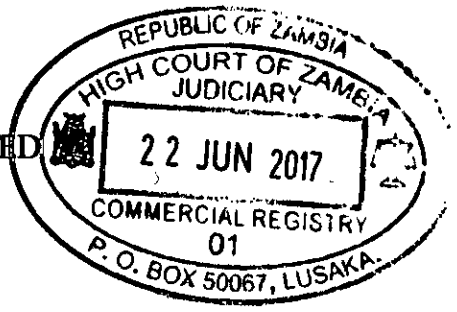
IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0563**

IN THE COMMERCIAL DIVISION

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ALIOS FINANCE ZAMBIA LIMITED **PLAINTIFF**

AND

BERHANE KIBROM **DEFENDANT**

Before: **Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka this 22nd day of June, 2017.**

For the Plaintiff: Mr. M. Yosa of Messrs. Musa Dudhia and Company

For the Defendant: Ms. N. Sumbwa of Messrs. Kalokoni and Company

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RULING

Cases referred to:

1. *Edward Owen Engineering Limited v. Barclays Bank International Limited (1978) 1 ALL E.R. 976*
2. *Access Bank Zambia Limited v. Group Five Z/con Business Park Joint Venture SCZ/8/52/2014 (unreported)*

Legislation referred to:

1. *Order 18 rule 19 of the Rules of the Supreme Court, 1999 Edition.*
2. *Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
3. *Article 118 (2) (e) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.*

This is an application by the Defendant to set aside the Writ of Summons and Statement of Claim herein for multiplicity of actions and abuse of court process pursuant to Order 18 rule 19 of the Rules of the Supreme Court, 1999 Edition and Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia. The Summons was filed in Court on 21st December, 2016 together

with an accompanying affidavit sworn by one Berhane Kibrom, the Defendant herein, List of Authorities and Skeleton Arguments.

The affidavit of Berhane Kibrom discloses that the Plaintiff commenced this action against the Defendant on 29th November, 2016. However, at the time of commencement of the action, there was actively before another court, under cause number 2015/HPC/0496, an action by the company where the Defendant is the Managing Director, namely, Keren Motors Limited on the same facts, seeking the same relief that is being sought in this Court. The deponent deposes further that he has been advised by his advocates and verily believes that since matters pertaining to the same subject herein are actively before another court, the Plaintiff cannot proceed with this matter, until all issues in controversy under cause number 2015/HPC/0496 are determined by the court.

As proof of the existence of the matter in the other court, the deponent produced a copy of the Writ of Summons and Statement of Claim under cause number 2015/HPC/0496 which is exhibited as exhibit "BK1". He further averred that he had been advised by his advocates and believed that the outcome in cause number 2015/HPC/0496 shall inevitably affect the proceedings in the matter herein and for that reason, this matter should not proceed. The deponent further averred that on 6th December, 2016, he caused to be filed in the Commercial Registry of the High Court a Conditional Memorandum of Appearance.

Berhane Kibrom deposed in addition that he has been advised by his advocates and believes that proceeding with the matter would be prejudicial in that there would be a multiplicity of actions and conflicting judgments on the same facts and remedies.

The Plaintiff opposed the application by way of an Affidavit in Opposition to Summons To Set Aside Writ for Multiplicity of Actions and Abuse of Court Process sworn by one Edward Mwachipata, the Recovery Manager in the Plaintiff Company.

The affidavit of Richard Mwachipata discloses that it is the Plaintiff's contention that contrary to the Defendant's assertions in its Affidavit in Support, the relief being sought in the action under Cause No. 2015/HPC/0496 and the action herein are not the same as they arise out of different contractual obligations and between different parties. Further, that the action under cause number 2015/HPC/0496 is anchored on the sale and leaseback agreements between the Plaintiff and Keren Motors Limited while the action herein is anchored on the letter of personal guarantee executed by the Defendant.

The deponent avers that the action under cause number 2015/HPC/0496 is not concerned with the enforcement of the guarantee but rather it is Keren Motors Limited who in the said action is disputing its liability to the Defendant under the sale and leaseback agreements referred to in paragraphs 3 to 5 of the Statement of Claim herein. Further, that it is noteworthy that the Defendant is not a party to the action under cause number 2015/HPC/0496.

It is the Plaintiff's further contention that as advised by Counsel, which advice the Plaintiff verily believes to be true, since the Defendant executed a demand guarantee, the Plaintiff's right to enforce the demand guarantee against the Defendant is not dependant on the outcome of the action under cause number 2015/HPC/0496. That the Plaintiff has the right at law to commence separate proceedings against the Defendant to enforce the guarantee. The Plaintiff denies the Defendant's contention that the outcome in cause number 2015/HPC/0496 shall inevitably affect the proceedings herein and avers that the Defendant's remedy lies against the principal debtor, Keren Motors Limited.

The Plaintiff asserts that by a letter of personal guarantee dated 5th November, 2014, the Defendant agreed to guarantee repayment of all monies and interest whatsoever together with costs, charges and expenses which shall at any time be due to the Plaintiff from Keren Motors Limited in any shape or form under and by virtue of the lease agreement, when the same shall become due and payable. That it was a term of the letter of personal guarantee that any

statement by the Plaintiff regarding the amount due to the Plaintiff at any time will be accepted by the Defendant as conclusive evidence of the extent of his liability under the guarantee.

The Plaintiff produced and exhibited a copy of the Letter of Personal Guarantee executed by the Defendant as exhibit "EM1". It is the Plaintiff's averment that there is no risk of conflicting judgments on the same facts and remedies as the dispute between the Plaintiff and Keren Motors Limited under cause number 2015/HPC/0496 is not relevant to enforceability of the guarantee by the Defendant.

On 14th February, 2017, the Defendant filed an Affidavit in Reply to Affidavit in Opposition to Summons to Set Aside Writ for Multiplicity of Actions and Abuse of Court Process, sworn by Berhane Kibrom wherein he reiterates that the action under cause number 2015/HPC/0496 and the cause herein arise from the same set of facts and thus there is a possibility of conflicting judgments being given on the same sets of facts; that the facts in issue under cause number 2015/HPC/0496 are the same as those that this Court is required to determine in this cause.

The Defendant further traverses the contents of paragraphs 9, 10, 11, 12 and 13 of the Plaintiff's Affidavit in Opposition and avers that he has been advised by his advocates and believes the same to be true, that the borrower commenced the action under cause number 2015/HPC/0496 seeking the court to make a finding of facts as to whether the borrower has paid the loan in full. The Defendant avers in addition, that he has been advised by his advocates and believes the same to be true that proof of liability on the part of the borrower is a condition precedent for enforcement of a personal guarantee and this is the main fact in issue yet to be determined under cause number 2015/HPC/0496.

The Defendant avers further that he will suffer irreparable damage if this Court orders him to pay the amount and the court in cause number 2015/HPC/0496 finds that the borrower had in fact discharged its liability to the Plaintiff herein.

At the hearing, learned Counsel for the Defendant reiterated the Defendant's contention in the Affidavit in Reply that proof of liability on the part of the principal debtor is a condition precedent to the enforcement of the personal guarantee against the guarantor. According to Counsel, in the matter under cause number 2015/HPC/0496 where the Plaintiff in this matter is the defendant and the principal debtor is the plaintiff, the latter is contending that the loan facility was discharged fully. That matter is yet to be determined by another court of similar jurisdiction. Therefore, the condition precedent, which is proof of liability on the part of the principal debtor, has not been discharged. For this reason, the application before this Court is premature. It was Counsel's prayer that this matter be dismissed or consolidated with the other matter, namely, cause number 2015/HPC/0496.

In response, Mr. Yosa, learned Counsel for the Plaintiff submitted that from the Summons they had taken note of the fact that the application before Court was made pursuant to Order 18 rule 19 of the White Book as well as Order 3 rule 2 of the High Court Rules. Mr. Yosa further noted that the relief sought in the Summons is to set aside the originating process. Counsel contended that the rules relied upon by the Defendant do not support the relief sought and that applications to set aside originating process are governed by Order 2 rule 2 of the White Book.

According to Counsel, this means that there is no congruency between the relief sought and the rules of Court upon which the application is founded. As regards Order 3 rule 2 of the High Court Rules, Counsel submitted that the said provision merely vests the Court with a general power to make any orders it deems fit. However, the power under Order 3 rule 2 is expressly stated to be subject to any particular rules.

It was Counsel's further argument that it follows that an application under Order 3 rule 2 must be buttressed by a specific rule which provides for the making of the application and the relief sought. According to Counsel, the fact that the relief sought herein is not supported by the Rules pursuant to

which the application is made, renders the application by the Plaintiff, on this ground alone, to be incompetently before this Court.

Additionally, Counsel submitted that should the Court be inclined to delve into the merits of the Plaintiff's application, the Defendant filed in Court an Affidavit in Opposition and Skeleton Arguments on 26th January, 2017 upon which the Defendant would place reliance. In response to Ms. Sumbwa's *viva voce* submissions, Mr. Yosa submitted that the alleged condition precedent to the bringing of an action against a guarantor is in fact a condition precedent to the establishment of liability of the guarantor and not a condition precedent to the commencement of an action to enforce a guarantee. Therefore, proof of the debt of the principal debtor is a matter to be determined at the trial of the action and not at this preliminary stage, for that is the way debts are proved. In any event, according to Counsel, the enforcement of a guarantee is not dependent on the outcome of a dispute between the principal debtor and the beneficiary of the guarantee. For emphasis, Counsel referred this Court to the case of ***Edward Owen Engineering Limited v Barclays Bank International Limited***[1]. It was the Plaintiff's contention that in the circumstances, this action is properly before Court and further, that there are triable issues which have been disclosed by the Plaintiff and therefore, the Plaintiff should not be driven from the judgment seat at this preliminary stage.

Reacting to the Defendant's prayer for consolidation, Counsel submitted that no prayer for consolidation of actions has been made in the Summons or in any of the documents filed by the Defendants. According to Counsel, if the Defendant wishes to have the two actions consolidated, he is at liberty to invoke the rules of Court which govern consolidation of actions and make the appropriate application in the appropriate form. Counsel submitted that the prayer for consolidation is incompetent and it is, therefore, the Plaintiff's prayer that the Defendant's application be dismissed with costs to the Plaintiff.

In reply, Ms. Sumbwa submitted that Order 18 rule 19 of the Rules of the Supreme Court provides that the court may strike out any pleadings which disclose no cause of action or are scandalous, vexatious or may delay the disposal of the main matter. Counsel submitted that the Defendant cited Order 18 rule 19 because of the fact that the relief sought under both actions arise out of the same facility and another court is yet to determine whether the loan facility has been discharged by the principal debtor.

Furthermore, Article 118 of the Constitution provides that matters should not be dismissed on technicalities but should be heard on the merits. Counsel submitted that in as much as Order 18 rule 19 does not talk about multiplicity of actions, it talks about scandalous and vexatious claims, which are an abuse of court process. It was the Defendant's prayer that the matter be dismissed with costs and further, that the Court exercises its discretion pursuant to order 3 rule 2 which allows this Court to make any orders it may deem fit, to order that the matters be consolidated.

Before I delve into the merits of the application before me, it is of utmost importance to make a determination on the competence of the application before this court for the reason that the outcome will determine whether this application proceeds to be heard on the merits or is disposed of summarily for being incompetently before the Court.

It is not in dispute that the application before Court has been made pursuant to Order 18 rule 19 of the White Court which provides as follows: -

> *"19. - (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement on the ground that: -*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) It is scandalous, frivolous or vexatious; or*
>
> *(c) It may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) It is otherwise an abuse of the process of the Court*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case maybe..."*

The application is further made pursuant to Order 3 rule 2 of the High Court Rules which stipulates that: -

> *"Subject to any particular rules, the Court or Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."*

As correctly submitted by the Plaintiff, the relief sought in the Summons is to set aside the originating summons. According to the Plaintiff, Order 18 rule 19 relied upon by the Defendant in its application does not support the relief sought and further, applications to set aside originating process are governed by Order 2 rule 2 of the White Book. Order 2 rule 2 of the White Book states as follows:

> *"2. - (1) An application to set aside any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*
>
> *(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."*

The Plaintiff submitted that it is evident that there is no congruency between the relief sought and the rules of court upon which the application is founded. In relation to order 3 rule 2 of the High Court Rules, the Plaintiff submitted that the rule merely vests the Court with a general power to make any orders that it deems fit. However, the power under Order 3 rule 2 is expressly made to be subject to any particular rules. It therefore follows that an application under Order 3 rule 2 must be underpinned by a specific rule which provides for the making of the application and the relief sought. It was the Plaintiff's argument that on this one ground, the application by the Defendant is incompetently before the Court and therefore, should be dismissed with costs.

In response, the Defendant submitted that in as much as Order 18 rule 19 of the White Book does not specifically talk about multiplicity of actions, it deals with scandalous and vexatious claims, which are an abuse of the court process. Further, that Article 118 (2) (e) of the Constitution as amended by

the Constitution of Zambia (Amendment) Act No. 2 of 2016 provides that justice shall be administered without undue regard to procedural technicalities, meaning that matters should not be dismissed on technicalities but should be heard on their merits. It was the Defendant's prayer that the matter be dismissed with costs and further, that this Court exercises its discretion pursuant to Order 3 rule 2 which gives the Court the power to make any orders it may deem fit, to make an order that the two matters, namely, cause number 2015/HPC/0496 and cause number 2016/HPC/0563 which is before this Court, be consolidated.

From the rules cited above, it is clear, as submitted by the Plaintiff, that the Defendant's application to set aside writ for multiplicity actions and abuse of court process was based on a Rule that does not support the relief sought. Indeed, Order 18 rule 19 has nothing to do with applications to set aside originating process but everything to do with applications to strike out or amend pleadings or endorsement on writs on the grounds stipulated in (a) to (d) of rule 19. It is clear, therefore, that there is no justification for the Defendant to have relied on Order 18 rule 19 for this application.

As for the Defendant's reliance on Order 3 rule 2 of the High Court Rules. I concur with the submission by the Plaintiff that the Order cited is subjected to particular rules and therefore, must be reinforced by a specific rule which provides for the making of the application and the relief sought. Since in this case the Order upon which Order 3 rule 2 is meant to be anchored does not support the application and relief sought, Order 3 rule 2 does not have any leg to stand on and hence does not offer any assistance to the Defendant.

Having found that Order 18 rule 19 of the Rules of the Supreme Court does not support the relief sought, what is the consequence of this finding with regard to the application before Court? Learned Counsel for the Defendant argued that matters should not be dismissed on technicalities but should be heard on the merits in accordance with Article 118 (2) (e) of the Constitution. In my experience, it is not unusual when faced with procedural deficiencies for counsel to seek solace in the said constitutional provision. However, in

the case of ***Access Bank Zambia Limited v Group Five/Zcon Business Park Joint Venture***[2], the Supreme Court laconically stated as follows:

> *"Article 118 (2) (e) of the Constitution of Zambia never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the Court."*

For the aforestated reasons, I find the application to set aside writ for multiplicity of actions and abuse of court process to be incompetently before the Court and is dismissed forthwith. Counsel for the Defendant prayed that this court exercises its discretion pursuant to Order 3 rule 2 of the High Court Rules to order the consolidation of the two matters referred to above. However, this prayer cannot succeed for the simple reason that no application for consolidation is before this Court. The prayer for consolidation of the matters came from out of the blues when Counsel for the Defendant was closing her *viva voce* submissions. That is not the way applications are brought before Court and further, Article 118 (2) (e) of the Constitution cannot be called to the aid of the Defendant in this case because as the Supreme Court ably guided in the case cited above, litigants have an obligation to comply with procedural imperatives as they seek justice from the Courts.

In sum, the application to set aside writ for multiplicity of actions and abuse of court process is dismissed with costs for being incompetently before the Court.

Leave to appeal is granted.

Delivered at Lusaka the 22nd day of June, 2017.

Winnie S. Mwenda (Dr)
HIGH COURT JUDGE