IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE AND LUSAKA

SCZ NO. 14 OF 1999
APPEAL NO. 99 OF 98

(CIVIL JURISDICTION

BETWEEN:

BANK OF ZAMBIA APPELLANT
AND
CHIBOTE MEAT CORPORATION LIMITED RESPONDENT

CORAM: NGULUBE, CJ., CHIRWA AND MUZYAMBA JJS
On 22nd April, 1999 and on 14th July, 1999

For the Appellant: Mr. Ali Hamir, SC.
For the Respondent: Mr. Steven Malama, of Jaques and Partners

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JUDGMENT

Ngulube, CJ., delivered the judgment of the Court.

The history of this matter can be stated quite briefly. The Meridien BIAO Bank Zambia Limited ran into some difficulties. They were overdrawn at the Bank of Zambia to the tune of K 6.7 billion in its current account. When it became apparent that Meridien Bank was in some difficulty, the Bank of Zambia acceded to a request from that Bank that the overdraft be transformed into a loan which would carry a relatively smaller amount of interest. The Bank of Zambia as the regulating authority for the commercial banks was quite agreeable provided that the amount transformed into a loan was secured. One Mr. Andrew Sardanis promised the central bank that suitable security would be offered from various sources including from sister companies and so it was that the Central Bank was offered as part of the security the proceeds of sale of an abattoir belonging to Chibote Meat Corporation Limited. To this end. a charge document was prepared and which was signed by two of the Directors of the respondent company. Eventually Meridien Bank went under

and the Central Bank seized it under the Banking and Financial Services Act. In order to realise the security which had been offered the Central Bank, the appellant in these proceedings, commenced an action in order to enforce the security by taking possession of the mortgaged property. In resisting the claim it was alleged on behalf of the respondent that the mortgage or charge had been procured by duress and undue influence exercised by Mr. Sardanis on the Directors who executed the document and who were simply instructed or directed to sign the document. It was contended on behalf of the respondent that execution of the security was procured by fraudulent concealment of the true state of Meridien Bank which was already insolvent and which, had the Directors of the defendant known the full facts, would not have justified signing the security.

The learned trial judge considered both the affidavit and viva voce evidence. Some of that evidence averred that the controlling interest in the defendant company was in a holding company the majority of the shares in which may have passed from the control of Mr. Sardanis through his holding company namely ITM International SA to a company called Oakvale which had agreed to purchase the majority and controlling interest in the holding company of which the respondent was a subsidiary. The learned trial Commissioner upheld the objections on behalf of the respondent company based on misrepresentation, alleged illegality, undue influence, and bad faith. The court resolved to deal with the claim by the Central Bank by examining the issues raised by the respondent and to find out whether the same held water or not under the circumstances. The learned trial Commissioner found that, despite the

efforts to bail out Meridien Bank, that Bank failed to reduce its overdraft and admitted it was facing liquidity problems.

The court found that as at February, 1995 the situation at Meridien BIAO Bank was hopeless and it was failing to meet its obligations and to honour its promises to the appellant. The learned trial Commissioner held that since the Bank that is Meridien Bank was pledging the proceeds of sale of the abattoir belonging to the respondent, Meridien Bank should have informed the respondent of what was going on and the fact that it was in some difficulties and could'nt meet its obligation. The learned trial Commissioner held that had the defendant known what was truly going on it would not have entertained any moves by ITM International SA to procure its standing surety for monies owed by Meridien Bank.

It should be noted for the record that in considering the knowledge of the defendant in these matters and in considering the issues of duress and undue influence it was trite that the respondent and indeed any body corporate can only know or be overborne or unduly influenced through its human agents; in this case through the two directors who gave evidence in these proceedings. One director gave evidence as DW1 Mr. Raghuraman who was employed by the respondent as Financial Controller and sometimes acted as Secretary. He deposed that he had received a call from their group headquarters at ITM International which was housed in Meridien centre in Lusaka. He was given the document and asked to take it to DW2 Mr. Longwe and then countersign it and affix the company seal and take it back to Meridien Centre. He said he knew that he was executing a charge though he had'nt known about it previously. He said there was no board resolution approving the charge. At the time, according to the witness, he saw nothing wrong in getting instructions from ITM

International SA. The second witness for the respondent was Mr. Nackson Longwe, a director. He testified that at the time he executed the charge he did not think that Meridien Bank was insolvent because there was some money injected in it. He said he was aware that the Bank of Zambia was making efforts to bail out Meridien Bank and that he was aware that the charge he was signing was security for a bank lending. He became concerned when it became apparent that Meridien Bank was going under. He testified that at the time of signing he did so in the belief that he was assisting a sister company. It was this witness who alleged that he had acted under duress and undue influence exercised by Mr. Sardanis.

The learned trial Commissioner reviewed the case from the perspective of the three issues raised by the respondent. One of them was that it was unlawful and illegal for the appellant to have allowed Meridien Bank to continue operating knowing fully well that that Bank was insolvent. In this regard reliance was placed on Section 86 of the Banking and Financial Services Act CAP 387 of the Laws of Zambia as well as Section 87 of the same Act. These Sections read---

> **"86. For the purposes of this Chapter, a bank is insolvent when it ceases to be able to meet its obligations as they fall due or when its assets are insufficient to meet its liabilities.**
>
> **87. (1) A bank shall not, while insolvent:**
> **(a) receive any deposit; or**
> **(b) enter into any new, or continue to conduct any existing banking or financial service business."**

It was submitted on behalf of the respondent and accepted by the learned trial Commissioner that the effect of these sections was that the Central Bank was under a duty to seize Meridien Bank as soon as it was clear that the Bank was insolvent instead of attempting to rescue the Bank. We shall return to this matter a little later and to discuss whether in fact on a true reading of the sections they are an injunction

directing the Central Bank to shut down Banks and not to attempt to rescue them. There was evidence from PW1 who was Mrs. Chilufya Mbalashi that the Central Bank had tried to give a chance to Meridien Bank for a rescue programme to take effect and that in helping that Bank, the Central Bank was trying to maintain a sound banking system. When it became clear that all the efforts were in vain, the appellant seized Meridien Bank. As previously stated the learned trial Commissioner considered that it was illegal to allow Meridien BIAO Bank to continue operating when the appellant knew that it could not meet its obligations and actually failed to meet such obligations as at 17th February, 1995. The third issue which was considered by the learned trial Commissioner and which was proposed by the respondent was that of undue influence. It was said that DW1 and DW2 signed the charge out of fear as to what would happen to their jobs if they refused to sign. It was held that the witnesses were ordered to execute the documents and that they did not do so of their own free will. The learned trial Commissioner took judicial notice of the fact that Mr. Sardanis is and was a well known and powerful businessman arguing that there was no way in which the two defence witnesses would have stood in his way. That being the case they had not executed the charge of their own free will and that therefore this amounted to duress on the part of ITM International SA through Mr. Sardanis and that the respondent company did not authorise the execution of the charge in question. It was also held that because the Bank - the appellant Central Bank - knew that the situation at the Meridien BIAO was hopeless but nonetheless went ahead to draft the mortgage when it should have seized Meridien BIAO, this indicated bad faith. All in all, the learned trial Commissioner upheld the objections raised by the respondent opining that the Central Bank should have

disclosed - presumably to Messrs Longwe and Raghuraman - that Meridien BIAO was insolvent. In the event, the court held that there was undue concealment of material facts which vitiated the execution of the document. Authorities were cited to this effect and it was the view of the learned trial Commissioner that the respondent would not have entered into an agreement as surety to have its abattoir pledged for the purpose of having Meridien Bank's overdraft converted into a loan if it knew of the insolvency. That being the case and on the totality of the evidence the learned trial Commissioner struck down the mortgage and security in this matter.

The Central Bank has appealed to this court. Four grounds of appeal have been filed . The first was that the trial judge erred in fact and in law by concluding that the plaintiff wrongfully exercised its discretion by permitting Meridien BIAO Bank Zambia Limited (in liquidation) to continue operating when it ought to have seized it due to its insolvent position as this is in total negation of the evidence of the plaintiff on the point and is in disregard of the powers of the plaintiff as enshrined under Section 4 (2) (a) of the Bank of Zambia Act No. 43 of 1996 and as read with Section 94 (2) of the Banking and Financial Services Act No. 21 of 1994. The second ground alleged that the trial Judge fell into error by his failure to address the thrust of the Plaintiff's submissions on the point that matters of internal procedure or management of a company regarding preparation and eventual execution of a security document could not affect an innocent third party such as the plaintiff in this matter. Third that the Judge erred in fact by concluding that the plaintiff was considering lending Meridien BIAO Bank Zambia Limited more money when the point at issue at the material time was really one of converting an existing overdraft into a loan so as to render some financial relief to the operations of the Bank in question. And fourthly,

that the trial Judge erred when he concluded that there was undue influence or pressure in the execution of the security document herein as this is not supported by the evidence on record. We heard elaborate arguments and submissions from Mr. Hamir and Mr. Malama. Mr. Hamir began by pointing out that the appellant supervises the banking sector and also operates accounts for commercial banks upon terms determined by its board. It was pointed out that in terms of Section 42 (3) of the Bank of Zambia Act No. 43 of 1996, there is conferred statutory authority to advance money to a bank. The Bank of Zambia, it was pointed out, took measures in relation to the Meridien BIAO authorising an overdraft. It is this overdraft which was converted to a loan. On 2nd February, 1995 the Central Bank secured a negative pledge from Meridien International Bank Limited not to encumber its assets to another. This appears in the bundles of the documents before the court. It also granted an additional loan of 5 billion secured on a charge on Meridien Centre which is presently the COMESA Building in Lusaka. The appellant obtained personal guarantees from Mr. Sardanis as the record shows and also negotiated for group support from Meridien as well as securing a pledge of the proceeds of the sale of the Chibote Abattoir. All this, Mr. Hamir pointed out, appears in the bundle of documents before the court. The Abattoir is registered in the name of the respondent company and was valued at 8.4 million US$. The Central Bank also received a resolution of the Directors of ITM International SA to pledge the proceeds of the abattoir once sold. Again as Mr. Hamir pointed out in the documents, one Mr. Stylianou was a member of the Board of the ITM as well as of the respondent company. The Zambian Meridien had an account with Meridien International in London to the value of about K9 billion. Mr. Hamir pointed out that it could not

retrieve this money from London because Meridien International Bank Limited was not in a position to remit the money to Zambia, as the documents showed. To compensate for the failure to remit the money to Zambia Meridien International Bank Limited agreed to transfer group assets from the Chibote Group of Companies to Meridien Bank in order to enhance its assets base. All this it was pointed out, appeared from the documents before the court. It would then have more assets than liabilities to forestall liquidation, so the submission went. Similarly the pledge of the proceeds of the abattoir constituted a payment by a sister company of the entire loan owed by Meridien to the appellant. The economic effect, Mr. Hamir argued, was that Meridien would not dip into its pocket and its assets would increase by that amount. These were efforts made to forestall the liquidation of Meridien, Mr. Hamir pointed out. The effort failed because the depositors made a run on the bank. The record shows there were about forty thousand depositors according to the bundle of documents. Again it was pointed out that in the respondent's bundle there was shown an agreed programme of action under which Meridien executed a loan agreement. Turning to ground one Mr. Hamir argued that the learned trial Commissioner was wrong to hold that the respondent's Board did not authorize the transaction. He argued that the respondent belonged to a group of companies and that as far back as 1992 68% shares were worth 31 million dollars which means a 100% would be worth 45 million dollars which in kwacha terms was over K113 billion. He argued that any manager would have been familiar with the procedures on the resolutions required by the company so that when Mr. Longwe and Mr. Raghuraman testified concerning the resolution Mr. Longwe was Chairman of the respondent and a Director while Mr. Raghuraman was a very senior person with a lot of experience. He submitted that

they knew about the need to secure a resolution where required. Mr. Hamir further submitted that a resolution is an internal matter of the company. So was the share sale agreement and the management agreement which the respondent relied upon. It was not for consumption of outsiders who would not know of any limitation of the Directors not to do certain things without Oakvale's consent. Mr. Hamir relied on clause 4.2 of the agreement in the record. He submitted that as Chairman and a senior Director, Mr. Longwe was familiar with the internal documents. It was also submitted that the two officers would be familiar with the articles of Association of the Company concerning the resolutions and the affixing of the company seal, just as they would be familiar that Section 195 of the Companies Act required a resolution for affixing the seal. The submission was that any outsider perusing the articles would see that the articles empower the respondent to encumber its assets for the debt of a third party and the Directors are vested with that authority. It was Mr. Hamir's submission that a mortgage duly executed was an affirmation of Section 195 of the Act that a company has authorised that transaction. He pointed out that the learned trial Commissioner appears not to have addressed his mind to these matters. The explanations offered in the witness box by the two witnesses for the defence who appeared to have repented of the transaction that they had been cowed into signing and affixing the seal ought not to have been found to have been credible. Mr. Hamir submitted that it could not be true that they did so because of Mr. Sardanis or ITM International or because of persons in Mr. Sardanis's office. Mr. Hamir argued that, as Mr. Longwe claimed he was a nominee of Oakvale which held 68% of the shares and if ITM owned only 32% of the shares it was not feasible that a minority shareholder could intimidate the nominee of the majority shareholder. He suggested that the

whole of the story should have been found to be incredible. Oakvale's indebtedness, it was pointed out, was not to Sardanis or ITM but to Meridien Bank International. Mr. Longwe and Mr. Raghuraman did not owe anything to Mr. Sardanis or ITM International SA. Mr. Longwe, it was pointed out, said in his affidavit that they were paying ITM International SA which was not true as the document showed; they were in fact paying the Meridien International Bank. Similarly evidence of ignorance about the pledge was also incredible, Mr. Hamir submitted. Outside valuers came and valued the Abattoir at 8.4 million dollars and negotiations were taking place to sell so that money could be paid to the appellant. The supplementary record of appeal showed the guarantee and loan agreement Mr. Longwe and Mr. Raghuraman signed. They signed a document containing the pledge but came to testify that they had no knowledge of the pledge. He submitted that this was not to be believed. The Title Deeds had to be retrieved from the Building Society and it was Mr. Hamir's submission that in all these circumstances the two officers should not have been heard to say that they did not know what they were doing or that they did so against their wishes. Finally on this point Mr. Hamir argued and submitted that the law today is intended to take care of situations where directors wish to raise internal want of authority to defeat a third party claim. He pointed out that from the times of the **Royal British Bank –v- Turquand (1843-60) ALL ER Reprint 435** and now under Sections 23 to 25 of the Companies Act it is no longer possible to raise internal irregularities against an innocent third party. We interpose at this stage to quote the relevant sections of the Companies Act, CAP 388. Sections 23, 24 and 25 of the Companies Act read-------

"23. No act of a company, including any transfer of property to or by a company, shall be invalid by reason only that the act or transfer is contrary to its articles or this Act.

24. No person dealing with a company shall be affected by, or presumed to have notice or knowledge of, the contents of a document concerning the company by reason only that the document has been lodged with the Registrar or is held by the company available for inspection.

25. A company or a guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company that---

(a) any of the articles of the company has not been complied with;

(b) a shareholder agreement has not been complied with;

(c) the persons named in the most recent annual return or notice under section *two hundred and twenty-six* are not directors of the company;

(d) the registered office of the company is not an office of the company;

(e) a person held out by a company as a director, an officer or an agent of the company has no authority to exercise the powers and perform; the duties that are customary in the business of the company or usual for such a director, officer or agent;

(f) a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or genuine; or

(g) the financial assistance referred to in section *eighty-three* or the sale or disposal of property referred to in section *two hundred and sixteen* was not authorised; except where that person has, or ought to have had by virtue of his position with or relationship to the company, knowledge of the fact asserted."

It appears, as Mr. Hamir submitted, that these sections which are for the protection of third parties were given shortthrift by the learned trial Commissioner who decided to

deal with this case only on the basis of the issues which had been raised by the respondent. Mr. Malama's reply on this particular point consisted only in a suggestion that the appellant was trying to argue a case which had not been submitted to the court below and also in reiterating the grounds that had been put forward to support the contention that the mortgage was invalid as against the respondent. The learned trial Commissioner had in fact recited the fact that the submissions had been made on behalf of the Central Bank concerning the position of third parties vis-à-vis the internal arrangements and the internal management of a company and the complaint in the ground of appeal is that the learned trial Commissioner found the sections of the law and those submissions to be inapplicable.

The learned trial Commissioner made much of the relationship between a surbordinate and a superior in the persons of Mr. Sardanis vis-a-vis Mr. Longwe and Mr. Raghuraman. The corporate entities engaged in these transactions indeed could only have had knowledge or ignorance or fear or influence through the human beings managing their affairs; and the question which was not discussed but which was in fact staring the court in the face was whether those with a controlling voice and interest in a company could not bind the corporate entities which in common language they "own". In other words it was not discussed, it seems to us, whether the beneficial owners of a company, that is, the beneficial owners of shares have or do not have overriding authority over the company's affairs and even over the Board of Directors: See for example **Van Boxtel -v- Kearney (1987) ZR 63**. This question arises not only because of the provisions of the Companies Act which we have set out but also because the complainants in the case were clearly nominees and were clearly subservient and under the domination of Mr. Sardanis and others at the head office

who appeared to assert and exercise an overriding authority. The case of Van Boxtel and also the case of re: **Pan Electronics (1988-89) ZR 19** are authority for proposition that the beneficial owners especially shareholders, enjoy as a matter of right overriding authority over a company's affairs. Theirs is the controlling voice over the wishes of mere directors and nominees. We will be returning to this point a little later. For now to continue with the narrative we heard submissions and arguments from Mr. Hamir on the rest of the grounds advanced by the appellant. Thus in relation to the second ground which related to misrepresentation it was his submission that the learned trial Commissioner was in error to say that the respondent was not informed of the insolvency of Meridien BIAO Bank. He said the state of Meridien's financial plight was a notorious fact and pointed at the fact that there was a run on the Bank. He also drew attention to the evidence of two directors of the respondent who said they knew that the Bank of Zambia was trying to bail out Meridien. Mr. Hamir further pointed out that the directors in the respondent company's holding company were Mr. Stylianou, Mr. Simpungwe and Mr. Temba. He drew attention to the fact that even before Oakvale came in and thereafter they continued as directors. He submitted that through these persons the respondent would have had a good idea about Meridien's plight. The two directors who testified confirmed that Meridien BIAO Bank was a sister company and that both that Bank and the respondent belonged to the Chibote Group. Mr. Hamir pointed out that it was unusual for a trading company to sign a security demanded by the Bank of Zambia to guarantee a Bank. He submitted that the transaction was extraordinary and that persons of Mr. Longwe's and Mr. Raghuraman's expertise would have fully realized the position. He further submitted that in the case of Banks, they are not obliged to

disclose their client's affairs. He relied on the case of **National Provincial Bank of England Limited -v- Lord Glanusk (1911-1913) All ER Reprint page 810.** Mr. Hamir concluded on this ground by submitting that it was an error for the learned trial Commissioner to find that the respondent was not informed. Under the third ground, Mr. Hamir submitted that the court below erred to conclude that under Section 86 of the Banking and Financial Services Act, CAP 387, Meridien BIAO Bank was insolvent and should have been seized by the appellant. He argued that there was no evidence that customers' cheques were not being honoured. He pointed out that the Bank of Zambia converted the overdraft to a loan and deferred payment for another three months to allow the Abattoir to be sold. This, he submitted, was not an act of insolvency. Mr. Hamir pointed out that Meridien was in business; Central Bank did not then call in the overdraft and that Section 43 of the Bank of Zambia Act allowed the appellant to make loans. He complained that the reference to bad faith permeates the whole judgment. He argued that the appellant was trying to forestall insolvency and lent K15 billion. The finding that the Bank of Zambia should have shut the Bank on 15th February 1995 was a misdirection, so the submission went. Under ground four, Mr. Hamir submitted that the court erred to say the witnesses acted under undue influence and fear of Mr. Sardanis. He said the evidence did not support the conclusion, not even that Sardanis was too powerful. He submitted that the Directors signed freely and voluntarily to assist a sister company. They made a deliberate decision. The two, he argued, were mere nominees. Mr. Hamir submitted that according to the records the Hon. B.Y. Mwila guaranteed Oakvale's purchase price and had everything to lose, he was more powerful than Mr. Sardanis. Under another ground he submitted that the learned

trial Commissioner was in error to say that the use of a company seal under a former name was material. It is the directors who decided to use the seal under the respondent's former names and such use did not invalidate the charge. Mr. Hamir also complained that the learned trial Commissioner had nothing good to say about the appellant and the efforts which the appellant was making to rescue Meridien Bank. He submitted that the attempt to rescue Meridien Bank was made in good faith and it is all very well to come and condemn them after the event simply because the effort did not bear fruit. He pointed out that public money was used in this exercise.

On behalf of the respondent Mr. Malama began by submitting generally that this court should not look at how a case should have been presented and then substitute its verdict for that of the lower court but should look at the way the case was actually presented; the evidence which was called and any evidence that may be allowed later, including the assistance counsel render through their verbal or written submissions. He argued that a litigant should not be allowed to make a case as it ought to have been made below. The court should only look at the matters which are on record. We agree generally with Mr. Malama's observations that indeed this is a court of record and that appeals are conducted based on the record. As a matter of fact, appeals are a re-hearing of the case on the record. Mr. Malama argued that the case concerned a challenge by the respondent to the validity of the mortgage on its property. He reiterated the arguments which were used below. He submitted that a mortgage is a contract like any other contract at common law and that the defences which are available in a contract are available even in a mortgage. Thus misrepresentation vitiates the contract as much as a mortgage. Also, undue influence and duress will also vitiate the contract. He argued that the misrepresentation in this

case was based on the Central Bank's failure to disclose that Meridien was no longer a bankable proposition. He submitted that this was, in old language, fraudulent misrepresentation. The respondent should have been informed through its Board of Directors; the contract ought to have been declared invalid. Mr. Malama argued that the thrust and pillar of the respondent's case was the undue influence which may even be presumed undue influence. He said such undue influence can be presumed in certain relationships including overriding influence. He relies on the case of **Barclays Bank plc vs O'Brien (1993) 4 ALL ER 417** and also the case of **CIBC Mortgages plc vs Pitt and Another (1993) 4 ALL ER 433.** The Barclays Bank case concerned a husband and wife situation and in the leading judgment by Lord Browne Wilkinson the House of Lords discussed the question of undue influence and the various classes which can arise. They considered the class where there is actual undue influence where it is proved affirmatively that the wrong doer exerted undue influence on the complainant to enter into the particular transaction which is impugned. Their Lordships also discussed the class of presumed undue influence which arises because there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. Then of course their Lordships discussed certain relationships such as solicitor and client or medical advisor and patient which as a matter of law raise the presumption of undue influence. Their Lordships further proposed that there may be situations where even if there is no relationship a de facto situation exists of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer. As we said the Barclays Bank case was a husband and wife situation. The Pitt case was another

husband and wife situation and there it was established that there was actual undue influence by the husband over the wife. However, the holding number two in the head note is significant and this reads and we quote-----

> **"(2) However, although the wife had established actual undue influence by the husband, the plaintiff was not affected by it because the husband had not, in a real sense, acted as its agent in procuring her agreement and the plaintiff had no actual or constructive notice of the undue influence. So far as the plaintiff was aware, the transaction consisted of a joint loan to the husband and wife to finance the discharge of the existing mortgage on the matrimonial home with the balance to be applied in buying a holiday home. The loan was advanced to both the husband and wife jointly and there was nothing to indicate to the plaintiff that the loan was anything other than a normal advance to a husband and wife for their joint benefit. The mere fact that there was a risk of there being undue influence because one of the borrowers was the wife was, in itself, not sufficient to put the plaintiff on inquiry. The appeal would therefore be dismissed."**

In this particular case the husband got the wife to sign documents on the security of the matrimonial home and the point of significance, for the purposes of this case, is that even if there was actual undue influence the court recognised the position of the innocent third party who dealt with the husband. Mr. Malama argued that the list of relationships is not closed. He said Mr. Sardanis exerted due influence on Mr. Longwe and he should have informed Mr. Longwe. He submitted that one company can exert undue influence over another through the officials. The onus then shifts to the creditor or the principal to show that that relationship does not exist. He submitted that though the learned trial Commissioner did not specifically allude to the point it was raised and proved. Those to gainsay refused to come to court; there is now equitable agency rather than presumed agency. Whenever a lender wants to rely on a third party mortgage today he has to be on the look out and he cites the Barclays Bank case on this point. He submitted that constructive notice means the

lender must enquire if the third party mortgage or charge has been properly obtained and if the lender leaves it to the principal debtor he does so at his own peril. Mr. Malama submitted therefore that when the resolution came from ITM International SA and not from the respondent, the Bank of Zambia should have been put on enquiry. The Central Bank had failed to rebut the presumed undue influence so the submission went. The third point which Mr. Malama wished to raise was that the Central Bank's discretion not to declare a bank insolvent was a judicial discretion. He argued that Meridien Bank was defunct on or after 17th February, 1995 and that the Bank was not entitled to the charge at all, in law. The court below agreed with the respondent and Mr. Malama's point and submission was that the Central Bank should not have left it to Mr. Sardanis; they should have taken action. The fourth point raised by Mr. Malama concerned bad faith. He submitted that after 17th February, 1995 when it was clear that Meridien BIAO was not in a position to service its obligation the Central Bank surely acted in bad faith.

These then were the submissions and arguments before us. We confirm that an appeal in this court is by way of a re-hearing on the record. We have considered all the points raised and all the arguments and it seems to us that in selecting to deal only with the issues raised by the respondent in resolving this case the learned trial Commissioner fell into error. Accordingly, he did not deal with the points which have been raised in the grounds of appeal. For example, he has not dealt with the submission that matters of internal procedure in the management of a company would not be the concern of third parties. We do have to agree also that the attitude which permeates the entire judgment below was one of undue sympathy for nominees who otherwise would be expected in the normal and usual course to carry out the wishes of

with a superior claim of right or title. Thus, we affirm that those with a superior claim and title such as the beneficial owners of the company have overriding authority over the company's affairs, even over the wishes of the Board of Directors: See the **Van Boxtel vs Kearney case.** We consider that there is nothing in Banking and Financial Services Act in the sections to which we have made reference which prevents the Central Bank from attempting to rescue a commercial bank which is in distress. There is no injunction in those sections which orders the Central Bank to forthwith seize any commercial bank which is in distress. On the contrary, if in the judgment of the regulating authority which is the Central Bank there appears to be room for a rescue to be mounted and for steps to be taken which would forestall the insolvency of a bank, it is in the highest public interest, certainly in the interest of the depositors of the bank, that such a bank should be kept alive. It also appears to us that it is wholly unrealistic, as between a nominee and his principal, that there can be talk of undue influence in carrying out the wishes of the principal. If anything, it is the nominee who stands in a relationship of trust and confidence and who should take account of the best interests of the principal and the beneficial owner who has entrusted him with his property. We have no doubt whatsoever that to find undue influence in these circumstances in relation to a nominee and his principal or superior claimant was completely unrealistic. It seems to us the whole of the attitude of undue sympathy for nominees who should normally carry out the wishes of those with a superior claim of right together with the undue condemnation of an otherwise noble effort which was in the highest public interest to keep afloat a commercial bank which was in distress was a misdirection. It seems to us in the circumstances that the whole of the conclusion by the learned trial Commissioner in favour of the respondent

possibly be supported. The appeal is allowed; the judgment below reversed

In its place we enter judgment for the appellant Central Bank on its claim for possession in order to enforce its security. Costs follow the event and will be taxed if not agreed.

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M.M.S.W. NGULUBE
CHIEF JUSTICE

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D.K. CHIRWA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE