NMB BANK LIMITED
versus
FORMSCAFF PRIVATE LIMITED
and
PENNIWILL PRIVATE LIMITED
and
RODNEY GALLAGHAN
and
MILLICENT THERESA GALLAGHAN
and
CHARLES CANNINGS
and
CLIFFORD JOHNSON
and
LESLEY BENNET

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 27 August, 30 August & 10 October 2018

Civil Trial

O Mutero for the plaintiff
Professor W Ncube for the first, third, fourth, fifth, sixth & seventh defendants
Advocate L Uriri for the second defendant

MUZENDA J: On the 13 March 2017 plaintiff issued summons claiming against the defendants jointly and severally one paying the other to be absolved, payment of:

(a) US$368 706.62 being capital
(b) US$20 654.10 being interest
(c) Interest on the sum of US$368 706.62 at the rate of 18% per annum subject to change from time to time with effect from the 26 of November 2016 to date of payment.
(d) Costs of suit on a legal practitioner and client scale and collection commission as provided for under the law society of Zimbawe by-laws (1982).

At the commencement of trial, on the 27 August 2018, by consent of all the parties the claim was amended in para 16 of the declaration as follows:

(i) by the deletion of the Capital amount of US$368 706.62 and the substitution thereof with the amount of US$361 034.23.

(ii) by the deletion of the interest amount of US$20 654.10 and the substitution thereof with the amount US$28 246.49

The total amount being claimed by the plaintiff coming up to US$389 362.72.

The plaintiff's claim as amplified in the declaration is premised on the following synopsis.

"9. In or about November 2015, at Harare, Plaintiff and first defendant entered into an agreement in terms of which plaintiff extended to first defendant a loan of US$373 000. The loan was accessed through first defendant's operating account.

10. Interest was to accrue on the facility at the rate of 12 per cent per annum subject to change from time to time, but in the event of first defendant defaulting on making due and punctual payment of any installment, the arrears were to attract interest at the rate of 18 per cent per annum subject to change from time to time, further first defendant agreed to pay bank charges regarding the administration of the account.

11. The loan advanced of US$373 000 was repayable to plaintiff as follows:

(a) US$2 000 on the 30 of November 2015

(b) US$1 500 on the 30 of December 2015

(c) US$2 000 on the 30 January, 2016

And thereafter, US$15 200 per month with effect from the 28 of February 2016 until full payment.

12. It was a term of the agreement that in the event of first defendant defaulting on making due and punctual payment of any instalment, the total outstanding amount thereunder would immediately become due and payable.

13. …….

14. Second, third, fourth, fifth, sixth and seventh defendants bound themselves jointly and severally as sureties and co-principal debtors with first defendant for payment of any and all monies due to plaintiff by first defendant.

15. On divers occasions defendants defaulted on making due and punctual payments under the agreement resulting in the total outstanding amount under the agreement as at the fifth of November 2016 in the sum of US$389 360.72 falling due and payable on the 25th of November 2016."

DEFENDANT'S PLEA

All the seven defendants deny that the amount of US$373 000 plaintiff claims arises from the loan agreement. The first defendant denies that it is liable to the plaintiff for the capital sum of US$361 034.23 (as amended) or at all arising out of the loan agreement signed on 16 November 2015 because only US$350 000 in capital was actually lent and advanced to the first defendant and the entire capital debt was repaid in full on 30 December 2015 less than two months after 16 November 2015.

The agreement terminated in 60 days in terms of the loan or facility agreement. And the agreement does not have a survival clause. Para 24 of the facility cancels all previous agreements and this meant that even the balance on first defendant's account is not covered by the agreement in question. First defendant denies liability under the facility and contended that the plaintiff actually recovered more interest than was lawfully due to it. First defendant also denies liability for any legal costs as it does not owe plaintiff any money under the facility in question and if plaintiff is successful, it would only be entitled to normal costs.

Defendants contend that all the suretyship deeds are void for vagueness in that they cover unlimited liability. The liability under suretyship must contain a limit in monetary terms. The defendants further challenge the validity of the suretyship for they were not all authorized by the second defendant's board of directors. The second defendant challenges the company resolution for having been signed by an incompetent company representative. The acknowledgement of debt alluded to by the plaintiff is challenged by the first defendant because it was not typed by its representatives. Equally so the resolution signed by Ms Blumears was a nullity, second defendant avers.

First defendant denies defaulting payment. It denies owing plaintiff any amount and also deny being liable to payment of plaintiff's claims.

On the 30 May 2017 the defendants sought to amend their pleas. They added that if at all first defendant was liable *ex contractu* the loan agreement of 16 November 2015, first defendant will dispute the amount owing since provisionally as at the end of 2016 first defendant's credits against debits had brought first defendant's debit balance to less than US$109 000. The defendants further contend that either, the purported acknowledgement of debt or the loan agreement or both contravene section 12 of the Money Lending and Rates of Interest Act and consequently invalid and unenforceable.

Second Defendant further pleaded that its act of suretyship fails to comply with the requirements of section 12 of the Money lending and rates of interest Act for an instrument of debt as defined in that act and the purported act of suretyship is therefore of no force or effect as an instrument of debt. Second defendant's act of suretyship had expired by reason of the effluxion of time, having been signed more than three years before the grant of the loan as claimed for it was signed on 23 May 2012. Second Defendant further pleaded that neither of the mortgage bonds filed reflect that they were surety bonds for debts owing by the first defendant to plaintiff and accordingly do not bind second defendant to plaintiff for this purpose. Further the mortgage bonds filed amount to a disposal of the whole or a greater part of the second defendant's assets in the absence of formal approval of a general meeting of shareholders as required by the Companies Act and for that reason they are of no force or effect. It reiterated that the registration of the mortgage bond in favour of the plaintiff was not authorised by the second defendant and that plaintiff as lender clearly overreacted and unlawfully requested the mortgage bonds.

The third, fourth, fifth, sixth and seventh defendants challenged the suretyships and validity of the mortgage bonds and contravention of Money Lending and Rates of Interest Act. Some of the suretyships were also signed long back in February 2011, they had expired defendants aver. The defendants pray for plaintiff's claim to be dismissed with costs.

DEFENDANT' CLAIM IN RECONVENTION

Due to the invalidity of the suretyships alleged in the pleas, the defendants pray that their respective purported suretyships be declared null and void and of no force and effect.

The second defendant in its counterclaim also prays that plaintiff be ordered to issue formal consent according to deeds registry requirements for the cancellation of mortgage bonds registration Nos 1557/2013 and 1656/2013 allegedly passed by second defendant in favour of plaintiff and with the said documents of consent to release to second defendant the deeds of the said mortgage bonds and deed of transfer No. 1998/1975 made in favour of second defendant on 7 May 1975.

The third and fourth defendants further pray that plaintiff be ordered to issue formal consent according to deeds registry requirements for the cancellation of mortgage bonds Reg Nos. 2416/2011 and 4889/2011 allegedly passed by third and fourth defendants in favour of plaintiff and with the said documents of consent to release to third and fourth defendants the deeds of the said mortgage bond and deed of transfer No. 8573/95 made in favour of third and 4th defendants on 15 December 1995.

Defendants jointly further pray for costs of suit in respect of this claim in reconvention.

PLAINTIFF'S PLEA TO DEFENDANTS' CLAIM IN RECONVENTION

Plaintiff in its plea to the defendant's claim in reconvention contend that defendants executed open guarantees which are valid, lawfully and enforceable. It further avers that second defendant's suretyship was and is properly constituted and was extended premised upon a valid resolution by the defendant company: The acknowledgement of debt was also properly executed by first defendant and is valid. The plaintiff added that due process was equally provided in the execution on the guarantee by second defendant, and plaintiff was unaware that third and fourth defendant's daughter unlawfully signed the guarantee and does not admit same. Plaintiff denies that its representatives interfered in the execution of the guarantee by second defendant. It argues that the guarantee is hence valid and enforceable.

Plaintiff contends further that due process was followed in the registration of the two bonds.

According to plaintiff second defendant's resolutions were made and powers of attorney issued. The bonds were properly registered and are valid. As a result according to plaintiff there is no legal basis on which second defendant's guarantee and mortgage

bonds should be cancelled. Plaintiff prays for the dismissal of defendant's claim in reconvention with costs.

AGREED JOINT ISSUES FOR TRIAL

1. Whether or not first defendant is indebted to plaintiff in the sum of US$ 361 024 as capital and US$28 246.49 as interest under and in terms of the loan agreement signed by the parties and dated 2 November 2015?
2. Whether or not second, third, fourth, fifth, sixth and seventh defendants are jointly and severally liable together with first defendant for the capital and interest amount claimed under and in terms of their respective deeds of suretyship.
3. Whether or not second defendant's first and second mortgage bonds numbers 1557/13 and 1655/13 in favour of plaintiff are valid and enforceable, and whether or not the said bonds be declared null and void and cancelled?

PLAINTIFF'S CASE

On 27 August 2018 the plaintiff opened its case by calling Cuthbert Gunundu. He is a university graduate holding a Bachelor of Business Studies, a Masters degree in business Administration, a holder of a diploma certificate in Institute of Bankers of Zimbabwe and is employed by the plaintiff as an Account Relationship Manager. He has been employed by the plaintiff since January 2008. His job entails managing customers account, more particularly the customer's operating account, receiving credit applications for borrowing to assess credit worthiness of the borrower and make recommendations to the credit committee, to approve or reject a credit application. Once a resolution to lend to the customer is made, he will monitor performance of that client's account to ensure that the borrower performs in line with the terms of the facility. When there is a deviation by the borrower, the witness would make recommendations for call up or otherwise of the debt. These are the major roles of his job.

He knows the first defendant as a long outstanding customer of the plaintiff. The second to seventh defendants are guarantors to first defendant. He testified that since 2011 when he was assigned to manage the first defendant's account the plaintiff demanded the requirement of guarantees to safeguard its moneys loaned out.

From 2011 the plaintiff received guarantees in terms of security guarantees as well as Mortgage Bonds against third and fourth defendants' properties. The security guarantees proferred by the third and fourth defendants were for unlimited lifespans until the defendants have paid their debts in full.

In 2013 the witness told the court that the first defendant approached the plaintiff for further borrowing and the first defendant's directors were advised by the plaintiff that the plaintiff would need further security. At that stage third defendant indicated that it had associates to cover and provide security for the debt. Sometime in 2015 the first defendant submitted an application to get assistance from the plaintiff through a loan to pay off its existing debt. At that stage the witness stated that the first defendant had failed to meet its obligations. The first defendant then approached the plaintiff to access a loan whose proceeds the first defendant would then use to pay off its existing debts. That fresh application of 2015 culminated into a fresh loan agreement which is the agreement dated 2 November 2015. As at the date of the loan agreement, the witness told the court that the first defendant owed the plaintiff a total of US$373 000-00. The terms of that loan agreement was that the bank had to be secured and in terms of clause 6 of the agreement the security was already in the hands of the plaintiff.

As a result of the 2nd November 2015 agreement the plaintiff advanced a loan to the first defendant to pay off the debt, a loan draw down of $350 000-00 and that amount was to pay off the first defendant's outstanding debt. On 30 December 2015 the second entry on the bank statement shows that there was a loan repayment of $350 000-00 and the witness told the court that to the plaintiff it was a debit to show that it was a new loan account. The witness denies that the first defendant repaid the amount on 30 December 2015, there was no settlement on the account. The witness denied the assertion made by the defendants that the plaintiff had sued under the wrong agreement. He further added that the first defendant was using its operating account. The witness also explained that the customer signed an acknowledgment of debt cited on pp 10-12 of the plaintiff's bundle of documents, p 202 of the record of proceedings. The document the witness said was executed by the third defendant and did so on behalf of the first defendant. He added that although the loan agreement shows a figure of $373 000-00 and the acknowledgement of debt bears an amount of $377 299-70 the 2 documents relate to the same transaction. Asked by the plaintiff's lawyer to explain the witness stated that by 6 November 2015 the first defendant

owed the plaintiff $377 299-70, the facility letter dated 2nd November 2015 showed $373 000-00 and the acknowledgement of debt dated 16 November 2015 was the date the acknowledgment of debt was executed. The acknowledgment of debt was send to the first defendant on 31 October 2015 and by that date the amount due to the plaintiff from the first defendant was $377 299-20 from time to time the first defendant was periodically depositing money into the operating account and this resulted in gradual reduction of the first defendant's obligation. However from the 2nd November 2015 the first defendant failed to meet its obligations.

The witness further explained to court that the defendants provided two forms of security the guarantees and mortgage bonds contained on pp 67-69 of the plaintiff's bundles. The second defendant executed it for registration. In 2012 the borrower applied for an increase to its loan facility and that is when the security was made. The witness insisted that all the documents were properly executed and the resolution on p 69 of the bundle was authentic and valid.

Mr Gunundu was cross-examined by Advocate W. Ncube and was put to task to explain the capital debt of $373 000-00 and the $361 024-00 and also $350 000-00 and he had difficulties to explicitly define such figures. Tasked to explain why the plaintiff would write on its statement that the second entry on the statement of 30th December crediting the first defendant's account with an amount of $350 000-00, the witness stated that it was a "confirmation" of the loan advanced to the fist defendant. Further, under cross-examination, the witness averred that the loan agreement of 2 November 2015 permitted the plaintiff to factor in the old debts. Pressed to explain clause 12 of the facility letter on p 16 of the record, that clause 12 cancel's and invalidates all previous agreements the witness admitted that the plaintiff was bound by that clause. He could not produce a letter or application to show that the first defendant applied to the plaintiff for a loan to facilitate funding an existing date. Commenting on clause 2 of the facility letter relating to "working capital requirements" he testified that a letter application for a loan to pay off existing debt includes or encapsulates working capital requirements. He failed to explain precisely the purpose of the loan, he could not satisfactorily explain the purpose of $350 000-00 whether it was for settling previous debts or was for working capital requirements if it was for payment of old debts then it ceased to be for working capital.

On the aspect of surety, he agreed that the surety agreements violated s 12 of the Money Lending and Rates of Interest Act [*Chapter 14:14*] but insisted that they are valid. The defendants

after signing the 2 November 2015 loan agreement did not provide securities to cover the new loan. On the aspect of the in *duplum* rule schedule the witness computed the figures starting from 1 October 2015 and did not commence on 2 November 2015. The calculation patently included past debts and recapitalised the interest and he could not answer the question put to him, whether it was not proper to calculate the figures with effect from the date of the new loan. He denied that the amount due to the plaintiff is at least $108 000-00 however the entries on the bank statement were debited based on the new loan not on the old debts. He also admitted that the acknowledgment of debt, on p 9 of the plaintiff's bundles was prepared by the bank using a blank form which is later completed by the customer and the customer provides handwritten information to an existing format and the figure on the acknowledgement of debt $377 499-70 was written by the plaintiff. He had difficulties of explaining the signature on the acknowledgment of debt.

The witness was referred to p 6 of the bundle by Mr *L Uriri* and asked to comment on the aspect of the declaration by the plaintiff that the plaintiff's claim is based on 2 November 2015 agreement and no other and he agreed. He agreed with the second defendant's defence lawyer that the whole cause of action is premised on 2 November 2015 agreement. He agrees further that the $350 000-00 was for working capital. He could not however agree that on 30 December 2015 the first defendant paid off the borrowed $350 000-00 clearly acquitted by the narrative. He confirmed that the 2 November 2015 is a stand-alone agreement and cancels all previous facility letters.

On the security and mortgage bonds he concurred with Mr *Uriri* that the amounts of $437 500-00 was not registered for the 2015 November loan agreement but were meant for loans for 2013. The mortgage bonds were executed for the 2013 agreement not for 2 November 2015 agreement. There was no accompanying resolution by the second defendant authorising the third defendant to represent the second defendant in any capacity, yet the 2013 agreement was totally distinct from the 2015 loan agreement. The resolution captured on p 70 resolution by the second defendant's directors was prepared by the plaintiff bank and it does not authorise a power of attorney to pass a mortgage bond. It also does not provide for registration of a continuing covering bond, nor does it identify any property which is going to be covered by the mortgage bond. Relating to the *causa* of the mortgage bond, he admitted that the second defendant was not indebted to the plaintiff. On p 99 of the record it is clear that the second defendant was not granted any loan by the plaintiff and the $375 000-00 was not loaned to the second defendant by the plaintiff. On

p 105 the clauses on the surety bonds do not reflect the truth about the entire transactions, the witness confirmed under cross-examination, because it appears that the surety bond was passed by the debtor itself. The witness does not know as to who signed the documents and was not there when such documents were signed. He was at pains in marrying the documents prior to November 2015 with the 2015 loan agreement which is the cause of action for the plaintiff. He sought to rely on the clauses of the Mortgage bond which speak of continuing cover and failed to explain the practicality of clause 12 of the 2 November 2015 agreement. The witness had difficulties to explain what transpired relating to figures and signature on documents and legality of the documents contained on the plaintiff's bundle. He did not impress as a good witness, moreso when he was subjected to a protracted cross-examination by defendant's legal practitioners. He did not fare well in evidence in chief and under cross-examination. He did not know much even on basic issues of practices and interpretation of a simple loan agreement. If clause 12 of the loan agreement cancelled all past agreements how can the witness resort to previous debts to calculate the capital debt? How can the witness "confirm" a loan facility after a month from the date the loan was signed and then enter into its own books the inscription "loan repayment $350 000-00?" The capital sum of $373 000 -00 keeps changing and no comprehensive statement to explain that continuous change of figures was produced and no good explanation by the plaintiff's witnesses was proferred. This court cannot prepare a contract for the parties, it will interpret what is on paper and drawn conclusions from such. The duty to clarify the terms of the agreement lies with the plaintiff through its witness, Mr Gunundu left a lot of issues hanging.

The second witness to be called by the plaintiff was Mr *V.S. Nyangulu*, a registered legal practitioner, a Conveyancer and Notary public. He was conveyancer in the registration of second defendant's 1st and 2nd mortgage bonds, (numbers 1557/13 and 1655/13) in favour of the plaintiff. According to the witness valid and proper resolutions were passed authorising him to attend to the bond registration process which was executed by the second defendants' representatives. He added that all due process was followed pertaining to the registration of the mortgage bonds and there is no legal basis for their setting aside.

The witness also pointed out that on instructions the bank would normally send an e-mail stating that it wants to have a bond registered by him the bank will forward the copy of the title deed then he prepares the relevant papers. He would then prepare a power of attorney to pass a

bond, a resolution by the company borrower and send the papers back to the client bank via e-mail. The bank will down load the documents, print them out and send to client borrower for signing. After all the papers are signed, the bank submits them together with the requisite on original title deeds to the conveyancer who then lodges them with the Registrar of Deeds. He is the one who prepared and registered all the documents on p 294 of the record and the one on p 293. Otherwise all the other processes were done by the plaintiff.

He is the one who prepared the power of attorney which he filed with the Registrar of Deeds including the mortgage bond on p 303. He also prepared the Resolution accompanying the power of attorney. He admitted that the documents before the court attached to the plaintiff's bundle are mortgage bonds and no surety mortgage bonds, however they are relevant to the loan under consideration and they are a continuous cover, the borrower will continue to draw money from the lender, and according to Mr *V.S. Nyangulu* para 2 of Schedule of the Mortgage Bond provides for a continuing cover.

After witness' evidence Advocate Professor Ncube did not have questions to the witness.

Mr *Uriri* questions the witness about the legal requirements of a mortgage bond as well as Surety Bonds, more particularly on the aspect of the *causa* which can either be a loan or a Surety. The witness acknowledged that the *causa* on both documents was not accurately captured and admitted that once the *causa* is defective the entire document is a nullity. He was also put to task on the authenticity or otherwise of a power of attorney and or a resolution and again admitted that the documents before the court had short comings. A power of attorney must accurately describe the *causa* and prepared by an authorised person for a specific purpose. The resolution of accompany must be prepared and signed by the appropriate agents and Directors of the Body Corporate. The power of attorney on p 293 the witness admitted was not authorised. He also admitted that the second defendant as a company cannot execute any document and has to do that via an agent by power of a resolution and name a natural person and the plaintiff has failed to prove all these essential elements. He further acknowledged that the power of attorney on p 293 which authorised to pass a mortgage bond in the sum of $375 000-00 becomes the causa to pass a mortgage bond and not to pass a Surety Mortgage bond. On p 302 of the record the witness does not know the identity of the person who executed the document and the power of attorney at p 293 does not pass the test of a valid document. At p 294 the Mortgage bond itself on the *causa*, the

identity of the debtor is not correct; one cannot be both surety and borrower. On p 295, the declaration which is the basis of the Acknowledgment of Debt is falsely stated. Both the declaration and the *causa* are incorrect. The effect is that the documents are a nullity and also subsequently invalidates the mortgage bond. The witness also admits that on p 302 of the record authority that is given to a legal practitioner to pass a mortgage bond and not a surety mortgage bond. He also admitted on p 303 the debtor shown there is not the correct one. The same applies to the declaration on p 309. Both are invalid. He finally admitted that the power of attorney had shortcomings that go to the root of the documents. The effect of the cross examination completely resulted in the destruction of the mortgage bonds, surety bonds and requisite powers of attorney to pass mortgage bonds more particularly relating to 2 November 2015 loan agreement.

The plaintiff then closed its case. The first, third to seventh defendants indicated that they wished to make an application for absolution for instance. The second defendant also made the same indications.

In their application for absolution the first, third to seventh defendants argue that the issues for determination in this mater are:

(i) Whether or not the plaintiff led sufficient evidence on the face of it to establish its case against the defendants in respect of the pleaded cause of action.

(ii) Whether or not the plaintiff's evidence *prima facie* established valid sureties and mortgage bonds for that pleaded cause of action?

The cause of action pleaded by the plaintiff, defendants submitted, against the first defendant is that in or about November 2015, at Harare, the plaintiff and the first defendant entered into a loan agreement in terms of which plaintiff loaned and advanced to the first defendant the amount of $373 000-00 through the first defendant's operating account with the plaintiff and that the first defendant defaulted on making due and punctual repayment in terms of the agreement resulting in the first defendant owing the total sum of $389 360-72 made up of the capital sum of $361 034-23 and interest of $28 246-49.

The cause of action against the second and seventh defendants was pleaded as arising out of them having bound themselves jointly and severally as sureties and co-principal debtors with the first defendant from the due payment of any and all monies due to the plaintiff by the defendant under the loan agreement.

The plaintiff attached to its summons a statement of account pleaded to reflect the transaction history of the loan account. That statement of account showed that on 15 November 2015 the plaintiff credited the first defendant's operating account with the amount of $350 000-00 described as "loan draw down" under reference number LD 1532 460482 and further on 30 December 2015 the operating account was credited with the same amount of $350 000-00 described as "payment of principal" under the same reference number LD 1532460482. The defendants submit that the net effect of these entries was to restore the first defendant's previous overdrawn overdraft facility.

The plaintiff also attached copies of surety agreements with the third-seventh defendants all of which predated the pleaded loan agreement having been made:

(a) by 3rd defendant on 25 February 2011
(b) by 4th defendant on 25 February 2011
(c) by 5th defendant on 25 February 2011
(d) by 6th defendant on 25 February 2011
(e) by 7th defendant on 25 February 2011

Further the plaintiff's cause of action against the third and fourth defendants, plaintiff attached mortgage bond numbers 2416/2011 and 4889/2011 dated 19 April 2011 and 4 August 2011 respectively by the third and fourth defendants against a property they co-own as a certain piece of land situate in the District of Salisbury, called stand 7 Greencroft Township Ascot of Subdivision A and B of Mabelreign measuring 2392m². The respective mortgage bonds contain the same *causa* clause stating that "the appearer" declared that whereas that mortgages have been granted certain loan credit and or other facilities by NMB Bank Limited in respect of the mortgage bonds. The two mortgage bonds also contain the same declaration stating that "the appearer hereby acknowledged the mortgages to be truly and lawfully indebted and held firmly bound into and on behalf of the bank in the capital sum arising from and being money lent and advanced or to be lent and advanced or readvanced."

The defendants submitted that Cuthbert Gundundu contradicted in material respects the particulars of the plaintiff' claim as pleaded and as amplified by the documentary evidence attached to the summons and declaration. Under cross-examination by the defence the witness insisted that the loan agreement was not to finance the first defendant's working capital needs but

to refinance existing indebtedness, he could not however produce the written application made by the first defendant to refinance existing debt. To Mr Gunundu, the loan described in the agreement of 2 November 2015 as being to refund working capital requirements meant the same thing as the refinancing of existing debt and further that the narration of that on 31 December 2015 there was debit entry of payment of principal was a mere confirmation of the loan amount which had been credited on 20 November 2015. According to the defendants the documentary evidence produced by the plaintiff shows that the loan amount was repaid and narrated as such on 31 December 2015.

The defendant further submitted that the 2 November 2015 loan agreement was repaid and what may be owed to the plaintiff by the first defendant may be from the old debt. The defendant argued that the plaintiff is estopped from disputing that the loan advanced on 2 November 2015 was repaid on 31 December 2015 and cited cases for that submission. Similarly the plaintiff is estopped from disputing that the loan was for funding the first defendant's working capital requirements.

The defendants went to argue that the plaintiff cannot claim the amount of $361 034-23 as capital arising out of the loan agreement of 2 November 2015 because only $350 000 was credited to the first defendant's account under the loan agreement and the rest of the amount up to $361 034-23 relates to monies advanced earlier in terms of prior credit facility agreements otherwise not pleaded as part of the plaintiff's cause of action. The amount of $361 034-23 being claimed relates to money advanced earlier than 2 November 2015 in terms of some other agreements which amount clearly includes both old capital and old interest in circumstances where the plaintiff has not provided the *in duplum* schedule relating to those agreements.

The defendants also argue that the acknowledgement of debt dated 6 November 2015 does not take the plaintiff's case any further. In the declaration the plaintiff has not pleaded any cause of action founded on the acknowledgement of debt. Secondly, an instrument of debt the acknowledgement of debt does not bind the first defendant because no evidence was led as to any resolution of the first defendant authorising the acknowledgement, the acknowledgement does not bear the name of any official of the first defendant authorised to execute it and who so executed it and the acknowledgement was not executed by any official of the first defendant authorised or otherwise as it does not bear any such official signatures.

As a result of the foregoing the third – seventh defendants argue that the plaintiff has not managed to prove their liability to it of the principal debtor given that their liability is pleaded and arising out of them having stood as surety to the first defendant's indebtedness.

As the application for absolution relates to the registration of continuing covering mortgage bond which was not outlined the third to seventh defendants submitted that the plaintiff produced a board resolution dated 21 May 2012 which allegedly authorised it to register a mortgage bond against the second defendants property; that authority was not for a continuing covering mortgage bond. None of the defendants ever authorised the plaintiff to register a continuing covering mortgage bond. The plaintiff was only authorised by the surety mortgage bond to register just one surety mortgage bond in respect of the loan that was advanced to the first defendant in 2012 and not any time thereafter. The plaintiff's purported rights arising from the registration of a continuing mortgage loan that was not authorised cannot be saved from the inevitable consequences of invalidity; the defendants argued and they cited *Elsie* v *Johnson* ZW SC 49/17.

The sureties executed by third – seventh defendants were all executed on 25 February 2011 in respect of some facility arrangement availed to the first defendant in 2011 but in respect of which the plaintiff gave absolutely no evidence. The plaintiff seeks that these sureties be held to bind the third to seventh defendants in respect of the loan agreement of 2 November 2015. The defendants argued that the surety agreements cannot found a valid cause of action against the third –seventh defendants on account of the fact that having been executed on 25 February 2011 the underlying indebtedness arising out of them as of that date prescribed three years after 25 February 2011, that is on the 25 February 2014 by virtue of s 15 (d) of the Prescription Act, [*Chapter 8:11*]. The fact that the surety agreements are invalid because they contravene s 12 of the Money Lending and Rates of Interest Act [*Chapter 14:14*] in that they did not state the amount actually lent to the borrower.

Thirdly the fact that the plaintiff did not obtain the consent of the third-seventh defendants when the terms of the first defendants indebtedness were materially altered when plaintiff and the first defendant entered into the loan agreement of 2 November 2015 which was materially different from the overdraft facilities in respect of which they were or equally given in 2011.

On the issue of mortgage bonds the third-seventh defendants submitted that a mortgage bond which contains a false *causa* and as a false declaration is invalid, of no force or effect and

unenforceable (they referred the court to Mhishi M L a Guide to the Law and Practice of Conveyance in Zimbabwe, 2004 at p 41). Mr Nyangulu did not refer to mortgage bonds executed over the property of the third and fourth defendants. However the defendants urge the court to equally apply the principle of the law relevant to the third and fourth defendants property which were executed or registered by Mr Sobusa Gula Ndebele who was not called by the plaintiff to give evidence.

The third-seventh defendants contend that the mortgage bonds relied upon in respect of third and fourth defendants are the same as those relied upon as against the second defendant. Both bonds contain also false *causa* and false declaration since they state that they are for monies lent and advanced to the third and fourth defendants when it is common cause that no monies were lent and advanced by the plaintiff to the third and fourth defendants. Hence the third and fourth defendants are that the mortgage bonds that were registered by Mr Gula-Ndebele at the behest of the plaintiff or in favour of the plaintiff as against the third and fourth defendant's Mabelreign immovable property are invalid and of no force or effect and unenforceable against the two defendants. The bonds allegedly also contravene s 45 of the Deeds Registries Act, [*Chapter 20:05*] in that even therein there are continuing bonds, third and fourth defendants liability under each of them is uncapped. In any event the unlimited surertyship agreement from which they are founded is contrary to public policy for its attempt to provide an unlimited surety. The first, third –seventh defendants pray for absolution and also pray for the cancellation of the 2 mortgage bonds registered against their Mabelreign property.

The second defendant also applied for absolution and in addition, it prays for the grant of its counter-claim at the close of the plaintiffs' case on the basis that the *facta probanda* has been resolved in its favour at the close of the plaintiff's case and as such the second defendant believes that there is no need for evidence to establish the same.

According to the second defendant the plaintiff's evidence has established the following:

1. that there was resolution to pass a mortgage bond in respect of the first bond, and,
2. that both mortgage bonds are generally covering bonds as opposed to surety mortgage bonds,
3. that the *causa* is money lent and advanced; and,

4. that the plaintiff never in fact lent and advanced any money to the second defendant, and,
5. that the *causa* in respect of bonds is in fact false; and
6. that one cannot be a surety for one's own debt.

The second defendant further added that the plaintiff relies on the mortgages. The plaintiff had the onus of establishing that the mortgages were complete and regular on the face thereof. An incident of this onus was the duty to begin. The plaintiff failed to discharge this onus, it meant that the only material before the court is the second defendant's admitted claim. The second defendant prays for a judgment in its favour.

The second defendant associates itself with the first, third- seventh defendants' facts laying the basis for the application for absolution, inclusive of the submissions made by the first, third-seventh defendants. However the second added that the plaintiff's case is that it entered into a facility agreement. That agreement resulted in the first bond, which was intended to be a surety mortgage bond. The truth according to the second defendant is that no surety mortgage bond was registered, but a continuing general covering bond predicated on money lent and advanced. It is common cause that no money was lent and advanced. The plaintiff never related with the second defendant. The plaintiff testified that the first arrangement was not honoured, the result was refinancing agreement but from the evidence led by the plaintiff it did not consult the second defendant on the plaintiff's own case, there was novation, but it was novation without recourse to the surety discharges, the surety and all security. In any event the plaintiff admitted that a new arrangement came into place, it would therefore not sue on the old arrangement. On the face of documentary evidence the money advanced to the principal debtor was paid off within just over a month of the advance.

The second defendant contends that the net effect of the evidence on the principal debt and alleged sureties is:

(a) the agreement between the plaintiff and the principal debtor was novated
(b) the plaintiff's claim had been compromised as between the plaintiff and the principal debtor;
(c) the obligations between the plaintiff and the principal debtor were materially and prejudicially altered,

(d) there was prejudicial extension of time within which to meet the alleged conditions of the contract as between the plaintiff and the principal debtor;

(e) there was prejudicial agreement not to enforce as between the plaintiff and the principal debtor.

A guarantee extends to the obligations which flow from the contract itself, the suretyship agreement could not apply to that new agreement which a novation by the agreement between the parties. The plaintiff's claim was grounded on the fact that this novation agreement between the plaintiff and the principal debtor was not effected as desired but a novation releases the surety.

The plaintiff is opposing the application for absolution. The plaintiff submits that its claim against the first defendant is based on a credit facility agreement dated 2 November 2015. The amount available under the agreement was not exceeded US$373 000-00 and the repayment made was provided. The credit facility cancelled all the previous agreements between the plaintiff and the first defendant and is the only source of any obligations currently due to the plaintiff by the defendants. The plaintiff further contends that the first defendant was indebted to the plaintiff from a previous facility at the time the agreement dated 2 November 2015 was executed. Mr Gunundu told the court the facility was availed to first defendant to settle the previous debt which was now due. Plaintiff cites clause 12 of the agreement (2 November 2015) which cancelled all previous agreements. It argued that defendants are estopped from alleging the existence of any other valid agreement apart from this one, the cause of action.

According to the plaintiff the credit facility dated 2 November 2015, was executed to enable first defendant to settle a previously existing debt. On the issue of clauses 2 and 3 of the agreement which states that the facility is for working capital requirements, plaintiff submitted that there is standard definition of the term Working Capital requirements. To plaintiff such a term includes debt refinancing, the debtor would be freed from the obligation of settling a debt at once, thereby releasing funds for working capital.

Plaintiff admits that it credited first defendant's account with a sum of US$350 000.00 on 20 November 2015. These were the loan proceeds from the agreement dated 2 November 2015. The same account was debited with a sum of US$350 000.00 on 30 December 2015 under the narration of "payment of principal," to plaintiff it was a confirmation of the loan and first defendant's debt under the agreement dated 2 November 2015.

Plaintiff insists that it has established a case on what it can and should succeed. It moves the court to put defendants to their defence and explain their offer of $108 000.00, $250 000.00 and $292 000.00. Plaintiff also contend that the acknowledgment of debt is not the cause of action but was of requirement of 2 November 2015 agreement and the acknowledgment reflects that first defendant's name signed off on the acknowledgment, it is witnessed and witnesses are known, the amount of debt is reflected. Third defendant has to explain why he signed off the acknowledgment by writing "Formscaff (Private) Limited" and witnesses have to explain.

On the issue of third – seventh defendants suretyship agreements, plaintiff argued that even though the suretyships were executed in 2011 they all cover current and future debts, they cover unlimited amounts and they have unlimited lifespan hence the suretyship agreements are valid and enforceable. To plaintiff, the issue of prescription does not arise at all and the date of execution does not matter. Plaintiff adds that section 12 of Money Lending and Rates of Interest Act, does not apply to the suretyships, they are not instruments of debt. The plaintiff dismisses the defendants' suggestion by all sureties that they should be released from Suretyships because there was a material variation of the principal obligation. It says that this point was not pleaded by the defendants and thus should not be considered.

The plaintiff urges the court to put defendants to their defence so as to explain the signatures on the powers of attorney, the plaintiff makes the same averments relating to powers of attorney and the resolutions, it wants the defendants to explain as to who signed the documents and relies on s 12 of the Companies Act. Plaintiff further contends that the defendants attack on the *causa* on the mortgages bonds is misplaced and insist that the mortgage bonds are valid and further submit that it may not be necessary to state the cause of debt in a Bond. It argues that there was no contravention of s 45 or any other provision of the Deeds Registries Act. The mortgage bonds are continuing covering security. To the plaintiff clause, 2 of each bond provides for continuing cover for second, third and fourth defendants' liability to plaintiff however arising, whether directly or indirectly. That would cover second, third and fourth defendants suretyships and such cover is to the value of each bond.

As for the counter-claim in respect of second, third and fourth defendants, plaintiff submitted that the counter-claim cannot be granted in the absence of the establishment of their

cause; they have to give evidence. As a result the plaintiff prays that the application for absolution be dismissed with costs since it is frivolous and misplaced.

THE LAW

An application for absolution from the instance is akin to and stands on much the same footing as an application for discharge for an accused person at the close of the case for the prosecution.

(*Gasycoyne* v *Paul & Hunter* 1917 TPD 17 at 173; *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goldridge (Pvt) Ltd* 1971 (1) ZLR (A) at 4C. *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87 (5) at 94F).

In the case of *Supreme Service Station* (*1969) (Pvt) Ltd* (*supra*) the court summed up the test in the following terms;

> "The test therefore boils down to this. Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any exactitude than by saying that it is the sort of mistake a reasonable court might make, a definition which helps not at all."

(See also *Dube* v *Dube* 2008 (1) ZLR 326 (H) at 328-D)

In *United Air Charters* v *Jarman* 1994 (2) ZLR 341 (S) at 343 B-C, GUBBAY CJ stated:-

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application at the close of his case, if there is evidence upon which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

(See also *Walker* v *Industrial Equity Ltd (supra)* at 94 C-D, *Manyange* v *Mpofu and Ors*, 2011 (2) ZLR 87 (H) at 93).

Given the summary and extra-ordinary nature of absolution from the instance, the court will where possible lean in favour of continuing the case and hearing the defendant's evidence rather than dismissing plaintiff's claim.

(See *Standard Chartered Finance Zimbabwe Ltd* v *Georgras & Anor*, 1998 (2) ZLR 547 (H) at 552H – 553C.

Bailey N.O v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H) at 488F- G. *Nestros* v *Innscor Africa Ltd* 2007 (2) ZLR 267 (H) at 268 G. *Manyange* v *Mpofu & Ors (supra)* at 93E).

In *MC Plumbing (Pvt) Ltd Hyalong construction (Pvt) Ltd* 2015 (1) ZLR 134 (H) CHIGUMBA J succinctly outlined the test for absolution thus;

> "My interpretation of the test to be applied to the question of whether to grant absolution from the instance to a defendant at the close of plaintiff's case is as follows:
>
> 1. the first question to be considered is whether there is any evidence at the close of the plaintiff's case upon which a court, directing its mind reasonably to such evidence could or might find for the plaintiff?
> 2. the second question to be asked is whether there are any special considerations or reasons why the court should reject the evidence adduced on behalf of the plaintiff (for example glaring inconsistencies, or unacceptable variance with the pleadings filed of record).
> 3. The third question that may be asked is whether the plaintiff has failed to adduce any evidence or adduce insufficient evidence to establish an essential element of its claim.
> 4. Lastly, whether an overall assessment of all the evidence adduced on behalf of the plaintiff, the pleadings filed of record, the annexures, the exhibits, all the discovered documents coupled with the vi*va voce* evidence, fall short of establishing the plaintiff's case on the face of it (*prima facie*)"

ISSUES FOR DETERMINATION

The issues for determination in this application for absolution from the instance are:

a) whether or not the plaintiff led sufficient evidence on the face to establish its case against the defendants in respect of the pleaded course of action.
b) whether or not the plaintiff's evidence *prima facie* established valid sureties and mortgage bonds for that pleaded cause of action.
c) whether the defendants' counterclaims succeed once the application for absolution from the instance is granted.

WHETHER OR NOT PLAINTIFF LED SUFFICIENT EVIDENCE ON THE FACE OF IT TO ESTABLISH ITS CASE AGAINST THE DEFENDANTS IN RESPECT OF THE PLEADED CAUSE OF ACTION.

The cause action pleaded by the plaintiff against the first defendant that in or about November 2015, first defendant entered into a loan and advanced to first defendant the amount of US$373 000.00 through first defendant's operating account with plaintiff and that first defendant defaulted in terms of the agreement resulting in first defendant owing the total sum of $389 360.72 made up of the capital sum of $361 034.23 and interest of US$28 246.49.

As already paraphrased herein above in the foregoing, the cause of action against third to seventh defendants was pleaded by the plaintiff as arising out of the five of them having bound themselves jointly and severally as sureties and co-principal debtors with first defendant for the

due payment of any and all monies due to plaintiff by first defendant under the loan agreement. The 2nd November 2015 loan agreement provided that the loan was repayable over a three year period expiring on 31 January 2018, first defendant liquidating the debt in monthly installments. Central to the application by the defendants is the statement of account reflecting the transaction history of the loan account. On that statement shows that on 15 November 2015 plaintiff credited the first defendant's operating account with the amount of $350 000.000 described therein as "loan drawdown" and on 30 December 2015 the operating account was credited with the same amount of $350 000.00 described as "payment of principal". Under the identical reference number LD1532460482. The problem arises as to the purpose of the $350 000. The plaintiff's star witness Mr Gunundu told the court that the facility was availed to first defendant to settle the previous debt which was now due and to the plaintiff this is legally permissible, it cited the case of *Commercial Bank of Zimbabwe* v *MM Builders and Suppliers (Private) Limited & Ors* 1996 (2) ZLR 421 at 466 D-E where GILLES PIE J stated;

> "This is not necessarily to say that the parties are unable, *ex post facto*, that is once the " debt" is called up to agree a novation of the debt. That is for instance, to contract a new loan in terms of which money is advanced by the creditor in an amount of the outstanding capital and accrued interest up to the double in order to permit of the repayment of the outstanding indebtedness, this new debt would then be repayable on agreed terms. This would be a true capitalization of the interest on the previous debt. It is the practice of merchant banks. It is in conformity with the old roman agreement as to anticismus. If concluded knowingly by freely contracting parties when the existing debt is called up l can see no objection to that -whereas an agreement in advance to waive the rule leaves the debtor exposed to precisely those perceived evils which the rule is formulated to combat, a novation after the event permits the debtor the informed choice of increasing his possible indebtedness or of taking advantage of the cessation of accrual of interest."

On page 422 C – D, of the headnote the following appears:

> "On the question of bank overdrafts, it was argued per the bank that the *induplum* rule did not apply to overdrafts. The basis of the argument was that each cheques drawn against the overdraft facility, was in effect a separate loan, as is every debt arising out of charges ledger fees commission and the like. Each such "loan" was totalled daily and interest accrued on the outstanding amount. At the end of the month, the interest itself was added to the total indebted- ness. The interest was itself thus a loan and thus effectively capital. Alternatively because interest is capitalized monthly it loses its identity as interest and becomes capital."

This argument was rejected on the grounds that debits from interest cannot be regarded as loans to customers and are jurisprudentially quite distinct from debits for advances or charges."

Mr O. Mutero in citing the above case, equated its scenario with facts of this matter more particularly relating to the 2nd November 2015, agreement. I do not agree to that comparison. The

2nd November 2015 loan agreement was not dealing with a novation. The 2nd November 2015 agreement pertains to the sum of $350 000 for working capital. There is no capitalization of interest mentioned in the 2015 November agreement which would have justified comparison of this matter to the *CBZ Ltd* (*supra*) case. The comparison is misplaced. If the 2nd November 2015 agreement was dealing with capitalization of interest the agreement should have contained clauses to that effect and the amount of such interest would have computed and the extent of capitalization specifically spelt out. The cause of action by the plaintiff relates to $350 000 loaned to first defendant on the 2nd November 2015 and interest of US$28 246.49 calculated from the date of the loan. Why would the plaintiff claim further interest if the interest was capitalized on 2 November 2015?

On the debiting of $350 000 on 30 December 2015 under the narration of "payment of principal" Mr Gunundu for the plaintiff testified that, that entry was not a payment by first defendant but a confirmation of the loan and first defendant's debt under the agreement dated 2 November 2015. Plaintiff's replication to defendant's plea, on page 26 of the record, does not show that the entry of $350 000.00 in plaintiff's statements is a confirmation of the loan, the word confirmation appeared for the first time during hearing, when Mr Gunundu was giving evidence, the first defendant in its plea had pleaded that it had repaid $350 000.00 on the 30th December 2015 and plaintiff in its wisdom did not see the importance of addressing that averment in its replication. Why would plaintiff wait for a month plus other days to "confirm" the first defendant's loan? Why wait until 30 December 2015? The witness, Mr Gunundu, as already outlined in the summary of plaintiff's evidence above, had difficulties to explain this aspect in examination in chief and during cross examination. If it was a confirmation why did not the plaintiff on its entry write the word "confirmation" than to write "repayment" which when ordinarily looked at by a lay person would mean that the first defendant repaid the $350 000.

I am convinced by the first defendant's submission that it repaid the $350 000 and the plaintiff's own books of account or statement conspicuously confirms that payment which tallies with the first defendant's plea. That payment was made barely 2 months after the date of the agreement and there was no need for calculation of the cost of the loan in form of interest charges. I do not agree with the plaintiff's contention that it was just a credit entry. In any case the evidence of Mr Gunundu on that aspect left a lot to be asked especially when the court looks at the narration

accompanying that entry as well as the ledger entry number LD/532460482 bearing the amount of $350 000.00. The evidence adduced on behalf of the plaintiff, the pleadings filed of record, the annexures, the exhibits the viva voce evidence, the highlighted inconsistencies and contradictions in the testimony of Mr Gunundu, fall short of establishing the plaintiff's case in the face of it.

WHETHER OR NOT PLAINTIFF'S EVIDENCE ON THE FACE OF IT ESTABLISHED VALID SURETIES AND MORTGAGE BONDS FOR THAT PLEADED CAUSE OF ACTION

Plaintiff submitted that third-seventh defendants executed surety agreements, binding themselves jointly and severally as sureties and co-principal debtors with first defendant for payment of first defendant's debts to plaintiff. The plaintiff admits unreservedly that the surety ships were all executed well before 2 November 2015 agreement, that was in 2011 but however avers that the sureties covered current and future debts, they covered unlimited amounts and have an unlimited lifespan. As such they were all valid and enforceable. To plaintiff, it does not see the question of prescription arising at all. In this matter, the plaintiff further argues that, the principal obligations, the credit facility dated 2 November 2015, the debt will fall due on 25 November 2016. It is also argued by the plaintiff that s 12 of the Money Lending and Rates of Interest Act [*Chapter 14:14*] does not apply. The surety-ships signed by third - seventh defendants were executed before 2 November 2015 loan agreement was entered into , they do not form an instrument of debt and do not have to comply with s 12 of the relevant cited legislation, plaintiff submitted.

On the other hand, the first, third to seventh defendants submitted that the sureties were all executed on 25 February 2011 in respect of some facility arrangement availed to first defendant in 2011 but in respect of which plaintiff seeks that these sureties be held to bind the third to seventh defendants in respect of the loan agreement of second November 2015, they raise prescription computed from 25 February 2011 and expiring on 25 February 2014 by virtue of s 15 (d). The third to seventh defendants also raise the invalidity of the sureties because they contravene s 12 of the Money Lending and Rates of Interest Act (*supra*) which provides that

> "Section 12 (1) Every instrument of debt other than a mortgage bond or general covering bond executed within Zimbabwe in respect of a loan of money shall separately and distinctly set forth:
> a) that it is executed for money lent; and
> b) the amount actually paid to the borrower; and
> c) the rate of interest which is to be charged in respect of the loan."

Section 12 (2) makes it a criminal offence for non-compliance.

It is clear that the 2011 sureties do not relate to the 2015 loan agreement and the alleged 2011 sureties which plaintiff seek to rely on for the 2015 agreement do not apply. The amounts covered in the sets of documents, the sureties and the loan agreement do not match. The sureties do not have a corresponding applicable rate of interest. The essential term of the suretyships, have to be identified, included in writing and these include the nature of the debt to be secured its extent and these have to be embodied in the document, which is the surety-ship. In this matter such a document or covenant is the 2011 suretyship agreement signed by third to seventh defendants which apparently existed well before the 2015 loan agreement. I conclude that the 2011 suretyships signed by the third to seventh defendants do not relate to the 2015 loan agreement. I am also persuaded by the third to seventh defendants' argument that s 15 (d) of the Presumption Act applies to the surety ships. CF Forsywith & J T Pretorius, in *Caney's The Law of Surety ship*, 6 ed p 200 had this to say:

> "Prescription of the principal debt will extinguish that debt and thereby release the surety, this follows from the principle that the surety ship is accessory to the principal debt and that after its extinction there is nothing to support the surety ship."

There is no averment in the plaintiff's pleadings that the first defendant failed to pay the Principal debt loaned to it in 2011 leading to the third to seventh defendants signing those contracts and that the alleged breach was cured by the first defendant in entering into a fresh loan facility in 2015 so as to have a continuing cover emanating from the 2011 suretyships.

A suretyship must be for a definite period laid upon conditions agreed upon by all the parties and not to be inferred from previous documents at the option of a creditor.

The plaintiff also confronted challenges on the aspect of mortgages bonds. Mr Nyangulu the second witness called by the plaintiff was placed in embarrassing position when he was asked to comment on the legal effect of a false *causa* or false declaration in a mortgage bond.

(See Mhishi M.L *A Guide to the Law and Practice of Conveyancing in Zimbabwe,* (2004) at p 41).

Mr Nyangulu gave testimony in respect of mortgage bonds he had executed over the property of the third and fourth defendants. Those were registered by Mr *Sobusa Gula Ndebele*, and that witness was not called. However the mortgage bonds contain false *causa* and false declarations. They refer to money lent and advanced to third and fourth defendant yet no such money was lent and advanced to the third and fourth defendants by the Plaintiff, hence third and

fourth defendants' Mabelreign immovable property's mortgage bonds are invalid. I am persuaded by the third and fourth defendants' argument that they also contravene s 45 of the Deeds Registries Act in that neither of them is uncapped. The unlimited suretyship agreement from which they are founded is contrary to public, policy for its attempt to provide an unlimited surety.

The second defendant agrees with the submissions made by the first, third to seventh defendants on the validity and legality of the suretyships and the mortgage bonds. I have considered all the submission made by the defendants and I am persuaded by them. I am convinced that even though the plaintiff argues that there was novation which have already been dismissed, novation without recourse to the surety discharges the surety and all security. In any case 2 November 2015 loan agreement, clause 12 thereto provides cancellation of all previous facilities and does not put a proviso or otherwise relating to the previous surety ships and or mortgage bonds. Plaintiff admitted that a new arrangement came into place and plaintiff could not sue on the old arrangement. In any case plaintiff's claim had been compromised as between plaintiff and the principal debtor, the obligations between the plaintiff and the principal debtor were materially and prejudicially altered. There was a prejudicial extension of time within which to meet the alleged conditions of the contract as between the plaintiff and the principal debtor and finally there was a prejudicial agreement not to enforce as between the plaintiff and the principal debtor. In the matter of *Webb* v *Shell Zimbabwe (Pvt) Ltd* 1982 (1) ZLR 102 (SC) at 105 H, the court held that however wide and general a guarantee may be, it only extends to the obligations which flow from the contract itself. As such the Surety-ship agreement could not apply to that new agreement which was in essence, a novation of the agreement between the parties having entered into this novated agreement, the old obligation and all accessories thereto were destroyed and it was not open to the plaintiff to try to go back to such obligation to hunt for a surety thereto. The other criticism of plaintiff covers the power of attorney to register the mortgage bonds and Mr Nyangulu admitted to the shortcomings and there is no need to revisit such.

I have also examined the arguments advanced by the defendants pertaining to the counterclaims. With respect to third and fourth defendants they are praying for cancellation of the two mortgages bonds registered against their Mabelreign property and for the second defendant submits that r 437 of the High Court of Zimbabwe Rules lays down the principles to be applied in determining which party in a civil trial shall adduce evidence first. The second defendant also avers

that if the plaintiff's claim is dismissed there is no need for evidence to establish the same. Second defendant goes on to submit that there has been a direct admission of the cause of action, the effect of the admission is that the plaintiff (in reconvention) does not have to prove that which is admitted.

In the matter of *Mining Industry Pension Fund* v *DAB Marketing (Pvt) Ltd* SC 25/12, MAKARAU JA said that:

> "The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted."

The second defendant was entitled to judgment upon the plaintiff's confession of its claim in evidence. The plaintiff relies on the mortgages. It had the onus of establishing that the mortgages were complete and regular on the face of them. An incident of this onus was the duty to begin. If it failed to discharge this onus, it meant that the only material before the court is the second defendant's admitted claim. The second defendant would thus be entitled to judgment. In *Nkambule* v *Minister of Law and Order* 1993 (1) SA 848 at 852 it was stated that:

> "In my view the defendant did not discharge the onus resting on him. I would uphold the appeal with costs and amend the magistrate's order to read as follows: "judgment is granted in favour of the plaintiff…"

In *Rabinowitz & Anor NNO* v *Ned Equity Insurance & Anor* 1980, DFA 403 at 429 the court said that:

> "In my view therefore the first defendant did not discharge the onus of proving that the death was covered by the aviation endorsement, consequently the plaintiff's entitled to judgment against the first defendant for the amount claimed."

It is on this basis that the second defendant, as the plaintiff in reconvention, contends that, its claim in reconvention is admitted and there is no need to lead evidence on matters that are admitted and as such are common cause or cannot be seriously controverted.

On this point, the plaintiff submitted that second, third and fourth defendants have filed counterclaims which cannot be granted in the absence of the establishment of their case. They have to give evidence. Plaintiff opted not to cite any case law authority to counter what the defendant had submitted on the aspect of the necessity to call evidence of the plaintiff in reconvention where the defendant in reconvention has only admitted the shortcomings of the surety ships and the mortgage bonds. Further moreso where the principal cause of action by the plaintiff in convention

has been dismissed. All the defendants have laid both factual and legal basis for their application for absolution and prayer for judgments on the counter claim. I am satisfied that plaintiff sued on a cause of action that was discharged in full on 30 December 2015. The current claim is hence both invalid as well as excipiable. The claim was void *ab initio.* The plaintiff contends that it has proved a *prima facie* case, I do not agree, a judgment cannot be granted on the basis of a claim and cause of action that ceased to exist. When the loan arising from November 2015 agreement was fully paid on 30 December, the liability of the principal debtor – arising from that loan was effectively discharged. Where the principal debtor is discharged or released then the obligation of the surety ceased to exist because a contract of surety is accessory to the main contract.

(*Kilroe – Daley* v *Barclays National Bank* [1984] ZASCA 90 1984 (4) JA 609 at 622).

Not even the argument that there was novation or a compromise of the loan agreement for which the surety ships were given can resurrect the plaintiff's dead case because novation or compromise discharges all sureties as well:

(*SW Adef (Pty) Ltd* v *Dyke N.O* 1978 (1) SA 9128 at 940 G-H).

In the matter *Gordon Lloyd Page & Associates* v *Rireira & Anor* 2001 (1) SA 88 (SCA) at 92 E – 93 A it was stated:

> "The test for absolution to be applied by a trial at the end of plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A) at 409 G – H in these terms:
>
> > 'when its absolution from the instance at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established but whether there is evidence upon which a court applying its mind reasonably to such evidence could or might (not should or ought) find for the plaintiff…'
>
> This implies that the plaintiff has to make out a *prima facie* case in the sense that the evidence relating to all elements of the claim... to survive absolution because without such evidence no court could find for the plaintiff."

Where the plaintiff has failed to prove a *prima facie* case against the defendants on the basis of which the court could or might find for the plaintiff there is no need to put the defendants on their defence. There is nothing before the court that warrant defendants being called upon to rebut.

DISPOSITION

1. The application for absolution from the instance made by the defendants succeeds with costs.

2. The surety ships in favour of plaintiff entered into by 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendant and plaintiff be and are hereby cancelled.
3. The mortgage bonds passed by 2nd, 3rd and 4th defendants in favour of plaintiff namely Numbers 2416/2011, 4889/2011, 1557/2013 and 1656/2013 be and are hereby cancelled.
4. The plaintiff to pay costs of counterclaim to the defendants on attorney-client scale.

Sawyer & Mkushi, plaintiff's legal practitioners
Sheshe & Mutonono Attorneys, 1st, 3rd – 7th defendants' legal practitioners
Thompson Stevenson & Associates, 2nd defendant's legal practitioners