

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 227/2019  
HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

KV WHEELS AND CONSTRUCTION LIMITED

**APPELLANT**

**AND**

INVESTRUST BANK PLC

**RESPONDENT**



**CORAM : Mchenga, DJP, Chishimba and Sichinga JJA**

**On the 17<sup>th</sup> February, 2021 and 15<sup>th</sup> April, 2021**

For the Appellant : Mr. K. Phiri of Messrs Malambo & Co. for Mr. Sitali of Messrs Butler & Co.

For the Respondents: Mr. N. Nchinto and Mr. C. Hamwela of Messrs Nchinto & Nchinto.

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**JUDGMENT**

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**CHISHIMBA, JA, delivered the Judgment of the Court.**

**CASES AUTHORITIES CITED:**

1. Southland Rubber Co. Ltd v Bank of China (1997) HKLRD 1300
2. Equitable Trust Company of New York v Dawson Partners Limited (1927) LLR 49.
3. Zulu v Avondale Housing Project Limited (1982) ZR 172
4. The Attorney-General v D.G. Mpundu (1984) Z.R. 6

5. Fortis Bank v Indian Overseas Bank (2010) Lloyds Rep 227
6. Discount Records Limited v Barclays Bank Limited (1975) 1 Lloyd's Rep. 444
7. Malas and Another (T/A Hamzeh Malas and Sons) v British Imex Industries Limited (1958) 1 All ER 262
8. Bulgrains and Company limited v Shinhan Bank (2013) All ER (D) 339
9. KV Wheels and Construction Limited v DBZ Appeal No. 123 of 2016
10. R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd (1977) 2 All ER 862

### **LEGISLATION REFERRED TO:**

1. Uniform Customs and Practices for Documentary Credit Rules (UCP 600)

### **OTHER WORKS REFERRED TO:**

1. Halsbury's Laws of England, Vol. 48, 5<sup>th</sup> Edition.
2. Goode on Commercial Law, 4<sup>th</sup> Edition (2009).

## **1.0 INTRODUCTION**

1.1 This is an appeal against the judgment of the Hon. Mrs. Justice K. E. Mwenda-Zimba dated 19<sup>th</sup> November, 2019 which dismissed the claims brought by the appellant.

## **2.0 BACKGROUND**

2.1 The background to the appeal is that the appellant sought to acquire a block and paver-making machine (herein after "the machinery") from an Italian firm known as Sparts International SRL as per Offer No. 329/11-M8. Subsequently, Sparts

International SRL issued a proforma invoice No. 97B for the total purchase price of US\$900,000.00 to the appellant. The terms of payment on the proforma invoice were that 30% of the purchase price or US\$270,000.00 was to be paid upfront as down payment, and the balance of 70% or US\$630,000.00 was to be paid via an irrevocable letter of credit payable at sight against a bill of lading and packing list of goods.

- 2.2 To acquire the machinery, the appellant applied for and was offered a medium term loan facility of Kwacha equivalent of USD\$1, 179, 296.00 from the Development Bank of Zambia (herein after “DBZ”) as per facility letter dated 11<sup>th</sup> November, 2012.
- 2.3 In a letter dated 29<sup>th</sup> November, 2012, DBZ wrote to the respondent requesting it to issue an irrevocable letter of credit from a reputable bank. The terms of issuance of the letter of credit were that DBZ would pay 30% of the invoice value or US\$270,000.00 upfront as down payment, with the balance of US\$630,000.00 or 70% of the invoice value being paid through an irrevocable letter of credit to be opened on behalf of the appellant by the respondent. Other conditions were that DBZ was to approve the terms and conditions of the letter of credit.

- 2.4 In a letter dated 26<sup>th</sup> April, 2013, the respondent informed DBZ that it was in receipt of compliant shipping documents for the letter of credit from Citibank of New York being the bill of lading, packing list, warranty certificate, commercial invoice, certificate of origin and certificate of insurance. DBZ responded instructing the Respondent to go ahead and make payment to Sparts International SRL. Subsequently, the respondent issued a letter of credit in the sum of US\$630,000.00 as instructed by DBZ and as per the terms of the proforma invoice with an insurance cover of 110% of the CIF value. The letter of credit, which was governed by the UCP 600 Rules, was honoured and USD\$630,000.00 was paid to Sparts International SRL.
- 2.5 The commercial invoice issued by Sparts International SRL was in the sum of US\$630,000.00 while the certificate of insurance was for the insured amount of US\$693,000.00 being 110% of the commercial invoice value.
- 2.6 Regrettably, Sparts International SRL only shipped part of the equipment and was declared bankrupt. As the appellant failed to service the loan facility, DBZ brought an action for payment of the outstanding loan and obtained favourable judgment. The appellant then appealed to the Supreme Court which, in

upholding the High Court judgment, held that “issuing bank” in that case, meant the respondent herein.

### **3.0 CLAIM IN THE COURT BELOW**

3.1 Arising from the Supreme Court decision, the appellant proceeded to commence an action against the respondent by way of Writ of Summons, endorsed with the following reliefs:

- 1) USD\$630,000.00 being the amount which was paid by the Defendant to Sparts International SRL on or about 26.04.2013 and debited to the Plaintiff's Account No. 36928927 held at Development Bank of Zambia, contrary to the terms and conditions of the letter of credit IBP/LC/2012/13 issued by the Defendant bank on behalf of the Plaintiff as the shipping documents presented by Sparts International SRL were non-compliant to the said letter of credit;*
- 2) Damages for loss of business occasioned to and suffered by the Plaintiff as a result of the non-delivery of the rest of the equipment which should have been delivered in a single shipment under the letter of credit IBP/LC/2012/13;*
- 3) Special damages for loss suffered by the Plaintiff whereby its assets and properties which had been pledged as security for the loan from DBZ under the facility letter dated 17<sup>th</sup> August, 2012 have been seized by DBZ; and*
- 4) Interest and costs.*

### **4.0 DEFENCE BY THE RESPONDENT**

4.1 In the court below, the respondent resisted the claims against it by relying on its pleadings. In the defence it filed, the

respondent averred that the letter of offer, bill of lading and letter of credit (payable on sight) specified that they related to a fully automated block making plant complete with a batching plant, and that in any event, the duty to ship in full was always on the seller, and not the respondent. It was further stated that the respondent sought approval for the payment from Development Bank of Zambia through which the appellant had procured the letter of credit and the approval was given in writing by a letter dated 3<sup>rd</sup> May, 2013 on which basis the respondent made payment. The respondent further averred that the documents were also cleared by City Bank as being clean before payment was made to the seller.

- 4.2 In its final submissions in the court below, the respondent submitted that the appellant had failed to establish its case against the respondent because Article 34 of the UCP 600 Rules absolves a bank from liability for problematic documents. In this case, the respondent could not be held liable for any inaccuracy, impropriety or otherwise of the shipping documents issued by Sparts International SRL.
- 4.3 Secondly, the respondent contended that the Development Bank of Zambia was the only instructing party in the opening

up of the letter of credit. That the respondent was further instructed to pay Sparts International SRL after opening the letter of credit. Therefore, it was argued that the appellant is a complete stranger to the letter of credit and cannot sustain a cause of action against the respondent on the basis of the letter of credit.

- 4.4 The third argument advanced by the respondent in the court below was that the appellant's loss, if any, was a result of Sparts International SRL in not delivering the goods bought, which situation could not be attributed to the respondent. This is because Sparts International SRL had a duty to ensure delivery. The failure to deliver the goods contracted is not one for which the respondent can assume liability.
- 4.5 Fourthly, the respondent submitted that the description of the goods on all the documents provided to the respondent did not suggest part shipment as the description was the same on all the documents.
- 4.6 Lastly, the respondent submitted that there was no relationship between the acts complained of and the damage allegedly suffered as the damage was as a result of the non-servicing of the DBZ loan. That the respondent had nothing to do with this

default on the part of the appellant just like it had nothing to do with the non-delivery of goods by Sparts International SRL. Therefore, it was contended that the damage complained of is too remote to be properly attributable to any alleged acts on the part of the respondent.

#### **5.0 EVIDENCE AND ARGUMENTS IN THE COURT BELOW**

5.1 At trial, the evidence of the appellant was that while the description of the machinery to be purchased in the offer letter, packing list and bill of lading marched, there was a discrepancy in the commercial invoice and proforma invoice in the amounts appearing being US\$900,000.00 and US\$630,000.00 respectively. The appellant submitted that since the proforma invoice indicated the amount of US\$900,000.00, the certificate of insurance ought to have reflected the sum of US\$990,000.00 being 110% of the CIF value.

5.2 Therefore, the contention by the appellant was that the respondent was responsible for the losses suffered as it did not pay in accordance with the letter of 29<sup>th</sup> November, 2012 from DBZ in that the description of the goods was referring to the offer letter.

- 5.3 It was argued that the **Uniform Customs and Practices for Documentary Credit Rules (UCP 600)** applied to the letters of credit issued by the respondent on behalf of the appellant. Therefore, in terms of Article 4(a) of the UCP 600, the doctrine of strict compliance had been incorporated stipulating that all parties concerned in a letter of credit transaction should deal with documents and not with goods or services to which the documents relate. In this case, it was submitted that field 43P appearing on the letter of credit meant that part shipment was not allowed but that the respondent went ahead to pay and was thus liable for the loss suffered by the appellant. Therefore, the view by the respondent was that as long as the description of the goods was the same on the documents, then there was compliance is wrong as the sale was not by description but subject to the letter of credit.
- 5.4 On the commercial invoice, the argument was that the letter of credit required it to be signed and covering goods "as per proforma invoice No. 97b" whose value was US\$900,000.00 instead of US\$630,000.00 appearing on the letter of credit. With respect to the certificate of insurance, it was submitted that what was presented only covered 110% of the US\$630,000.00

instead of 110% of US\$900,000.00 as stipulated under Article 28 of the UCP 600 Rules. These discrepancies were said to be fundamental and went to the root of the letter of credit. According to the appellant, upon the respondent opening the letter of credit on behalf of the appellant, a contractual relationship was created between them with the conditions in the letter of credit forming the basis of the contract between the parties.

- 5.5 On behalf of the respondent, it was submitted in the court below that Article 34 of the UCP 600 absorbs a bank from liability for problematic documents. For this reason, the claims could not be sustained as they were based on the accuracy, propriety or otherwise of the documents and description of the goods on the documents from Sparts International SRL.
- 5.6 With respect to DBZ instructing the respondent to pay, it was submitted that the respondent, having acted on the instructions from DBZ, cannot now be found liable for having done so. As such, the appellant could not sustain a cause of action against the respondent based on the letter of credit as it is a complete stranger to the contract created by the letter of credit. With respect to the loss suffered by the appellant as a result of Sparts

International SRL not delivering the goods bought, the argument advanced was that this situation is not attributable to the respondent. The thrust of the submission was that the respondent cannot assume liability for the default of Sparts International SRL.

- 5.7 The fourth argument made on behalf of the respondent in the court below, was that the description of the goods on all the documents provided to the respondent, being the proforma invoice, commercial invoice, packing list and bill of lading, neither suggested part shipment nor shows that the goods as described are not the same. Specifically, it was submitted that the instruction from DBZ of 29<sup>th</sup> November, 2012 to the respondent was to open a letter of credit with "***Actual payment made on sight of Bill of Lading and Packing List of goods stated in the proforma invoice.***" Therefore, the requirements of the "sight only" letter of credit had been met as the description on the documents in issue were generally the same.

- 5.8 The fifth argument advanced in the court below was that there was no relationship between the acts complained of and the damage allegedly suffered by the appellant. The submission was that the damage allegedly suffered by the appellant was as a

result of non-servicing of the DBZ loan, and that the non-delivery of the goods by Sparts International SRL had nothing to do with the respondent.

## 6.0 **DECISION OF THE HIGH COURT**

6.1 Judge Mwenda-Zimba considered the evidence and submissions before her. She took time to generally consider the operation of letters of credit and referred to the learned authors of **Halsbury's Laws of England, Vol. 48, 5<sup>th</sup> Edition at paragraph 242** who define letters of credit as follows:

***"A letter of credit is an undertaking by a bank to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit."***

The learned Judge thus opined that a letter of credit is a form of guarantee given to a seller that the goods will be paid for and that the operation of documentary credits has been harmonised by the UCP 600. Thus, Articles 4(a), 2 and 14 of the UCP 600 imbeds the autonomy of a letter of credit from the underlying contract and the doctrine of strict compliance, respectively.

6.2 The learned Judge found that the issue that fell for determination was whether, in view of the discrepancies, the respondent was in order to honour the letter of credit in the

circumstances of the case. With respect to the discrepancy in the amount appearing on the commercial invoice *viz-a-viz* the proforma invoice, the court below considered the letter of 29<sup>th</sup> November, 2012 with the attached proforma invoice and the letter of credit, and found that they all had the exact description of the goods, and so did all the other documents presented by the beneficiary.

6.3 The learned Judge further found that the discrepancies were with respect to the commercial invoice which stated US\$630,000.00 instead of US\$900,000.00, and the certificate of insurance which provided a figure of US\$693,000.00 instead of the CIF value of US\$900,000.00. She reasoned that the letter of credit only placed a condition that the commercial invoice should cover “goods” as per the proforma invoice without stating what should be the total amount. The court below opined that the documents described the goods to be supplied in the same manner the goods were described on the proforma invoice and the letter of credit.

6.4 With reference to Article 14(d) of the UCP 600, the court below opined that the documents need not be identical and need not conflict while Article 18, on the contents of the commercial

invoice, lays emphasis on the description of the goods and not the amount on the proforma invoice. Therefore, the court found that, on their face, the documents submitted were a compliant presentation of the letter of credit.

6.5 With respect to the certificate of insurance, the court below found that, on its face, the goods covered were the same ones covered in the proforma invoice and letter of credit. However, as the letter of credit required the cover to be for 110% of the CIF value being US\$900,000.00 and not US\$630,000.00, she took the view that the certificate of insurance was not compliant with the letter of credit. As the UCP 600 require the documents to be compliant, “on their face”, “strict compliance” did not require a microscopic view of the documents to establish compliance in view of Article 14(a).

6.6 Fortified by the case of **Southland Rubber Co. Ltd v Bank of China** <sup>(1)</sup> where the court interpreted the meaning of the expression “appear on their face”, the court below reasoned that if the bank could ascertain with ease from the documents presented that they related to a particular letter of credit, then the documents could be said to be compliant on their face.

- 6.7 The court below further noted that except for the commercial invoice, the UCP 600 do not require strict compliance of any document with the letter of credit and further that, the strict requirement for commercial invoices relates to the description of the goods only as per Article 18.
- 6.8 On the question of the alleged contractual relationship between the appellant and the respondent, the court below found that no such relationship existed as the transaction was between the appellant and DBZ while the respondent relied on the authority from DBZ to pay. DBZ requested the respondent to prepare a letter of credit and gave instructions on what documents should be considered before making payment, the said documents being the bill of lading and packing list with no reference to the commercial invoice or certificate of insurance. Further, DBZ gave instructions that the terms of the credit were to be approved by it and not the appellant or respondent.
- 6.9 The learned Judge further reasoned that even if one was to argue that the documents were not compliant, the non-delivery of the goods could not be attributed to the alleged defect in the documents as the beneficiary did acknowledge receipt of the money and kept promising to deliver. She further found that

none of the documents presented suggest part shipment of the goods which was not allowed, and as such, the bank could not be held liable as its obligation to pay arose on presentation of conforming documents, and not delivery of the goods. The reason for this being that a letter of credit transaction is essentially independent of the underlying sales transaction in line with the autonomy principle embedded in Articles 4 and 5 of the UCP 600 Rules. The court below then concluded that the appellant had failed to prove its case on a balance of probabilities.

## 7.0 **GROUNDS OF APPEAL**

7.1 Aggrieved, the appellant now seeks to assail the decision of the High Court by advancing ten grounds of appeal couched as follows:

- 1) The learned Judge in the court below erred in fact and in law when, after finding that there was a discrepancy with the commercial invoice presented by the seller, she went on to hold that the commercial invoice was, on the face of it, compliant with the conditions of the letter of credit notwithstanding that the commercial invoice presented by the seller was for US\$630,000.00 instead of US\$900,000.00 stipulated on the proforma invoice;*
- 2) The learned Judge in the court below erred in law and fact by stating that the letter of credit said nothing about the amount that should be on the commercial invoice, when in fact, every*

*commercial invoice necessarily has to show the value of the goods or services to which it relates;*

- 3) *The learned Judge in the court below erred in fact and in law when she held that the letter of credit only placed a condition that the commercial invoice should cover the goods as per proforma invoice, and that the letter of credit did not refer to the total amount that should be stated on the commercial invoice, despite the letter of credit clearly making reference to the proforma invoice which showed the value of the goods bought by the Appellant;*
- 4) *The learned Judge in the court below erred in fact and in law when, after finding that there was a discrepancy with the certificate of insurance, she went on to hold that the certificate of insurance was, on the face of it, compliant with the conditions of the letter of credit notwithstanding that the said certificate of insurance was for US\$630,000.00 instead of US\$990,000.00 being 110% insurance cover required under the letter of credit;*
- 5) *The learned Judge in the court below erred in fact and in law when she held that the Respondent and the Appellant had no relationship, a finding which not only ignores the relationship in a letter of credit but also contradicts the finding of the Supreme Court in Appeal No. 123 of 2016 where the Supreme Court held that the Respondent was the issuing bank of the letter of credit dated 20<sup>th</sup> December, 2012 herein;*
- 6) *The learned Judge in the court below erred in law and fact when she failed to appreciate the nexus between the non-compliant documents presented by the seller, the non-delivery of the rest of the equipment, and the loss resulting in the foreclosure of the Appellant's properties and that the claim relating to the foreclosed properties was by way of special damages;*

- 7) *The learned Judge in the court below misdirected herself when she focused on the description of the goods and failed to appreciate the seriousness of the discrepancies in the amounts reflected in both the commercial invoice and the certificate of insurance;*
- 8) *The learned Judge in the court below erred in law and fact when she stated that none of the documents presented suggests pre-shipment of the goods. The fact that the certificate of insurance was only for US\$630,000.00 instead of US\$990,000.00 clearly showed that there was part-shipment of the goods;*
- 9) *The learned Judge in the court below erred in law and fact when, despite the Respondent having opened a letter of credit on behalf of the Appellant, she stated that the Respondent was merely obliged to carry out the instructions of the Development Bank of Zambia, a statement which shows that the learned Judge did not appreciate that the letter of credit constituted a distinct and separate contract between the Respondent and the Appellant; and*
- 10) *The learned Judge in the court below erred in law and fact when she held that the Respondent was an agent of the Development Bank of Zambia, a proposition which has been refused by the Supreme Court in Appeal No. 123 of 2016 wherein the Appellant had tried to deploy the same argument over the same letter credit.*

## **8.0 APPELLANT'S HEADS OF ARGUMENTS**

- 8.1 The gist of the contention in ground one is that the court erred in finding that the commercial invoice, notwithstanding a discrepancy, was on the face of it, compliant with the conditions

stipulated in the letter of credit. The discrepancy, in this respect, was in regard with the amount of US\$630,000.00 appearing on the commercial invoice instead of US\$900,000.00 stipulated in the proforma invoice. It was submitted that letters of credit owe their reputation as a reliable payment method to two doctrines being: the doctrine of autonomy and the doctrine of strict compliance.

8.2 With respect to this appeal, it was submitted that the relevant doctrine is that of strict compliance which stipulates that the documents presented by a seller or beneficiary for payment under a letter of credit, should strictly comply with the terms of the letter of credit. Where the documents presented by the seller do not conform to the terms of the letter of credit, the bank should not pay the seller. As authority, the case of **Equitable Trust Company of New York v Dawson Partners Limited**<sup>(2)</sup> was cited where it was held that:

*"It is both common ground and common sense that in such a transaction, the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus*

*financed, cannot take upon itself to decide what will do well enough and will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.”*

8.3 It was submitted further that field or line 46A of the SWIFT MT 700 letter opened by the respondent on behalf of the appellant stipulated the documents which the supplier, Sparts International SRL, was required to present in order to be paid, being the commercial invoice covering goods as per the proforma invoice, and the certificate of insurance. It was argued that the value of the goods on the proforma invoice being US\$900,000.00, it followed that the value on the commercial invoice ought to have been US\$900,000.00 as opposed to US\$630,000.00. Therefore, the commercial invoice presented by the seller was not compliant with the terms of the letter of credit and could have easily been discovered without the respondent undertaking a microscopic inspection of the documents.

8.4 Therefore, on the authority of the **Zulu v Avondale Housing Project Limited**<sup>(3)</sup>, this Court was urged to reverse the findings of the court below that the commercial invoice presented by the

seller was, on the face of it, complaint with the conditions of the letter of credit.

8.5 The appellant argued grounds two and three together as they both relate to whether or not the stating of the amount on the commercial invoice is of significance. It was contended on behalf of the appellant that the view of the court below that a commercial invoice need not include the value of the goods, is contrary to Article 18 of the UCP 600 which states as follows:

***Commercial Invoice***

***a. A Commercial Invoice***

- i. must appear to have been issued by the beneficiary (except as provided in article 38)*
- ii. must be made out in the name of the applicant (except as provided in sub-article 38(9))*
- iii. must be made out in the same currency as the credit; and*
- iv. must be signed.*

8.6 The argument was made that in view of Article 18(a)(iii) which requires that a commercial invoice be made out in the same currency as the letter of credit, an invoice must indicate the amount to be paid together with the description of the goods or services. A commercial invoice that does not state the value or price of goods or services to which it relates cannot be described as a commercial invoice. To this end, the Court was called upon

to interfere with the findings of the lower court as it is both perverse and not supported by the evidence.

8.7 Ground four, like ground one, challenges the finding of the court below that the certificate of insurance was, on the face of it, compliant with the conditions in the letter of credit notwithstanding the discrepancy. The issue was that the certificate of insurance stated the amount of US\$693,000.00 instead of US\$990,000.00 being 110% of the CIF or CIP value of the goods in terms of Article 28(f)(iii) of the UCP 600 Rules.

8.8 It was submitted that an insurance certificate for US\$693,000.00 cannot be said 'on its face' to be compliant with the requirement that it be for US\$990,000.00. Further, that the mere fact that the goods were described correctly in the insurance certificate is not sufficient as the letter of credit specifically required that the certificate of insurance should cover the goods purchased 110%. Once again, this Court was urged to reverse the finding of the lower court that the certificate of insurance was compliant with the conditions of the letter of credit.

8.9 The fifth and ninth grounds of appeal contend that there was a contractual relationship created by the letter of credit between

the appellant and respondent. It was submitted that in the letter of credit opened by the respondent, Field 50 shows the appellant appearing as applicant and thus created a relationship between the parties. It was further argued that even at page J17 of the judgment of **KV Wheels and Construction Limited v Development Bank of Zambia SCZ Appeal No. 123 of 2016**, the Supreme Court found that the letter of credit in issue in this appeal, was issued by the respondent herein.

8.10 Therefore, it goes without saying that there existed a relationship between the respondent as issuing bank, and the appellant as buyer by virtue of the letter of credit dated 29<sup>th</sup> November, 2012. The court was urged to reverse the findings of the lower court.

8.11 The appellant contends in ground six that there is a nexus to be appreciated between the non-complaint documents presented by Sparts International SRL, the non-delivery of the rest of the equipment, and the resulting loss from the foreclosure of the appellant's properties and the claim for special damages for the foreclosed properties. It was further advanced that the claim touching on the foreclosed properties

is not premised on the underlying contract between the appellant and Sparts International SRL but comes as special damages arising from the respondent's decision to make payment on non-compliant documents.

8.12 The argument being that there is a continuous thread connecting events from the appellant contracting the loan and providing securities; the payment on non-complaint documents leading to the non-receipt of the rest of the machinery, as a result of which the appellant could not implement its project and service the loan thereby prompting DBZ to institute an action for foreclosure on the securities. Consequently, the respondent's decision to make payment on non-compliant documents, resulted in the appellant suffering damage beyond the US\$630,000.00 paid by the respondent under the letter of credit. The case of ***The Attorney-General v D.G. Mpundu*** <sup>(4)</sup> was called in aid where it was held that:

***"If a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of a wrongful act, he must warn the defendant in the pleadings that the compensation claimed would extend to this special damage, thereby showing the defendant the case he has to meet."***

8.13 Ground seven of the appeal argues that it was a misdirection by the court below to focus on the description of the goods as opposed to the seriousness of the discrepancies in the amounts reflected in the commercial invoice and certificate of insurance. It was argued that documents have been held to be non-compliant or discrepant for reasons other than the description of the goods. That even if goods are consistently and properly described, documents may still be held to be discrepant if they do not comply with some other conditions or parameters specified in the letter of credit. The case of **Fortis Bank v Indian Overseas Bank**<sup>(5)</sup>, was cited to fortify the submission.

8.14 In ground eight the appellant contends that the fact that the certificate of insurance was for US\$693,000.00 instead of US\$990,000.00 clearly shows that there was part shipment of the goods. It was submitted that field 43P of the letter of credit was endorsed with the words “NOT ALLOWED” meaning that part shipment of the goods was not allowed. Therefore, the respondent ought to have examined the documents so as to make sure that all the goods had been shipped.

8.15 The fact that both the commercial invoice and the certificate of insurance were for lesser amounts than the CIF value, should

have put the respondent on guard that something was wrong. It was further submitted that the fact that the insurance cover was only for US\$693,000.00 instead of US\$990,000.00, clearly showed that not all the goods had been shipped.

8.16 In the tenth ground of appeal, the appellant argues that the respondent was not an agent of DBZ but the issuing bank in terms of the decision of the Supreme Court in Appeal No. 123 of 2016. Therefore, the learned Judge in the court below ought to have guided herself accordingly.

#### **9.0 RESPONDENT'S HEADS OF ARGUMENT**

9.1 Heads of argument in opposition dated 14<sup>th</sup> April, 2020 were filed on behalf of the respondent. On the basis that several grounds of appeal relate to the same issues, the respondent proceeded by dealing with the grounds in groups rather than separately.

9.2 Therefore, grounds one, two, three and four were dealt with together as they allege discrepancies in the amounts on commercial invoice and insurance certificate, and the implications this has on the letter of credit. It was submitted that essentially, the appellant is contending that because Sparts International SRL sent a commercial invoice and

insurance certificate with alleged discrepancies, then the letter of credit was not compliant. It was further submitted that this is misconceived for two reasons. In the first instance, the letter of credit itself, on the instructions given by DBZ, specified the conditions that needed to be met in order for the letter of credit to be considered as compliant; and secondly, the UCP 600 Rules reject the notion that a bank should be held liable for any defective document (especially in this case where the alleged defect was no fault of the respondent).

9.3 The appellant advanced the argument that the conditions given to the respondent by DBZ in order for the letter of credit to be compliant, were clear and plain as per the letter dated 29<sup>th</sup> November, 2012 requiring the respondent to only pay upon sight of the bill of lading and packing list of goods as stated in the proforma invoice. It was submitted that there was no departure by the respondent from the conditions given by DBZ and as such, the letter of credit was in full compliance.

9.4 The respondent placed reliance on the case of **Equitable Trust Company of New York v Dawson Partners Limited**<sup>(2)</sup> cited by the appellant, where Lord Summers stated as follows:

***“... if the bank does as it is told, it is safe; if it declines to do anything else, it is safe: if it departs from the conditions laid down, it acts at its own risk.”***

It further looked to Article 34 of the UCP 600 Rules which absorbs banks from claims based on the accuracy, propriety or otherwise of the documents and description of the goods on the documents. Therefore, the appellant's losses arose from the failure of Sparts International SRL to perform its obligations.

9.5 With respect to ground seven, which was addressed on its own, it was submitted that the learned Judge in the court below gave a legally tenable reason as to why she focused on the description of the goods to determine whether the letter of credit was in compliance. The reason tendered, as it appears at page J47 of the judgment, is that:

***“The letter of credit only placed a condition that the commercial invoice should cover the ‘goods’ as per proforma invoice. ...”***

Therefore, being instructed to make payment upon sight of the bill of lading and packing list as stated in the proforma invoice and commercial invoice, it follows that the requirements of the letter of credit had been met.

- 9.6 With regard to the certificate of insurance, it was argued that Article 34 of the UCP 600 Rules, does not place any liability on the respondent for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document.
- 9.7 With respect to the case of ***Fortis Bank v Indian Overseas Bank***<sup>(5)</sup>, cited by the appellant as authority that a letter of credit can be rejected for non-compliance, it was submitted that the authority has absolutely no relevance to the issue before this Court as a letter of credit can only be rejected by a court if it does not comply with the conditions that were agreed between the parties. Therefore, the conditions specified by DBZ having been met, DBZ proceeded to approve the disbursement of the money to Sparts International SRL.
- 9.8 Grounds five, nine and ten were argued together as they relate to the relationship between the appellant and the respondent. The position of the respondent is that DBZ having instructed them to open a letter of credit, and there being no other communication from the appellant, it followed that DBZ was the only party from whom the respondent was taking instructions. Therefore, the respondent could not be found liable for acting

on an instruction from DBZ on whose instruction it had opened the letter of credit.

9.9 For authority, the respondent looked to Article 4 of the UCP 600 Rules and the learned authors of **Goode on Commercial Law, 4<sup>th</sup> Edition (2009)** at page 1081 who state as follows:

*"Though IB (Issuing Bank) opens the credit on the instructions of B (Buyer), its undertaking to S (Seller) is given as principal, not as B's agent. B is not even an undisclosed principal. He is a complete stranger to the contract established by the letter of credit. ... if IB in breach of its mandate, accepts a tender of non-conforming documents, B has no locus standi to assert that, in the relation between IB and S, such acceptance is ineffective."*

Therefore, the appellant being the buyer, is a complete stranger to the letter of credit between the respondent and DBZ.

9.10 With respect to ground six, the respondent took the position that the non-compliant documents, non-delivery of equipment and foreclosure of the appellant's properties, have absolutely nothing to do with the respondent as it neither prepared the documents, delivered the equipment nor foreclosed the appellant's properties. In this regard, it was submitted that the respondent cannot assume liability for the default of Sparts International SRL.

9.11 It was further submitted that Article 4 of the UCP 600 Rules distinguishes a letter of credit from any other contract on which it may be based. Similarly, it was contended that the specific details of the amounts in the proforma invoice and certificate of insurance as between the appellant and Sparts International SRL has nothing to do with the respondent who was only required to abide by the conditions stipulated in the letter of credit as instructed by DBZ. Therefore, in terms of Article 4(b) of the UCP 600 Rules, the respondent resisted the attempt by the appellant to include as an integral part of the credit, a copy of the proforma invoice.

9.12 To anchor the argument, the case of ***Discount Records Limited v Barclays Bank Limited***<sup>(6)</sup> was cited where the court refused to grant an injunction on the basis that the underlying contract was separate from the obligation of the bank to pay under the credit. As the rules governing letters of credit are couched in clearest of terms, it was submitted that the respondent is not connected to the appellant's losses in any way and that, therefore, this ground has no legal basis and ought to be dismissed.

9.13 Lastly, with respect to ground eight, it was submitted that all the documents presented by Sparts International SRL (i.e. the proforma invoice, commercial invoice, packing list and bill of lading) indicated that the shipment was a full shipment for all the goods: there was nothing on the face of the documents that suggested otherwise. The standard for the examination of such documents as specified in Article 14 (a) of the UCP 600 Rules is that the bank has to examine them, 'on their face'.

9.14 It was submitted that where an irrevocable letter of credit is at play, the banker still has an obligation to pay, irrespective of any dispute there might be between the parties on whether or not the goods were up to credit or not. For authority, the case of ***Malas and Another (T/A Hamzeh Malas and Sons) v British Imex Industries Limited***<sup>(7)</sup> was called in aid were, in refusing to grant an injunction, the English Court of Appeal held that:

***"In the exercise of the court's discretion the injunction would not be granted, because the opening of a confirmed letter of credit constituted a bargain between the banker and the seller of goods which imposed on the banker an absolute obligation to pay, irrespective of any dispute between the buyer and the seller in regard to the quality of the goods, and in the present case it would be wrong to interfere with the commercial practice established on that principle."***

9.15 We were urged to dismiss the appellant's entire appeal and to uphold the judgment of the High Court.

#### **10.0 APPELLANT'S ARGUMENTS IN REPLY**

10.1 The appellants filed heads of arguments in reply dated 21<sup>st</sup> April, 2020. In replying to grounds one, two, three and four, it was submitted that even a discrepancy in relation to a single condition, such as the certificate of insurance or the commercial invoice, is sufficient for the appellant to succeed in its action.

10.2 On the argument that DBZ specified the conditions to be met, it was argued that the respondent has mixed itself up with regard to the letter from DBZ and the letter of credit. The submission was that the letter of credit contained the conditions to be complied with (which the documents tendered by the seller needed to comply with) and was not restricted to what was stated in the letter from DBZ. Therefore, it was not the letter of credit which had to be compliant, but the documents presented which had to comply with the letter of credit.

10.3 The appellant insisted that once the respondent opened the letter of credit, it entered into an agreement with the appellant

that payment would only be effected if the documents presented were compliant. It was contended that the appellant by completing the SWIFT MT 700 Form for the letter of credit and incorporating the UCP 600 Rules into the letter of credit, the respondent agreed to be bound by the conditions contained in the resultant letter of credit.

10.4 On the submission that there was no departure from the conditions given by DBZ, it was contended that the issue is not about compliance with the conditions contained in the DBZ letter, but rather with compliance of the conditions set out in the letter of credit, which is a different document altogether. The appellant insisted that the commercial invoice and certificate of insurance presented by the seller were both not compliant with the conditions in the letter of credit and could easily have been established by simply looking at the commercial invoice and certificate of insurance.

10.5 On the reference to Article 34 of the UCP 600 Rules, it was contended that the respondent has misapprehended the meaning of the provision as the same does not absolve a bank of liability in an instance where the bank pays on non-compliant documents. Therefore, the case of **Equitable Trust Company**

**of New York v Dawson Partners Limited** <sup>(2)</sup> was still good law together with the case of **Bulgrains and Company limited v Shinhan Bank** <sup>(8)</sup>.

10.6 In replying to grounds five, nine and ten, the appellant maintained that the question of the relationship between the respondent and the appellant was settled by the Supreme Court in the case of **KV Wheels and Construction Limited v DBZ** <sup>(9)</sup> which held that the respondent was the issuing bank. As DBZ asked the respondent to open a letter of credit in favour of the appellant, it followed that the other party was the appellant, and that a contractual relationship existed between them.

10.7 With respect to ground six, the appellant maintained that there is a clear connection between the events and the claim relating to the foreclosed properties which are being claimed by way of special damages. It was further submitted that the appellant is not making a claim on the underlying contract of sale between themselves and Sparts International SRL as they are fully aware of the doctrine of autonomy in letters of credit.

10.8 In replying to ground seven, it was submitted that documents have been held to be discrepant on other factors despite the goods having been consistently described. Therefore, the fact

that goods have been consistently described does not render the documents compliant if the amounts shown on those documents are wrong.

10.9 The appellant reiterated its arguments in the heads of arguments with respect to ground eight and prayed that the appeal be allowed with costs, here and in the court below.

#### **11.0 DECISION OF THIS COURT**

11.1 We have considered the appeal, the arguments advanced and the authorities cited by the learned advocates and State Counsel.

11.2 The appeal before us, evolves around an irrevocable letter of credit that was issued by the respondent on request by DBZ on behalf of the appellant.

11.3 It is not in dispute that the respondent issued an irrevocable letter of credit in favour of Sparts International SRL of Italy. The letter of credit was payable at sight against the bill of lading and packing list of goods. The value sum being US\$ 630, 000.00 representing 70% of the invoice value. The 30% of the invoice value in the sum of US\$ 270, 000.00 was paid upfront by DBZ.

11.4 It is further not in dispute that on the 26<sup>th</sup> of April, 2013, the respondent notified the DBZ that it had received compliant

shipping documents for the letter of credit from Citibank, New York composed of the following: bill of lading, packing list, warranty certificate, commercial invoice, certificate of origin and insurance. The respondent further advised that it would honour the drafts at sight. DBZ responded on the 3<sup>rd</sup> of May, 2013 giving the respondent the go ahead to make payment to Sparts International SRL. The respondent honoured the letter of credit.

11.5 The appellant has raised ten grounds of appeal, which are interlinked and connected.

11.6 The key issue raised in the appeal is whether the terms and conditions of the irrevocable letter of credit were complied with. In addressing this issue, we will tackle the issues raised in grounds 1, 2, 3, 4, 7 and 8 of the appeal which relates to the alleged discrepancies in the commercial invoice, certificate of insurance and proforma invoice vis-à-vis conditions upon which the letter of credit was payable.

11.7 The definition of a letter of credit as defined by Black's Law Dictionary, 9<sup>th</sup> Edition is:

***"An instrument which the insurer (usually a bank) at a customer's request, agrees to honour a draft or other demand made by a third party (beneficiary) as long as the draft or payment complies with specified conditions, and regardless of***

*whether any underlying agreement between the customer and the beneficiary is satisfied.”*

11.8 As regards the commercial purpose for which the system of documentary letters of credit have developed in international law, it was to give the seller of goods an assured right to be paid before he parted with control of the goods without risk of the payment being refused or deferred because of a dispute with the buyer. It followed the contractual duty owed by an insuring or confirming bank to the buyer to honour the credit notified by him on presentation of apparently confirming documents by the seller matched by a corresponding liability on the part of the bank to the seller to pay him the amount of credit on presentation of the document. See the case of **R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd** <sup>(10)</sup> (supra).

11.9 The letters of credit are subject to the terms and conditions of the ICC Uniform Customs and Practice for Documentary Credits.

11.10 The principle governing letters of credit is that payment by the issuing bank is made on the basis of presentation of documentation that conform to the terms and conditions of the letter of credit. Without presentation of the requisite

documentation, the issuing bank lacks authority upon which to effect payment to a third party.

11.11 An irrevocable letter of credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented to the nominated bank of the issuing bank and that the terms and conditions are complied with; if the credit provides for sight payments, to pay at sight.

11.12 In addressing the key issues for determination, we shall start by addressing the alleged issues of discrepancy raised in amounts on the commercial invoice, certificate of insurance and proforma invoice.

11.13 Grounds one, two, four and seven will be considered together as they are all anchored on the issue of the discrepancy in the amounts on the commercial invoice and certificate of insurance viz-a-viz the letter of credit. In addressing the issue of the discrepancies in the aforementioned documents, the starting point is a consideration of the contents of the proforma invoice issued by the seller, Sparts International SRL appearing at page 156 of the record of appeal.

11.14 The said proforma invoice issued to the appellant on 27<sup>th</sup> November, 2012 is for the total purchase price of

US\$900,000.00. The mode of payment is indicated as “**30% DOWN PAYMENT, 70% CONFIRMED AND IRREVOCABLE LETTER OF CREDIT**”. Under description, the invoice states as follows:

***“Payment: 30% as down payment (US\$270,000.00), 70% confirmed and irrevocable letter of credit payable at sight (US\$630,000.00)”***

11.15 In view of the above terms, DBZ proceeded to pay the 30% down payment to Sparts International SRL as confirmed by the letter dated 29<sup>th</sup> November, 2012 to the respondent. As for the balance of 70% of the purchase price, the proforma invoice required that it be paid via an irrevocable letter of credit. Thus, DBZ, in its letter of 29<sup>th</sup> November, 2012, instructed the respondent to open an irrevocable letter of credit and make payment upon sight of the bill of lading and packing list of goods as stated in the proforma invoice.

11.16 As the instruction was to open an irrevocable letter of credit for 70% of the balance of the purchase price being US\$630,000.00 as stipulated in the proforma invoice, the Respondent proceeded to do so and to make payment for the same balance as directed by DBZ in its letter of 3<sup>rd</sup> May, 2013. It must be recalled that this was also the instruction in the proforma

invoice of 27<sup>th</sup> November, 2012 as confirmed by the commercial invoice subsequently issued on 25<sup>th</sup> March, 2013 ahead of payment.

11.17 While it is accepted that the total purchase price of the equipment and machinery to be supplied was US\$900,000.00 (as stated in the proforma invoice), it must be understood that the payment was to be staggered in two instalments to be paid separately and not at once. The first, being a down payment of 30% or US\$270,000.00, was paid by DBZ in complying with the terms of the proforma invoice. The proforma invoice further made it a term of the purchase agreement that the balance of 70% or US\$630,000.00 was to be paid via a letter of credit. It is for this reason that DBZ instructed the respondent to issue the letter of credit and make payment for the second instalment being US\$630,000.00 as per the commercial invoice and proforma invoice. In so doing, the respondent, as issuing bank, complied with the instructions it was given.

11.18 Therefore, we are of the firm view that there was no discrepancy in the commercial invoice, proforma invoice and the letter of credit as regards the purchase price in view of the terms of payment requiring two instalments. The appellant, in insisting

that there was a discrepancy in the purchase price to be paid appearing on the commercial invoice *viz-a-viz* the letter of credit, is in effect failing to appreciate the clear terms of payment issued in the proforma invoice.

11.19 In any case, the appellant was equally aware of the payment terms requiring a down payment of 30% and the balance of 70% being paid through an irrevocable letter of credit as it had received the facture proforma invoice.

11.20 Further, if the respondent had endorsed the letter of credit appearing at page 172 of the record of appeal with the amount of US\$900,000.00 (being the full purchase price), then Sparts International SRL would have been overpaid by US\$270,000.00 which DBZ had already paid.

11.21 The letter of credit being endorsed with the sum of US\$630,000.00, it followed that the certificate of insurance could only be endorsed with the insured amount of US\$693,000.00 (being 110% of the amount on the letter of credit). The respondent could not take upon itself to issue a letter of credit in the sum of US\$900,000.00 so as to have an insured amount of US\$990,000.00 for the reason that its instructions as given by DBZ, were to assist the appellant to

open a letter of credit in the sum of US\$630,000.00. This is also the amount that was instructed by Sparts International SRL in the proforma invoice.

11.22 Article 34 of the UCP 600 absorbs the issuing bank, in this case, the respondent from liability for the conditions stipulated in a document. The provision is in the following terms:

***“Disclaimer on Effectiveness of Documents***

***A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; ....”***

11.23 Further, Article 18 of the UCP 600 in regard to a commercial invoice stipulates that it must appear to have been issued by the beneficiary and made out in the same currency as the credit. The credit was for US\$ 630, 000.00 covering goods as per invoice No. 97B. The purported discrepancy in the sum of US\$ 900, 000.00 stated in the proforma invoice instead of the sum of US\$ 630, 000.00 indicated in the commercial invoice and credit has already been explained. The appellant appears to have misunderstood the fact that though the proforma invoice is for goods worth US\$ 900, 000.00, the letter of credit issued by the issuing respondent bank as instructed was for the sum

of US\$ 630, 000.00. This is because DBZ paid directly to the supplier the sum of US\$ 270, 000.00 which was 30% of the invoice value.

11.24 Therefore, as the respondent complied with the instructions given to it, and as confirmed by the facture proforma invoice to pay the balance of 70% of the purchase price of US\$630,000.00 via a letter of credit, it follows that there was in effect no discrepancy in the commercial invoice as presented to it. The respondent is thus not liable for the loss or damage suffered by the appellant.

11.25 For these reasons, grounds one, two, four and seven lack merit.

11.26 With respect to ground three, it is accepted that the goods outlined to be purchased in the proforma invoice were the same as those outlined in the commercial invoice. Thus, the letter of credit placed the condition that the commercial invoice should cover goods as per proforma invoice. It is accepted that the proforma invoice provided the total value of the goods as being US\$900,000.00.

11.27 However, sight must not be lost of the fact that the same proforma invoice had given clear terms of payment that the balance of 70% of the purchase price was to be paid via an

irrevocable letter of credit. Consequently, the commercial invoice, while covering all the goods, endorsed the balance of 70% of the purchase price for purposes of the letter of credit. If the appellant had challenges with regard to the terms of payment, they ought to have engaged Sparts International SRL to revisit the terms, or to bring it the attention of the respondent and not wait until after the respondent had made payment. It must be borne in mind that the respondent's obligation to pay arose on sight of documents and not upon delivery. Therefore, as noted in 7.8 above, it was not for the respondent to amend the terms of the documents presented to it.

11.28 Further, in terms of Article 34 of the UCP 600, the respondent cannot be held liable for the form, legal effect, or for the general or particular conditions stipulated in a document, in this case the proforma invoice upon which it based the letter of credit. To this end, ground three must fail.

11.29 Ground five, nine and ten seek to identify the type of relationship that existed between the appellant and respondent viz-a-viz the letter of credit and the judgement of the Supreme Court in Appeal No. 123 of 2016. The Supreme Court decision, based on the authorities cited therein and the letter of credit,

was that the respondent herein was the issuing bank. Indeed, Article 1 of the UCP 600 provides that:

***Issuing bank means the bank that issues a credit at the request of an applicant or on its own behalf.***

11.30 As regards the relationship between the issuing bank and the applicant, the Supreme Court did not go any further to place any responsibilities and liabilities or to state if an agency relationship existed. However, Article 4 of the UCP 600 gives an insight as to what liabilities and/or responsibilities fall to parties in a letter of credit by drawing a line between the contract of sale and the credit. The provision is in the following terms:

***Credits v. Contracts***

***a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.***

***A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.***

**b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.**

11.31 To ascertain the nature of a relationship between parties in respect of letters of credit, recourse is had not only to the definition ascribed to the issuer, but to the definition of letter of credit. Defined as a letter from the bank (issuer) guaranteeing that a buyer's (applicant/customer) payment to a seller will be received on time and for the correct amount. See Investipedia.

11.32 An irrevocable letter of credit is further defined as an official correspondence from the bank that guarantees payment for goods or services being purchased by an individual or entity, referred to as the applicant that requests the letter of credit from the issuing bank.

11.33 To this end, there existed a relationship of applicant (buyer) and issuing bank between the appellant and the respondent respectively, and that the conditions in the letter of credit formed the basis of the contract. Ground five, nine and ten have merit to the extent that there exists such a relationship.

11.34 Therefore, the lower court erred in law and fact when it held that the appellant and respondent had no relationship. Further,

as regards the obligations of the respondent, as earlier stated, the issuing bank's undertaking the stipulated documents are presented to it which are complying, the issuing bank must honour the credit. If the documents are not compliant, to refuse to honour the letter of credit is a contract between the issuer and the applicant (buyer). Therefore, the court below, by stating that the respondent was an agent of DBZ erred as the respondent was issuer of the irrevocable letter of credit.

11.35 Ground six seeks to attach liability to the issuing bank for the resulting loss the appellant suffered due to the non-delivery of the machinery and the consequent foreclosure by DBZ. In considering grounds one, two, four and seven, it was concluded that the respondent complied with the instructions given to it by DBZ to issue a letter of credit for 70% as per the proforma invoice.

11.36 This brings us to the key issue whether the respondent was presented with compliant documentation. The irrevocable letter of credit provided for payment of the sum of US\$ 630, 000.00 upon sight of commercial invoice covering goods as per proforma and insurance certificate. Further, the instructions by DBZ to the respondent was to assist the appellant to open a

sight letter of credit payable at sight against the bill of lading and packing list of goods for 70% of the invoice value (proforma invoice).

11.37 The respondent were in due course presented with the compliant shipping documents from Citibank, New York as follows: bill of lading, packing list, warranty certificate, commercial invoice, certificate of origin and insurance. DBZ equally confirmed them as compliant. On the basis that the received compliant documents for the letter of credit, payment was effected.

11.38 We are of the view that the respondent, as issuing bank were presented with compliant stipulated documents and were obligated to honour the credit by sight payment. It was irrevocably bound to honour the demand.

11.39 Therefore, on the face of the documents presented to it, the Respondent found no irregularity or discrepancy to entitle it to withhold payment.

11.40 It must be noted that the transaction between the appellant and Sparts International SRL failed due to the failure of the seller to deliver the machinery even after it had been paid as stipulated in the proforma invoice. Sparts International SRL received the

payment and acknowledged this fact in several communications but failed to meet its obligations. This failure cannot be attributed to the respondent, in its capacity as the issuing bank, whose only role was to make payment as per the irrevocable letter of credit issued. The failure of Sparts International SRL to deliver cannot be attributed to any perceived defect in the proforma invoice, commercial invoice or letter of credit.

11.41 Further, in terms of Article 4(b) of the UCP 600, the respondent is protected from reliance of certain documents by the applicant. The provision states as follows:

***b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.***

The reason for this, is that the obligation to pay arises upon presentation of specific documents, and not delivery. Therefore, the respondent would only have been liable for any loss incurred by the appellant if it failed to honour its obligation to pay upon sight of the bill of lading and packing list.

11.42 In any case, Article 34 of the UCP 600, which is outlined in paragraph 7.10 above, provides that the issuing bank assumes no liability or responsibility, inter alia, delivery of the goods or

services represented by any document. Therefore, there is no nexus worth considering to attach liability to the Respondent. Ground six fails.

11.43 Ground eight contends that the endorsement of field 43P with the words “*NOT ALLOWED*” on the letter of credit means that part shipment of the goods was not allowed. This is not in dispute. However, it has been argued that the respondent ought to have examined all the documents so as to ensure that all the goods had been shipped. It was further argued that in view of the insurance cover being US\$693,000.00, the respondent ought to have realised that not all the goods had been shipped. We do not accept this flawed argument.

11.44 In the letter from DBZ dated 29<sup>th</sup> November, 2012, the respondent was instructed “***to open a sight of letter of credit ... for 70% of the invoice value. Actual payment of the funds is to be made on sight of the bill of lading and packing list of goods as stated in the proforma invoice.***” This was because 30% of the invoice value, being the down payment, had already been paid by DBZ. Hence, why the certificate of insurance was for the sum of US\$ 693, 000.00 which covered 110% of the CIF value. It cannot be imputed that because the certificate of insurance was based on

the sum of US\$ 630, 000.00, then there was part shipment of goods.

11.45 Secondly, a perusal of the bill of lading and the packing list does not suggest or indicate that there was part shipment of the machinery. These documents simply show what goods have been shipped. Thirdly, in terms of Article 34 of the UCP 600, the Respondent, as issuing bank is absolved from issues of delivery. Article 34 provides as follows:

*A bank assumes no liability or responsibility for the form, sufficiency, accuracy, ..... or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.” (underlining for emphasis)*

11.46 Therefore, the respondent cannot be held liable for the failure of Sparts International SRL to ship or deliver the entire consignment at once as it was not guided by the value on the certificate of insurance, but rather the instruction to pay upon

sight of the bill of lading and packing list. To this end, ground eight is bereft of merit.

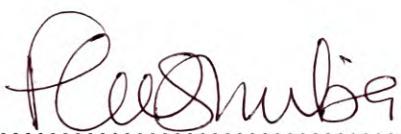
## 12.0 **CONCLUSION**

12.1 Though grounds five, nine and ten have succeeded, the said grounds only sought to determine the relationship between the parties and have no substantial effect on the claims of the appellant. Therefore, the net result is that the appeal has failed and is dismissed with costs to the respondent.



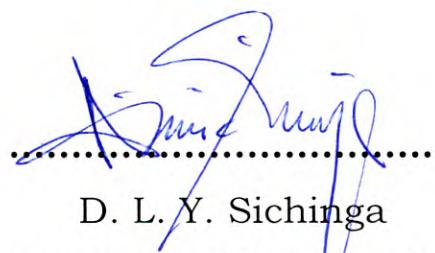
C. F. R. Mchenga

**DEPUTY JUDGE PRESIDENT  
COURT OF APPEAL JUDGE**



F. M. Chishimba

**COURT OF APPEAL JUDGE**



D. L. Y. Sichinga

**COURT OF APPEAL JUDGE**