the reduction of the debt is so colossal that DW3, manning the national debt would not have been unaware of it.

On grounds 3 and 4, Counsel submitted that the learned Deputy Registrar grossly erred in law when he formed the flawed or erroneous conclusion that “**there has been no convincing testimony by the Appellants to show that, infact, the rescheduled debt, referred to in Exhibit “KN2”, is totally different from the debt held in the Bank of Zambia pipeline**” when the onus was clearly upon the Respondents to prove their assertion that the debt which was reconciled on 22nd January, 1996 was the same debt which was or had been the subject of the Rescheduling Agreement dated 9th March, 1984 and which was the same debt covered in KN2. Counsel argued that the learned Deputy Registrar erred when he based his determination of the debt due to the Appellants on the letter (KN2) whose contents clearly were inconsistent with the totality of the evidence. He argued that he had demonstrated clearly in grounds 1 and 2 that there was evidence to support the claim by the Appellants of the amount due. Citing the case of **Zulu v Avondale Housing Project2 and Galaunia Farms Ltd vs National Million Company Ltd and National Milling Corporation Ltd4** where Sakala CJ said;

**“The burden to prove any allegation is always on the one who alleges”**

Counsel more or less repeated his submissions in ground 2. In the alternative, he argued that the learned Deputy Registrar misdirected himself when he failed to find the correct reading of the subject letter (KN2). He submitted that the letter in question should not even have been given the weight of being the basis for the conclusion, which the learned Deputy Registrar reached as to the debt due to the Appellants because (a) the author of the letter only attached KN2 to an affidavit and as such he was not available for cross examination. His evidence was adduced by way of an affidavit. He was not called to give **viva voce** evidence to test the veracity of his testimony. (b) the contents of KN2 were inconsistent to the totality of the evidence before the court.

On Ground 5 Counsel argued that the learned Deputy Registrar misdirected himself when he glossed over all the fundamental and fatal deficiencies/weaknesses which characterised the Respondents’ evidence thereby coming to a conclusion which could not reasonably be entertained. That the learned Deputy Registrar relied solely or largely upon the affidavit of Kellyford Nkalamo which affidavit the Respondents filed in opposing the Appellants’ application of determining the debt due to them. He submitted that the deponent of “KN2” was not called to give viva voce evidence to be subjected to cross examination. So the learned Deputy Registrar should have approached his testimony with the necessary circumspection. In support of this argument, Counsel cited one portion of the learned Deputy Registrar’s ruling at page R3 (page 15 of the Record of Appeal) which reads:

“**The issue that has arisen is why KN2 (that is, the letter of 30th August 1995) was not produced at the reconciliation meeting that gave rise to exhibit MB2 (i.e. Minutes relating to the reconciliation meeting of January, 1996). The defence has also wondered why (GRZ) was not represented at the meeting that gave rise to exhibit MB2 as it is presumed that had they been present, exhibit KN2 would have been produced and the report would have been different**”.

According to Counsel, this approach was rather simplistic. He argued that the evidence of the Respondents’ witnesses had been heavily discredited and consequently wholly unreliable on account of inconsistencies, contradictions and mutual fabrications, (see page 32 of the submissions). According to him, it was clear even from a cursory reading of the ruling that the learned Deputy Registrar leaned on one side of evidence without analysing both sides of the evidence. He argued that looking at the minutes of the reconciliation meeting; one can only conclude that at the meeting a consensus was reached. That none of the issues now raised were subject of discussion during that meeting. He submitted also that leaving aside the schedules which are at page 318 – 319, it is clear that even the documentation that had been subject of discussion at the meeting, were infact annexed to the minutes. For example the subject Minutes make it clear that the meeting discussed (a) Standard Chartered Bank data base, (b) bills which were on the Standard Chartered data base in relation to the 1st Respondents’ data base (c) bills that belonged to Society Amonima Electrical and (4) US$5.3 million owed to the 1st Appellants (this is the money which GRZ sent to UN on humanitarian consideration). Also according to Counsel, the minutes of 22nd January, 1996 did not disclose the figure which the Appellants’ representatives tabled before the meeting as to the amounts which were due. What is clear from the minutes, according to Counsel, is that apart from the inclusion of the omitted amounts, some amounts were excluded from whatever figure the Appellants were claiming as owed to Society Amonima Electrical. Also as already stated, a sum of US$5.3 was deducted. Citing the case of **Peter Ng’andwe V Rex Ngoma5,** Counsel argued that where a court is presented with “uncontroverted evidence” on an issue, the Court is duty bound to adjudicate or rely on such “uncontroverted evidence” unless there is a good reason not to do so. The learned Deputy Registrar did not follow this ratio decidendi.

On grounds 6 and 7 which are interlinked, Counsel argued that the learned Deputy Registrar erred when he failed to seriously consider or evaluate or assess fully the evidence and submissions adduced before him while at the same time the learned Deputy Registrar devoted substantial part of his evaluation or consideration of the evidence or portions of the evidence which were apparently favourable to the Respondents. According to Counsel, the Court substantially ignored all the favourable evidence which was adduced or presented before him on behalf of the Appellants and thus did not adjudicate upon all the issues which were actually presented on behalf of the Appellants. Counsel submitted that even cursorily looking at the ruling, will leave no one in doubt, that the Court below, gave a biased evaluation of this critical evidence before it, presented on behalf of the Appellants. In Counsel’s view, the Court below was very selective in its approach to the evidence adduced before it and submissions which were filed to buttress the evidence before it. Counsel argued that even due weight was not given to the evidence adduced before him. This is why the learned Deputy Registrar glossed over most of the weaknesses that characterised the case for the Respondents. In his view, there is nothing in the Ruling which would suggest even faintly that due weight was accorded to the solid and compelling evidence buttressed by the submissions on behalf of the Appellants. According to Counsel, the learned Deputy Registrar based his decision solely on the solitary letter of the 30th August, 1995 (KN2). Citing the case of **Incar Zambia Ltd Vs K.N.G. Solanki6**, Counsel argued that the learned Deputy Registrar misdirected himself in picking and choosing which aspects of the evidence for the Appellants he was to accept and rely on and which of the evidence he was to reject. He cited the case of **The Attorney-General V Marcus K. Achiume**7, where this Court enunciated the following guidance:-

“**An unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a mis-direction which no trial Court should reasonably make, and entitles the appeal Court to interfere**”.

So on these grounds, Counsel urged this Court to uphold the Appeal.

The 1st Respondent, in response, argued grounds 1 to 4 together as the issues raised were overarching. The 1st Respondent, referring to the preamble to document KN1 (the Rescheduling Agreement) argued that that preamble first described the purpose of entering into that agreement. The parties were GRZ and Yugoslavian Bank for International Economic Corporation. Counsel explained that the purpose of this agreement was to deal with the debts which had matured between Yugoslavian companies as creditors and Zambian companies as debtors. The reason for this Rescheduling Arrangement, Counsel further submitted, was that the two sovereign countries, recognising the economic constraints which they were both facing and realising that both countries wanted economic activities to still continue, therefore sought to reschedule the payments of the debts which had matured. So the Agreement in article I was to the effect that the arrears of the debts from the contracts between Yugoslavian companies and Zambian companies in that schedule, which had matured in favour of the Yugoslavian companies up to 31st December, 1982 were to be consolidated and rescheduled. Article I provided for payment in ten (10) equal annual semi annual instalments of such debts. On the rescheduled amounts commencing on the 1st June 1984 to 1st December, 1988. Article II, referring to debts appearing in that schedule which matured in March 1983, these were to be rescheduled and to be paid in (20) twenty equal annual semi annual instalments commencing on the 2nd February 1985 to 1st July 1995. Article III provided that the amounts in schedule 1 and schedule 2 were to be subjected to further verification and confirmation in relation to liabilities and counterpart funds. Counsel explained that both schedule 1 and schedule 2 referred to Energoinvest as the Yugoslavian creditor and ZESCO as the Zambian debtor. Counsel further argued that it was not in dispute that this agreement covered both ZESCO a wholly GRZ owned company and Energoinvest as a company which was domiciled in former Socialist Republic of Yugoslavia. Counsel further explained that Yugoslavia being a socialist state, all the companies and property were state controlled and in Zambia all the parastatal companies’ debts were public debts. Therefore it was not a coincidence that the agreement (KN1) was government to government, covering companies that were state controlled. So even though the Appellants and the Respondents were not parties to this Rescheduling Agreement, the same agreement was made on their behalf by the owners of the companies in line with the case of **John Paul Kansengele and 40 Others vs Zambia National Commercial Bank Limited9** in which the case of **Van Boxtel Vs Kearney10** was cited with approval. Counsel argued that by parity of reason, as schedule 2 provided that debts which matured in 1983 were to be rescheduled and paid in equal semi annual instalments commencing 1st February, 1985 to 1st July 1995, the Appellants’ debts were included in these debts rescheduled. According to Counsel, this is why the Appellants on the 30th August, 1995, two months from the 1st of July 1995, wrote KN2 to the Director of Loans and Investment stating that the Appellants had been to see the Director of Loans and Investment in April 1995 and as a follow up, the Appellants wrote this letter. So the only reasonable inference to draw is that the letter (KN2) which makes references to the rescheduling of arrears, had a connection with the Rescheduling Agreement (KN1).

On the assertion that the principal amount due was as per the reconciled figure of the 22nd January, 1996 and that that amount was US$21,459,336.20, Counsel argued that it is common ground that that reconciliation was done on the basis of the data base which was with ZESCO and the data base which was with the Appellants and the 1st Respondent. There is also unassailable evidence that ZESCO and the 1st Respondent were not aware of the existence of KN1 and KN2. Ministry of Finance was absent. Furthermore, looking at the names of those who attended the meeting at the 1st Respondent’s premises on the 22nd of June, 1996, the author of KN2 (Mr. Vucinic) was present at the meeting. This same author of KN2 never disclosed the contents of KN2 to the meeting. Even the contents of KN1 were never brought to the attention of the meeting at which the reconciliation of the debt due was the main subject. Counsel canvassed the view that as it is trite law that he who asserts must prove and since the Respondents had placed before the court the two documents KN1 and KN2, the Appellants had a responsibility to demonstrate that the two documents were of no relevance to establishing the debt due. The Appellants failed to do so. It was incumbent, according to Counsel, upon the Appellants to call the author of KN2 and any representative of the Appellants to prove the accuracy of their assertion that the two documents related to different debts other than the debt which was subject of reconciliation and the debt which was subject to assessment by the learned Deputy Registrar. It was also incumbent on the Appellants to call the author of KN2 and any representative of the Appellants to explain that both KN1 and KN2 related to other debts other than the debt before the court. The failure to offer plausible explanation of KN2 and KN1 was fatal to the Appellants’ own claim (see the case of **Atheneon Engineering Company Limited v Daniel Lufunda Lumai11**. By parity of reason, the failure by the Appellants to call the author of the Appellants letter of 30th August, 1995 (KN2) to testify that the said letter related to another debt and the absence of any other explanation, significantly diminished the evidential value that could have been placed on the Appellants’ assertion that KN2 related to a different debt and therefore tended to lead to the inference that the Appellants’ claim was less probable. Further, it tended to lead to the inference that they knew that they were owed a lesser amount of money. This is why they withheld or failed to disclose that evidence to representatives of the 1st Respondents and ZESCO during the reconciliation meeting of the 22nd January, 1996. According to Counsel, the court below weighed all the evidence before it before adjudicating on the issues. Counsel canvassed that more than ample evidence had been tabled before the court to establish that there was a rescheduling agreement of the debts owed to Yugoslavian state controlled companies and that that debt which was reconciled, was the same debt subject to rescheduling in 1984 and the same subject to assessment by the Deputy Registrar. The agreement to reschedule the debt (KN1) was produced before the Deputy Registrar as an exhibit to an affidavit deposited by K. Nkalamo filed in court on 5th April, 2004. In paragraphs 9 to 10, the deponent clearly explained document KN1. The deponent explained that the agreement (KN1) concerned the same debt which was subject to assessment before the learned Deputy Registrar. Counsel also pointed to PW1’s evidence on behalf of the Appellants who when he was cross examined about KN1, testified that the document looked authentic and that he was aware of the rescheduling of debts. PW1 went on to state that it was a normal practice to reschedule debts. Counsel observed that the same witness had earlier on told the court that he could not follow how the rescheduling had not been known by ZESCO. He told the court in re-examination at page 373 that although the Appellants were not a party to the rescheduling agreement, they were represented by Marjanovic one of the two persons who executed the agreement at page 45. Counsel wondered how PW1, through his testimony could allege that the debt which was rescheduled was different from the debt subject to the assessment when he told the court that he (PW1) was aware of the rescheduling agreement and that he never talked to Mr. Vucinic about KN2. Counsel therefore, prayed that these grounds of Appeal be dismissed.

On grounds 5, 6 and 7 which dealt with the learned Deputy Registrar’s valuation of the evidence, Counsel submitted that the main issue which the Deputy Registrar had to determine was whether the principal sum due to the Appellants was US$21,459,336.20 as claimed or that infact the principal sum was US$6,199,152.12 on the basis of the documentary evidence produced by the Respondents, which according to the Respondents had not been taken into account at the meeting of 22nd January, 1996. Counsel argued that the Appellants’ “case” of claiming that amount of US$21,459,339.20 was based entirely on the minutes of the meeting of the 22nd January, 1996 MB2 and the acknowledgment by DW1 on the 22nd February, 1996 (MB3) that a sum of US$21,459,336.20 was the judgment debt when there is evidence that the meeting of the 22nd January, 1996 did not take into account an acknowledgment by the Appellants in KN2 that substantial payments had been made to the redeem principal debt via copper exports. Counsel argued that KN2 made references to debt scheduling agreement. So the learned Deputy Registrar had before him two conflicting stories. He chose to believe the Respondents’ version of the story as probable as opposed to the Appellants’ story. Counsel therefore argued that the Deputy Registrar’s position was not assailable. He argued that the learned Deputy Registrar took into account the inconsistencies referred to and decided which of the two stories was more probable. According to Counsel, the lower court used the yard stick set by Lord Denning L. in **Miller vs Minister of Pensions8**  in assessing which side to accept when he said;

**“that degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: we think it more probable than not; the burden is discharged; but if the probabilities are equal it is not”**

Counsel therefore urged this court to dismiss the 3 grounds of Appeal as lacking merit.

The second Respondent’s response was more less the same as the first Respondents’ response and urged this court to equally find no merit in all grounds of Appeal. On ground 1, the second Respondents’ Counsel argued that from page 15 through to page 17 of the record, the reasoning of the learned Deputy Registrar shows how he decided to accept that the debt in issue had infact been rescheduled as alleged by the Respondents. According to Counsel, the Deputy Registrar clearly weighed the evidence before him and adjudicated on the issues and the arguments raised. In the alternative, on the argument that the Deputy Registrar erred when he failed to find that there was no credible evidence adduced to support the Respondents’ allegation that the Judgment debt had been partially resolved as it had been subject to the debt rescheduling agreement, Counsel submitted that there was ample evidence tendered before the court which proved that an agreement rescheduling the debt was entered into and that is KN1 and that this agreement covered the very same debt subject of assessment before the court.

On Ground 2 on the argument that the learned Deputy Registrar’s view or conclusion that the GRZ (Ministry of Finance) was not aware of the amount of money which the Appellants were seeking to recover from the 1st Respondent on account of their pipeline debt, was clearly at odds with the evidence which was adduced before the court, Counsel argued that the Appellants must have grossly misunderstood the portion of the judgment which they were attacking. In Counsel’s view, the portion being attached is at page 16 of the record. It reads:

**“The position seems to be that there was correspondence between the Plaintiffs and the Ministry of Finance which the 1st Defendant did not have. It also seems to be the position that the rescheduling agreement in this case was a matter between the Government of Zambia and the Yugoslav Bank International cooperation without the involvement of the actual debtors and creditors. It is apparent in this case that neither ZESCO nor the Bank of Zambia were privy to the rescheduling agreement as the debtors and there is no indication of the involvement of Energoivnvest as the creditors.”**

According to Counsel, that extract does not support the conclusion that the lower court held that the Government of the Republic of Zambia did not know the amount that the Appellants were seeking to recover. That this portion of the judgment stated meant that (1) there was correspondence between the Appellants and the Ministry of Finance which correspondence the 1st Respondent did not have, (2) the Rescheduling Agreement in KN1 was a matter between the government of the Republic of Zambia and Yugoslav Bank for International Economic Cooperation without involving the actual creditors and debtors and that (3) neither ZESCO nor the 1st Appellant were privy to this contract. Counsel argued that the interpretation by the Appellants was stretched to mean that the Ministry of Finance did not know the amounts the Appellants were claiming from the 1st Respondent. Counsel therefore argued that if his interpretation is the correct interpretation, then this ground of appeal would not be a ground born out of any finding of the court below, it would be a ground created as a result of misapprehension of this portion of the Ruling of the learned Deputy Registrar and as such should fail. In the alternative, on the argument by the Appellants that the learned Deputy Registrar failed to make a definite finding on whether or not the 1st Respondent was not aware of any partial settlement of the debt via copper exports, Counsel argued that the lower court did not need to make that sort of finding because it accepted the largely unchallenged evidence of the existence and the circumstances of KN1 and KN2. Counsel argued that the lower court was called to adjudicate upon all issues in difference and the duty of the court was to determine the quantum owed. Counsel therefore, argued that the learned Deputy Registrar was on firm ground to have reached the conclusion which he did and that his conclusions were supported by the evidence before the court. He therefore, urged the court to dismiss this ground of appeal.

On ground 3, on the argument that the lower court grossly erred when it formed the flawed opinion that the Appellants had not tendered any convincing evidence that in fact the rescheduled debt referred to in KN2 at page 40, was totally different from the debt in BOZ pipeline, the debt which was reconciled on the 22nd January, 1996, Counsel first reproduced a portion of the ruling and argued that the learned Deputy Registrar was not trying to shift the onus of proof to the Appellants. That the learned Deputy Registrar concluded in the way he did after considering all the evidence as it related to exhibit KN2. That in the absence of any evidence rebutting KN2, he accepted the Respondents’ position that the debt, which was rescheduled (KNI) was the same debt as the one which was referred to in KN2 and the one which was in the pipeline which was reconciled. Counsel referred to the fact that the Appellants had not filed any affidavit in opposition to the affidavit of Mr. Nkalamo and that had they wanted Mr. Nkalamo to be in attendance to give viva voce evidence and to be cross examined, the Appellants would have secured his attendance in court. Counsel further explained that since the Appellants knew of the existence of documents KN1 and KN2 it was incumbent on them to have raised the importance of these two documents at the meeting of reconciliation of the debt on the 22nd January, 1996. Counsel further argued that the letter of 30th August, 1995, (KN2) was not even referred to at the meeting of 22nd January, 1996 because although the Appellants knew of its existence, its existence was not known to all those who attended the meeting on behalf of the Respondents and ZESCO. So the bottom line was that on the 30th August, 1995, the Appellants are on record confirming that the amount of money owed to them was US$6,199,252.12. It was therefore inconceivable, Counsel argued, that that sum of money grew within the period of six months later to a staggering figure of US$21,459,336.20, which the Appellants were claiming. Counsel therefore urged this court to dismiss this ground of Appeal as lacking merit.

Ground 4, on the argument that the lower court erred when it relied on document KN2, the document whose contents were clearly inconsistent with the totality of the evidence, Counsel argued firstly that none of the authorities cited and submissions presented, supported this ground. Secondly, that, the ruling of the court from page 13 to 17 indicated that the lower court did not only rely on one document. It relied on all the evidence adduced before it, thus proceeded and narrowed the claim to two main documents. Counsel further argued that the Appellants had not shown how, if at all, that sole document, allegedly relied on, was inconsistent with the totality of the evidence before the court. Counsel repeated most of the arguments adduced in Ground 1 and urged this court to equally find no merit on this ground.

On grounds 5, 6 and 7 on the arguments that the lower court devoted a substantial portion of its ruling to evaluating submissions favourable to the Respondents while substantially ignoring the arguments in favour of the Appellants, Counsel’s response is that the lower court adjudicated on all the issues and the cause of action presented by the parties. In Counsel’s view, the only issue which was before the court was the question of the debt due to Appellants following a consent order entered between the parties (see the case of **Trade Kings Limited Vs Unilever PLC and Cheesebrough Ponds (z) ltd and Lever Brothers (z) limited1**). Counsel argued that during the course of hearing, the Appellants had accepted the procedure of adducing evidence by way of an affidavit. The court therefore rightly gave the same weight to the evidence adduced by way of affidavit as that evidence adduced viva voce. Counsel submitted that the onus of proving the claims, on the balance of probabilities, lay on the Appellants. That the Appellants had a duty to prove that a sum of US$21,456,335.20 plus interest was owed to them. They failed to do so. The evidence of the Appellants was unsatisfactory in the face of PW1 acknowledging documents KN1 and KN2 although he attempted to suggest that they referred to other debts. The learned Deputy Registrar rightly chose to disbelieve the Appellants’ evidence. According to Counsel, that position taken by the learned Deputy Registrar was unassailable. So he argued this court to dismiss the whole appeal. These are the arguments which were before this court.

We have considered in depth the arguments and the authorities cited. We have also thoroughly perused the record of appeal. We agree that the lower court was called upon to assess the debt due to the Appellants following the consent judgement entered between the concerned parties before Chibomba J (as she was then).

Looking at grounds 1 to 7, we are satisfied that the central questions by the Appellants are whether or not the conclusions by the learned assessing Deputy Registrar were backed by the evidence before the court, whether or not there was evidence to establish the nexus between the Rescheduling Agreement of March 1984, (KN1) the summary of the debt in KN2 on 30th August 1995 (KN2) and the pipeline debt due to the Appellants. We see a lot of overarching arguments and issues in all the grounds of appeal (1 to 7). We intend to deal with grounds 1 up to ground 5 together and then deal with grounds 6 and 7 together.

Before we deal with the arguments before the court, we are satisfied that there is common ground on the following facts (1) That ZESCO incurred a debt as a result of contractual activities rendered by the Appellants of various electrical projects which were undertaken by the 2nd Appellants at the instructions of ZESCO (2). The Zambian Government and the Yugoslavian Bank for International Corporation representing the Yugoslavian state controlled companies entered into a rescheduling agreement on 9th March 1984 which entailed that debts of Yugoslavian companies maturing in 1982 listed in the first schedule, were to be rescheduled for them to be paid in ten equal annual semi annual instalments, commencing on 1st January, 1984 up to December, 1988. In the second article, the debts appearing in second schedule, which matured in March, 1983, were to be rescheduled and to be paid in twenty equal annual semi annual instalments, commencing first February, 1987 up to 1st July, 1995. Both Schedules 1 and 2 of the agreement referred to the 1st Appellants as a creditor and to ZESCO as the Zambian debtor. (3) Zambia was under going foreign exchange problems. Because of this, BOZ created a commercial pipeline account, a mechanism which entailed that all the Zambian companies or entities, which owed foreign companies or entities, had to put money in a pipeline, (kwacha equivalent of the debt), to be released as foreign exchange to creditors whenever foreign exchange was available. (4) The GRZ guaranteed parastatal companies’ debts (5) ZESCO is and was a parastatal entity and so its debts were guaranteed by GRZ. (6) ZESCO like other debtors was obliged to remit kwacha equivalent to the debt owed to the Appellants to 1st Respondent’s pipeline Account. That money was to be locked up until foreign exchange was available. It was a queuing system. (7) ZESCO had paid the kwacha equivalent of US$21,459,336.20 prior to 22nd January 1996 into the 1st Respondent’s pipeline Account (8) The Appellants and ZESCO were not parties to the agreement of March 1984 but they signed the schedules. (9) There was an on going process of reconciliation of debts between the Appellants and ZESCO. (10 ) KN2 reflected this on going process of reconciling the debts owed by ZESCO to the Appellants (11) The meeting of the 22nd January, 1996 which produced MB2 was attended by:-

Mr. P. C. Malambo - BOZ, Chairman, representing 1st Respondent

Mr. A. Ngombe - BOZ, representing 1st Respondent

Mrs. Sombe - ZESCO

Mr. N. Vucinic - Energoinvest, representing Appellants

Mr. B. Blagojevi - Energoinvest, representing Appellants

(12) Mr. Vucinic was the author of KN2. He also represented the Appellants at the meeting of 22nd January 1996. (12) At this meeting neither document KN1 nor KN2 were discussed.

Given this set of facts on which there was common ground, we now deal with issues in contention. We will deal with grounds 1 to 5 as already stated. In our view, the central issues in these 5 grounds of Appeal are whether or not the learned Deputy Registrar was on firm ground to have held that there was a nexus between KN1,KN2 and the judgment debt. Whether or not there was evidence, other than KN2, to support his holding that the reconciled amount of US$21,459,336.20 was arrived at the meeting of 22nd January 1996, without taking into account documents KN1 and KN2.

It is well settled that the two Appellants were Yugoslavian companies and as such state controlled and therefore fell within the category of the foreign creditors which were covered in KN1 (the rescheduling agreement). We are satisfied that KN1, as per its preamble, reflects an agreement between GRZ and the Yugoslav Bank for International Economic Co-operation, on behalf of the Yugoslav state controlled companies. We are therefore, satisfied that since the rescheduling agreement of 9th March 1984 covered the settling of arrears of debts due to state controlled Yugoslav companies and since Article I schedule 1(b) and Article II of this Agreement reflected the debts which had matured up to 31st December, 1982 and the debts which had matured in 1983 and since schedule I and II referred to ZESCO as the debtors and Energoinvest as the Yugoslav creditors and also looking at pages 318 and 319, the schedules which were attached to MB2 (minutes of the meeting of 22nd January 1996), the debts discussed due to the Appellants were the same. Coming to the next argument that neither ZESCO nor the Appellants were parties to the agreement reflected in KN1, we hold the view that in as far as the position of ZESCO is concerned, applying the ratio decedendi of John **Paul Kasengele and 40 Others vs Zambia National Commercial Bank9** the Government of Zambia entered into this agreement covering all the debts incurred by the parastatal bodies like ZESCO as ZESCO was and is 100% state owned. We are equally satisfied that as regards the Appellants, as it is common ground that since all Yugoslav companies were state controlled, the agreement between the Yugoslav Bank for International Economic Cooperation and GRZ, was entered on behalf of all these state controlled companies. Therefore, the agreement between the Zambian Government and this Yugoslav Bank for International Economic Cooperation was binding on both the Appellants as well as ZESCO. Our conclusion on this point is even buttressed by the added fact that ZESCO and the Appellants thereafter even signed the schedules. Therefore we are persuaded to hold that KN1 established that all the debts due to Yugoslavian companies maturing between 1982 to 1985 were to be rescheduled and to be repaid as per agreement in KN1.

Tied to this first limb of argument is the next argument on whether or not there was a nexus between KN2 and KN1. As already stated, schedule 1 and 2 of the rescheduling agreement KN1 referred to the Appellants as Yugoslav creditors and ZESCO as the Zambian debtor, Article III of KN1 provided that the amounts in schedule 1 and 2 of KN1 had to be subjected to verification and confirmation. According to the evidence before the court, it was common ground that KN2 reflected an on going process of reconciliation and verification of the exact amount owed to the Appellants in the pipeline of the 1st Respondent. DW4 in his evidence referred to payments made pursuant to Article II of KN1. DW5 also testified that KN2 established that the Appellants received partial payments in the pipeline. Also we are equally satisfied that according to the evidence before the court, there was no argument on whether or not the debt owed to the Appellants did not mature between 1982 up to 1985. So the conclusion by the lower court that the debts owed to the Appellants were rescheduled even though ZESCO had paid the equivalent sum in kwacha to the 1st Respondent’s pipeline account and thus indicating that it was capable of paying its own debts even after 9th March 1984 was supported by the evidence. This conclusion, in our view, is even much more supported by the fact that the 2nd Respondent had guaranteed all public debts and because of the foreign exchange problems it was experiencing, had established a mechanism of paying foreign debts through the pipeline account of the 1st Respondent. Therefore as DW5 testified, even though ZESCO did not ask to be bailed out, 2nd Respondent had an obligation to pay these debts via copper exports. This conclusion is strengthened by the fact that Mr. Vucinic the then Director of the 2nd Appellant summarised the Appellants’ debt in KN2. So there was a nexus between KN1 and KN2.

The Appellants have strongly argued and even referred to DW3’s evidence that KN2 was not referring to the debt in KN1. The learned Deputy Registrar in our view correctly rejected this proposition because he weighed this argument against the evidence of DW5. DW5’s evidence was that pursuant to Article 1(b), the 2nd Respondent made payments to the Appellants via copper exports. DW5 also testified that the 2nd Respondent guaranteed all public debts. He also testified that pursuant to Article II of KN1, the 2nd Respondent made payments directly to the Appellants via copper exports although he was not sure of the actual amount of debt which was paid through that mechanism. DW5 accepted that there was a mix up on the amount paid and dates when this was done. In our view, it could not have been a coincidence that document KN2 made references to “the rescheduling of debts” due to Energoinvest outstanding in BOZ and Ministry of Finance based on the Agreement obviously making references to the Appellants and to the Agreement. Also it would be too much of a coincidence that the same document “KN2” talks about arrears due to Energoinvest and the same document starts by saying:-

**““On 18th April we delivered to your office complete elaboration of the debt outstanding in BOZ and Ministry of Finance Republic of Zambia based on Agreement of rescheduling arrears due to Energoinvest”**

Based on the agreement of rescheduling

**“Total Rescheduled amount was ...... US34,252,554.69**

**Total Instalments paid (mostly by copper) ...... US$28,053,102.57**

**Unpaid Balance ...... US$ 6,199,452.122**

We are, therefore satisfied that all these pieces form a chain of evidence establishing a nexus between KN1 and KN2. In our view, this conclusion is equally buttressed by the fact that this document KN2 was authored on 30th August 1995 precisely two months after 1st July 1995 a date referred to in Article II of Schedule 2 of the 1984 Rescheduling agreement. It is a cardinal principle and well established principle procedure that he who alleges must prove. We thus hold that the onus was on the Appellants to have proved that there was no nexus between KN1 and KN2. We adopt the approach of the court in the case of **Atheneon Engineering Company Limited v Daniel Lufunda Lumai11** in a claim for damages and negligence out of a motor vehicle accident, where the court held that failure to call a witness who witnessed the accident and failure to offer any explanation of not calling this witness, resulted in the dismissal of the claim. In this case, the Appellants’ main contention was that KN2 was referring to another debt other than the debts in KN1 but they failed to call the author of KN2 to prove that KN2 indeed related to another debt other than the ones referred to in KN1 in that face of the contents of KN2. Their failure to do so and the absence of an explanation for such a failure significantly diminished the evidential value of their assertion that there was no nexus between KN1 and KN2.

Coming to the next limb of the arguments on whether or not there was unassailable evidence establishing that there was nexus between KN1, KN2 and the pipeline debt, it is common ground that there was this meeting on the 22nd January, 1996 specifically held to reconcile the debts due to the Appellants six months after KN2 was authored by Mr. Vucinic the Director of the 2nd Appellant. The purpose was to reach the consensus on the outstanding debt. The Director of the 2nd Appellant the author of KN2 was in attendance at this meeting on the 22nd January 1996. It is common cause that only the data base of the 1st Respondent, ZESCO’s and the 1st Appellant’s were looked at and taken into account. It is also common ground that the 2nd Respondents were not in attendance for whatever reason. It is also common ground that the correspondence between the 2nd Respondent and the Appellant was not presented to the meeting of the 22nd January 1996. DW2 and DW3 both testified to that. So the letter from Hon. Mushota, the then Minister of Legal Affairs to Hon. Penza, the then Minister of Finance and the letter from Hon. Mushota to his Excellency the President copied to the Director DW5 and the letter from the Appellant MB3 were not taken into account. It was argued that even if all these facts were established, the learned Deputy Registrar should have weighed these against the background that the 1st Respondent was the 2nd Respondent’s agent. There was close intercourse between the 1st Respondent and Ministry of Finance. We accept all this. However, even taking all that into account, the fact that the 2nd Respondent was not represented and that its data base was not presented before the meeting of 22nd January, 1996 and the fact that Mr. Vucinic the author of KN2, the representative of the Appellants at the meeting of 22nd January 1996 did not raise the existence of KN1 and KN2 at that meeting, all these in our view diminished the weight of the evidence of this close intercourse between the 1st Respondent and the 2nd Respondent. It is trite law that a party alleging has to prove his/her assertion. The fact that the Appellants failed to call Mr. Vucini to explain that KN2 and KN1 were not relevant to the discussions on the 22nd January 1996, that significantly diminished the weight for the Appellants’ assertion that KN2 had no nexus to KN1 and the debt being assessed. What even strengthens this conclusion, in our view, is the evidence of the only witness of the Appellants PW1, when he was asked to explain the existence of KN2 (and whether or not he talked to Mr. Vucinic to explain the existence of KN2). He said:-

**“KN2 is authored by Nicola Vucinic. I do not know where he is. I did not discus the letter with him. On page 1 of the plaintiff’s bundle of documents are minutes. I did not discuss the minutes with Vucinic and Blagojevic.”**

Applying Lord Denning’s dictum on the degree of cogency in the case of **Miller v Minister of Pensions8,** where he says:;

**“that degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: we think it more probable that not; the burden is discharged; but if the probabilities are equal it is not”**

We are therefore satisfied that the learned Deputy Registrar’s conclusion that there was a nexus between KN1 and KN2 and the debt being assessed was unassailable. In the absence of the explanation by PW1 and the failure to call Mr. Vucinic, the learned Deputy Registrar had to accept DW5’s evidence that in line with Article II (b) of KN1, GRZ partially paid the pipeline debt and that that is the nexus between KN1, KN2 and the debt being assessed.

Consequently, we hold that the learned Deputy Registrar’s view that GRZ was not aware of the amount of money which the Appellants were claiming at the meeting of 22nd January 1996 was not at odds with evidence before the court because we also hold the view that even the correspondence between the Appellants and the Ministry of Finance was not before the meeting. For instance the letter to Hon. Penza from the Appellants after the meeting on 22nd January 1996, the letter addressed to the Governor of the Bank of Zambia, from Hon. Mushota (Minister of Legal Affairs then) to the Head of State which indicated the amount of the debt and which should have established that the Governor of the Respondent was fully aware of the amount of the debt and the pressure which the 2nd Appellant was putting on the Zambian government were not before the meeting of 22nd January 1996.Correspondence could have diminished the weight of this evidence that the meeting of 22nd January, 1996 was not attended by all the key stakeholders. The Government officials from both Ministry of Finance and Ministry of Legal Affairs did not attend. In fact, according to the evidence of DW3, he was not sure as to whether or not they were invited to this meeting. So this crucial meeting was only attended by representatives from the 1st Respondent, ZESCO and the Appellants. One can therefore deduce that since only officials of the Ministry of Finance and the Appellants had this information on KN1 and KN2 which the officers of the Appellants did not attend the meeting of the 22nd January 1996, the learned Deputy Registrar was therefore on firm ground to have concluded that the 2nd Respondent was not aware of the actual debt the Appellants were claiming at the meeting of 22nd January, 1996.

On the argument that the learned Deputy Registrar concluded that the 1st Respondent was not aware of this partial settlement of the debt in issue via copper exports. The learned Deputy Registrar who was better placed to assess the demeanour of witness accepted the evidence of DW3, which evidence remained unimpeached even after thorough cross examination, that the 1st Respondent was not given this information before the 22nd January 1996 that there had been partial payment through copper exports to Yugoslavia by GRZ. In fact, according to DW3, had they been given that information, the 1st Respondent would have changed its data base. Therefore although we accept the Appellants’ argument that DW3, manning the national debt, ought to have known the state of the debt between ZESCO and the Appellants and that he ought to have known whether or not there was any partial payment through copper exports, however, looking at the evidence of DW3 which the court accepted, we agree that supported by DW5’s evidence, GRZ knew the state of the debt owed to the Appellants as at 22nd January, 1996, as per their own data base. But this state of the debt as per 2nd Respondents’ data base was not presented to the meeting of the 22nd January, 1996 as the 2nd Respondents were not represented at the meeting. In addition, the Director of the Appellants (Mr. Vucinic) who was fully aware of this partial payment as he had six months before the meeting, authored KN2. But he did not disclose this information to the meeting of the 22nd January 1996. The learned Deputy Registrar therefore, was correct to have accepted the evidence of DW3 and DW5 (the 2 key officials in the reconciliation exercise) that KN2 established that there was a partial payment via copper exports and that MB2 reflected the conclusions of the meeting on the 22nd January 1996, which conclusions were made without taking into account the existence of KN1, KN2 and KN3. Given this scenario, as the learned authors in **Smells Principles of Equity12** have put it:-

**“if by mistake a written instrument does not accord with true agreement between the parties, equity has the power to reform, or rectify that instrument so as to make it accord with the true agreement.”**

We consequently hold that as the minutes reflected in MB2 did not accord with the true agreement between the parties; therefore equity has power to reform or rectify MB2 so as to make it in accord with the true agreement. We also hold that the learned Deputy Registrar was better placed, as a trier of facts, to decide which of the two stories was more probable. He decided that the Respondents’ story was more probable basing on all the facts presented to him.

The next limb of the argument by the Appellants was that the learned Deputy Registrar grossly erred in law when he formed the flawed or erroneous view that there was no testimony by the Appellants to show that infact the scheduled debt referred to in exhibit KN2 is totally different from the debt held in BOZ pipeline. According to Counsel for the Appellants, the lower court shifted the burden of proof to the Appellants. In our view, the lower court was not shifting the burden of proof to the Appellants. As per the established principles of law in civil cases, the Appellants were the claimants. They therefore had a duty to establish, on the balance of probabilities, that the debt rescheduled referred in KN1 was totally different from the debt held referred to in KN2 and the debt in BOZ pipeline, the debt which was reconciled. In our view, looking at PW1’s evidence, the only witness for the Appellants, the Appellants failed to establish that there was no nexus between the debt reflected in KN1, the debt reflected in KN2 and the debt which was subject to assessment. PW1 at page 375 of the record of appeal accepted that as at 30th August, 1995, the debt outstanding was this US$6,199,542.12 million plus interest. He tried to draw a distinction between KN1 and KN2 by referring to the fact that they had different amounts. In cross examination PW1 told the court that the 1st Respondent had reproduced 3rd schedules signifying new invoices issued after 9th March 1984 totalling US$3,165,962.21. We have agonised over this piece of evidence, however we take into account that KN2 was written long after 9th March 1984. We hold the view that if this figure of US$3,165,962.21 was invoiced later than the 9th of March 1985, Mr. Vucinic in writing KN2 must have been taken into account this information of the invoices issued after 9th March, 1984. We therefore find that the conclusion by the learned Deputy Registrar was neither flawed nor erroneous on this point.

Coming to grounds 6 and 7, on the attack by the Appellants on the learned Deputy Registrar’s analysis and assessment of the evidence and submissions before him, we have carefully cogitated on whether or not the learned Deputy Registrar glossed over all the weaknesses and deficiencies of the Respondents’ evidence. Firstly in our view, the weakness alleged to have been in the Respondents’ evidence are not weaknesses. For instance, Counsel for the Appellants referred to the reliance by the learned Deputy Registrar on the affidavit of Kellyford Nkalamo. Counsel submitted that this was a wrong approach in that the deponent of KN2 was not called to give viva voce evidence and be cross examined. We note from the record that the procedure adducing evidence by way of affidavit was adopted by the court with full consent by both parties. At page 369 up to 371, we note that the Respondents had insisted on viva voce evidence in support of the claim by the Appellants. The Appellants on the other hand more or less accepted to rely on the affidavit evidence. According to pages 23 to 33 of the record, it was the Appellants who were prepared to proceed with the assessment on the basis of affidavit evidence. The Respondents on the other hand had insisted on viva voce evidence. So the Appellants cannot have their cake and eat it. In addition, we hold that the weight given by the learned Deputy Registrar to the affidavit evidence of Kelly Nkalamo was buttressed, in our view, by the fact that in cross examination of PW1, the only witness for the Appellants, when asked to explain the existence of KN2 offered no explanation to the court on (a) where the author of KN2 was and (b) why the author of KN2 was not called as a witness to explain its existence. This approach did not assist the court.

On the analysis and weight given to the submissions and the evidence before the learned Deputy Registrar, this court has in a plethora of authorities guided the bar as to the weight this court attaches to submissions. The court has said ad noseum that the submissions do not have the same weight as evidence before the court. Submissions are for the assistance to the court. Therefore even if submissions are not filed in any given case, the court would still assess the evidential value of the facts before it and adjudicate on issues presented to it. It should, therefore be stated again that all in all whether submissions and authorities cited are restated in any judgment or not, that should not necessarily mean that the court has not taken those submissions and authorities into consideration. The court does seriously take into consideration all the authorities cited and submissions whether restated in the judgment or not.

In this case, we are satisfied that the court considered all the submissions and issues brought before it and ruled that the debt due was as reflected in KN2. The learned Deputy Registrar was tasked to assess what was duly due to the Appellants after the meeting of 22nd January 1996 MB2. It was therefore imperative for the learned Deputy Registrar to have examined seriously and to have taken into account all the documentary and oral evidence presented before him. The lower court was duty bound to consider even these documents which were not presented before the meeting of 22nd January, 1996. The lower court had to consider whether KN2 reflected the debt due or whether it was over taken by the meeting of the 22nd January 1996. The court had to decide on whether or not the principal amount after August 1995 would have tripled to US$21,459,336.20. Obviously this was not possible.

Therefore applying the principle laid down by Lord Dening in **Miller8**’scase, the learned Deputy Registrar chose to accept the story as told by the Respondents as being more probable than the story told by the Appellants. He, in our view, did not misapprehend the facts before him.

We, in total sum, find that there is no merit in all the grounds of Appeal. We dismiss the appeal with costs to be agreed on or to be taxed in default of agreement.

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D. K. Chirwa

**ACTING DEPUTY CHIEF JUSTICE**

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L. P. Chibesakunda M. S. Mwanamwambwa

**SUPREME COURT JUDGE SUPREME COURT JUDGE**