

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2017/HPC/0180

BETWEEN:

FIRST ALLIANCE BANK ZAMBIA LTD

PLAINTIFF

AND

VALUE AUTO SPARES LIMITED

1ST DEFENDANT

BRIGITTE BALANDINOS

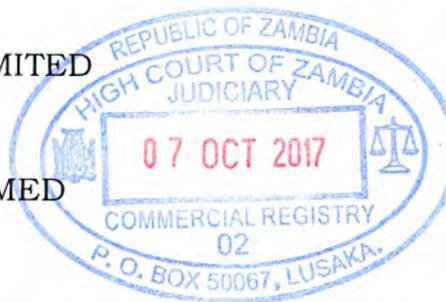
2ND DEFENDANT

SALLY VERONICA MOHAMED

3RD DEFENDANT

RAUL RAVEN

4TH DEFENDANT



Before the Hon. Lady Justice Irene Zeko Mbewe.

For the Plaintiff:

Mr. G. Pindani of Messrs Chonta, Musaile & Pindani

For the Defendants:

Mr. Alex Muyebe of Messrs Suba Tafeni & Associates.

R U L I N G

Cases Referred To:

1. *ABC Corporation (Z) Limited (T/A Bank ABC) v Plinth Technical Works Ltd & Others SCZ No 28 of 2015.*
2. *Corpus Legal Practitioners v Mwanandai Holdings Limited SCZ Judgment No. 50 of 2014.*

3. *Development Bank of Zambia v Sunset Pharmaceutical [1995/1997] ZR 187*
4. *China Henan International Economic Technical Cooperation v Mwange Contractors Limited [2002] ZR 28*
5. *S Brian Musonda (Receiver of First Merchant Bank Zambia Limited In Receivership) v Hyper Food Products [1999] ZR 124*
6. *Ellen v Allan [1914] 1 Ch 904*
7. *Avon Finance Company Limited v Bridget [1985] 2 ALL.E.R 281*

Legislation Referred To:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

The Defendants herein raised a preliminary issue pursuant to **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** for the determination of the following:

1. That the matter before Court was wrongly commenced by way of Writ of Summons as opposed to an Originating summons as required by law.

The Defendants prays that the matter be dismissed for irregularity and want of jurisdiction.

An affidavit in support of notice of response to a preliminary issue was filed on 21st July 2017 deposed to by Gilbert Pindani Counsel

for the Plaintiff seized with conduct of the matter. The deponent strongly opposes the preliminary issue and argues that the nature of the relief sought by the Plaintiff includes:

“An Order that the 4th Defendant honours his personal guarantee in the event that the proceeds of the sale of the said mortgaged properties are not adequate to pay off the outstanding debt”.

The deponent argues that the basis for commencing proceedings by way of writ of summons is that enforcement of a personal guarantee is not covered under **Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia**. That severing the reliefs in different actions according to the relief sought would amount to a multiplicity of actions and therefore the Court has power to adjudicate upon it. Counsel contends that the 1st Defendant admits being in default and indebted to the Applicant (**Exhibit “GP 1”**).

In its skeleton arguments, Counsel for the Plaintiff relies on **Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia** and **Order 88 Rule 1 Rules of the Supreme Court 1999 Edition**. Counsel argues that the cited Orders clearly show that a mortgage

action can be commenced by way of writ of summons accompanied by a statement of claim. The Court's attention was drawn to the Plaintiff's claim for:

“An Order that the 4th Defendant honours his personal guarantee in the event that the proceeds of the sale of the said mortgaged properties are not adequate to pay off the outstanding debt”.

Counsel for the Plaintiff contends that the above stated relief cannot be included where the matter is commenced by way of originating summons but only through a writ of summons. To strengthen his argument, the case of **African Banking corporation Zambia Limited T/A Bank ABC v Plinth Technical Works Ltd & 5 Others**¹ was cited where the Supreme Court held that a debenture and personal guarantees do not strictly fall under a mortgage action. Counsel for the Plaintiff argues that the effect of the preliminary issue was to ask that reliefs arising from the same set of facts and in the same transactions be commenced under two different originating processes is promoting multiplicity of actions and an abuse of Court process which the Court shall not entertain.

In support of this argument the case of **Corpus Legal Practitioners v Mwanandai Holdings²** was drawn to the Court's attention. The Plaintiff prays for dismissal of the preliminary issue with costs.

In the Defendant's affidavit in support of reply to opposition, deposed to by Dinos Balandinos a Director in the 1st Defendant, the salient facts are that there is no need to resort to the personal guarantee of the 4th Defendant as the current market value of both mortgaged properties far exceeds the amount owed to the Plaintiff. That one of the mortgaged properties namely Stand 6540 Lusaka owned by the 2nd Defendant is valued at K7,000,000 according to a valuation dated 19th April 2017 (**Exhibit "DB 1"**). According to the 1st Defendant, it disputes the interest rates applied at various times which affected the total computation of the total debt and that the variations were never explained to the Defendants. That the 1st Defendant has advertised the said mortgaged properties in order to settle the debt in question (**Exhibit "DB 2-3"**).

At the hearing, both parties relied on the filed documents, skeleton arguments list of authorities and made oral submissions.

I have carefully considered the affidavit evidence on record, skeleton arguments, list of authorities and oral submissions. The Defendant's application is predicated on **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** which provides as follows:

“3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated”.

Counsel for the Plaintiff relies on the case of **ABC Corporation (Z) Ltd (T/A Bank ABC) v Plinth Technical Works Limited and Others¹ and Corpus Legal Practitioners v Mwanandai Holding Limited²** in support of the proposition that a personal guarantee does not fall under a mortgage action. In the latter case, the Supreme Court held inter alia that:

“a debenture and personal guarantees do not, strictly speaking, fall under a mortgage action....”

That where a matter begun by originating summons, it appears to the Court that the matter should have been commenced by writ of summons, the Court under **Order 28 Rule 8 Rules of the Supreme Court, 1999 Edition** has power at any stage of proceedings to order that the proceedings should continue as if the matter had been so begun and may in particular, order that any affidavits shall stand as pleadings and give further directions on the conduct of the matter.

I find that the right to the reliefs claimed arise out of the same transaction. I concur with Counsel for the Plaintiff that severing of the action would lead to a multiplicity of actions as guided by the Supreme Court in the case of **ABC Corporation (Z) Ltd (T/A Bank ABC) v Plinth Technical Works Limited and Others**. Indeed the Court frowns on a multiplicity of actions where separate actions are brought involving the same parties and arising from the same set of facts as espoused in the case of **Development Bank of Zambia v Sunset Pharmaceutical**³.

The upshot is that the Defendant's preliminary issue lacks merit and is dismissed with costs to the Plaintiff.

A perusal of the 1st Defendant's affidavit in support (of reply) dated 28th July 2017 deposed to by Dinos Balandinos a Director in the 1st Defendant company, shows that the 1st Defendant is not disputing their indebtedness to the Applicant. I have examined paragraph 8 and it reads as follows:

"8. That had the Defendants been given enough time to sale at a commercial price one of the mortgaged properties namely Stand 6540 Lusaka owned by the 2nd Defendant which was valued on 19th April 2017 at the price of K7,000,000.00, which price is enough to cover the overdraft facility. There is now produced and shown to me Exhibit marked "DB1" true copy of the valuation report."

I find this to be an admission and I am guided by the Supreme Court in the case of **China Henan International Economic Technical Cooperation v Mwange Contractors Limited**⁴ where it was held that:

"It would be absurd to expect a court which is in control, to pause and wait for an application for judgment on admission

where clearly the defence is deemed to have admitted the claim."

Instructive is the case of **Ellen v Allen**⁵ where it states at page 909 as follows:

"the admission may be express or implied, but it must be clear"

I therefore take the view that this is an appropriate case for this Court to enter Judgment on admission as the 1st Defendant's admission is clear and unequivocal.

The 1st Defendant avers that it disputes the interest rates applied at various times which has in turn affected the total computation of the total debt and that the same was not explained to the Defendants as a result of which negotiations with the Plaintiff stalled. The 1st Defendant having admitted the debt, I order the Plaintiff to furnish the 1st Defendant with bank statements showing the interest rate applied on the overdraft facilities availed to the 1st Defendant. This is to be done within 14 days of this Judgment.

The Plaintiff claims for an order for foreclosure, possession and sell of Stand No 6540, Lusaka owned by the 2nd Defendant and

Subdivision A1 of Subdivision "Y4" of Farm 748 Njo Ndola owned by the 3rd Defendant and an enforcement of the personal guarantee of the 4th Defendant.

It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure, delivery up of possession of mortgaged property. These remedies are cumulative as espoused in **S Brian Musonda (Receiver of First Merchant Bank Zambia Limited In Receivership) v Hyper Food Products⁶**.

It is trite that a mortgagor has a right in equity to redeem even after the date fixed by the mortgage period for repayment has passed. A perusal of the record shows that the 1st Defendant made several undertakings to settle the outstanding amount and I find that the same was abrogated.

The upshot is that the 1st Defendant having admitted its indebtedness to the Plaintiff herein, I enter Judgment on admission in favour of the Plaintiff in the claimed sum of ZMW4,368,267.37 plus interest at the contractually agreed interest rate from date of writ to date of Judgment and thereafter at the commercial lending rate until full payment. The Judgment sum is to be paid within

seventy-five (75) days of this Judgment failure to which the Plaintiff shall be at liberty to foreclose, take possession and exercise the power of sale over the mortgaged properties namely Stand No 6540, Lusaka owned by the 2nd Defendant and Subdivision A1 of Subdivision **"Y4" of Farm 748 Njo** Ndola owned by the 3rd Defendant.

In default, the Deed of Transfer shall be executed by the Registrar of the High Court in terms of Section 14 **High Court Act, Cap 27 of the Laws of Zambia.**

The 1st Defendant argues that there is no need to resort to the personal guarantee of the 4th Defendant as the current market value of both properties far exceeds the amount of money owed to the Plaintiff. In respect to the liability of a guarantor, in **Avon Finance Company Limited v Bridget**⁷ [1985] 2 ALL.E.R 281 Lord Denning opined as follows:

"Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. Take the case of a

borrower in urgent need of money. he borrows it from the bank at high interest and a friend guarantees it. The guarantor gives his bond and gets nothing in return, The common law will not interfere."

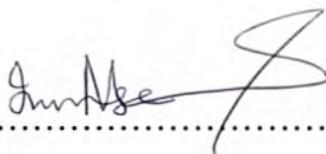
A perusal of the pleadings shows that the 4th Defendant executed a personal guarantee whose terms provide that in the event that the 1st Defendant fails to meet its obligations, the Plaintiff can enforce the 4th Defendant's personal guarantee. In this case as stated aforesaid, the 1st Defendant has defaulted or failed to pay the Plaintiff.

In the event that the proceeds from the sale of the mortgaged properties are insufficient to expunge the 1st Defendant's indebtedness in full, the Plaintiff shall be at liberty to execute on the 4th Respondent as guarantor.

Cost to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Dated at Lusaka this 7th day of October, 2017.



A handwritten signature in black ink, appearing to read 'Irene Zeko Mbeve', is written over a horizontal dotted line.

**HON IRENE ZEKO MBEWE
HIGH COURT JUDGE**