

**IN THE HIGH COURT FOR ZAMBIA**

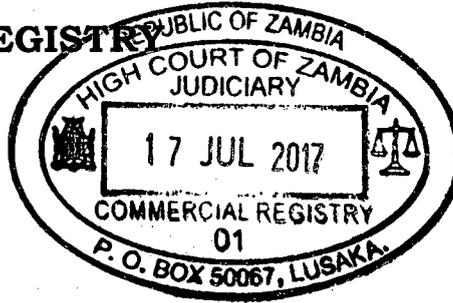
**2017/HPC/0083**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**



**DEVELOPMENT BANK OF ZAMBIA**

**APPLICANT**

**AND**

**ROZHO ENTERPRISES LIMITED**

**1<sup>ST</sup> RESPONDENT**

**ZHOROMI KAZHINGA**

**2<sup>ND</sup> RESPONDENT**

**RODINAH CHIWETA KAZHINGA**

**3<sup>RD</sup> RESPONDENT**

**Before the Hon Lady Justice Irene Zeko Mbewe**

*For the Applicant* : *Mrs. N Mumba Legal Counsel Development Bank of Zambia*

*For the Respondents* : *Mr. W Simutenda of Messrs GDC Chambers*

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## **R U L I N G**

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### **Cases Referred To:**

1. *Royal Bank of Canada v Larry Micheal Jones [2000] B.C.S.C 520*
2. *Kelvin Hangandu v Law Association of Zambia. (2011/HP/955)*
3. *Maiden Publishing House & Stationers Limited and Others v Indo Zambia Bank Limited (unreported) SCZ/8/266/2013*
4. *Rosemary Bwalya Attorney General Commissioner of Lands v Mwanamuto Investments Limited (SCZ Judgment No. 8 of 2012)*

5. *New Plast Industries v The Commissioner of Lands and The Attorney General* (2001) Z.R. 51

**Legislation Referred to:**

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

This is the Respondents' application for an order to cross-examine deponent and to subpoena witnesses to tender documents and to give viva voce evidence at trial pursuant to **Order 30 Rule 21 High Court Rules, Cap 27 of the Laws of Zambia** as read together with **Order 32 Rule 2 (2) & (3)** and **Practice Note 38/2/6 of the Rules of the Supreme Court 1999 Edition (White Book)**.

The application is supported by an affidavit and skeleton arguments filed on 16<sup>th</sup> March 2017. The affidavit was deposed by the 2<sup>nd</sup> Respondent who avers that on 10<sup>th</sup> February 2017 the Applicant commenced an action against the Respondents by way of originating summons accompanied with an affidavit in support of which the Respondents filed an opposing affidavit. The deponent avers that the Respondent's affidavit raised contentious and diametrically opposed factual issues which require cross-examination of the deponent for clarity of the same evidence. It is deposed that the Respondents intend to subpoena the relevant officers of the Applicant and other experts in the agricultural and financial sectors whose evidence is very critical in clarifying the myriad contentious factual issues.

In opposing the application, the Applicant filed an affidavit dated 28<sup>th</sup> April 2017 deposed to by Jala Hapunda. It is deposed that the

Respondents' affidavit in opposition to originating summons reveals that the material points of opposition are that the Respondents loan was not restructured as per facility letter dated 27<sup>th</sup> July 2016 that the quantum of the claim by the Applicant in these proceedings is illegal and speculative and that the 1<sup>st</sup> Respondent has been servicing the loan. It is deposed that the terms of restructuring are a matter of documentary evidence and that if the terms were not effected by the Applicant, specific reference could have been made to the loan statement exhibited in the affidavit in support of originating summons to show the Court how, if at all, the Applicant has departed from the terms of facility letter dated 27<sup>th</sup> July 2016.

It is deposed that it is unclear as to why the Respondents allege that quantum of the Applicant's claim is illegal and speculative and that the Respondents could have made an explicit contention in relation to the exhibited loan statement indicating the reason for the assertion. It is deposed that if the 1<sup>st</sup> Respondent had been making payments it need only produce proof of such payment.

According to the deponent, there are no issues between the parties that would justify or necessitate the giving of oral evidence nor the tendering of any further documents as all grounds of opposition raised by the Respondents can easily be supported by documentary evidence and the Applicant's claim can similarly be impugned by documentary evidence. That allowing oral evidence to be presented will not serve any purpose and will merely delay the fair and expeditious determination of this matter.

Both parties filed skeleton arguments and list of authorities.

At the hearing, Counsel for the Respondents submitted that there are good and convincing reasons warranting the grant of the Order sought by the Respondents and referred the Court to the case of **Royal Bank of Canada v Larry Micheal Jones<sup>1</sup>** and **Kelvin Hangandu v Law Association of Zambia<sup>2</sup>**.

In response, Counsel for the Applicant submitted that the issues for determination of this matter is whether or not the 1<sup>st</sup> Respondent has defaulted in its obligations under the loan agreement which governed the relationship with the Applicant herein. Counsel for the Applicant argues that it cannot reasonably be said that there are material controversies which would justify the giving of viva voce evidence and cross-examination of deponents.

I have considered the affidavit evidence, skeleton arguments and list of authorities including the oral submissions of Counsel for both parties.

The Respondents' application is predicated on **Order 30 Rule 21 of the High Court Rules, Cap 27 of the Laws of Zambia** as read with **Order 32 Rule 2 (2) and (5)** and **Practice Direction Note 38/2/6 of the Rules of the Supreme Court, 1999 Edition**.

**Order 30 Rule 21 High Court Rules, Cap 27 of the Laws of Zambia** provides as follows:

*“In addition to, or in lieu of affidavits, the Court or a Judge may, if it thinks expedient, examine any witnesses viva*

*voce, or receive documents in evidence, and may summon any person to attend to produce documents, or to be examined or cross examined, in like manner at the hearing of a suit”.*

**Order 38 Rule 2 (3) Rules of the Supreme Court of England 1999 Edition** provides to the effect that:

*“2. (3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.”*

From the cited Orders aforesaid, this Court has jurisdiction to determine the application for an order to cross-examine deponent and to subpoena witnesses to tender evidence and give viva voce evidence at trial.

I have carefully considered the affidavit evidence by both parties. It is not in dispute that the Applicant availed a loan facility to the 1<sup>st</sup> Respondent on 9<sup>th</sup> October 2014 and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent guaranteed to pay all outstanding amounts in the event

of default on the part of the 1<sup>st</sup> Respondent. It is not in dispute that there was a restructuring of the facility and that the 1<sup>st</sup> Respondent has failed or neglected to comply with the payment obligations. However, the Respondents are contending that there are some contentious issues raised by the deponent in their affidavit in opposition to affidavit in support of originating summons which can only be clarified by the deponent if subpoenaed to give viva voce evidence and also permit the calling of other witnesses and production of other documentary evidence.

I find that the Respondents have not demonstrated the need to cross-examine the deponents of the respective affidavit as the affidavit evidence already before Court is sufficient. The content of what amounts to the hearing of the parties in any proceedings can either take the form of oral or written evidence. The Supreme Court in the case of **Maiden Publishing House & Stationers Limited and Others v Indo Zambia Bank Limited**<sup>3</sup> stated that:

*“Affidavit evidence, like oral evidence, may sometimes traverse issues of disputed fact. In such cases, the veracity of such evidence needs to be tested. When a court is faced with two competing contentions on an issue of fact, it is called upon to resolve those contentions and come up with a finding of fact.”*

With the guidance of the Supreme Court in the above cited case, I am of the view that it only becomes necessary to test the veracity of affidavit evidence in cases where factual issues are in contention.

The Respondents are alleging that they failed to honor the payment obligation due to economic hardships which I opine is not a defence at all. The Respondents further intimate that they intend to call an agricultural expert as a witness. I find it difficult to fathom the relevance of such a witness in a matter where the issue mainly surrounds on default on the part of one of the contracting parties being the 1<sup>st</sup> Respondent herein. Counsel for the Applicant cited the case of **Rosemary Bwalya Attorney General Commissioner of Lands v Mwanamuto Investments Limited**<sup>4</sup> where the Supreme Court cautioned that discretionary power must be exercised judiciously and for good and convincing reasons, and I adopt the said principle.

In view of my finding in the preceding paragraphs, I am ably guided by the case of **New Plast Industries v The Commissioner of Lands and The Attorney General**<sup>5</sup> where the Supreme Court held:

*“Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right of a hearing simply because he had not adduced oral evidence.”*

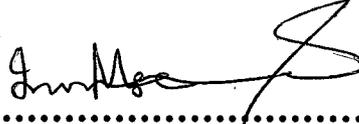
Presently, I have not found any good and convincing reasons upon which I can exercise my discretion to subpoena the deponent of the affidavit for purposes of being cross examined and to subpoena witnesses to give viva voce evidence at trial and tender documents. I find that the affidavit evidence before me is sufficient to enable me determine the matter.

For the foregoing reasons, I dismiss the Respondents' application herein for lack of merit.

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

Leave to appeal is hereby granted.

Dated in Chambers this 17<sup>th</sup> day of July 2017.



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**HON. IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**