

**IN THE HIGH COURT OF ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2012/HPC/0268**

**BETWEEN:**

**INTERMARKET BANKING CORPORATION  
ZAMBIA LIMITED**

**APPLICANT**

**AND**

**NONDE MUNKANTA**

**RESPONDENT**

**BEFORE HON. JUSTICE NIGEL K. MUTUNA IN CHAMBERS ON THE 28<sup>TH</sup>  
DAY OF NOVEMBER, 2012**

**FOR THE PLAINTIFF: Mr. L. Zulu of Tembo Ngulube and  
Associates**

**FOR THE DEFENDANT: Mr. W. Mubanga and Ms. M. Kamwenga of  
Messrs Chilupe and Permanent Chambers**

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**R U L I N G**

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Cases referred to:

**1) *Printing and Numerical Registering Co.-Vs-Simpson (1875) LRR  
19 EQ 462***

Other authorities referred to:

**1) *Arbitration Act No.19 of 2000*  
2) *Supreme Court Practice, 1999, Volume 1***

**3) Atkins Court Forms (1978), Volume 12**

**4) Ewan McKendrick, Contract Law, Macmillan Press Limited, London 1997**

**5) High Court Act, Cap 27**

This is the Respondent's application to stay proceedings pending referral to arbitration. It is made by way of summons, supporting affidavit and skeleton arguments filed on 27<sup>th</sup> September, 2012.

The Applicant's response is by way of affidavit in opposition and skeleton arguments filed on 5<sup>th</sup> November, 2012.

The facts of the case as they relate to this application are that, sometime in February, 2011 the Applicant agreed to extend a loan facility to the Respondent in the sum of USD 100,000.00. Pursuant to the said agreement, the Applicant wrote to the Respondent on 10<sup>th</sup> February, 2011, setting out the terms and conditions of the loan. Upon the Respondent confirming the terms and conditions, the parties executed a mortgage deed which was registered in the Lands and Deeds Registry and dated 24<sup>th</sup> February, 2011. By the said mortgage deed the Respondent charged his property known as Stand number 6486, Lusaka to the Applicant as security for the loan. The Respondent also executed a deed of guarantee and indemnity on 17<sup>th</sup> February, 2011 in favour of the Applicant.

It was a condition of the said deed of guarantee and indemnity that if a dispute arises as to the validity, interpretation, effect or rights and obligations of either party under the deed, which dispute can not be resolved amicably, either party may refer such dispute to arbitration.

A dispute arose concerning payment by the Respondent of the moneys due under the mortgage deed which prompted the Applicant to commence these proceedings. It therefore filed originating summons and an affidavit in support, in response whereof the Respondent made this application. It is his

contention that these proceedings are wrongfully before this Court because the parties agreed that any dispute that may arise will be resolved through arbitration.

In the affidavit in support, the deponent, Nonde Munkanta, being the Respondent, contended that he has been advised by his counsel and he verily believes that in accordance with the agreement entered into by the parties they are obliged to refer any dispute they may have to arbitration. He contended further that a copy of the said agreement appears as exhibit "BB1" to the Applicant's affidavit filed on 4<sup>th</sup> June, 2012. The said exhibit, he stated is also described as the facility letter. As a consequence of this he contended further, the Applicant is barred from instituting proceedings before this Court and consequently the Court has no jurisdiction to entertain the matter.

The affidavit in opposition was sworn by one Biggie Banda. It revealed that there is no arbitration clause in the mortgage deed pursuant to which this action is brought. Further that, this was the case with the facility letter as well, as such the Respondent's application is misconceived.

The affidavit also revealed that the arbitration clause is contained in the deed of personal guarantee and indemnity, which document is not in dispute in these proceedings.

The matter came up for hearing on 20<sup>th</sup> November, 2012, and counsel for the two parties along with relying on the skeleton arguments made verbal submissions.

In the Respondent's arguments, Mr. W. Mubanga argued that there is an arbitration clause in the agreement between the parties being the personal guarantee signed by the Respondent. By the said agreement under clause 7 he argued further, the parties agreed that in the event of a dispute arising which can not be resolved amicably, then it would be referred to arbitration.

Counsel went on to argue that this action does not arise from the mortgage deed but rather the facility letter exhibited BB1 to the affidavit in support, which letter refers to both the mortgage deed and the guarantee. It was argued that in the absence of a clause in the facility letter that one document does not override the other, all three documents should be read together. Further that, a personal guarantee becomes effective when a debtor fails to meet his obligation. Which is the case in this matter because the Applicant alleges that the Respondent has failed to pay, therefore, the guarantee has become effective. The said personal guarantee having an arbitration clause enshrined in it, this Court is obliged by virtue of section 9(2) of the **Arbitration Act** to refer the dispute to arbitration. The said section, counsel argued stipulates that reference to an arbitration clause constitutes an arbitration agreement as long as the contract is in writing.

Counsel proceeded to define the word dispute and likened an arbitration clause to a consent judgment pursuant to Order 42 rule 5A subrule 4 of the **Supreme Court Practice (white book)**. He also argued that the effect of a consent order is the same as the effect of a contract. Reference was made in this respect to **Atkins Court Forms (1978) Volume 12** at pages 13 to 14, paragraph 9. It was also argued that the law of contract recognizes the parties' freedom to enter into a contract and that once they enter into such a contract the Court is obliged to recognize it and enforce it. In articulating the said argument, counsel made reference to the text **Ewan Mckendrick, Contract Law**, at page 3 and the case of **Printing and Numerical Registering Co.-Vs-Simpson (1)**.

Counsel ended by praying that these proceedings should be stayed.

In his submissions counsel for the Applicant Mr. L. Zulu argued from two limbs. In the first limb he argued thus: the matter is properly before this Court because the arbitration clause that the Respondent seeks to invoke is inoperative; the matters before this Court are not subject to any arbitration

clause; and the arbitration clause relied upon by the Respondent is contained in the personal guarantee which is a separate document and contract from the mortgage deed. Counsel relied upon section 10 of the **Arbitration Act** in articulating the foregoing arguments without elaborating.

In the second limb, counsel began by arguing that Order 42 rule 5A subrule 4 of the **white book** cited by the Respondent's counsel has no relevance to the matters before this Court because the parties have not executed a consent order. It was argued further that the Applicant agrees that public policy demands that the Court must give effect to the parties' contractual obligations. It is for this reason, it was argued, that the Applicant took out the originating summons for purposes of enforcing the Respondent's contractual obligations. He ended by arguing that if the Respondent has a dispute against the Applicant touching on the personal guarantee, he is free to commence arbitration proceedings which can continue whilst Court proceedings are going on.

In his reply, Mr. O. Mubanga argued that the personal guarantee is part and parcel of these proceedings. It was, he argued produced by the Applicant as "BB17" to "23" and it belongs to them.

I have considered the affidavit evidence and the arguments by counsel. The following facts are not in dispute, that is to say:

- 1) *that the parties entered into a loan agreement by which the applicant extended to the Respondent the sum of USD 100,000.00*
- 2) *that the said agreement was evidenced by three documents, namely, the mortgage deed, personal guarantee and facility letter*
- 3) *there is an arbitration clause in the personal guarantee*
- 4) *there is no arbitration clause in the facility letter or mortgage deed*
- 5) *a dispute has arisen out of the loan agreement*

Having stated the facts that are not in dispute, it is my considered view, that the issue that arises is: is the dispute between the parties one of the disputes agreed to be referred to arbitration?

By virtue of section 10 of the **Arbitration Act**, where the parties have agreed to refer their dispute to arbitration, the Court is obliged upon, application by one of the parties, to stay proceedings and refer the parties to arbitration. The section states as follows:

***“10. (1) A Court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”***

Therefore, if the answer to the issue I have highlighted in the earlier part of this ruling is in the affirmative, I am obliged to grant the relief sought by the Respondent and stay these proceedings and refer the parties to arbitration. Further, the answer to the issue raised lies in the nature and extent of the claim in this action and the interpretation of the extent of the arbitration clause as contained in the personal guarantee. I will begin by addressing the nature and extent of the claim.

By the originating summons filed herein, the Applicant seeks to enforce the Respondent's obligations in the mortgage deed executed by the parties. In doing so it seeks the following relief as per the endorsement:

*“1. An Order against the Respondent for the payment of the sum of US\$127,917.98 being outstanding balance owing from the Respondent in respect of a Loan facilities granted to him*

2. *An order that should the Respondent fail, neglect or refuse to pay the aforementioned monies, the Legal Mortgage created by the Respondent for the benefit of the Applicant in respect of Stand No.6486 he enforced by an Order of Foreclosure, vacant possession and sale thereof*
3. *Payment of interest on the monies stated in (1) above at the agreed rate*
4. *Further or other relief that the Court shall deem fit*
5. *Costs."*

This claim is predicated on Order 30 rule 14 of the **High Court Act** which makes provision for the recovery of moneys secured by a mortgage or foreclosure and sell of such secured property. The Order states as follows:

***"14. Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-***

***Payment of moneys secured by the mortgage or charge;***

***Sale;***

***Foreclosure;***

***Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the***

***mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;***

***Redemption;***

***Reconveyance;***

***Delivery of possession by the mortgagee.”***

These are some of the reliefs sought by the Applicant in the originating summons, which are predicated on the mortgage deed.

Further, as I have stated and found in the earlier part of this ruling, there is no arbitration clause in the mortgage deed produced as exhibit BB3 to the affidavit in support of substantive matter. Therefore, prima facie, it appears that the parties are not compelled to refer their dispute to arbitration. This however, is dependent upon the finding I will make in respect of the nature and extent of the arbitration clause as contained in the personal guarantee, which I now turn to determine.

Counsel for the Respondent has argued that the personal guarantee is part and parcel of the mortgage deed and that it comes into effect once a borrower makes default as alleged in this matter.

A reading of the two documents, namely, the personal guarantee and mortgage deed reveals that the two documents do not indicate that they are dependent on each other or that they must be read as one. The facility letter does not also indicate that the documents must be taken as one but merely indicates that the two shall be the two securities provided by the Respondent. This is evident from clause 8 of the facility letter which is exhibit “BB1” to the affidavit in support which states as follows:

***“8. SECURITY***



8.1 *Continuous mortgage over stand No.6486, Magoti Road, Roma, Lusaka*

8.2 *Personal guarantee signed by Mr. Nonde Munkanta.”*

Further, whilst it is not disputed that the documents arise out of the same transaction they must be understood in their proper context which is that, the mortgage deed is the primary security securing the funds and offers the Applicant the luxury of possession of the property charged. On the other hand the personal guarantee is a secondary or additional security which permits the Applicant to pursue the Respondent personally and beyond the security offered. This is clear from the wording of the personal guarantee which state in part that the Respondent binds himself to pay and satisfy and gives to the bank a guarantee and indemnity.

Arising from what I have stated in the preceding paragraph it is therefore clear that the Applicant has an option to pursue two remedies, namely under the mortgage or the personal guarantee. The Applicant may also choose to invoke both remedies. If it invokes the remedy via the personal guarantee or both, then, the arbitration clause comes into play. If it invokes the remedy via the mortgage, the arbitration clause does not come into play.

I have stated in the earlier part of this ruling that the endorsement in the originating summons clearly indicates that the Applicant has invoked its rights under the mortgage deed only, as such the arbitration clause is of no effect.

In arriving at the finding in the preceding paragraph, I have considered the argument made by counsel for the Respondent by which he likens on arbitration clause to a consent order. I have dismissed the argument because it is legally unsound for the following reasons. Firstly an arbitration clause is an agreement between parties to the exclusion of the Court, whilst a consent order is an agreement of the parties which is endorsed and sealed

by the Court. Secondly, an arbitration clause is an agreement that expresses the parties desire to resort to arbitration and not litigation in the event of a dispute arising. On the other hand a consent order is an order that arises out of agreement by parties who have subjected their dispute to the realms of judicial or Court adjudication.

I have also considered the argument by the Respondent in respect of the need for the Court to acknowledge and enforce the parties' right to contract. I entirely agree with the argument which agreement is evident in my findings in the earlier part of this ruling.

By way of conclusion and answer to the issue raised, this is not the dispute that the parties agreed to refer to arbitration. As such the application lacks merit and I accordingly dismiss it with costs. I further direct that the matter come up on the hearing of the originating summons on 6<sup>th</sup> day of December, 2012, at 15:15 hours.

Delivered in chambers this 28<sup>th</sup> day of November, 2012.

**NIGEL K. MUTUNA**

**HIGH COURT JUDGE**