IN THE SUPREME COURT FOR ZAMBIA **SCZ/8/79/2009**

HOLDEN AT LUSAKA **Appeal No 86/2009**

(Civil Jurisdiction)

BETWEEN:

ZAMBIA NATIONAL COMMERCIAL BANK LIMITED **APPELLANT**

AND

K.P.M. COMPUTER SERVICES LIMITED **1ST RESPONDENT**

PATSON MWILA KAFWIMBI **2ND RESPONDENT**

CORAM: Chibesakunda, Ag CJ, Mwanamwambwa and Phiri, JJS

On 1st January, 2012, and 10th October, 2013

FOR THE APPELLANT : Mrs S Wamulume, Legal Counsel

FOR THE RESPONDENTS : Mr S. C. Mwananshiku of Messrs M & M Advocates

JUDGMENT

Chibesakunda, Ag. C.J, delivered the Judgment of the Court.

Cases referred to:

1. ***Central African Power Corporation v Commonwealth Development Corporation Limited (1968) ZR 70***
2. ***Re Esso Petroleum Company Limited v Alstonbridge Properties Limited [1975] 2 All ER 358***
3. **Re Brown's Estates [1893] 2 Ch D 300**
4. ***BP Zambia Plc v Interland Motorland Limited (2002) 37 at 40***

5. ***Cuckmere Brick Company Limited v Mutual Finance Limited [1971] 2 All ER 633***
6. ***Investrust Merchant Bank Limited and Simbeye Enterprise Limited v Ebrahim Yousuf (2004) ZR 28***
7. ***Wilson Masauso Zulu v AHP Limited (1982) ZR 172***

Legislation referred to:

1. ***Companies Act Chapter 388 of the Laws of Zambia Section 203***

Works referred to:

1. ***Halsbury Laws of England Volume 20 and 32, 4th Edition Reissue***
2. ***White Book Order 88/5/9 RSC 1999 Edition***
3. ***Cheshire and Fifoot's Law of Contract Tenth Edition***

This is an appeal against the Judgment of the High Court dated 20th June, 2008 refusing to grant the Appellant, among other remedies, vacant possession of Sub-division 28 of sub-division 1 of Farm No. 378A.

This is a dispute in which the Appellant (Plaintiff in the court below) filed originating summons claiming to be entitled to Sub-division 28 of sub-division 1 of Farm No 378A Villa Wanga Lusaka following the failure by the 1st Respondent (1st Defendant) and 2nd Respondent (2nd Defendant) as Guarantor to repay a loan of K39, 589,118.41 obtained through an equitable mortgage. The Appellant claimed the following:

(i) An order for possession of the farm,

(ii) Power of sale and/or foreclosure of the mortgaged property

(iii) Other relief and;

(iv) Costs

The Appellant testified in the lower court that the 1st Respondent obtained a loan of K35 million from the Appellant on 7th April, 2004 through an overdraft facility for working capital requirements. The loan was due for repayment on 30th April, 2005 and was secured by Subdivision no 28 of Subdivision no 1 of Farm Lot No. 378A, Villa Wanga in Lusaka, property of the 2nd Respondent. In addition, the loan was secured by a Personal Guarantee by the 2nd Respondent as well as a Directors' Personal Guarantee in support of the third party mortgage. That the 2nd Respondent signed the credit facility letter as Managing Director of the 1st Respondent. Further that the 1st Respondent deposited with the Appellant Certificate of Title No L5671 in respect of the same property. The Appellant deposed in an Affidavit in support of Originating Summons that the Respondents neglected to execute the Mortgage Deed and subsequently failed to pay back the loan.

The 2nd Respondent in response deposed in his Affidavit in Opposition to Originating Summons that although he gave his Certificate of Title to the Appellant it was not meant to secure the loan or mortgage. That he realized the money he was borrowing was not very significant and would be adequately covered by the other security provided under personal Guarantee. More so, that the value of property was over K800, 000,000 which was far more than the debt of only K39, 589,118.41. The 2nd Respondent deposed that although he did not sign the Mortgage Deed, the Appellant proceeded to lend him the money. The 2nd Respondent denied liability on account that the Appellant had not sufficiently shown that the 1st Respondent (as Principal Debtor) had failed to repay the loan before resorting to him as Guarantor. That the Appellant had not given him a written demand as provided under the Deed of Guarantee indicating that the 1st Respondent had failed to repay the loan and requesting the Guarantor to pay the outstanding debt.

The Appellant's Affidavit in Reply was to the effect that the 2nd Respondent of his own will and volition handed over his Certificate of Title. Further, that the Personal Guarantee was in addition to the

mortgage created and was in accordance with Bank lending terms and conditions contained in the Letter of Credit Facility. The Appellant argued that it was clear that the Respondents were not in a position to repay the loan. That from the time the loan matured on 30th April, 2005 no payment had been made. The Appellant argued that sufficient demand was made to the 2nd Respondent about the 1st Respondent's failure to pay the debt.

The Parties filed Skeleton Arguments and later agreed by consent to resolve the matter by way of pleadings and submissions, after which the learned trial Judge delivered his Judgment. We must state from outset that we found the Judgment a little difficult to follow. The learned trial Judge started out by reproducing, in full, the Appellant's Affidavit in Support of the Originating Summons and the 2nd Respondent's Affidavit in Opposition. The learned trial Judge observed that the Appellant filed Affidavit in Reply without leave of the Court and against the High Court's decision in ***Central African Power Corporation v Commonwealth Development Corporation Limited***[1]. The learned trial Judge, nevertheless,

proceeded to reproduce in full the Affidavit in Reply. This was a misdirection.

In assessing the evidence, the learned trial Judge found that indebtedness was indubitable and was even admitted. He also found that the Credit Facility was addressed to the 1st Respondent excluding the 2nd Respondent who never signed. The learned trial Judge observed that the 2nd Respondent did not sign the 3rd Party Mortgage either and neither was the document exhibited before court. The learned trial Judge found that the Appellant did not make a demand in writing which should have been sent by prepaid post to the last known address of the 2nd Respondent in accordance with Clauses 1 and 19 of the Deed of Guarantee. The learned trial Judge ruled that these requirements constituted conditions of the guarantee and as such he did not agree with the Appellant's argument that the case of **Re *Esso Petroleum Company Limited v Alstonbridge Properties Limited***[2] did not apply. The learned trial Judge said the case was applicable and was supported by the learned authors of Halsbury's Laws of England at page 117 para 183 who stated as cited by the 2nd Respondent that,

"A guarantor is a favoured debtor. He is entitled to insist upon a rigid adherence to the terms of his obligation by the creditors...."

Based on his findings, the learned trial Judge made the following decision,

"As this was a condition precedent to the commencement of the action which has not been complied with, I decline the remedies which the Plaintiff (Appellant) sought with costs to the Defendants (Respondents) which in default of agreement are subject to taxation."

Dissatisfied with this Judgment, the Appellant had appealed to this Court on the following amended grounds:

(i) The trial Judge erred in law and in fact when he overlooked the fact that there was evidence of indebtedness by the 1st Respondent demand in writing having been furnished.

(ii) The trial Judge erred in law and fact when he failed to enter Judgment against the 1st Respondent on the basis of the evidence on record.

(iii) The trial Judge erred in law and fact when he overlooked the fact that the 2nd Respondent who had guaranteed the loan had implied notice of the 1st Respondent's indebtedness having acknowledged the demand in writing for and on behalf of the 1st Respondent.

(iv) Any further ground as shall appear upon perusal of the record of proceedings.

At the hearing of the Appeal, Counsel for the Appellant relied on the Heads of Argument but emphasized one point under grounds one and two which she argued as one. She argued that while a guarantor needed a demand in writing that the debt was due, that was not the case with the debtor. Similarly the same did not apply to a Principal Debtor where there was a pre-existing debt payable on demand. For this proposition, Counsel relied on the case of ***Re Esso Petroleum***[2]. The Counsel submitted that on the basis of this authority the court below erred when it dismissed the entire case on the ground that the Appellant did not issue a written demand of the debt due on the 2nd Respondent in his capacity as Guarantor instead of proceeding to enter Judgment against the 1st Respondent. Counsel submitted before us that in the same authority the Chancery Division proceeded to hold that the Mortgagor was liable and that an action could commence against the Mortgagor without due notice.

On Ground three, Counsel for the Appellant submitted that having established that a Guarantor may require notice on demand before commencing a mortgage action, in the case at hand the 2nd

Respondent who was Guarantor to the 1st Respondent had implied or constructive notice that the money borrowed by the 1st Respondent was due and payable to the Appellant as he was at all times Managing Director of the 1st Respondent. Counsel drew our attention to pages 12 and 13 of the Supplementary Record of Appeal, which showed that the letters of demand on the money owed were written to the 2nd Respondent informing him that the debt was overdue and payable to the Appellant. Counsel submitted that the address used was the same for both the 1st and 2nd Respondents at page 35 of the main Record of Appeal and the Guarantee on page 34. It was also submitted that the Guarantor undertook that if notice was sent it was sufficient (clause 19, page 36 of the Record). Counsel argued that the ratio in the **Re Brown's Estates**[3] at p 305 and in the **Re Esso Petroleum**[2] case at pp 359-366 was that notice was given to a Guarantor in order to give him time to look for money to pay on behalf of the Principal debtor. The 2nd Respondent, having been the Managing Director of the 1st Respondent and having received the letter, was well aware.

In response, Counsel for the Respondents also relied on their Heads of Argument. Counsel submitted that the issues were well canvassed in the submissions suffice to say that the relief being sought by the Appellant was not specifically pleaded nor canvassed in the court below. As regards Ground three, Counsel argued that there was no evidence to prove that when the letters of demand were written the 2nd Respondent was still Managing Director. Learned Counsel submitted that the 2nd Respondent was Director. That in his Affidavit in Opposition, the 2nd Respondent did not say he was Managing Director. He referred us to the learned authors of Halsbury's Laws of England 4th Edition Volume 20 page 117 para 183 which requires that a letter of Demand to be addressed to the Guarantor and not by implication. Counsel submitted that there was no proof that the 2nd Respondent got a letter of demand. Counsel submitted that a short interpretation of the letters was that there was a real possibility that the 2nd Respondent did not get the information that payment was being demanded. He too relied on the **Re *Esso Petroleum*[2]** case as his authority. He submitted that it was not in dispute that if there was no demand, action against the 2nd Respondent ought to fail based on the submissions in the Heads

of Argument. Counsel emphasized that preliminary purpose of mortgage was to recover money, and not to repossess the house which appeared to be the motive in this case. He prayed for the appeal to be dismissed with costs. When reminded that the learned trial Judge dismissed the demand but held the debt was not paid, Counsel submitted that this was only to the extent of the foreclosure. He submitted that the learned trial Judge could not have made an order against the 1st Respondent. He pointed us to the 2nd Respondent's Affidavit in Opposition to Originating Summons paragraphs 5-9 which explained that the debt was K39,589,118.41 and that the Bank was satisfied that security would be offered. Counsel submitted that the 1st Respondent did not dispute that there was a debt and was willing to pay in instalments.

In reply, Counsel for the Appellant submitted that on the aspect of security, it was true that there was an equitable mortgage. It was not registered but it was enforceable. The property belonged to the 2nd Respondent (see p30 of the record). On the question when the money was due to be paid, Counsel submitted that it was payable

as a lump sum (see p26 of the Record). It (the facility) came to an end at a particular date. The Bank's interest was to obtain money but there had been no interest to pay the money back so the Bank had no option but to seek foreclosure.

We have examined the evidence on record and the submissions in the Heads of Argument. There was common ground that the 1st Respondent obtained a loan through an overdraft facility from the Appellant. The 1st Respondent was owing sum of K39,589,118.41 and that the said loan was secured by an equitable mortgage of Sub-division 28 of Sub-division 1 of Farm No 378A, property of the 2nd Respondent as Guarantor. The 2nd Respondent deposited the original certificate of title of the said property with the Appellant. There was also common ground that 2nd Respondent had additionally secured the loan by a personal guarantee and Directors' guarantee. The main issue therefore that requires our determination is whether there was any or proper service of the letter of demand on the 2nd Respondent (as Guarantor) before having resort to him/it to repay the debt of the 1st Respondent (Principal Debtor).

In the case of ***Re Brown's Estate***[3], to which we were referred by Counsel for the Appellant it was held,

> ***"A right of action under a covenant contained in a mortgage by a surety to pay on demand did not accrue against the surety's estate until a demand was first made."***

Further, in defining what constituted a demand the learned authors of Halsbury Laws of England Volume 20 in note 4 at p125 para 194 stated that,

> ***"In principle, a demand is necessary to terminate a bank overdraft facility and require repayment of the balance."***

And at pp125-126 para 195 the learned authors stated,

> ***"Modern guarantee forms usually require the guarantor to pay on demand. In such cases, a valid demand is necessary ingredient of the creditor's cause of action against the guarantor. The demand must comply with any requirements imposed by the contract of guarantee as to the form and manner of demand....It is sufficient that the demand makes clear to the Guarantor that the creditor requires to be paid a sum which is in fact due.***

And in note 5, the learned authors stated,

> ***"There must be a clear intimation that payment is required to constitute a demand, nothing more is necessary and the word demand need not be used."***

From the authorities cited above, it is clear that a letter of demand to the guarantor is a pre-requisite to the commencement of any mortgage action. In the case before us, demand in writing did form

an essential part of the conditions of the Deed of Guarantee. (See clauses 1 and 19 on pages 33 and 36 of the record) Up to this point, we find no reason to fault the findings of the learned trial Judge. However, we disagree with him that no letter of demand was sent to the 2nd Respondent. The letters dated 11th November, 2005 and 21st November, 2005 exhibited on pages 12 and 13 of the Supplementary Record of Appeal fall within the definition of a demand as espoused by the learned authors of Halsbury's Laws of England. Counsel for the Respondents had argued in his submissions that the 2nd Respondent was not a Managing Director but a Director of the 1st Respondent and therefore had not received the letters of demand and that there was likelihood that the 2nd Respondent did not get the information about the need for payment. We disagree with this proposition. Under the Companies Act Chapter 388 of the Laws of Zambia Section 204, a Director is described as a person appointed to direct and administer the business. It is trite law that, a company is a metaphysical being which acts through human agents. As a metaphysical entity or fiction of law which only has legal but not physical existence, a company (though being a separate and distinct legal person from its

members or shareholders) can only act through the humans charged with its management and the conduct of its affairs. (See ***BP Zambia Plc v Interland Motorland Limited***[4] at p40) As such, the 2nd Respondent as Director or even Managing Director of the 1st Respondent was deemed to have had notice whether actual or implied of the letter of demand. If we are wrong in this conclusion, Clause 19 of the Deed of Guarantee states that the service of the letter of demand would be,

> ***"deemed to have been sufficient if sent by prepaid post letter to the last known address or to the address stated hereon of the undersigned and shall be assumed to have reached the addressee in the course of post."*** (Emphasis ours)

On close examination and as rightly observed by Counsel for the Appellant, the address used by the 2nd Respondent in the Deed of Guarantee (page 35 of the record) is the same as that of the 1st Respondent. It can therefore be assumed that the 2nd Respondent received the letter of demand. Furthermore, there seems to be an exception to the principle of a letter of demand being a condition precedent. This is to the effect that,

> ***"Where there is a pre-existing debt, no demand is necessary to complete the creditor's cause of action even where the debt is expressed to be payable on demand."***

(Halsburys Laws of England Volume 20 p125 note 4 of para 194)

This was the position adopted in ***Re Esso Petroleum***[2]. In that case the Chancery Division dismissed a claim against the new sureties for moneys due under the mortgage on account that a demand for payment had not been made to them in accordance with the Principal deed but upheld a claim for possession against the Defendant (Principal Debtor). Watson J, stated as follows,

> ***"I fully accept, of course, that where there is pre-existing debt which is payable 'on demand', such a demand (other than the service of proceedings) is not a prerequisite to the bringing of an action to recover that debt."***

Similarly, in the present case there was an equitable mortgage for which the Appellant was entitled to enforce against the 1st Respondent following default on an already existing debt. Having established that there was this debt, we agree with the Appellant that the even if the learned trial Judge did not find a claim against the 2nd Respondent on account of lack of demand notice, he ought to have found the 1st Respondent liable for payment of the debt. Grounds one and two must succeed.

In dealing with ground three, we wish to state that the ordinary rule is that a mortgagee is entitled as of right (unless the

mortgage deed provides otherwise) to possession of the mortgaged premises. (See Order 88/5/9 RSC) But in the present case the 2nd Respondent did not execute the Mortgage Deed. The 2nd Respondent had asserted through Counsel that he did not sign the Mortgage Deed because he did not agree that his property should be used as security for the property. More so that his property, as of 2007, had a value of K800,000,000 (p39 of the record) as against a debt of slightly under K40,000,000. In the absence of any proof such as a property valuation report we are unable to ascertain the value of the property in question. Further the Mortgage Deed was not exhibited as was observed in the court below. However, on the non-execution of the Mortgage Deed we have this to say. Although a signature gives a document a contractual character to which the parties are bound and can be held liable, it matters little if it is not signed in the ordinary sense of the word, provided the form or document was designed to constitute the final written record of the contract made between the parties. (See Cheshire and Fifoot's Law of Contract pp145-146 and 187). The Mortgage Deed was, in our view, a representation of the final written record of a contract which had already been made. In addition we hold the firm view that there was

sufficient consideration in that the 2nd Respondent signed the Letter of Credit Facility and Deed of Guarantee and even surrendered the Title deeds to the Appellant, and on its part the Appellant released the money for the loan. The Respondents cannot now be seen to renege on its obligation after enjoying the full benefit of the loan. If the 2nd Respondent had any reservation he ought to have raised the issue before the funds were released or soon thereafter. But he remained quiet even as late as 4th April, 2005 when he was reminded to execute the deed. As regards the value of the property being more than sufficient security, the mortgagee's sole obligation to the mortgagor in relation to the sale is to act in good faith. The mortgagor is under a duty to take reasonable care to obtain whatever is the true market value of the property the moment he chooses to sell. (See ***Cuckmere Brick Company Limited v Mutual Finance Limited***[5]) This court also held in ***Investrust Merchant Bank Limited and Simbeye Enterprise Limited v Ebrahim Yousuf***[6] that,

> ***"At Common Law, a mortgagee is not directly a trustee of the power of sale. The Power of sale given to a mortgagee is to enable him to realize his debt, if he exercises it bona fide for that purpose without corruption or collusion with the purchaser, the court will not interfere, even though the sale***

was disadvantageous to the mortgagor unless the price is very low for it to be in itself evidence of fraud."

From the authorities cited above, we find no basis of the Respondent's argument that the property could not be used as security as it was in excess of the loan.

Further, Counsel for the Respondents argued that the Appellant only pleaded possession of the 2nd Respondent's property and did not make a separate claim for payment of the outstanding amount and interest from the 1st Respondent as is the practice in Originating Summons. Our view is that Order 30 Rule 14 of the High Court Rules entitles a mortgagee or mortgagor or any person having the right to foreclosure,

> ***"to take out as of course an originating summons...for such relief of the nature or kind following as may in the summons be specified, and as circumstances of the case require.*** (our own emphasis)

The import of this order is the mortgagee or mortgagor or any other party entitled to claim need not make a specific claim. Besides the Court too has the discretion to make the relevant order to depending on the circumstances. Ground three also succeeds.

Based on our ratio in ***Wilson Masauso Zulu v AHP Limited***[7], we are satisfied that this is case in which this court can interfere with the findings of the court below. We order that the Respondents be given a period of sixty (60) days in which to repay the debt in full in default the Appellant shall be at liberty to possess and sell the mortgaged property. The appeal is allowed with costs against the Respondents to be taxed in default of agreement.

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L. P. Chibesakunda
ACTING CHIEF JUSTICE

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M. S. Mwanamwambwa
SUPREME COURT JUDGE

.....
G. S. Phiri
SUPREME COURT JUDGE