IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 84/2016**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

INDUSTRIAL CREDIT COMPANY LIMITED	**1ST APPELLANT**
PAN AFRICAN BUILDING SOCIETY	**2ND APPELLANT**

AND

MALAR INDUSTRIES LIMITED	**1ST RESPONDENT**
SUBRAMANIA BALAKRISHNAN	**2ND RESPONDENT**

Coram: Wood, Musonda and Mutuna, JJS
on 5th and 7th March, 2019

For the 1st Appellant: N/A

For the 2nd Appellant: Mr. F. Mudenda, Messrs Chonta, Musaila & Pindani Advocates

For the Respondents: Mr. C. Kaela, Messrs G. M. Legal Practitioners

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JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Holmes Limited v. Buildwell Construction Company Limited [1973] Z.R 474**
2. **Colgate Pamolive (Z) Inc v. Abel Shmeu Chika and 110 Others: Appeal No. 181 of 2005**
3. **L'Estrange v. Graucob [1934] ZKB 394**
4. **Blay v. Pollard and Morris [1930] ALL. ER 609**
5. **Kalusha Bwalya v. Chardore Properties and Ian Haruperi (2015) SJZ.... 20**
6. **Wilson Masauso Zulu v. Avondale Housing Project (1982) Z.R. 172**
7. **Khalid Mohamed v. The Attorney-General**
8. **Miller v Minister of Pensions: [1947] 1 All.E.R 372**
9. **Mohamed v AG: [1982] ZR 49**

Legislation referred to:

1. **Section 29 of the Banking and Financial Services Act, Chapter 387of the Laws of Zambia**

Other Works referred to:

1. ***Furmston, Michael, Cheshire, Fifoot and Furmston's Law of Contract, 14th Edition, (London, Butterworth, 2001)***
2. ***Black's Law Dictionary***

PRELUDE

When we heard this appeal, Mr. F. Mudenda, of counsel, informed us that although his firm had jointly undertaken the preparation of the appellants' Heads of Argument with Messrs Mulenga, Mundashi and Kasonde Legal Practitioners and Messrs Isaac and Partners, their co-advocates had since (formally) withdrawn from acting for the 1st appellant while his firm's further conduct of the matter was limited to the 2nd appellant.

Having regard to the fact that the two appellants' Heads of Argument were already on record, we made a decision to proceed with the hearing of the appeal even under the circumstances which had arisen as we did not consider that the 1st appellant was going to be prejudiced.

1.0 INTRODUCTION

1.1 This appeal contests a judgment by which the court below found the appellants liable in damages for breach of contract.

1.2 The appeal also challenges the lower court's order requiring the Deputy Director to assess the interest which, the court determined, remained owed to the respondents on account of some money market instruments which the 1st respondent had issued in favour of the 1st appellant by way of investment.

2.0 HISTORY AND BACKGROUND OF MATTER

2.1 The history and background circumstances to which the present appeal can be traced were substantially incontestable.

2.2 Sometime in year 2008, the 1st respondent placed a sum of K5,200,525,000 (unrebased) with the 1st appellant by

way of an investment in the latter's investment instruments known as Money Market Instruments ("MMIs") at the agreed yield or interest rate of 30% per annum.

2.3 With the application of interest, the 1st respondent's investment through the medium of MMIs progressively blossomed such that, by April, 2010, the value of the 1st respondent's MMIs had grown to K5,867,248,290,00 (unrebased).

2.4 In the meantime, sometime in November, 2008, the 1st appellant, in its capacity of the 1st respondent's creditor by virtue of the MMIs, was requested to consent to a restructuring and recapitalisation programme which the latter desired to participate in as adverted to in next paragraph

2.5 Having regard to a variety of factors/considerations, including, crucially, the fact that the 1st respondent ranked as the 1st appellant's biggest creditor at the time on account of the value of its MMIs, the 1st appellant approached the 1st respondent for the purpose of having

the latter participate in a **'Debt for Equity Swap'** which the 1st appellant felt was going to spur its restructuring and recapitalisation agenda.

2.6 We pause here to mention that, a crucial consideration which had prompted the 1st appellant to invite the 1st Respondent to convert a proportion of the monetary value which was embedded in the latter's MMIs into equity (and thereby secure the recapitalization of the 1st appellant) was the fact that the 1st respondent stood to lose more than any other creditor as the biggest investor in the 1st respondent in the event of the 1st respondent going under.

2.7 Returning to our continuing narrative, in terms of this **'Debt for Equity Swap'** arrangement, the 1st respondent was going to assign a sum of K2,389,000,000.00 out of the total value of its MMIs as at 31st December, 2009 to a limited company known as Vehicle Finance Limited which was intended to assume ownership of the 1st appellant. For the avoidance of doubt, Vehicle Finance Limited was sued as the 3rd defendant in the court below.

2.8 In consideration of the said assignment of the sum of K2,389,000,000.00 (unrebased) by the 1st respondent to Vehicle Finance Limited, the 1st respondent was going to be allotted shares representing the equivalent of 8.2% of the paid up share capital of Vehicle Finance Limited which shares were going to be nominally held by the 2nd respondent on its behalf. For completeness, the remaining balance of the value of the Money Market Instruments in question was to be retained by the 1st appellant as the 1st respondent's continuing investment upon the terms earlier agreed.

2.9 The arrangement which has been alluded to in 2.6 and 2.7 above was evidenced by a letter dated 31st December, 2009 which was written by the 2nd respondent and was addressed to Vehicle Finance Limited. The relevant portion of the letter, whose subject matter was reflected as: ***'Industrial Credit Company Limited ("ICC")*** - **Debt for Equity Swap - Money Market Instruments in the name of Malar Industries Limited** was couched in the following terms:

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"Pursuant to various discussions between the parties, Vehicle Finance Limited ('VFL') has informed us that they intend to subscribe for an additional USD1,500,000-00 (United States Dollars One Million Five Hundred Thousand) in the common shares of Industrial Credit Company Limited ('ICC').

Further to the discussions between the parties in this regard, we, Malar Industries Limited, herein represented by Subramania Balakrishnan (Date of Birth 30th May 1940) have agreed to, forthwith, irrevocably assign to VFL our right and interest in ZMK2,389,000,000-00 (Zambian Kwacha Two Billion Three Hundred and Eighty Nine Thousand only) Money Market Instrument held at ICC in return for an 8.2% stake in VFL by S Balakrishnan and to enable VFL to pursue its right to recapitalise ICC.

The above ZMK equivalent shall be converted into USD at the ruling rate of 4,778 to equate to a USD investment of USD500,000-00.(United States Dollars Five Hundred Thousand only).

Yours sincerely,
Malar Industries Limited

(S. Balakrishnan)
Managing Director

c.c. Pc Richards – CEO, Industrial Credit Company Limited
RR Chandramouli – MD, Exim Advisory Services Limited"

2.10 A dispute subsequently arose between the 1st respondent and the 1st appellant with respect to:

2.10.1 the number of shares which were allotted to the 2nd respondent in accordance with the agreement earlier mentioned. The 1st respondent took issue with the number of shares which were allotted to the 2nd respondent as they felt that they represented less than 1% of the 8.2% which had been agreed upon;

The proposed restructuring and recapitalisation of the 1st appellant through the involvement and participation of Vehicle Finance Limited and Exim Bank of Tanzania did not take place; and

2.10.2 the 1st appellant merged with or was taken over by the 2nd appellant without the consent of the 1st respondent as a creditor of the 1st appellant.

2.11 By reason of the matters in the preceding paragraph (i.e., 2.10), the respondents informed the 1st appellant that the 1st respondent had decided to rescind the 'Debt for Equity' Swap and, consequently, demanded the immediate payment of the value of the 1st respondent's MMIs which,

as of 31st December, 2009 stood at K5,382,943,880.00 (unrebased) together with running interest at the agreed rate of 30% per annum less any moneys which the 1st respondent had been advanced as of that date on account of the MMIs.

3.0 THE COURT ACTION – THE PARTIES' POSITIONS

3.1 Following the appellants' refusal to yield to the respondents' demands, the latter instituted an action in the court below seeking the following relief:

3.1.1 An order of rescission of the "Debt Equity Swap" between the [respondents] and the 1st appellant and Vehicle Finance Limited.

3.1.2 An order for payment by the 1st and 2nd appellants, to the 1st respondent of the value of the Money Market Instruments in the sum of K5,382,943.88 together with interest at 30% per annum effective from 31st December 2009 less any monies advanced to the latter.

Further and in the alternative –

3.1.3 a) Damages for breach of Contract

b) Damages for Fraudulent and/or innocent misrepresentation

3.1.4 Interest

3.1.5 Legal Costs.

3.2 According to the statement of claim which the respondents took out, the gist of their grievances, as captured at 2.9 above, was that the appellants had failed to honour the basis on which the respondents (allegedly) entered into the Debt for Equity Swap. In effect (although not precisely pleaded in these terms), the respondents took the position that the appellants and Vehicle Finance Limited had acted in breach of their contract or had made fraudulent or innocent misrepresentations with respect to the matters highlighted at 2.9 above.

3.3 In their defence, the 1st appellant and Vehicle Finance Limited acknowledged the Debt for Equity Swap by pleading to the effect that the 1st respondent did irrevocably assign to Vehicle Finance Limited a monetary value equivalent to K2,389,000,000.00 out of the total value which was represented by the Money Market

Instruments which the 1st appellant had issued in favour of the 1st respondent by way of acknowledging the extent of the latter's investment in the 1st appellant.

3.4 According to the 1st appellant and Vehicle Finance Limited, the said K2,389,000,000.00 referred to in the preceding paragraph represented the agreed consideration for an 8.2% stake in the capital of Vehicle Finance Limited which had been agreed to be taken up and nominally held by the 2nd respondent on behalf of the 1st respondent.

3.5 The 1st appellant and Vehicle Finance Limited further averred in their defence that the Debt for Equity Swap in question was irrevocable and was not conditional upon Exim Bank of Tanzania investing in the 1st appellant.

3.6 The 1st appellant also averred in its defence that, aside from the fact that the 2nd respondent was issued with 1804 ordinary shares on account of the consideration earlier mentioned, the total value which had been represented by the 1st respondent's MMIs was further reduced through repayments such that as of 31st December, 2012, such that the value of the MMIs which stood to the credit of the

1st respondent had been reduced to K147,823,960,660.00 (unrebased) adding that the 1st appellant stood ready and willing to settle this reduced amount. However, both the 1st appellant and Vehicle Finance Limited denied having made any false representation to the respondents on account of the Debt for Equity Swap.

3.7 For its part, the 2nd appellant pleaded in its defence that, sometime in late 2011, it entered into a corporate restructuring transaction with the 1st appellant.

3.8 The 2nd appellant further averred that, in terms of that corporate restructuring transaction, it (the 2nd appellant) took over certain assets and liabilities which had hitherto belonged to the 1st appellant save that the take over did not extend to the MMIs.

4.0 THE TRIAL, CONSIDERATION OF MATTER AND TRIAL COURT'S DECISION

4.1 Following the closure of the parties' respective pleadings, the matter was tried in the usual way. The trial court

heard evidence and the parties' respective submissions which it considered.

4.2 Before the trial court gave its perspective with respect to the evidence and submissions which had been laid before it, it identified a number of issues that it deemed to have been established to its satisfaction. These issues were, firstly, that the respondents had invested a sum of about K5.2 billion (unrebased) with the first appellant for which the 1st respondent was issued with six MMIs with an interest yield of 30% per annum.

4.3 Secondly, the court noted that the 1st appellant ran into financial difficulties which forced it to enter into a debt for equity swap with the respondents. This arrangement entailed that the 1st respondent assigned a value of K2,389,000,000.00 out of the total value of its MMIs to Vehicle Finance Limited in consideration for an 8.2% stake in the share capital of Vehicle Finance Limited.

4.4 Thirdly, the trial court noted that the grievances which the respondents had raised had formed the basis for their

search to have the court order a rescission of the debt for equity swap.

4.5 After considering the relief of rescission and the basis upon which the same can be properly founded, the trial court came to the conclusion that whatever representations which the 1st appellant had made to the respondents in relation to Exim Bank did not constitute fraudulent or innocent misrepresentations.

4.6 Arising from its conclusion in 4.5, the trial court determined that, as the relief of rescission was predicated upon the tort of misrepresentation which had failed, it could not grant that relief.

4.7 Notwithstanding its conclusion in 4.6, the trial court turned to consider the availability of damages for breach of contract which the respondent had sought in the alternative.

4.8 In the trial court's view, the parties in this matter had discussed the issue of bringing Exim Bank on board and that the respondents only agreed to the debt for equity swap after they had been assured about Exim Bank

coming on board. The trial court opined in this regard that the appellants were aware that failure to secure Exim Bank would constitute a breach of the agreement which they had reached with the respondents. Accordingly, the lower court granted the respondents damages on account of the breach which were to be assessed by the Deputy Director.

4.9 With regard to the corporate restructuring involving the two appellants which, as noted early on in this judgment, had taken place coupled with the fact that the 1st appellant had, in the meantime, become insolvent and only existed on paper, the trial court took the view that the 2nd appellant had taken over the affairs of the 1st appellant. On this basis, the lower court opined that the respondents were perfectly entitled to institute proceedings against the 2nd appellant notwithstanding that it had nothing to do with the MMIs which were in issue in this matter.

4.10 It is worthy of note, with regard to the matters in 4.9 above, that the trial court rejected the 2nd appellant's contention that it did not take over the MMIs. According to the lower court, the 2nd appellant could not walk away from the 1st

appellant's debts in respect of the debt for equity swap ostensibly on the basis that these debts had remained with the 1st appellant after the corporate restructuring transaction.

4.11 With regard to the respondents' claim on account of the value of its outstanding MMIs, which the respondents put at K210,000.00 (rebased), together with the agreed interest at 30% per annum, the trial court noted that neither of the two sides to the dispute adduced sufficient evidence on the issue for the purpose of enabling the trial court to make a definitive determination around the same adding that the parties only addressed the issue through their respective submissions. Accordingly, the honourable court referred this issue of interest to the Deputy Director for assessment.

5.0 THE APPEAL AND GROUNDS OF APPEAL

5.1 The appellants were not satisfied with the judgment of the court below and have now approached us by way of this appeal which they founded on the following grounds:

5.1.1 The learned trial judge erred in law and in fact when she held the 1st and 2nd Defendants liable for breach of

contract on account of an alleged representation that did not form a part of the irrevocable debt to equity swap agreement between the parties.

5.1.2 The learned trial judge erred in law when she referred the Plaintiffs' claim for interest to assessment, in the absence of evidence by the Plaintiffs to show that the amounts paid by the 1st Defendant did not include interest and further in the absence of a finding by the court that any interest was due at all.

5.1.3 The learned trial judge erred in law and fact when she held that the 2nd Defendant was liable to the 1st and 2nd Plaintiffs contrary to section 29 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia and the law on assignment of obligations.

5.1.4 Any other ground of appeal.

6.0 CONTENTIONS/ARGUMENTS ON APPEAL

The two sides to the appeal filed their respective Heads of Argument to support the positions which they respectively took in relation to the appeal.

6.1 The appellants' counsel opened his Arguments around the first ground of appeal by drawing the following passage from the judgment now under attack:

> *"I am therefore inclined to accept that the plaintiffs' assertions that they agreed to the debt to equity swap after assurances that Exim Bank would come on board and to avoid losses... The first and second defendants knew that failure to get Exim*

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> *Bank was in breach of the agreement with the Plaintiffs... In view of the foregoing I find the first and second defendants liable for damages for breach of contract regarding* Exim Bank".

6.2 Learned counsel for the appellants then went on to submit that the court below erred in holding the appellants liable for damages for breach of contract when the execution of the debt for equity swap was not conditional upon the conclusion of any arrangement with Exim Bank of Tanzania. According to counsel, this position was borne out by the terms of the debt for equity swap itself which we referred to early on in this judgment.

6.3 Counsel then cited our decision in the case of **Holmes Limited v. Buildwell Construction Company Limited**[1] where we said the following in relation to terms of a written contract:

> **"Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary or contradict the terms of the written contract."**

6.4 The appellants' counsel also cited our judgment in the case of **Colgate Pamolive (Z) Inc v. Abel Shmeu Chika and**

110 Others[2] where we made the following observations with respect to the sanctity of the terms of a contract:

> **"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracts and that their contracts when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of justice."**

6.5 According to the appellants' counsel, the English cases of **L'Estrange v. Graucob**[3] and **Blay v. Pollard and Morris**[4] also speak eloquently to the general rule that a person is bound by the terms of any instrument that he signs and seals even though he did not read it, let alone, understand its contents. Counsel then cited our judgment in the case of **Kalusha Bwalya v. Chardore Properties and Ian Haruperi**[5] where we observed that the only exception to the rule which has been described above is where a person signs or seals a document under a mistaken belief as to the nature of the document due to some condition such as blindness or where the person is a victim of a trick or fraudulent misrepresentation with respect to the nature of the document.

6.6 Counsel for the appellants concluded his arguments around the first ground by contending that, as the lower court made a finding in its judgment that the respondents were not induced into signing the debt for equity swap on account of any misrepresentation, no basis existed for the court's conclusion that the appellants had breached the said agreement merely because of the non-actualisation of the arrangement with Exim Bank which arrangement was not, for the avoidance of any doubt, a condition – precedent to the execution of the debt for equity swap transaction.

6.7 Counsel accordingly submitted that the court below erred in holding the appellants liable in damages for breach of the debt for equity swap and urged us to reverse the erroneous holding.

6.8 With respect to the second ground, counsel opened his arguments by drawing the following passage from the trial court's judgment:

> **"I note also the submissions by learned counsel for the Plaintiffs that the Plaintiff is owed K210,000.00 as what has been paid was without interest, which was agreed at 30% per annum. Both parties did not adduce sufficient**

evidence on this issue and chose to address it in their submissions, I will therefore also refer it for assessment by the Deputy Director."

6.9 Learned counsel then went on to submit that the position which the trial court took as quoted above constituted misdirection as it implied that the appellants had a duty to adduce evidence in support of the respondents' claim for interest. Counsel further submitted that the question of interest should only have been referred to assessment if, on the preponderance of the evidence submitted by the respondents, it was clear that interest was due. According to counsel, to the extent that the court below found that the respondents had not adduced sufficient evidence to support their claim for interest, the court below ought to have dismissed the said claim.

To support the above proposition, counsel for the appellants referred us to our observations in the case of **Wilson Masauso Zulu v. Avondale Housing Project**[6] where we said:

"A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the

opponents case. As we said in ***Khalid Mohamed v. The Attorney-General***[7]***:***

"Quite clearly a defendant in such circumstances would not even need a defence."

6.10 The appellants' counsel accordingly closed his arguments around the 2nd ground of appeal by submitting that, as the respondents did not adduce sufficient evidence to support their claim for interest, the said claim ought to have been dismissed.

6.11 With regard to the 3rd and final ground of appeal, the appellants' counsel opened his arguments around this ground by quoting Section 29 of the Banking and Financial Services Act, Chapter 387 which provides that:

> *(2) When the corporate restructuring transaction takes effect-*
>
> *(a) all assets and liabilities of the old entity or, in the case of a transfer of assets and liabilities, those assets and liabilities agreed to be transferred, shall vest in and become binding upon the new entity;*
>
> *(b) the new entity shall have the same rights and shall be subject to the same obligations as were, immediately before the transaction took effect,*

binding upon the old entity or, in the case of a transfer of assets and liabilities, the same rights and obligations as were applicable to the old entity with respect to the assets and liabilities transferred;

(5) The provisions of this section shall not affect the rights of any creditor of the old entity or of the new entity, except to the extent provided by this section. [UNDERLINING OURS]

6.12 Counsel then went on to argue that the evidence on record showed that the appellants agreed that the 1st respondent's Money Market Instruments ("MMIs") which were the subject of the action in the court below would not be transferred to the 2nd appellant. In this regard, our attention was drawn to a letter dated 17th November, 2011 from the 1st appellant to the Bank of Zambia which read as follows:

"Please see below the list of MMI holders and the attached documentation demonstrating that the MMI is allowable to be transferred to Pan African Building Society (PABS):

1. *Malar Industries Limited – The MMI is for K1,0287,000,000.00 (sic) and shall be settled on or before the transaction date assuming you give your approval to the transaction."*

6.13 According to the appellants' counsel, the position which has been highlighted above was also confirmed by DW1 and DW3 in their respective testimonies. In counsel's view, under Section 29 (2) of the Banking and Financial Services Act, the 2nd appellant cannot be held liable to the respondents given that the 1st and 2nd appellants did not agree that the respondents' MMIs would be transferred to the 2nd appellant.

6.14 In concluding his Arguments around the third and last ground of appeal, the appellants' counsel made reference to Michael Furmston's *Cheshire, Fifoot and Furmston's Law of Contract*, at page 509, where the learned jurist states:

> *"The question that arises here is whether B can assign the obligation that rests upon him by virtue of his contract with A to a third person, C, so that the contractual liability is effectively transferred from him to C. can he substitute somebody else for himself as obligor? English law has unhesitatingly answered this question in the negative. In the words of Collins MR:*

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It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

Novation, therefore, is the only method by which the original obligor can be effectively replaced by another. A, B and C must make a new contract by which in consideration of A releasing B from his obligation, C agrees that he will assume responsibility for its performance."

6.15 Supporting the above passages, counsel submitted that the respondents did not consent to the transfer of the 1st appellant's liability, if any, to the 2nd appellant and that this position was confirmed by PW1 in cross examination. Counsel accordingly urged us to allow the appeal with costs.

6.16 For his part, learned counsel for the respondents opened his arguments around the 1st and 2nd grounds of appeal by

drawing the following definitions of *'breach of contract'* and *'representation'* from *Black's Law Dictionary*:

> *"A presentation of fact either by word or by conduct made to induce someone to act especially in a contract"*

As for breach of contract, counsel noted that this expression is defined as:

> *"violation of a contractual obligation by failing to perform one's own promise".*

On the basis of the above definitions, counsel submitted that the learned trial judge was on firm ground when she held the appellants liable for breach of contract.

6.17 According to the respondents' counsel, the basis on which the Debt for Equity Swap Agreement was executed was the representation by the appellants to the effect that Exim Bank of Tanzania Limited had been sought as an equity partner for the purpose of recapitalisation and that the tripartite Share Subscription Agreement had materialised or was in fact effective. Counsel went on to contend that the respondents were induced by the said representation

to enter into the Agreement and yet the representation turned out to have been false.

6.18 Learned counsel accordingly submitted that the trial court was on firm ground in holding that the subject representation was false and that, in consequence, a breach of contract on the part of the 1st and 2nd appellants had occurred.

6.19 The respondents' counsel further submitted that the representation in question was a determining factor for the execution of the debt for equity swap and that this was evidenced by the correspondence by the 1st appellant and the respondents clearly showing that the intention of the parties was to have Exim Bank of Tanzania Limited come on board for purposes of recapitalisation.

6.20 With regard to the second ground, counsel submitted that the respondents' claim was for the principal debt plus interest and that the lower court found that the principal debt had been paid while the interest had not been and that this was what was referred to assessment. According to the respondents' counsel, it was unnecessary to provide

proof of the actual accrued interest because the same needed to be assessed.

6.21 The respondents' counsel also submitted that the trial court was on firm ground to refer the matter to assessment of the accrued interest in the light of the court's finding that the principal amount had been paid. According to counsel, the 1st appellant admitted owing interest which was supposed to be accruing at 30% per annum.

6.22 With regard to the 3rd and final ground, the respondents' counsel opened his arguments by contending that the appellants' interpretation of Section 29 of the *Banking and Financial Services Act* was misconceived. He went on to submit that an entity remains the same despite a change in form resulting from, *inter alia,* a merger or amalgamation. The entity remains the same as regards creditors, debtors and other debts and liabilities.

6.23 Learned counsel further argued that, despite the corporate restructuring or merger between the 1st and 2nd appellants, the 2nd appellant remained liable to the creditors of the 1st

appellant in terms of Section 29 of the *Banking and Financial Services Act.*

In this regard, counsel referred to the letter of 17th November, 2011 from the 1st appellant to the Bank of Zambia which we reproduced at 6.12 above.

6.24 According to the respondents' counsel, it was quite clear from the passage of the letter at 6.12 above that even the appellants were aware that the 1st appellant's debt to the respondents was to be transferred to the 2nd appellant.

Counsel accordingly urged us to dismiss the appeal with costs.

7.0 CONSIDERATION OF MATTER AND DECISION ON APPEAL

7.1 At the hearing of the appeal, Mr. Mudenda, learned counsel for the 2nd appellant confirmed having filed the appellants' Heads of Arguments upon which he relied. In addition, counsel informed us that the 2nd appellant was also relying on the Submissions which were filed on behalf of the 2nd appellant in the court below.

7.2 However, Mr Mudenda also indicated to us that it was his wish to augment the 2nd appellant's written arguments and Submissions with brief oral submissions.

7.3 In opening his augmentation around the first ground of appeal, Mr Mudenda informed us that he had been extremely troubled by the fact that the judgment of the lower court had the effect of rendering the 2nd appellant liable on account of a contract to which it was not a party. In this regard, learned counsel submitted that the debt for equity swap was a contract which arose in 2009 between the 1st appellant and the respondents and that, at that time, the 2nd appellant was not even in the picture as it only did so sometime in 2011.

7.4 Locating the factual matrix in 7.3 in their appropriate legal *milieu,* Mr. Mudenda argued that it is trite law that only parties to a contract can generally be liable on account of the terms of such a contract, including, for the avoidance of any doubt, any benefits or burdens arising under such a contract. This, counsel explained, is what the common law doctrine of privity of contract entailed.

7.5 Mr. Mudenda further criticized the trial court for having taken the position that the appellants' (alleged) failure to bring Exim Bank on board constituted "... a *breach of the agreement with the respondents...*"

7.6 Learned counsel for the 2nd appellant accordingly concluded his submissions around the first ground of appeal by submitting that there was no legal basis upon which the 2nd appellant could have been found liable on account of matters which had been contained in a debt for equity transaction to which it was not a party.

7.7 With regard to the 2nd ground of appeal, Mr. Mudenda submitted that any agreement between the 1st appellant and the respondents, including all issues relating to any agreed interest pursuant to such agreement to which the 2nd appellant had not been a party had no binding effect upon the 2nd appellant adding that, in fact, the issue of interest and the related reference of this issue for assessment by the Deputy Director ought not to have arisen at all given the trial court's finding and conclusion that no *sufficient evidence* had been laid before the trial court to warrant the granting of this relief. It was counsel's

further contention around this 2nd ground that the respondents carried the evidential burden of proving, to the requisite standard, their entitlement to interest and that, having failed to discharge this burden, it was not open to the trial court to refer the issue of interest for assessment.

7.8 As to the third ground of appeal, Mr. Mudenda begun by observing that this is a very crucial ground as it touched upon issues which the trial court did not seriously consider and simply glossed over.

7.9 Mr. Mudenda opened his oral augmentation around the third ground of appeal by quoting the following passage from the judgment now being assailed:

> *"In my judgment, on these facts, there is no way the 2nddefendant [now 2nd appellant] can get away by simply saying the plaintiffs' [now respondents] debt remained with the 1st defendant [now 1st appellant]. The 2nd defendant was expected to settle debts of the plaintiffs which was the essence of the debt to equity swap..."* (at p.49 of the Record)

7.10 According to counsel, the conclusion by the trial judge, as captured above, was not only contrary to the evidence which had been deployed before that court but went against the clear provisions of the law, namely, Section 29 of the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia, which has since repealed and replaced.

7.11 Adverting to the evidence on record, Mr. Mudenda began by referring us to a letter by the Bank of Zambia to the 2nd appellant's Chief Executive Officer which was dated 21st June, 2013 (and which occurs at page 168 of the record) and which partially read as follows:

> *"Prior to the approval of the corporate restructuring transaction [the 1st appellant] was required by the Bank of Zambia (BOZ) to obtain written consent from all its creditors, including holders of MMIs assigning their MMIs to [the 2nd appellant] in line with the proposed restructuring transaction. [the 1st appellant] had provided the signed consents from all its creditors as required*

except from one MMI holder, [the 1st respondent]. According to the attached letter dated 17 November, 2011 [the 1st appellant] had committed to settle the money owed to [the 1st respondent] on or before the restructuring transaction date assuming the BOZ gave approval to the transaction".

7.12 According to learned counsel, the BOZ letter, as quoted above, made it clear that the 1st respondent's MMIs were not transferred to the 2nd appellant and that this fact was further confirmed by the 1st appellant itself, as the issuer of the subject MMIs, in its letter to the BOZ which was dated 17 November, 2011 and which appears at page 159 of the record of appeal. It was Mr Mudenda's further submission that the 1st appellant's letter of 17 November, 2011 made it clear that the 1st respondent's MMI representing K10, 287,000,000.00 in value was to be settled on or before the restructuring transaction date.

7.13 Turning to the law, Mr. Mudenda argued that both the court below and the BOZ had misapprehended the

meaning and effect of section 29 of the repealed Banking and financial services Act, in so far as this statute had a bearing upon the restructuring transaction which counsel extensively referred to in the appellants' Heads of Argument. Learned counsel closed his oral augmentation of the 2nd appellant's arguments by reiterating that, having regard to the evidence which had been laid before the lower court, coupled with the clear position of the law, the 2nd appellant ought not to have been found liable on account of the MMIs in question. Counsel accordingly urged us to allow the appeal-so far as it related to the 2nd appellant.

7.14 For his part, Mr. Kaela, learned counsel for the respondents also confirmed having filed Heads of Argument on 19 February, 2017 upon which the respondents were relying. Counsel briefly augmented those Heads of Argument by submitting, in regard to the second ground of appeal, that the trial court was perfectly entitled to refer the issue of interest to the Deputy Director for assessment adding that some evidence had been placed before the trial court which had pointed to the 1st

respondent's entitlement to interest on account of the value of its MMIs.

7.15 With respect to the third ground of appeal, Mr. Kaela's brief argument was that section 29 of the Banking and Financial Services Act obliged the 2nd appellant to settle the liability which had arisen on account of the MMIs. Consequently, we were urged to dismiss the appeal with costs.

7.16 We are grateful to counsel involved for their very helpful perspectives.

We propose to address the grounds of appeal in the same order in which they were canvassed before us.

7.17 As we begin our reflections, we must immediately confirm that we have examined the evidence on record together with the judgment of the court below in the context of each of the grounds of appeal and counsel's arguments in relation to them.

7.18 Under the first ground of appeal, counsel for the appellants faults the learned trial judge for having held the 1st and 2nd appellants liable in damages for breach of contract on

account of what counsel described as an alleged representation which, it is contended, did not form a part of the irrevocable debt for equity swap which had been agreed upon between the parties.

7.19 According to the judgment of the learned trial judge, the appellants committed a breach of contract following their (alleged) failure to secure the participation of Exim Bank (Tanzania) Limited in the restructuring and recapitalisation of the 1st appellant. According to the trial judge, the respondents agreed to swap their debt for equity *"... after [receiving] assurances that Exim Bank would come on board to avoid losses..."*

7.20 The appellants' reaction to the trial judge's pronouncement, as captured above, was that, contrary to the position which the trial judge had taken in her judgment, what she had described as *'assurances'* or *'representation'* (to borrow the legal nomenclature employed by the appellants) touching upon the involvement of Exim Bank (Tanzania) Limited ("Exim Bank") in the restructuring and recapitalisation earlier

mentioned did not constitute a condition or condition-precedent to the subject debt for equity transaction.

7.21 According to the appellants' counsel, the debt for equity arrangement was a stand-alone transaction which was not conditional upon the actualisation of arrangements pertaining to Exim Bank.

7.22 In order to put the issues in contest in their proper perspective, we propose to return to the document at 2.9 above which had embodied the debt for equity swap.

7.23 A textual examination of that document reveals the following salient features:

7.23.1 It originated from the 1st respondent;

7.23.2 It was addressed to Vehicle Finance Limited; and

7.23.3 It evidenced an assignment, by the 1st appellant, of a sum of K2,389,000,000.00 being the monetary value represented by a portion of the MMIs which had been issued to the 1st respondent on account of its investment to Vehicle Finance Limited in return for an 8.2%

equity stake in Vehicle Finance Limited which was to be held on behalf of the 1st respondent by the 2nd respondent.

7.24 For the avoidance of any doubt, the document referred to in 2.9 above made no reference to either Exim Bank or the 'assurances' which the learned trial judge referred to in her judgment.

7.25 It is also worthy of note (and quite apparent to us) that what the learned trial judge described as *'assurances'* relating to Exim Bank was not incorporated in the debt for equity agreement as a contractual term.

7.26 It is also worthy of mention that, from a contractual standpoint, the consideration for the monetary value which the 1st respondent assigned to Vehicle Finance Limited was the 8.2% equity stake in that company. This position was affirmed by the respondents' own pleading in their amended statement of claim.

7.27 Lest we be misunderstood, in restricting our narrative to what we have unraveled thus far, we are in no way

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suggesting that the issue of Exim Bank was a fiction or a figment in the respondents' imagination.

7.28 According to one of the documents in the record relating to this appeal which we examined, namely, a letter dated 1st February, 2010 from the 1st appellant to the 1st respondent, Exim Bank was one of the parties to a Share Subscription Agreement dated 16th December, 2009 which was referred to in that letter. The other parties were the 1st appellant and Vehicle Finance Limited. Having regard to the significance of that letter of 1st February, 2010 *vis-à-vis* the issues in dispute in this matter, we propose to reproduce the same below:

> *"Monday, 1st February 2010*
>
> *The Managing Director*
> *Malar Industries Limited*
> *P O Box 71885*
> *Ndola*
>
> *Attention: Mr. S. Balakrishnan*
>
> *Dear Mr. Balakrishnan,*
>
> ***Industrial Credit Company Limited – Debt for Equity Swap***

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Following several discussions over the past six months, I summarise hereunder the situation in so far as the recapitalisation of Industrial Credit Company Limited ('ICC') is concerned and the effect that this transaction shall have on the Malar Industries Limited Money Market Instrument ('MMI').

1. *A schedule reflecting the balance due to Malar Industries Limited as at 31st December 2010 is attached hereto.*
2. *In terms of the Share Subscription Agreement, dated 16th December, 2009, entered into between ICC, Vehicle Finance Limited ('VFL') and Exim Bank (Tanzania) Limited ('Exim'), USD500,000 (or the ZM equivalent as at 31st December 2009) of the total outstanding is to be assigned by Malar Industries Limited to VFL – presently 100% shareholder of ICC – in return for an equity stake in VFL equivalent to 8.2% of the total paid up capital of VFL.*
3. *The ICC ZMK: USD rate as at 31st December 2009 was ZMK4,778 : USD1. The USD500,000 equivalent shall be ZMK2,389,000,000.*
4. *The remaining amount due to Malar Industries Limited shall be made available to the company once the injection of capital (and by definition, liquidity) by the new shareholders has taken place.*
5. *In order for the Conditions Precedent to the Share Subscription Agreement to be fulfilled, the above transaction shall be consummated as at 31st December, 2009, in order to reflect in ICC's audited Financial Statements at that date.*

We sincerely appreciate your understanding of the necessity for all parties involved in this complex transaction to play their role in ensuring that the oldest leasing company in Zambia receives the much needed recapitalisation. Failure of the parties to consummate the transaction now on the table would,

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undoubtedly result in significant losses being incurred by the current shareholders and the unsecured creditors, of which Malar Industries Limited is one. We have been striving for the past two years to ensure that this does not happen and we are both delighted and proud of what we have achieved, with no small measure of support and patience from all stakeholders, your company, in particular, included. Your support in this regard is greatly appreciated.

The transaction described above should ensure that Malar Industries Limited suffers no loss of capital, a significant portion of which shall be returned to the company within the next few months. Furthermore, the equity stake which the company shall hold in VFL should appreciate in value over time and secure a more than acceptable rate of return.

Please do not hesitate to contact the undersigned should you require further clarification or additional information.

Yours sincerely,
Industrial Credit Company limited

Timothy Mushibwe — *(Chairperson Designate)*

Paul C Richards — *(Chief Executive Officer)*

Enclosures

c.c. *Mr. RR Chandramouli – Managing Director, Exim Advisory Services*

Mr. WP Saunders – Vehicle Finance Limited"

7.29 It is quite apparent from even a cursory reading of the letter which has been reproduced above that the medium

through which Exim Bank was to participate in an entity with some connection to the respondents was the Share Subscription Agreement dated 16th December, 2009. According to the letter in question (and, as earlier noted), the parties to that Share Subscription Agreement were:

(a) the 1st appellant;

(b) the Vehicle Finance Limited; and

(c) Exim Bank.

7.30 For the avoidance of any doubt, neither of the respondents was a party to the Share Subscription Agreement.

7.31 It is also worth recalling that the document which had evidenced the debt for equity transaction arose later than and made no mention of the Share Subscription Agreement.

7.32 In her judgment, the learned trial judge accepted the respondents' assertion or claim that they agreed to the debt for equity swap after receiving assurances that Exim Bank would come on board.

7.33 Having regard to what we have discussed above, we find ourselves unable to agree with the trial judge over the

issue of the so-called 'assurances.' Indeed, we have felt more attracted to the appellants' contention that the Exim Bank issue was neither a condition-precedent to the debt for equity transaction nor was it a term of the relevant contract.

7.34 Furmston Michael, the author of the legendary *Chesire, Fifoot and Furmston's Law of Contract,* 14th edition has made the elementary point that although what parties to a prospective contract say or write may clearly be established,

> *"... it does not necessarily follow that all their words have become part of the contract. Their statements may be classified either as terms of the contract or as mere representations... If a statement is a term of the contract, it creates a legal obligation for whose breach an appropriate action lies at common law. If it is a mere representation, the position is more complicated.*
>
> *It is clear that if a party has been induced to make a contract by a fraudulent misrepresentation, he may sue in tort for deceit and may also treat the contract as voidable..." (at p.139).*

7.35 In the context of the matter at hand, and as learned counsel for the appellants correctly observed in their Heads of Argument, the trial judge did make a finding of fact to the effect that the respondents were not induced into executing the debt for equity swap on account of any misrepresentation, whether of the innocent type or the fraudulent genre. In reaching this conclusion, we have also not forgotten Mr Mudenda, the learned counsel for the 2nd appellant's plea that, so far as the 2nd appellant was concerned, no liability of any sort could have possibly attached against the 2nd appellant on account of the debt for equity transaction for the simple reason that it was not a party to that transaction. We entirely agree with this position.

In sum, the first ground succeeds.

7.36 In the second ground of appeal, the appellants faulted the learned trial judge for having referred the issue or question of the respondents' claim for interest on moneys that had been held by the 1st appellant on account of the respondents' investment in the 1st appellant's Money

Market Instruments to assessment by the Deputy Director.

7.37 The appellants' faulting of the trial judge on the issue of interest was informed by the appellants' position that no positive finding was made by the trial judge with regard to the respondents' entitlement to interest.

7.38 In her judgment, the learned trial judge refrained from making any definitive pronouncement with respect to the respondents' claim for interest. The judge took this position because she opined that *"both parties did not adduce sufficient evidence on [the] issue."*

7.39 We have examined the record and have noted, in particular, that during the trial, DW3, one of the 1st appellant's witnesses, testified that, as at 31st December, 2012, the respondents were owed a sum of K147,823,960 on account of the 1st respondents' MMIs which were not converted to equity.

7.40 The amount referred to in 7.39 was the same amount which was reflected in the 1st and 3rd Defendants' defence

(the 1st defendant now being the 1st appellant) as having being due and owing to the 1st respondent.

7.41 According to the evidence of DW3, the K147,823,960 mentioned in 7.39 was paid into court on 11th March, 2014 and was subsequently paid out.

7.42 In his evidence, PW1, the respondents' witness, testified in his evidence-in-chief as follows:

> *"... the [1st appellant] has paid K147,823,960 (rebased). This is what was due as at 31st December, 2012 according to their own document. This needs to be corrected to include interest from 01.01.2013 todate. It comes to around K210,000.00 rebased. Interest is at 30%."*

7.43 Given what we have unravelled above, it would appear that the outstanding balance which the 1st respondent was expecting on its MMI investment was K210,000. Of this amount, K147,823.96 was paid.

7.44 As the learned judge pointed out in her judgment, not much evidence was laid before the court below with regard to a number of issues around the subject of interest. For example, it is not clear from the evidence on record as to

whether what was paid into court was inclusive of the contractual 30% interest per annum. Indeed, the evidence did not also disclose whether, in fact, the K210,000.00 (rebased) which the 1st respondent was expecting was inclusive of interest.

7.45 Having regard to the doubts and uncertainties which we have alluded to in 7.44 above, we would agree with the learned counsel for the 2nd appellant that the respondents failed to discharge the burden of proof which necessarily rested with them with respect to their claim for interest to the requisite standard in civil causes.

7.46 In the well known English case of **Miller v. Minister of Pensions**[8] Denning, J (as his lordship then was) formulated the celebrated and oft-quoted twin standards of proof which, as a general rule, ought to be observed in determining whether or not a cause has been proven to the applicable standard. In relation to civil causes, the learned Judge observed that, if, at the end of the case the evidence turns definitely one way or the other, the tribunal must decide accordingly. But if the evidence is so evenly balanced that the tribunal is unable to come to a

conclusion one way or the other the burden is not discharged. In his lordship's own words:

> *"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'"*

7.47 In our own jurisdiction we have repeatedly said in a plethora of decisions, including the case of **Mohamed v. AG[9]:** and many others, that it is for the party that asserts or alleges to prove the assertion or allegation.

7.48 Turning to the matter at hand, the trial judge did note with regard to the issue of interest that *"both parties did not adduce sufficient evidence on [the] issue."*

7.49 Having regard to its conclusion in 7.44 above, it cannot be seriously contested that the trial court had failed to make a determination one way or the other with respect to the issue of interest due to insufficient evidence. This having been the case and, as learned counsel for the 2nd appellant correctly argued, the course of action which was open to

the trial judge was to dismiss the claim for interest. In the result, the second ground also succeeds.

7.50 The third and final ground of appeal faults the learned trial judge for having held the 2nd appellant liable to the respondents by reason of a transaction by which the 2nd appellant had acquired selected assets and liabilities of the 1st appellant.

7.51 According to DW1, that is, one of the appellants' witnesses in the court below, sometime in February, 2012, the 2nd appellant acquired some selected assets and liabilities which had hitherto belonged to the 1st appellant. DW1 however, denied that any merger had arisen between the 1st and 2nd appellants.

7.52 According to DW1, among the 1st appellant's liabilities which the 2nd appellant did not acquire was the former's liability to the respondents on account of the outstanding MMIs.

7.53 In its judgment, the trial court took the position that, following the sliding into insolvency of the 1st appellant, the 2nd appellant could not simply turn away and refuse to

settle the respondents' debt on the basis that the same had remained with the 1st appellant.

7.54 In reaching the position we have highlighted in the preceding paragraph, the trial judge was buoyed by its finding of fact that the 2nd appellant had taken over the affairs of the 1st appellant.

7.55 Our examination of the record relating to this appeal revealed the following:

7.55.1 that the 2nd appellant had sought to acquire some selected assets and liabilities which had hitherto belonged to the 1st appellant;

7.55.2 that on 21st November, 2011 the Bank of Zambia (BOZ) approved a proposed restructuring that had involved the 1st and 2nd appellants;

7.55.3 that in its letter to the 1st appellant approving the restructuring which was dated 21st November, 2011, the BOZ directed the 1st appellant to surrender its licence and cease to

conduct any financial service business. Notwithstanding the surrendering of its licence and the cessation of its business, the BOZ made it very clear that the 1st appellant had not been relieved of any obligation which it had incurred prior to the cessation of its business.

7.56 The picture which emerges from what we have unravelled at 7.55 above is that a corporate restructuring did, indeed, arise involving the two appellants.

7.57 In terms of the provisions of Section 29 of the *Banking and Financial Services Act*, Chapter 387 of the Laws of Zambia:

7.57.1 only those assets and liabilities which were agreed to be transferred to the 2nd appellant by the 1st appellant legally vested in the former;

7.57.2 the 2nd appellant only became liable to creditors whose debts were transferred; and

7.57.3 the 1st appellant remained liable to any creditors whose liabilities had not been transferred.

7.58 From the evidence on record, the 1st respondent's MMIs were not transferred to the 2nd appellant pursuant to the corporate restructuring earlier mentioned.

7.59 Arising from the foregoing, the trial court clearly fell in error when it determined that the 2nd appellant was liable to the respondents on account of the MMIs which had been issued to the 1st respondent by the 1st appellant. The third ground succeeds.

8.0 CONCLUSION

8.1 As the three grounds which were argued in this appeal have all succeeded, we allow the appeal.

8.2 The appellants will have their costs which should be taxed if not agreed.

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A.M. WOOD
SUPREME COURT JUDGE

.....
M. MUSONDA, SC
SUPREME COURT JUDGE

.....
N. K. MUTUNA
SUPREME COURT JUDGE