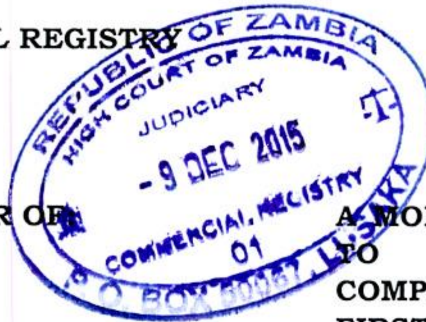
IN THE HIGH COURT FOR ZAMBIA 2015/HPC/0122

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF: **A MORTGAGE ACTION RELATING TO THE PROPERTIES COMPROMISED UNDER THE FIRST LEGAL MORTGAGE AND FURTHER CHARGE OVER S/D 47 OF FARM NO. 3370 LUSAKA**

BETWEEN:

AFRICAN BANKING CORPORATION ZAMBIA LIMITED **APPLICANT**

AND

CHAKAKA VILLAGE COUNTRY HOUSE LIMITED **FIRST RESPONDENT**
(Sued as Customer)

LAWRENCE SIKUTWA **SECOND RESPONDENT**
(Sued as Personal Guarantor)

CHAKAKA PROCUREMENT COMPANY LIMITED **THIRD RESPONDENT**
(Sued as Corporate Guarantor)

MADISON GENERAL INSURANCE COMPANY ZAMBIA LIMITED **FOURTH RESPONDENT**
(Sued as Financial Guarantor)

Before Hon. Mr. Justice Nigel K. Mutuna on this 9th day of December 2015

For the Applicant: **Mr. R. Simeza SC and Mr. K. Chenda of Messrs Simeza Sangwa & Company**

For the First, Second & Third Respondents: **Mr. M. Chiteba and Mr. B Chakoleka of Messrs Mulenga Mundashi Kasonde Legal Practitioners**

For the Fourth Respondent: **Mr. J. Jalasi of Messrs Eric Silwamba, Jalasi and Linyama**

R U L I N G

Cases Referred to:

1) *Pandoliker and Sons Limited and Others vs African Banking Corporation (T/A BANC ABC) SCZ 119 of 2013*

2) *Develpmet Bank of Zambia and Another vs Sunvest Limited and Another (1997) SJ12*
3) *Kelvin Hang'andu and Company (a firm) vs Webby Mulubisha (2008) ZR 82 (Vol.2)*
4) *Match Corporation vs Development Bank of Zambia (1999) ZR page 13*
5) *Inntrepreneur Pub Co. (GL) vs East Crown Ltd (2000) Vol.2 Lloyd's Reports page 611*

Other Authorities Referred to:

1) *Supreme Court Practice, 1999 Volume 1*
2) *Black's Law Dictionary, By Bryan A. Garner, 8th edition, Thomson West, USA*

The Applicant, African Banking Corporation Zambia Limited has moved this motion, for the exclusion of the First Respondent's cause of action. The application is made pursuant to order 15 rule 5 (2) of the rules of the Supreme Court of England, (***white book***) and it seeks the following relief:

1) *That the First Respondent's cause of action be excluded from this action;*
2) *That this action may be continued to the applicant's cause of action and the First Respondents alleged claims in rebuttal;*
3) *That there be an order for all consequential amendments to be made;*
4) *That the costs of and occasioned by this application be in the cause*

In effect, the Applicant seeks an order striking out the First Respondent's counter claim.

The background leading up to this action is as follows. The Applicant took out this action on 23rd March 2015 against, Chakaka Village County House Limited, Lawrence Sikutwa, Chakaka Procurement Company Limited and Madison General Insurance Company Zambia Limited, respectively sued as the First, Second, Third and Fourth Respondents. The action seeks an order of payment of the sum of USD9,442,461.80, as at 18th March 2015, which sum of money is claimed pursuant to facility letters dated 12th April 2010, 24th January 2012 and addendum dated 12th September 2012. It also seeks

to enforce the security which is by way of a legal mortgage over subdivision 47 of Farm 3370 Lusaka, by way of an order of possession, foreclosure and guarantees in respect of the Second, Third and Fourth Respondents. After the process was served upon the Respondents, the First Respondent applied for directions to file a counter claim. This was granted and on 13th August 2015, the First Respondent filed a notice of points of counter claim. It is the cause of action arising from this counter claim that the Applicant now seeks to exclude.

The Applicant's application is supported by an affidavit filed on 14th September 2015, and deposed by one Patricia Kalaba, the Debt Recovery Manager for the Applicant. Her evidence revealed that the First Respondent filed a notice of points of claim in which it is pleaded under paragraphs 5 and 6 that there was an exchange of correspondence between the First Respondent and Applicant which it is alleged culminated into the two entering into a syndication agreement by which the Applicant agreed to be lead manager for funds for the First Respondent to the tune of USD6,530,000.00. Further that, the counter claim cites various correspondence passing between the Applicant and First Respondent which allegedly evidences the entering into the said syndication agreement by the two.

The evidence also revealed that the applicant's claim as reflected in the amended originating summons is premised on the relationship of the parties as created by the facility letter of 12th April 2010 which was later redefined through the facility letter of 24th January 2012 and its addendum of 12th September 2012.

The First Respondents affidavit in opposition was filed and deposed by Lawrence Samva Sikutwa, the Second Respondent in this matter and Executive Director of the First and Third Respondents. The gist of the deponent's evidence was such that it traced the background leading up to the filing of the notice of counter claim, with emphasis on the fact that the Applicant did not raise objection to the same. The evidence also discussed the various applications that came before this court after the filing of the notice of counter claim at which the Applicant allegedly omitted to raise issue with

the notice of counter claim. It concluded by revealing the following facts, that is to say: that the deponent had been advised by counsel and verily believed that after this court gave directions for the counter claim it has become *functus officio;* that there are no grounds upon which this court can reverse the orders that it has given in relation to the counter claim; that the counter claim is partly premised on the syndication agreement which is readily admitted by the Applicant in the affidavit in reply; and the facility letter dated 24th January 2012 is part of the same transaction as the syndication agreement and are both part of the same agreement as is evidenced by clause 4 of the said facility letter.

The application came up for hearing on 15th October 2015. Counsel for the Applicant, Mr. R. Simeza SC and Mr. K. Chenda indicated that they relied on the affidavit in support and the skeleton arguments. They also made verbal submissions.

The major highlights of the arguments by counsel for the Applicant as contained in the skeleton arguments were as follows: the counter claim by the First Respondent is incompatible with the mortgage action brought by the Applicant; It is therefore a separate cause of action which ought to be dealt with separately outside the mortgage action; and that the First Respondent is at liberty to pursue the counter claim in an independent action. Counsel relied on order 15 rule 5(2) of the ***white book*** which they quoted as follows:

> *"5. Court may order separate trials etc*
>
> *(1) ...*
>
> *(2) If it appears on the application of any party against whom a counter claim is made that the subject matter of the counter claim ought for any reason to be disposed of by a separate action, the court may order the counter claim to be struck out or may order it to be tried separately or make such other order as may be expedient".*

Counsel went on to argue that in a decision recently handed down by the Supreme Court in the case of ***Pandoliker and Sons Limited and Others vs***

African Banking Corporation Zambia Limited (1) the principle in order 15 rule 5(2) of the ***white book*** had been applied when it was held as follows at pages 20 and 21:

> *"In this regard, we accept the submission by the learned counsel for the Respondent to the extent that the parties redefined their relationship through the new banking facility letter of 28th September 2011, any default or breaches under the previous relationship could not be part of the new credit affair that started with the 28th September 2011 banking facility letter ... Even assuming that the appellants had adduced sufficient evidence to show that their counter claim was well founded to raise a defence, the perceived breaches of the Respondent's pre-restructured facility in an action premised on the post structured facility, would in our view be anachronistic".*

In the verbal arguments, counsel for the Applicant argued that the powers of the court under order 15 rule 5 sub-rule 2 of the ***white book*** are discretionary. Further that they had cited a Supreme Court decision in the ***Pandoliker*** case which provides an example of circumstances where the court can exclude a counter claim. It was argued that a perusal of paragraphs 5 and 6 of the notice of points of counter claim and paragraphs 10, 11 and 12 of the affidavit in support shows that the alleged agreement that forms the bed rock of the counter claim was allegedly made in the year 2011. On the other hand the mortgage action is based on the facility letters which effectively modified the relationship between the Applicant and First Respondent. Counsel argued that a perusal clause 16 of exhibit *"PK1"* to the affidavit in support of originating summons and paragraphs 4, 5 and 6 of the affidavit in support of this application prove this fact. Further that based on the ***Pandoliker*** case, this court is bound by the principle of *stare decisis* to give effect to the principles in the Supreme Court decision, counsel prayed that the application should be granted.

Counsel for the First, Second and Third Respondents Mr. M. Chiteba and Mr. D. Chakoleka indicated that they relied on the skeleton arguments and affidavit in opposition filed herein. Counsel also made verbal submissions.

In the skeleton arguments, counsel for the First, Second and Third Respondents argued that the ***Pandoliker*** case was decided on its unique facts and is not applicable to this case. It was argued that this can be discerned from the *ratio decidendi* of the case which is at page 21 which is as follows:

> *"Even assuming that the Appellants had adduced sufficient evidence to show that their counter claim was well founded to raise a defence, the perceived breaches of the Respondents pre-structured facility in an action premised on the post structured facility, would in my view be anachronistic".*

It was argued that it is clear from the foregoing that the Appellants in the ***Pandoliker*** case hinged their counter claim on pre-structured facility whilst the Respondent's claim was premised on the post structured facility. This, it was argued, is not the case before this court because the First Respondent's counter claim is not anachronistic to the action commenced by the Applicant. That the First Respondent's counter claim is based on delays in disbursing funds under the facility which is the subject of these proceedings and is embodied in the facility letter dated 24th January 2012, as read with the addendum thereto dated 12th September 2012, and marked *"PK"* in the affidavit in support of originating summons. This said addendum, counsel argued provides for the manner in which disbursements were to be made and it is on the basis of the Applicant's failure to make the disbursements as agreed, that the counter claim arose. Counsel argued that this fact is further confirmed by the contents of paragraph 17 of the Applicant's affidavit in opposition to the counter claim filed on 27th August 2015 and paragraph 12 of the affidavit in reply filed on 5th June 2015. It was therefore argued that the counter claim is not anachronistic to the mortgage action and it is compatible to and relates to the facility letter.

Counsel argued further that the second limb of the counter claim is based on the fact that the Applicant is in breach of the syndication agreement. It was argued that the issue of the syndication cannot be separated from this action as it was part of the same transaction. This fact, it was argued, has been acknowledged by the Applicant as can be discerned from paragraphs 5, 7, 9

and 10 of the Applicants affidavit in reply filed on 5th June 2015. Counsel argued that the facility letter of 24th January 2012 at paragraph 4 make reference to the issue of syndication as follows:

> *"The Bank will avail the Borrower with a seven year loan facility in United State Dollars under syndication by African Banking Corporation Holdings. African Banking Corporation Zambia has not participated in the syndication, the Bank's role is to arrange and lead the syndication."*

It was argued that the foregoing clause demonstrates that the syndication agreement cannot be separated from the facility letter upon which this action is premised. Therefore, the counter claim is properly before this court. Counsel argued that if the Applicant is allowed to separate the actions, as it wishes to do, it will result in the possibility of conflicting decisions and a multiplicity of actions which this court frowns upon. In this regard counsel drew my attention to the cases of ***Development Bank of Zambia vs Sunvest Limited and Another (2)*** and ***Kelvin Hang'andu and Company (a firm) vs Webby Mulubisha (3).***

In their concluding remarks counsel argued that this court is *functus officio* as it relates to the issue of the raising of the counter claim by the First Respondent. This, it was argued, is on account of the fact that the First Respondent filed a motion before court prior to the raising of the counter claim, which motion the Applicant did not object to and pursuant to which this court gave directions for the raising of the counter claim. The position it was argued is compounded by the fact that the Applicant has adequately responded to the counter claim.

In the verbal submissions Mr. D. Chakoleka restated the arguments in the skeleton argument. The only departure was in the argument he advanced that the Applicant has not advanced any grounds that would justify this court exercising its discretion under order 15 rule 5 sub-rule 2 of the ***white book***.

In the verbal submissions Mr. M. Chiteba restated the arguments advanced in the skeleton arguments. The departure from the skeleton arguments was as follows: counsel drew my attention to paragraph 10 of the Applicant's

affidavit in reply to originating summons and argued that the deponent confirms that the Applicant acted in line with the syndication agreement; and that since the said paragraph is an admission, which the First Respondent is entitled to rely upon in accordance with order 38 rule 2 sub-rule of the ***white book***, there is no basis upon which the counter claim can be excluded.

In his submissions Mr. J. Jalasi indicated that his client relied upon the position as articulated by the First Respondent.

In response to the Respondents' arguments, Mr. K. Chanda argued that the facility letters are on record and none of them make reference to the agreement to syndicate made in the year 2011. This agreement according to the points of counter claim, is for the sum of USD6.5 million, counsel argued.

As regards the argument that the ***Pandoliker*** case is not applicable to this case, it was argued that in the ***Pandoliker*** case, as in this case, the proponent was African Banking Corporation Zambia Limited in a mortgage action based on, *inter alia,* a facility letter. This, it was argued, is the same situation in this case in terms of the proponent and the basis of the claim. To this end, counsel referred me to paragraph 8 of the affidavit in support which effectively confirms that this action by the Applicant is based on relationships defined in documents after the syndication mandate.

As regards the argument by Mr. M. Chiteba on the contents of the Applicant's affidavit in reply dated 5th June 2015, it was argued that the said affidavit is not relevant to this application because it addresses the issue of the counter claim.

On the effect of order 15 rule 5 of the ***white book***, counsel argued that the order does not preclude a party from resorting to it if the party has taken steps in defending the counter claim. Further that the order does not curtail the court's power if an application is made after directions for raising the counter claim were not opposed. It was also argued that the order does not set a time limit or stage within which such an application should be made. This, it was argued, is evident from the explanatory note to the order under order 15 rule 5 sub-rule rule 1 at page 217, which states that such an

application can be made at the substantive hearing or at trial. Counsel therefore submitted that the suggestion of waiver or preclusion is not supported by any authority and is alien to the broad discretionary powers of this court under order 15 rule 5 of the ***white book***.

As regards the argument advanced by the First, Second and Third Respondents, that having given directions for the raising of the counter claim, this court is *functus officio*, and counsel began by quoting ***Black's Law Dictionary*** on the definition of the term *functus officio.* It was argued that the directions which the First Respondent sought related to the manner in which the counter claim was to be raised. That the argument by the Respondents would be relevant if the Applicant was challenging the manner in which the points of counter claim are before the court. The issue before court, counsel argued, is the subsistence of the counter claim and whether it should be heard in the mortgage action before court. This, it was argued, is an issue that has not been raised before by any party nor has this court made a determination on it. Further that the order pursuant to which the application has been made does not preclude an application to be made where directions for raising of a counter claim have been given.

Counsel went on to respond to the argument that the counter claim is part of the restructured facility, thus: the court is urged to see paragraphs 5 and 6 of the notice points of counter claim; paragraph 5, 10, 11 and 12 of the affidavit supporting of counter claim filed on 13th August 2013; and paragraph 2.8 of the skeleton arguments in support of this application. It was argued that the facility letter which is produced as *"PK1"* to the affidavit in support of originating summons, makes no cross reference to an agreement to syndicate the sum of USD6.53 million and made in the year 2011. Further that clause 3.2 and 5.1 of the said facility letter state that it is capped at USD 3.5 million. That there is also clause 16 in the said facility letter which indicates that the facility which excludes and supersedes all prior arrangements without exception. By way of concluding arguments, counsel argued that the grant of this application will not lead to a multiplicity of actions because this action is a mortgage action premised on facility letters,

whilst the counter claim is based on a syndication agreement. It was argued that, the principles in the cases of ***Sunvest (2)*** and ***Hangandu (3)*** case are therefore not applicable to this matter. That there are two separate causes of action in respect of the claim and counter claim and that the beneficiary to the syndication agreement is also different from the beneficiary in the mortgage action. As such there can be no conflicting decisions if the First Respondent decides to sue on the counter claim separately. That even assuming that the principle in the ***Pandoliker*** case is in conflict with those in the ***Sunvest*** and ***Hangandu*** cases, this court is bound to follow the latest decision of the Supreme Court in line with the case of ***Match Corporation vs Development Bank of Zambia (4)***. Counsel prayed that the application should be granted.

I have considered the affidavit evidence and the arguments by counsel. The Applicant's contention in this application is that the counter claim has no relationship to the Applicant's claim and is a separate cause of action which cannot be pursued under the claim. The basis for the said contention is that it is alleged that the claim is governed by the facility letters, whilst, the counter claim is governed by the syndication agreement. The First Respondent on the other hand, has contended that the counter claim is part and parcel of this claim as it arises from the syndication agreement to which the facility letters were subject.

It is important that I first state the effect of order 15 rule 5 sub-rule 2 of the ***white book*** and the ***Pandoliker*** case before I determine this application. Order 15 rule 5 sub rule 2 of the white book states as follows:

> *"If it appears on the application of any party against whom a counter claim is made that the subject – matter of the counter claim ought for any reason to be disposed of by a separate action, the court may order the counter claim to be struck out or may order it to be tried separately or make such other order as may be expedient".*

The effect of this rule is that it grants this court discretion to strike out a counter claim or order that it be tried separately from the main claim. This is

in a situation where a court finds that subject matter of counter claim ought, for any reason, to be disposed of by a separate action. The explanatory notes to the order give examples where counter claims will be excluded as follows: where it would unduly delay the action; where it would be embarrassing; where it would substantially delay the Plaintiff's action for trial and would otherwise be inconvenient by greatly enlarging the area of dispute between the Defendants with which the Plaintiff was not connected; and where a fresh action would be statute barred.

The list is not exhaustive and merely highlights some examples. The test is, as I have stated in the early part of this ruling that, should the subject matter of the counter claim for any reason to be disposed of by a separate action.

Further, the wording of the order is such that it does not preclude an application where directions for the counter claim have been given and neither does it limit an application to a particular stage in the proceedings. I therefore dismiss the argument by counsel for the First Respondent to that effect. My finding is further enhanced by the fact that the explanatory notes on the order do not expressly or by implication suggest that such limitations exist in the making of the application. I have also dismissed the argument that this court is *functus officio* on the issue at hand. I have arrived at this decision based on the fact that the grant of directions for the counter claim is totally different from the issue now before me of whether or not the counter claim should be struck off. I am therefore not *functus officio.*

I now turn to consider the effect of the ***Pandoliker*** case. The facts of that case were that the Respondent commenced an action against the Appellants, in the court below by way of originating summons of 16th February 2012. The claim was for payment of all sums due and owing under a loan facility secured by a mortgage, which sums stood at USD1,208,533.06, as at 1st February 2012. The Respondent also claimed foreclosure on, and delivery up of the mortgaged property.

The background to the claim was that the Respondent, by a banking facility dated 24th December, 2007 advanced to the First Appellant the sum of

K1,600,000,000.00 (un rebased). The said sum was to attract interest at 21 percent per annum and was secured by a legal mortgage over property known as plot 724, Lusaka.

In January 2009, a further facility of USD 1,350,000.00 was availed to the First Appellant pursuant to which a further charge date 12th February 2009, in favour of the Respondent, was executed by the First Appellant. The further charge was secured by a demise of stand number 829 and plot 724 Lusaka and was subject to interest at the rate of 14 percent per annum. The further charge was obtained for purposes of effecting further development of stand no.829 Lusaka and the disbursement of the loan amount was to be made periodically upon request by the First Appellant. There was default on the loan repayment and the Respondent was prompted to sell one of the mortgaged properties, being Plot 829 Lusaka, at the price of USD800,000.00. After the sale, the USD800,000.00 was applied to the loan amount of USD1,350,000.00 which reduced the loan to USD870,148.55.

There was further default by the Appellant in repaying the outstanding amount, which prompted the Respondent to recommend that the Appellants' loan facility should be restructured. Pursuant to this, and by way of banking facility letter dated 28th September, 2011, the Respondent offered the First Appellant a banking facility in the sum of USD1,180,149.00 which was a consolidation of the balances on the two loans of K1,600,000,000.00 and USD1,300,000.00. The loan was also converted to an eight year United States Dollars denomination loan with interest placed at 12 percent per annum.

The restructured loan was secured by a first legal mortgage dated 14th January, 2008 made between the First Appellant and the Respondent over property known as plot 724 Lusaka. It was also secured by a company guarantee by the Second Appellant, a subordination of directors' loans by the Third and Fifth Appellants and directors' personal guarantees by the Third, Fourth and Fifth Appellants.

In opposing the application the Appellants averred that as regards the mortgage over plot 724, the First Appellant had been up-to-date with its

repayments until the Respondent started defaulting in the disbursement of funds towards the developments at stand no.829. Further that in relation to stand 829, the First Appellant had informed the Respondent that it did not need the USD1,350,000.00 to be disbursed at once but that it should be released to it on request as per construction requirements. The First Appellant listed the delays in the disbursements of the drawdowns complained of which it contended resulted in severe loss of business as a consequence of non-use of stand no.829 in the sum of USD614,400.00. The Appellants accordingly counter claimed the said sum from the Respondent. It was also contended that the delays in releasing the moneys by the Respondent resulted in the First Appellant procuring building materials at higher prices than those budgeted for, thereby increasing costs, which costs were stated at USD21, 500.00. Further that the First Appellant was sued by a third party supplier of building materials for non-payment of K70,000,000.00 plus interest. The said sum was attributed to the Respondent's failure to disburse moneys timely. Other complications the Appellants contended were attributable to the Respondent's default in disbursement of loan amounts were that: the First Appellant paid the sum of USD36,520.00 to Standard Chartered bank; it spent its own resources amounting to USD879,215 towards construction works at stand no.829; it had to redesign the ground floor of the said property and resubmit plans for purposes of planning permission when the Respondent breached the agreement to occupy the ground floor of stand no.829 for its offices, which cost the First Appellant placed at the sum of USD6,364.00 of its own resources; that the First Appellant paid USD40,000.00 property transfer tax following the sale of the mortgaged property initiated by the Respondent; and that a sum of K7,800.00 paid by the First Appellant on 1st February 2012 had not been taken into account.

The Appellants contended that owing to all these factors, the First Appellant defaulted because it was applying rentals for Plot 724 to finance the development of stand 829. As such the Respondent was not entitled to the reliefs claimed.

The question that the Supreme Court considered was whether there was a misdirection on the part of the learned High Court Judge when he dismissed the Appellants' counter claim.

In determination this question the Supreme Court held as follows at pages J19, 20 and 21;

> *"To the extent that by this facility letter, the loan arrangement between the parties was restructured, the letter provided a nexus between, the new arrangement and the old, the facility as originally arranged however, ceases to exist in the original format ...*
>
> *In our view, by deciding to restructure the loan facility through the banking facility letter of 28th September, 2011, the parties redefined their relationships so that reference to the old order had henceforth become impertinent. It is, therefore, not surprising that the affidavit in support of the Originating Summons, in the court below showed that the legal mortgage rights that the Respondent sought to enforce emanated and were referable to the banking facility letter of 28th September, 2011 ... In this regard, we accept the submission by the learned counsel for the Respondent that, to the extent that the parties redefined their relationship through the new banking facility letter of 28th September, 2011, any defaults and breaches under the previous relationship could not be part of the new credit affair that started with the 28th September, 2011 banking facility letter.*
>
> *Even assuming that the Appellants had adduced sufficient evidence to show that their counter claim was well founded, to raise as a defence, the perceived braches of the Respondent's pre-restructured loan facility in an action premised on the post structured facility would in our view, be anachronistic."*

The effect of the foregoing holding is that once parties enter into a fresh arrangement as to the borrowing by one of the parties, the initial arrangement in relation thereto falls away. Further, a party cannot rely on breaches and defaults of the other party committed on the previous arrangement as a

counter claim in relation to the claim by another raised through the new arrangement for borrowing. This ties in squarely with the provisions of order 15 rule 5(2) of the ***white book*** to the extent that this court is empowered, where it deems that a subject matter of a counter claim ought for any reason be disposed of by a separate action, to strike out the counter claim. In the ***Pandoliker*** case, the counter claim was deemed inappropriate as against the claim because it arose from a different transaction from the mortgage action from which the claim arose. This is the argument that the Applicant in this matter has also advanced. That is to say, it is contended that the Applicant's claim arises from the facility letter while the First Respondent's counter claim arises from the syndication agreement which is separate from the facility letters. On the other hand the Respondents contend that syndication agreement is part and parcel of the facility letter.

The determination of this matter therefore lies in the interpretation to be put on the facility letters and the syndication agreement. There are three facility letters dated 12th April 2010, 24th January 2012 and 12th September 2012. The facility letters are all marked exhibit *"PK1"* to the affidavit in support of originating summons. The first facility letter is dated 12th April 2010, and in the first paragraph of the said letter the parties are described as the Applicant and the First Respondent. Clause 1 indicates that the tenure of the loan was seven years whilst its purpose is stated under clause 2 as being to assist the borrower construct the main lodge, conference centre and completion of forty chalets. The amount advanced is stated under clause 3 as not exceeding USD3,500,000.00. The second facility letter dated 24th January 2012, also describes the parties as the Applicant and the First Respondent. It then describes the loan type as being, a new seven year term loan facility with a one year moratorium on principal repayments and as a continuation of the USD3,500,000.00 seven year loan facility. Clause 2 described the purpose of the loan as being to assist the borrower complete the construction of the lodge, meet construction costs and partly cover the purchase of fixtures and fitting for the lodge. Clause 3 states the amount as not exceeding USD3,500,000.00

and as a continuation of the loan that as at that date stood at USD3,387,207.21. Under clause 4 the facility letter states in part as follows:

> *"The Bank will avail the Borrower with a seven year loan facility denominated in United States Dollars under a syndication by African Banking Corporation Holdings."*
>
> *African Banking Corporation Zambia Limited has not participated in the syndication, the Bank's role is to arrange and lead the syndication ..."*

(The underlining is the court's for emphasis only).

By the said clause, the letter indicates that the syndication will be by African Banking Corporation Holdings and that the Applicant has not participated in the syndication.

The third facility letter dated 12th September 2012 varied clauses 1, 9, 11, 17 and 18 of the facility letters. These clauses related to the following: the tenure of the loan facility; the securities pledged; incorporation of other conditions; the period of the loan; and repayment terms. The facility letter also describes itself as an addendum to facility letter number L-500625-3 dated 24 January 2012 which is the second facility letter.

It is also important to restate that the facility letters were executed by the Applicant and First Respondent and not African Banking Corporation Holdings and the First Respondent. The letters were also subject to the securities which included, but not limited to mortgages. The first two facility letters also had clause 16, a no prior agreement clause, which states as follows:

> *"This facility, as of the signature thereof, represents the entire agreement between the Borrower and the Bank and consequently cancels and supersedes any and all prior documents, agreements or understandings whether oral or written, exchanged or delivered during negotiations leading up to this facility."*

As regards the allegations that the Applicant and First Respondent had entered into a syndication loan, it is apparent from the pleadings that there

was no formal agreement entered into, but that the same was allegedly consummated by way of exchange of correspondence. This can be discerned from paragraph 6 of the Notice of Points of Counter Claim by the First Respondent dated 13th August 2015. The said paragraph states as follows:

> *"The 1st Respondent will say that by virtue of the exchange of the letters referred to in paragraph 3 hereof, the 1st Respondent and the Applicant had entered into an agreement ("Agreement to Syndicate") under which the Applicant was to act as lead arranger in raising the Syndicated Loan required for the completion of Phase One of the Hotel."*

(The underlining is the court's for emphasis only)

The letters referred to in the paragraphs are exhibits to the affidavit in opposition to originating summons dated 20th April 2015, specifically, exhibits *"LSS3"*, *"LSS4"* and *"LSS5"*. I will not comment on the effect of the said letters, that is whether or not they constituted a binding contract, because this is reserved for another stage in these proceedings. My task at this point is merely to determine whether or not the counter claim arises from the same cause of action warranting its determination in this action. It is also important to note that whilst the Applicant and First Respondent were engaged in the exchange of the letters I have referred to, the Applicant had advanced moneys to the First Respondent by way of facility letter dated 12th April 2010 and further funding by way of facility letter dated 24th January 2012. What can be discerned from the foregoing, is that the syndication agreement contemplated a situation whereby the Applicant as lead arranger, under the auspices of African Banking Corporation Holdings, would arrange funding from other financial institutions to extend to the First Respondent. This is opposed to the Applicant funding the First Respondent on its own, as was the case in the mortgage transaction from which the claim arises. The pleadings appear to show, and for reasons I shall not go into at this point, that this syndication arrangement did not take off and that the funds that were extended to the First Respondent only came from the Applicant. This can be discerned from the affidavit evidence by the Respondent and the notice of points of counter

claim. In the latter, the important paragraphs are 19 and 22 which state as follows:

Paragraph 19

"That subsequent to Afriexim availing the Term Sheet, the parties entered into various discussions with a view to progress matters so as to complete the project. It would appear however, the applicant was not keen to complete the project. On the 9th of December, 2014 the Applicant advised the 1st Respondent that Afriexim had after preliminary analysis of the proposal of the 1st Respondent ... declined to consider the 1st Respondent's request for funding. I will specifically refer the court to the exhibit marked "LSS18" in the Affidavit in Opposition which is the letter dated 9th December, 2014 from the Applicant to the 1st Respondent."

Paragraph 22

"That it is the 1st Respondent's position that the Applicant has refused and or neglected to arrange full syndicated finance as contemplated under the agreement to syndicate which has led to loses that the 1st Respondent is counter claiming ..."

The effect of the foregoing paragraphs, when read with the facility letters reveals that there were two separate transactions. The first being the mortgage transaction evidenced by the two facility letters and the second being the syndication agreements evidenced by the exchange of correspondence. In the former, the Applicant individually extended moneys to the First Respondent, while in the latter, the Applicant was to be lead arranger in organising and in conjunction with other financiers, funding the First Respondent's project.

Consequent upon this, the cause of action which arises in relation to the mortgage action i.e. the originating summons, filed by the Applicant arises out of the two facility letters. Whilst the cause of action that arises from the syndication agreement arises from the exchange of correspondence that I have referred to earlier. These are two separate and distinct causes of actions, arising out of two separate and distinct agreements. This is re-inforced by the fact that clause 16 in the two facility letters which I have quoted in the earlier

part of this ruling excludes reference to any other agreement. This is an entire agreement clause whose effect is that the clause constitutes a binding contract between the parties that the full contractual terms are to be found in the document (in this case the facility letters) containing the clause and not elsewhere. This is in accordance with the holding in the case of ***INNTREPRENEUR PUB CO. (GL) vs EAST CROWN LTD (5)*** which states as follows at page 116:

> *"The purpose of an entire agreement clause was to preclude party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some chance remark or statement on which to found a claim as to the existence of a collateral warranty; the entire agreement clause obviated the occasion for any such search and the peril to the contracting parties posed by the need which might arise in its absence to conduct such a search; the clause constituted a binding agreement between the parties that the full contractual terms were to be found in the document containing the clause and not elsewhere, and any promises or assurances made in the course of the negotiations should have no contractual force; and the operation of the clause was not to render evidence of the collateral warranty inadmissible in evidence but to denude what would otherwise constitute a collateral warranty of legal effect (see p.614, col.1)".*

In view of my finding in the preceding paragraph, the firm view I take is that the two claims cannot be pursued in one action. To that extent I find merit in the Applicant's claim. In arriving at the foregoing finding, I have considered the argument by Mr. M. Chiteba that clause 4 of the facility letter of 24th January 2012 reinforces the fact that the syndication agreement cannot be separated from the facility letters upon which this action is founded. I have dismissed the said argument because as I have demonstrated in the earlier part of this Ruling, clause 4 sets out African Banking Corporation Holdings as the bank that would participate in the syndication and not the Applicant.

The issue now is, what is the fate of the First Respondent's counter claim. The Applicant has argued that it should be struck out. Order 15 rule 5 sub-rule

2 of the ***white book,*** upon which this application is anchored, gives me the option of either striking out the counter claim, ordering it to be tried separately or make any other order which may be expedient. I am inclined to order that that the counter claim be tried separately, and I so order. Having hived off the counter claim from the claim I order and direct as follows in relation to the future conduct of this matter:

a) The Applicant's claim

1) That in view of the fact that the parties have filed an affidavit in support one in opposition and one in reply, the matter is ready for hearing. It will therefore come up for hearing on 21st day of January 2016 at 9:00 hours

2) Pending the hearing in 1 above, the Applicant is at liberty to amend its affidavit in support of originating summons within 7 days of the date hereof and the Respondents to amend theirs in opposition 7 days thereafter. The purpose of the foregoing exercise is to remedy any short comings to the affidavits which are consequent upon the overall decision I have made

b) The counter claim

1) The matter to come up for directions as to the conduct of the counter claim on 21st day of January 2016 at 8:30 hours

As regards cost, I award same to the Applicant against the First Respondent.

Dated at Lusaka this 9th day of December 2015

NIGEL K. MUTUNA
HIGH COURT JUDGE