IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 14 OF 2001

HOLDEN AT KABWE

(CIVIL JURISDICTION)

BETWEEN:

DEVELOPMENT BANK OF ZAMBIA APPELLANT

AND

NACHILILA ENTERPRISES LTD. RESPONDENT

CORAM: Sakala, Chirwa and Chibesakunda, JJs on 18th April 2001 and 27th August 2002

For the Appellant: Ms. T.M. Liswaniso Kampata, Legal Offier, DBZ

For the Respondent: Mr. M. Mutemwa, Mutemwa Chambers

JUDGMENT

Chirwa, JS, delivered judgment of the Court:

The late delivery of the judgment is deeply regretted especially that it involves money. The facts of the case are not in dispute as far as the parties agreed to provide (Development Bank of Zambia) a loan to the respondent (Nachilila Enterprises Ltd.) for the development of a farm in Mbala. The respondent in the Court below claimed for specific performance of the loan agreement for US $500,750 dated 30th September 1994 between the

parties in which the bank was to lend the money to the respondent for the development of a farm to grow coffee, Irish potatoes and maize. The respondent also claimed damages for loss of business. In the alternative the respondent prayed for damages for breach of the said loan agreement and loss of business. After due trial and consideration of the evidence and submissions and the law put forward before the learned trial judge, the learned trial judge declined to order specific performance, instead it ordered compensation in form of damages for breach of the loan agreement and damages for negligence on the part of the appellant in failing to exercise professional care and attention in the processing, disbursement and/or utilization of the loan resulting in the wrongful disbursement of US $ 201,330.00 to Shweeta Enterprises (Export), an Indian firm that supplied farm equipment to the respondent on instructions of the appellant without the respondent's consent for the equipment, from the loan agreement funds. It is against this finding that the appellant has appealed to this court.

There were two grounds of appeal, namely firstly, that the learned trial judge misdirected himself when he found that the appellant had allowed the terms of the contract to be waived and that the appellants were liable in breach when in fact the appellants had complied with all the requirements under the loan agreement. Secondly, that the learned trial judge misdirected himself by awarding the respondents damages for breach of contract when he had found as a fact that the respondent had not complied with the terms of the contract as embodied in the loan agreement. We intend to deal with the two grounds together.

The appellants supported his appeal with written submissions and there were also written arguments by the respondent. In the first ground it was argued that no where in Mr. Mwanza's evidence was there anything to suggest that the appellant had breached the contract, to the contrary Mr. Mwanza was of the view that the respondent misused the funds as there was no physical progress on site and the respondent was reminded of this fact through correspondence after several meetings. It was submitted that Mr. Mwanza only expressed his

concern about there been no progress and such failure should not be blamed on the appellant. The failure by the respondent to utilize the US $78,760.00 disbursed for land clearing and dam construction does not entitle them to compensation as they have suffered no damage and the finding that the appellant had allowed a waiver in the loan agreement cannot be supported.

In reply the respondent submitted that the appellant in breach of Article 4.02 agreement, the appellant acquired coffee equipment from Schweeta Enterprises Ltd of India at US $204,000.00 without his knowledge and consent and this fact was brought to the attention of the appellant with no good response. Further, the cost from the preferred supplier was only US $40,00.00 and after further investigations it was found that the equipment from India was second hand and of sub-standard and this fact was reported by Mr. Mwanza in his report. It was submitted that the evidence in the Court below adduced on behalf of the appellant clearly showed that the appellant acted contrary to the loan agreement and that the change of site for the farm was with full knowledge of the appellant as the original site had been attacked by coffee berry disease although again there was no response from the appellant. It was submitted that the disbursement of the funds to a supplier not approved by the respondent was a breach of the loan agreement.

As to ground two it was submitted on behalf of the respondent that the learned trial judge correctly concluded that the appellant had waived its rights under the loan agreement by disbursing or continuing to disburse funds before the respondent raised its share capital as earlier stipulated as a condition. This also indicated that the appellant waived the loan agreement conditions. Further, the appellant although informed of the unsuitability of the original site and proposal of a new site and although the new site was internally agreed to by the appellant, authority was not communicated to the respondent, yet the appellant disbursed funds directly to the contractor for land clearing and dam construction. It was therefore submitted that the learned trial judge correctly found that the appellant was in breach of the loan agreement and in

the circumstances of the case refused to order specific performance and awarded damages instead.

We have gone through the loan agreement, the correspondence between the parties and even internal memorandums of the appellant and the evidence on record. We have also critically looked at the learned trial judge's judgment and submissions before us and we make the following observations: We observe and note that the loan agreement was for US $ 500,750.00 and was secured by five securities and it was for the development of a farm for the production of coffee, Irish potatoes and maize. An original site for the farm was selected but upon inspection as to its suitability for the cultivation of coffee, it was found to be unsuitable as the area had been infested by coffee berry disease and the appellant was duly informed and from internal memorandum it was agreed that a new site be found and in fact the appellant confirmed the shifting of the farm. In consequence of this, a sum of US $78,760.00 was disbursed for land clearing (70 ha,) and construction of a reservoir and factory shed. It was also a condition of the loan agreement that the respondent would raise its paid up share capital to at least K116,841,670.00. Further, the appellant, without knowledge and consent procured farm implements for Shweeta Enterprises, India and deducted from the funds available to the respondent under the loan agreement amounting to US $204,330.00. This equipment was rejected by the respondent as being second hand and of sub-standard and the appellant agreed to subsitute other equipment which again was rejected by the respondent. In particular we refer to letter at pages 28 and 33-35 of the record.

From the foregoing observations, we conclude that there were mutual breaches of the loan agreement by both parties. On the part of the respondent, the share paid up capital was not increased and the appellant was aware of this. The appellant, without prior knowledge and consent of the respondent procured farm equipment from Shweeta Enterprises at US $204,330.00 and paid for the same from funds disbursed from the loan granted to the respondent.

The appeal is therefore allowed. Costs usually go to the successful party but in view of the mutual breaches, each party to bear its own costs both here and in the Court below.

E. L. SAKALA
SUPREME COURT JUDGE

D. K. CHIRWA
SUPREME COURT JUDGE

L. P. CHIBESAKUNDA
SUPREME COURT JUDGE

From the conduct of the appellant in proceeding to disburse funds from the loan account before the respondent raised its paid-up share capital and procuring equipment and paying for the same from the loan account without approval of the respondent did amount to a waiver as found by the learned trial judge and he cannot be faulted. With the time lapse it is difficult to order specific performance. Further, with the default by the respondent to revise its paid-up capital, this too was in breach of the loan agreement and with this scenario justice must be tampered with equity. With these breaches, this contract cannot be performed. We order that the bank keeps the farm equipment it ordered and rejected by the respondent. As the respondent did utilise some of the disbursed US $ 78,760.00 for land clearing and loan dam construction the sum so used should be repaid by the respondent. The disbursement was done by the appellant directly to the contractor, MALALI CONSTRUCTION COMPANY and the sum of K17,500,000.00 was used (see page 99 of the record). It appears from the manner the funds were disbursed, the respondent never physically received the money and services were rendered to the tune of K17,500,000.00. For the benefit of the respondent this has to be ascertained by the Deputy Registrar. The balance kept by the construction company should be refunded to the appellant.

With these mutual breaches of the loan agreement neither party can benefit anything more. The awards made by the trial judge for breach of loan agreement, damages for negligence leading to wrongful disbursement of US $201,330.00 to Shweeta Enterprises and interest are set aside subject to our order on assessment of the sum actually spent by MALALI CONSTRUCTION COMPANY on the respondent and the balance to be paid to the appellant.