MATCH CORPORATION LIMITED AND DEVELOPMENT BANK OF ZAMBIA AND THE ATTORNEY GENERAL

NGULUBE,C.J., SAKALA, CHAILA, CHIRWA AND LEWANIKA, JJ.S.
3RD JUNE, 1998 AND 2ND MARCH,1999.
(S.C.Z. JUDGMENT NO. 3 OF 1999)

Flynote

Civil procedure - Loans - Secured by floating charge and specifc charge Civil procedure - Imposition of new government policies - Consequent imposition of taxes, increase in electricity tariffs - Levying of Penal Interest - Whether causing appellants defalt in repaying loans Civil Procedure - Principle of Indemnity whether applicable in *casu* - regard given to principle of stare decisis.

Headnote

The appellant had obtained foreign currency and local currency loans from the 1st respondent between 1989 and 1991. The loans were secured by a floating charge and a specific charge over two real property in Luanshya and Lusaka and over plant and machinery. The foreign currency was repayable according to a specific schedule at the rate of exchange of the dollar to the Kwacha prevailing from time to time. The appellant and other borrowers of the 1st respondent soon found themselves in severe distress when the new MMD government introduced liberalised economic policies which saw the Kwacha depreciate dramatically against the hard currencies. Consequently, the borrowers, including the appellant, defaulted on their loans to the first respondent.

Held:
That there was the necessary special relationship between the parties to support the creation of rights of indemnity.

For appellant: M.F. Sikatana , of Veritus Chambers.
For 1st respondent: B. Gondwe, of Development Bank of Zambia.
For 2nd respondent: B. Mumba, State Advocate.

Judgment

NGULUBE,C.J.: delivered the judgment of the court.

It was not in dispute below that the appellant had obtained loans between August, 1989 and March, 1991, comprising a total sum of U.S. $2,279,000 in assorted foreign currencies and K10 Million in local currency for the purchase of plant and machinery needed for the production of calcium carbide. At the time, one U.S. dollar equalled K8.00. The loans were secured by a floating charge and a specific charge over two real properties located at Plot 1320 Luanshya and Plot 5506 Lusaka and over the plant and machinery. The foreign currency loan was repayable in accordance with an agreed schedule at the rate of exchange of the dollar to the Kwacha prevailing from time to time. The appellant and other borrowers of the first respondent soon found themselves in severe distress when the new MMD Government introduced liberalised economic policies which saw the Kwacha depreciate dramatically against the hard currencies. Counsel for the appellant and indeed a witness called on their behalf at the trial spoke of the manufacturing industry in this country suddenly facing a crisis induced by the new Government policies which saw the imposition of taxes on imported new materials, huge increases in the electricity tariffs, and the free inflow of cheaper imported finished products

from countries which still subsidise and protect their industries. The witness painted a portrait of policy changes that left a trail of destruction in the manufacturing sector. The exchange rate of the Kwacha to the dollar soon made most foreign currency loans virtually unmanageable and almost unrepayable. The borrowers defaulted. It was pointed out in the arguments that this state affairs was compounded by the levying of penal interest, the kind of interest which this Court has recently pointed out cannot be allowed: See for example **Union Bank Zambia Ltd v Southern Province Co-operative Marketing Union Ltd, S.C.Z. Judgment No. 7 of 1997.** This means that we can immediately reject the arguments in this appeal by Counsel for the bank that penal interest was justified allegedly because the African Development Bank - one of the sources of the foreign currency lent to borrowers - itself exacted some kind of penal element of 10% per annum on all the bank's own late payments. This means that the state of the account and of the arrears position will have to be recalculated to expunge anything by way of or attributable to the inclusion of penal interest. This aspect of the appeal has to be allowed. However, to continue with the narrative, the bank and the Government through the Ministry of Finance recognised the difficulties for the borrowers brought about by the fluctuations in the exchange rates of the Kwacha to hard currencies. Thus, it was in evidence that the Government - a major shareholder in the bank - had intervened in 1986 and had arranged through the Central bank (the Bank of Zambia) to indemnify the borrowers of the bank against losses due to exchange fluctuations. It was also in evidence that by letter dated 25th February, 1993, written by the Permanent Secretary at the Ministry of Finance, the Government undertook to indemnify the borrowers against the exchange losses they would suffer in servicing their loans on account of fluctuations which had now wrought a desperate situation.

The evidence on record showed that it was none other than the respondent bank which made spirited submissions to the Ministry of Finance to revoke the offer of indemnity. It is a matter of surprised and comment that the bank fought so hard to slam the door on a possible solution to the predicament faced by the borrowers and the bank itself. Ostensibly, this was because it would have cost the Government too much - K10 billion in fact - to bail out the borrowers. As Counsel for the appellants pointed out and the Court below wryly observed, this was the same Government that subsequently spent K90 billion to try to bail out Meridien BIAO Bank, a private bank. The result was that by a letter dated 15th March, 1993, addressed to the respondent bank by the Deputy Minister of Finance, the indemnities were revoked the learned trial Judge in this case held that the indemnity had become effective and the Government became liable to absorb and meet the exchange losses prior to the date of the revocation. The quantum of the Government's obligation remained to be valued.

The bank had sued the defaulting appellant for an order for possession and sale of the plant and machinery and the recovery of all monies owed by the borrower. In rather solomonic fashion, the learned trial Judge did not grant all those orders but instead directed that the Government meet its obligation while the appellant also do pay within a month after the assessment their portion to be assessed by the Deputy Registrar which would include the principal any exchange losses after 15th March, 1993. The learned Judge also ordered that in accordance with the Lome IV Convention the parties do re-negotiate in order to lessen the burden on the borrowers.

There is an appeal and cross appeal.

In this case, we were asked to reconsider our decision in an earlier case between another borrower and the bank, that is the case of ***Vaccum Forming Industries Ltd and Other v Development Bank of Zambia*** **S.C.Z. Appeal No. 88 of 1994** in which the judgment of this Court was rendered on 16th July, 1997. That case which was on all fours was tried before a different Judge who came to a different conclusion on the indemnity and who tried the case on affidavit evidence only. On the principles of stare decisis, Counsel recognised that our earlier

decision would be binding unless good reason exists to depart from it or to effect a variation. As a matter of fact, Counsel attempted to arrest our first judgment until the cases could be consolidated and a single decision rendered. However, that was not to be. The principle of stare decisis was considered in ***Paton v Attorney General and Others,*** **(1968) Z.R.185.** The leading judgment with which the other two members of the bench agreed was delivered by Doyle, J.A., as he then was and he had this to say, at p. 190:

> **"Mr. Ryan, for the defendant cross-appellant, first argued that *Thixton's* case was wrongly decided. He submitted that this court was not bound by its previous decisions. The United States Supreme Court, the Supreme Court of the Republic of Ireland, the ultimate courts of Cananda, Austrilia, South Africa and most European countries hold themselves free, if they think it right to do so, to refuse to follow a previous decision. Recently, the House of Lords in England has abandoned its rigid adherence to the rule of stare decisis. I have no doubt that this court as the ultimate Court of Appeal for Zambia is not absolutely bound by its previous decisions. It can, however, only be for very compelling reasons that the court would refuse to follow a decision of the court and only where the court clearly considered that the previous decision was wrong. The relaxation of the rule is not its abandonment and ordinarily the rule of stare decisis should be followed. Abandonment of the rule would make the law an abyss of uncertainty. Mr. Ryan urged that it was open to this court to refuse to follow a previous decision which was not unanimous. That , in my view, is not a compelling reason. *Thixton's* case was fully argued and it has certainly not been shown that it was clearly wrong. Indeed I, as the dissenting Judge in that case, recognised and recognise that the result which flowed from the majority decision was more in accord with natural justice than that which flowed from the view of the law which I felt compelled to take. This point therefore fails."**

Again in ***Kasote v The People*** **(1977) Z.R. 75,** this Court not only affirmed the importance of the principle of stare decisis to a hierarchical system of Court (whereby lower Courts are bound to follow the latest of any superior Court's decision on a point) but also affirmed that being the final Court in Zambia this Court adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and, secondly, if so, whether there is a sufficiently strong reason to decline to follow it. Again *in* ***Abel Banda v The People*** **(1986) Z.R. 105,** this Court had to resolve which of two conflicting decisions represented good law and having made that choice we had to consider the principle of stare decisis. We had this to say at page114:

> **"The problem before us therefore is that we have made case law which we have now realised is indefensible.The principle of stare decisis requires that a court should abide by its ratio decidendi in past cases.Put simplistically inorder to have certainty in the law decisions of courts should be consistent and should not be so readily changeable as to make it at any given time what the law is on a given issue. In order to uphold this principle therefore past decisions should not be exploded for the sole reason that they are wrong. Courts should stand by their decisions even if they are erroneous unless there be a sufficiently strong reason requiring that such decisions should be overruled. As this Court held in *Kasote v The people*.**
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> **The Supreme Court being the final court in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly if so whether there is a sufficiently good reason to decline to follow**

it. We have already pointed out that *Chibozu* was wrongly decided and the next question for us to consider is whether there is sufficiently strong reason for us to decline to follow the decision in that case, it is our considered view that justice was not served in *Chibozu* because the symbolic scales of justice mean that just as an accused person should not be convicted unless there is sufficient and cogent evidence proving his guilt beyond reasonable doubt, the State also should not be made to lose a case unless the evidence it adduces cannot, in law, support a conviction; that way the scales are balanced. On this basis we come to the conclusion that sufficiently strong reason does exit to warrant the overruling of *Chibozu* on the basis that it is a non sequitur. We therefore hold that *Chibozu* is no longer good law to the extent considered in this judgment and it is therefore overruled."

In the instant case, the learned trial Judge had found that there was an effective indemnity valid up to the date of revocation and there was a partial frustration of contract. In the *Vacuum* Case, the learned trial Commissioner found that the revocation of the indemnity meant that there was none given *ab initio* and he found that there was no frustration of the contract; opining to the effect that the policies of Government though resulting in casualties could not be a frustrating event. In this case (where Counsel for the appellant urged us to go so far as to find that there was an indemnity which was not validly revoked) the learned trial Judge had taken the trouble to discuss the law of indemnity in some detail. In particular reference was made to Vol. 20 of Halsbury's Laws of England 4th Edition wherein the creation of rights of indemnity is discussed. In the *Vacuum* Case, the learned trial Commissioner mostly gave a political lecture on the inevitability of casualties in a liberalising economic environment. Be that as it may, this Court has already affirmed the learned trial Commissioner in the *Vacuum* Case. After discussing some authorities dealing with estopppel as well as with accord and satisfaction, we concluded (at J7 of the transcript of the judgment) as follows:

> **"In the present case, the Permanent Secretary's letter offered some indemnity but what consideration did the appellants offer to the defendants for them to enjoy release? The facts did not show that the appellants had offered any consideration or that there was true accord and satisfaction as discussed in the cases already referred to. Since there was no consideration or equitable right, the appellants cannot rely on the principle discussed in the High Trees case. We are therefore satisfied that the learned trial Commissioner did not misdirect himself in arriving at the conclusion that there was no indemnity."**

Was this conclusion so wrong that we must revisit the *Vacuum* Case and say that it was wrongly decided? The answer appears to lie in the circumstance that the Court had first of all to make a finding on the validity of the indemnity since there was no direct ordinary kind of contract as such between the borrower and the Government under which the latter would have specifically agreed to make good a loss suffered by the former. Indemnity, in the usual course, denotes a contract by which the promisor undertakes an original and independent obligation to indemnity, as distinct from a collateral contract in the nature of a guarantee by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee.

Furthermore, as the learned authors of Halsbury's Laws (Vol.20) put it at paragraph 307, rights of indemnity may arise either from contract, express or implied, from an obligation resulting from the relation of the parties or by statute. The decision in the *Vaccum* Case proceeded on the footing that the Government was a total stranger to the contract. Unlike in that case, there

was in this case detailed oral and documentary evidence from which it emerged that the Government was not, after all, the complete stranger it was thought to have been. There was a term in the contract that is Clause7 (a) in the second schedule which made the loan offer subject to the approval of the refinancing agency as well as of the Minister of Finance. Mr. Sikatana has drawn our attention to the role played by the Government even in the past. The bank itself was established by statute in the words of the preamble "to assist in the economic development of Zambia." Under the Development Bank of Zambia Act, appointments to the most Senior Management positions and of auditors, the directorships and the non-Governmental shareholdings all require the approval of the Minister. Indeed under the Act, the funds of the bank include such money as may be appropriated by Parliament. In short, the Minister has by law oversight of the bank's operations.The same Minister has oversight over the Bank of Zambia which was directed to implement the decision of Government to absorb the bank's losses through foreign exchange fluctuations. The Minister did not simply offer to indemnify the borrowers; the Minister in fact offered to bail out the bank itself which was then directed to pass on the benefits accruing to the bank from such arrangement to the borrowers. The letter of 19th February, 1993 from the Ministry's Permanent Secretary to the bank was in the following terms:

"MF/101/16/45

19th February, 1993

The Managing Director
Development Bank of Zambia
P.O Box 33955
LUSAKA.

LOSSES ARISING OUT OF EXCHANGE RATE FLUCTUATIONS: DEVELOPMENT BANK OF ZAMBIA

You will remember that last year the Minister of Finance agreed on behalf of Government to accept all your exchange losses up to and including 1st October, 1992. It should however be understood that the above acceptance is subject to the following conditions:

(i) This Ministry does not expect borrowers of your bank to bear the full loss arising out of exchange fluctuations. In other words, the benefits accruing to your bank as a result of Government's acceptance of liability for all exchange losses up to and including 31st October, 1992, should be passed on to your clients.

(ii) Where borrowing companies fail to meet their repayment commitments. You should convert the outstanding debts into shares which will be held in those companies in the name of your bank.

(iii) You should work out a capital enhancement scheme so that shareholders including Government can contribute to strengthen your bank's capital base.

(iv) While borrowing from international sources will be left to the Bank of Zambia, on lending to your bank will be denominated in Kwacha.

(v) Government will not be liable to meet exchange losses arising after the cut-off date which is 31st October, 1992.

1. In this Ministry's view, your bank should not handle smal personal loans which

should be referred to SIDO while large loans should be left with the international community.

2. I am copying this letter to the General Manager of the Bank of Zambia for his information and necessary action.

J.M. Mtonga

PERMANENT SECRETARY
MINISTRY OF FINANCE."

cc: General Manager
Bank of Zambia
P.O Box 30080
LUSAKA."

Some borrowers were informed of the foregoing development. A typical example was the letter of 25th February, 1993 from the Permanent Secretary to one Y. Zumla Managing Director of Vacuum Forming Industries involved in the *Vacuum* case.

This read:

"MFAL/102/14/125

25th February, 1993

Mr. Y. Zumla,
Managing Director,
Vacuum Forming Industries Limited ,
P.O Box 32661

LUSAKA.

Dear Sir,

DBZ LOANS

I thank you for your letter dated 23rd February, 1993. I wish to confirm that we have written DBZ requesting them to pass on the benefit that will be derived from our decision to take over exchange losses to the client. Kindly contact DBZ who will be in a position to brief you on the mechanism of how this will benefit the clients who have suffered exchange losses by servicing their loans to DBZ.

By copy of this letter the Managing Director of DBZ is being informed to expect contact from you so that you could meet him to discuss this matter.

Yours faithfully,

J.M. Mtonga,
PERMANENT SECRETARY (FINANCE)
cc: Mr. G. Mumba,
Managing Director ,
Development Bank of Zambia
LUSAKA"

From the foregoing, it is clear that there was the necessary special relationship between the parties to support the creation of rights of indemnity. Our conclusion in the *Vacuum* case clearly appears to have proceeded from an understandable misapprehension of the facts and the relationship between the parties brought about by the absence of the fuller facts, or of the oral evidence and the documents which were not placed before the first trial Court or before our Court in that earlier case. In the light of the fuller facts and the more detailed submissions here which have demonstrated that Government was not a trial stranger, it is apparent that strong ground exists for revisiting our earlier decision which proceeded from a serious misdirection on fact induced by the non-disclosure of all the facts which led to an erroneous conclusion of law on the validity of the indemnity in the circumstances.There was an indemnity in the terms of the Permanent Secretary's letter to the bank.

The two trial Courts under consideration came to two different conclusions:
The first considered that the revocation letter by the Deputy Minister revoked the indemnity *ab initio* while the second Court found that the indemnity was valid while it lasted until revoked. We have considered the arguments by Mr. Sikatana and Mr. Gondwe. Mr. Gondwe generally supported the trial Court in the ***Vacuum*** case while Mr. Sikatana commended the approach of the trial Court in the instant case but with the submission that the indemnity could in fact not be revoked. We can immediately reject the latter suggestion which was not supported by the terms of the Permanent Secretary's letter. There was in that letter no suggestion that the indemnity would be limitless in extent and duration. The second trial Court was clearly right to find that the indemnity was valid while it lasted and until revoked.The revocation it self followed representations by the bank. The bank's letter of 3rd March, 1993, was in the following terms:

"March 3rd, 1993

Hon. Rev. D. Pule,
Deputy Minister,
Ministry of Finance,
P.O Box 50062

LUSAKA

Dear Sir,

As per our discussion on Tuesday 2nd March 1993, please find attached a paper on exchange losses incurred by DBZ and its clients and possible solutions to the problem. Let me hasten to say that some clients have already been informed of the Government's decision to take-over exchange losses up to the 31st October,1992, cut off date through the Permanent Secretary's office, and as such the options indicated will now be only relevant to exchange losses accumulated as from 1st November,1992, to date. Due to the magnitude of the exchange ate depreciation between November 1st ,1992

and now, clients indebtedness to DBZ has gone up by approximately the amounts that are being written off, as such the options indicated are still relevant.

As indicated in the attached paper; the option of Government taking over exchange losses implies that GRZ will come up with the equivalent of exchange losses in cash to enable DBZ pay off its liabilities on its foreign currency borrowings. Exchange losses attributable to clients up to the cut off date are just slightly above K8.0 billion whereas those attributable to DBZ are K2.0 billion. Thus all in all approximately K10.0 billion is required to finance the exchange loss write off. Whereas the K2.0 exchange loss absorbed can be apportioned amongst DBZ's shareholders, B shareholders are likely to accept to absorb the K8 billion attributable to clients. The other factor which is important is the fact that in the loan agreements, clients accepted to undertake the exchange risk and that is why interest rates charged on loans were fixed. It might have been possible in the process of trying to alleviate the burden suffered by the clients to convert the loans in Kwacha and then charge interest rates with a hearing to Zambian interest rates. This would certainly have reduced the amount that is to be absorbed by Government.

The decision also implies that, for those clients who have paid off their loans, in the name of equity and fairness, they will have to be refunded that portion of their repayment which was attributable to exchange rate variations. DBZ's current liquidity position will not permit it to meet these repayments and as such we will expect new cash injection from Government to effect the decision taken.

Due to the fact that the decision has already been communicated to clients, I am humbly requesting that you convene a meeting as soon as possible, so that we can discuss the attached paper and come up with a solution for exchange losses that have accrued after the 31st October,1992, cut off date as well as the modalities of effecting the decision taken in as far as it relates to DBZ liabilities.

Yours faithfully,

GERSHOM MUMBA

cc Hon. E. G Kasonde, MP -Minister of Finance
cc Hon. D. Chitala, MP -Deputy Minister of Finance
cc Mr. J.M. Mtonga - Permanent Secretary, Ministry of Finance."

Hon. Pule's reply of 15th March, 1993, was in the following terms:

"MF/101/8/8/Sec
15th March ,1993.

Mr. G..M.B. Mumba,
Managing Director,
Development Bank of Zambia

10101 LUSAKA

Dear Mr. Mumba,

FOREIGN EXCHANGE LOSSES INCURRED BY DBZ AND ITS CLIENTS

Please refer to the your letter dated 3rd March,1993, and our consequent meeting attended by the Permanent Secretary and yourselves, regarding the above subject. The Government has carefully looked at this long outstanding issue and I wish to state the Government's final policy decision in this regard as follows:

(1) In view of the magnitude of the amount of foreign exchange losses involved, the Government is not in a position to absorb exchange losses incurred by DBZ and/or its clients. Current and foreseeable future Government budget constraints do not give chance to the Government absorption of such exchange losses. Further more, it will be contrary to current economic policy of phasing out all subsidies, and it would be almost impossible to convince multilateral and bilateral donor agencies on the need to do so.

(2) Notwithstanding the foregoing, the Government as the majority shareholder in DBZ will strive to inject fresh equity capital into the Bank to enable it generate sufficient income to cover any exchange losses that may arise. Minority shareholders will of course be expected to match the Government's injection of fresh capital so as to maintain proportionate balance in shareholding as per current DBZ Act provisions.

(3) In view of the above, DBZ is encouraged to come up with a menu of options like the ones suggested in your paper, intended to give relief to your clients subject to legal and other constraints, especially financial viability in terms of profitability and debt service capability.

This now clarifies the Government's position on the matter and you may wish to convey this message to your clients accordingly.

Yours sincerely,

Hon. Rev. Danny C. Pule, FCCA, FZICA, FCPA: MP
Deputy Minister, MINISTRY OF FINANCE"

The Government policy referred to by Hon. Pule was indeed further borne out by the Government's subsequent actions such as effecting the changes to the Bank of Zambia Act so that the Government – through the Central bank – is no longer legally obliged to determine the parity of the Kwacha nor of the exchange rates (contrast CAP. 360 of the 1995 Edition of the laws with Act No. 43 of 1996). The learned trial Judge in the instant case was on firm ground in the determination that there was for the limited duration found by her the indemnity whose value has yet to be assessed in the Court below.

There were submissions and counter submission on whether the contract had been frustrated by the economic liberation policies. In the view that we take, it was inappropriate to invoke the doctrine of frustration in this case where it could not properly be alleged that the contract had

become impossible of performance and the parties therefore discharged from further performance. The Law Reform (Frustrated Contracts) Act governs frustration and lays down how the rights and liabilities of the parties have to be adjusted. Loosely, speaking, there has to be some sort of restitution which in the present case would clearly not work. On the other hand, the learned trial Judge must have also recognised that it would be inequitable and unconscionable simply to have granted the bank the prayers in its suit even if a Court were disposed to order that the property if repossessed would be in full and final settlement, like an accord and satisfaction. We doubt very much that such a result would be in the interests of the bank even. In ordering fresh negotiations, we presume the learned trial Judge to have been exercising the Court's equitable jurisdiction. It is a jurisdiction of some antiquity. To illustrate this, we can do no better than to quote from Snell's Equity, 29th Edition under the heading "The Equity of Redemption", paragraphs No. 1 and No. 2 at page 391:

"1. Nature of mortgage at common law. By the old common law, the ordinary mortgage was strictly an estate upon condition. There was a feoffment of the land, with a condition (either in the deed of feoffment itself or in a deed of defeasance executed at the same time) providing that, on payment by the feoffer of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on livery of seisin being made, the feoffee became the legal owner of the land, subject to the condition. If the condition was performed, the feoffer re-entered; but if the condition was not performed, the feoffee's estate became absolute and indefeasible as from the time of the feoffment, the legal right of redemption being then lost for ever.

2. The equitable right to redeem. Happily, however, a jurisdiction arose under which the harshness of the old law in this respect was softened without any actual intereference with its principles. The courts of equity left the legal effect of the transaction unaltered but declared it to be unreasonable and against conscience that the mortgagee should retain as owner for his own benefit what was intended as a mere security. They accordingly adjudged that relief against the breach of the condition should be granted. Thus although the mortgagor lost his legal right to redeem, he nevertheless had an equitable right to redeem on payment within a reasonable time of the principal, interest, and costs. At first, the common law judges strenuously resisted the introduction of this new principle, but they were ultimately defeated by the increasing power of equity. In their own courts, however, they still adhered to the rigid doctrine of forfeiture, with the result that the law relating to mortgages fell almost entirely within the jurisdiction of equity."

The relief which equity affords requires that a reasonable balance be struck between the right to redeem within any extended period beyond that stipulated in the contract and the right of the other party to the benefit of the security in case of inexcusable default or in a hopeless case where for instance there is in fact no reasonable prospect of the borrower ever being able to pay. In this appeal, we heard detailed arguments and submissions; we heard how the borrower had used initiative to diversify into a different product from that originally intended; we heard how the borrower was now earning some money in exports. Counsel on both sides appear to have been agreed that there was in this case a reasonable prospect of repayment of the principle and allowable interest if a reasonable extension of time were granted. We heard proposals by the borrower for rescheduling the payments by making a down payment of US $100,000 and thereafter an initial monthly instalment of US $25,000. Quite commendably, we heard from Mr. Gondwe that the bank was no longer intent on the injurious course of repossessing the borrower's property and assets but suspected that the borrower was hiding some pennies and could actually pay a bigger down payment and bigger monthly instalments such as US $60,000. The debate raised the prospect of this Court getting involved in running

litigation, which we do not do. In the event, we consider that the borrower herein should begin to make the payments as they proposed before us with liberty to either party to apply to the Court below for review of the amounts from time to time and for any directions what should happen should there be default by the borrower.

In addition, either party is granted liberty to apply to the Court below for the computation of the indebtedness without a penal element (if such computation be not agreed by the parties) and for assessment of the value of the short – lived indemnity.

In sum, the penal element is to be expunged and time enlarged so as to enable the borrower to pay by instalments as discussed. Save for the variations to the extent indicated and otherwise already adjudged herein, we affirm the learned trial Judge in this action and resile from our decision on the point about the indemnity in the *Vacuum* case. We do not consider that there is a winner or a loser in this appeal where both the appeal and the cross-appeal are largely unsuccessful. Each party will bear their own costs of this appeal.

Each party bears it's own cost
