

DISTRIBUTABLE (27)

NMB BANK LIMITED
v
**(1) FORMSCAFF (PRIVATE) LIMITED (2) PENNIWILL
(PRIVATE) LIMITED (3) RODNEY CALLAGHAN (4)
MILLICENT TERESA CALLAGHAN (5) CHARLES CANNINGS
(6) CLIFFORD JOHNSON (7) LESLEY BENNET**

**SUPREME COURT OF ZIMBABWE
GARWE JA, PATEL JA & GUVAVA JA
HARARE, 17 OCTOBER 2019 & 25 FEBRUARY 2022**

E. Mubaiwa, for the appellant

W. Ncube, for the 1st, 3rd - 7th respondents

L. Uriri, for the 2nd respondent

GUVAVA JA:

1. This is an appeal against the whole judgment of the High Court (court *a quo*) dated 18 October 2018. The court *a quo* granted an application for absolution from the instance made jointly by the respondents, granted claims in reconvention and ordered the appellant to pay costs of the counterclaims on a legal practitioner and client scale.
2. The court *a quo* erred in this regard and the appellant was correctly aggrieved by the judgment of the court *a quo*. There is no evidence in the record that first, third, fourth, fifth, sixth, and seventh respondents had filed counterclaims and the court *a quo* erred in granting counterclaims that were not before the court. Although the second

respondent was properly before the court *a quo* the requirements for the grant of absolution from the instance were not met. Accordingly, the judgment must be vacated.

I set out hereunder the reasons for this finding.

BACKGROUND FACTS

3. The appellant is a registered commercial bank operating in Zimbabwe. The first respondent is a private company registered in accordance with the laws of Zimbabwe. The third to seventh respondents are private individuals who bound themselves as sureties and co-principal debtors in respect of a loan granted to the first respondent. The second respondent is a private limited company duly incorporated in Zimbabwe.
4. The appellant issued summons against the respondents on 13 March 2017 for the payment of US\$ 368 706.62 being capital and US\$ 20 654.10 being interest on the sum of US\$ 368 706.62 at the rate of 18% per annum, which rate was subject to change from time to time, with effect from 26 November 2016 to date of payment in full and costs of suit on a legal practitioner and client scale. At the commencement of trial, by consent of the parties, the claim was amended to read as follows:
 - “(i) by deletion of the capital amount of US\$ 368 706.62 and the substitution thereof with the amount of US\$ 361 034.23.
 - (ii) by deletion of the interest amount of US\$ 20 654.10 and the substitution thereof with the amount US\$ 28 246.49.”
5. The total amount claimed by the appellant amounted to US\$ 389 362.72. In its particulars of claim the appellant averred that in or around November 2015, the appellant and the first respondent entered into an agreement in terms of which the appellant extended to the first respondent a loan for the sum of US\$ 373 000.00. The loan was accessed through the first respondent’s operating account and was for the purpose of assisting

the first respondent in financing its working capital requirements. Interest was to accrue on the facility at the rate of 12% per annum subject to change from time to time and 18% per annum in the event of default by the first respondent in making due and punctual payment of any instalment. The loan advanced was repayable to the appellant as follows:

“(a) US\$ 2 000.00 on the 30th November 2015
(b) US\$ 1 500.00 on the 30th December 2015
(c) US\$ 2 000.00 on the 30th January 2016
and thereafter, US\$ 15 200.00 per month with effect from the 28th of February 2016 until full payment.”

6. It was a term of the agreement that in the event of the first respondent defaulting in making due and punctual payment of any instalment, the total outstanding amount would immediately become due and payable. The second, third, fourth, fifth, sixth and seventh respondents bound themselves jointly and severally as sureties and co-principal debtors with the first respondent for payment of any and all monies due to the appellant. The respondents defaulted in making due payment of the loan under the agreement giving rise to the total outstanding amount claimed by the appellant of US\$ 389 362.72.
7. All the respondents jointly entered an appearance to defend and in their plea denied that the amount claimed by the appellant arose from the agreement dated 2 November 2015. The first respondent denied owing the appellant any money as it argued that the loan advanced through the loan agreement was repaid in full on the 30th of December 2015. The first respondent further denied owing the appellant any interest under the loan facility and maintained that the appellant actually recovered more interest from it than was lawfully due.

8. The second to the seventh respondents averred that all the suretyship deeds held by the appellant were void for vagueness as they covered an unlimited liability. They contended that a suretyship deed must contain a limit in monetary terms so as to be valid. The second respondent averred that the deed of suretyship between it and the appellant was void as it was not authorised by its board of directors. The first respondent further stated that the acknowledgment of debt executed by it in favour of the appellant was unenforceable as it was not signed by its representatives. The second respondent also averred that it never authorised the registration of a mortgage bond in favour of the appellant over its property known as Subdivision A of Subdivision H of N'Thaba of Glen Lorne situate in the District of Salisbury held under Deed of Transfer number 1998/95 ('the property').
9. Together with its plea, the second respondent filed a claim in reconvention against the appellant and averred that the appellant fraudulently procured a suretyship and mortgage bond in its favour over the second respondent's property. The second respondent prayed that the suretyship deed and mortgage bond be cancelled. The appellant entered a plea against the claim in reconvention and denied all the averments made by the respondents.
10. On 30 May 2017, the third to seventh respondents indicated their intention to apply to amend their pleas and file a claim in reconvention at the pre-trial conference. The amendments sought alleged that all the respondents' purported suretyships had expired by effluxion of time, having been signed more than three years before the loan was granted. It was also averred that the suretyships were in contravention of s 12 of the Moneylending and Rates of Interest Act [*Chapter 14: 14*] ('the Moneylending Act') and as such were invalid and unenforceable. In the proposed claim in reconvention, the third to seventh respondents sought an order that their respective suretyships be declared null

and void. The second, third and fourth respondents prayed that the mortgage bonds in their names be cancelled. There is, however, no evidence in the record that the amendment was ever granted at the pre-trial conference or at the trial.

11. On 27 July 2017, the parties signed a Joint Pre-Trial Conference Minute and the issues for determination by the court *a quo* were stated as follows:

“1. Whether 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants’ deeds of Suretyship are valid and enforceable.

1. Whether 2nd Defendant’s 1st and 2nd Mortgage Bonds (numbers 1557/13 and 1656/13) in favour of Plaintiff are valid and enforceable or whether they should be cancelled.

2. Whether 1st Defendant is indebted to Plaintiff under the Loan Agreement dated 2 November 2015 in the sums of US\$ 368 706.62 as capital and US\$ 20 654.10 as interest and was there novation or termination of the loan agreement.

3. Whether 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants, jointly and severally one paying the others to be absolved are indebted to Plaintiff as alleged or at all.”

12. At the trial, the appellant led evidence through two witnesses, namely, Mr. C. Gunundu (Gunundu) the appellant’s Account Relationship Manager and Mr. V.S. Nyangulu (Nyangulu) a registered legal practitioner and conveyancer. Gunundu testified that the appellant and the first respondent had a long business history spanning many years. They agreed that the bank would advance a loan to the first respondent which loan would, in turn, re-finance the existing loan already held by the first respondent. He further testified that the first respondent and its sureties had failed on numerous occasions to fulfil the loan obligations which it owed to the appellant. The new arrangement was meant to assist the respondents. Gunundu maintained that the surety deeds and mortgage bonds made by the second to seventh

respondents in the appellant's favour were all valid and properly constituted. He further maintained that the sureties were open and unlimited and as such covered all the money obtained through loans by the first respondent from the appellant.

13. The second witness, Nyangulu, testified that the mortgage bonds he registered on behalf of the second respondent in favour of the appellant were valid and were registered after due process and board resolutions had been passed.
14. At the close of the appellant's case, the first to seventh respondents made an application for absolution from the instance. In making the application the first and third to seventh respondents averred that the appellant sued the respondents on a cause of action which had already been discharged on 31 December 2015. They also alleged that their sureties were not valid. In making its application the second respondent averred that the appellant failed to prove a valid cause of action that the mortgage bonds against its property, registered in favour of the appellant, were valid.
15. In response to the applications for absolution from the instance, the appellant argued that the applications were frivolous. It vehemently denied receiving any payment from the first respondent in repayment of the loan. It also maintained that all the documents in respect of the security for the loan were valid and that the obligation of the sureties had not been extinguished by prescription or on any other basis.
16. The court *a quo*, in dealing with the matter, found that the appellant's first witness Gunundu was not a credible witness and that he contradicted himself on material issues. The court further found that the appellant failed to prove a *prima facie* case against the respondents. The court went on to find that the first respondent repaid the loan of US\$ 350 000 on 31 December 2015 as evidenced by the appellant's own books of account and statements. The court *a quo* also found that the suretyships made in favour of the

appellant by the second to seventh respondents were invalid and unenforceable as they were not in compliance with s 12 of the Moneylending Act. Further, that the sureties did not relate to the 2 November 2015 loan facility and as such could not be relied upon by the appellant in making a cause of action for the repayment of a loan under that facility.

17. The court *a quo* further held that the mortgage bonds executed in the second respondent's name were invalid as they were not made in compliance with the law and that the sureties and mortgage bonds could not be held to have an unlimited clause to their operation as such a clause was contrary to public policy. The court concluded that, as the appellant had failed to prove a *prima facie* case against the respondents, the respondents' claims in reconvention had merit and that there was no need to put the respondents to their defence. In the result the court made the following order:

- “1. The application for absolution from the instance made by the defendants succeeds with costs.
2. The surety ships (*sic*) in favour of the plaintiff entered into by 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.”

18. Dissatisfied with the decision of the court *a quo*, the appellant noted the present appeal on the following grounds of appeal:

- “1. The court *a quo* erred in holding that any amounts which were due to Appellant under the agreement dated 2 November 2015, were repaid in full and that Plaintiff sued on a cause of action that was discharged in full on the 30th of December

2015, in so doing, the court *a quo* failed to appreciate that the agreement (dated 2 November 2015) was entered into to enable the 1st respondent to settle previously existing debts.

- 1.1 The court *a quo* erred in strictly evaluating and rejecting the appellant's evidence and effectively demanding of it more than a *prima facie* (sic) as if it had (sic) evidence from defendants.
 - 1.2 The court *a quo* erred in granting respondents 1, 3 to 7 counter-claims which were not before it.
 - 1.3 The court *a quo* erred in granting the counter-claims by respondents 1, 3 to 7 when those respondents had not moved it to grant same as at that stage.
 - 1.4 The court *a quo* erred in itself cancelling the parties' agreements when it was not a party thereto and in violation of the sanctity thereof.
2. The court *a quo* erred in holding that:
- (a) The Suretyship agreements executed by 2nd, 3rd, 4th, 5th, 6th and 7th Respondents did not relate to the agreement dated 2 November 2015, and that neither did they cover any amounts due thereunder.
 - (b) The Suretyship agreements had prescribed. In so holding, the court *a quo* grossly failed to appreciate that at law, a Surety's obligations only arise upon demand.
 - (c) The 2nd, 3rd, 4th, 5th, 6th and 7th Respondents were released from their Suretyship due to material variation of the principal obligation, when this was not pleaded and no evidence proving actual prejudice was placed.
 - (d) That 2nd, 3rd, 4th, 5th, 6th and 7th Respondents' suretyship agreements were void for being contrary to public policy.
3. In agreeing with 2nd, 3rd, 4th, 5th, 6th and 7th Respondents' entire submissions on the application for absolution from the instance, the court *a quo* grossly erred in holding 2nd to 7th Respondents' averment that the suretyship agreements are invalid for

violation of Section 12 of the Money Lending (*sic*) and Rates of Interest Act [*Chapter 14:14*].

4. The court *a quo* erred in holding that the Mortgage Bond passed by 2nd Respondent, and 3rd and 4th Respondents are invalid and grossly failed to appreciate that at law, the Mortgage Bonds are valid as an instrument of both debt and hypothecation.
5. Consequent to the gross misdirection referred to in Paragraph 1, 2,3 and 4 above, the court *a quo* erred in granting 1st to 7th Respondents' application for absolution from the instance and entering Judgment in favour of Respondents as per their claim in reconvention for cancellation of the suretyship agreements and Mortgage Bonds.
6. The court *a quo* erred in awarding costs against Appellant in respect of the Respondents' claim in reconvention on a higher scale, when there was no legal basis for so doing."

PROCEEDINGS BEFORE THIS COURT

19. Counsel for the second respondent, Mr *Uriri*, raised a preliminary point to the effect that the notice of appeal was fatally defective and incapable of amendment. On the other hand, counsel for the appellant, Mr *Mubaiwa*, made an application to amend the appellant's grounds of appeal and relief sought. In making the application counsel argued that he was raising legal issues which would not prejudice the respondents.
20. Counsel for the first, third to seventh respondents, Mr *Ncube*, agreed with Mr *Uriri* who opposed the application for the amendment and argued that the notice of appeal was not in compliance with r 37 (1) (d) as read with r 44 of the Supreme Court Rules, 2018 ('the Supreme Court Rules') in that the grounds of appeal were not clear and concise. Counsel argued that the 2nd ground of appeal was invalid as it was vague. He also submitted that the grounds of appeal attacked all the findings of the court *a quo* which rendered the notice of appeal fatally defective.

21. As indicated above, Mr *Uriri* raised a preliminary point to the effect that the appellant's grounds of appeal were not clear and concise and sought a striking off of the appeal.

He further submitted that the relief sought by the appellant was defective as it did not pray for a remittal of the matter for continuation of the trial on the merits of the matter in the event that the appeal succeeds. Counsel submitted that this rendered the appeal fatally defective.

22. The amendment sought by the appellant was made by way of notice and in terms of the r 41 of the Supreme Court Rules. Rule 41 provides as follows:

“Power to allow amendment

41. The court may upon application by notice or upon oral application by counsel during the course of any hearing allow, upon such terms as it may think fit to impose, amendment of the grounds of appeal or of any pleadings or other document and may similarly permit a party to appear or be represented notwithstanding any declaration in terms of rule 50 to the effect that the party does not intend to appear or be represented.”

23. With regard to the issue of whether or not the appellant's grounds of appeal were fatally defective on the basis that they were not clear and concise as required by the rules of this Court, we found that the grounds of appeal could have been more elegantly crafted, however, they were not fatally defective. This Court has pronounced itself on the test to be applied in determining whether or not grounds of appeal are valid. In *Zvokusekwa v Bikita Rural District Council* SC 44/15 the Court noted that:

“One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner.”

Also, in *Dr Kunonga v Church of the Province of Central Africa* SC 25/17 at pg 18 the Court stated that:

“...where the court is faced by some of the grounds of appeal that are not clear and concise and by others that are, the courts should proceed to determine the appeal on the basis of the valid grounds.”

24. The Court must be guided by the substance and not the form of the grounds of appeal. At the end of the day the determining factors of whether or not grounds of appeal are valid and compliant with the rules of the court can be set out as follows:

- a. the grounds of appeal must relate to the judgment appealed against,
- b. must clearly and concisely show how the decision of the court *a quo* is erroneous, and
- c. must show the basis upon which the decision should be vacated.

In this regard a proper reading of the appellant’s grounds of appeal clearly reveal the basis upon which the judgment of the court *a quo* is being challenged. The only ground of appeal which is unclear and meaningless and cannot be allowed to stand is ground 1.4. Indeed, it was accepted that the grounds could have been crafted in a more elegant manner. However, at the end of the day, it was our view that they met the threshold as set out in the rules and in the case authorities, except for ground 1.4 which we struck out.

25. The additional grounds of appeal in the notice of amendment were predicated on the same facts which were before the court *a quo*. The appellant in its heads of arguments had already made submissions on the basis of the amended grounds. The respondents had responded to the heads of argument. In the circumstances of this case, however it did not appear that the respondent would suffer any prejudice if the application was granted.

As the amendment was not prejudicial to the respondents and any prejudice could adequately be compensated with an appropriate order of costs, we saw no reason to refuse the application.

On the basis of the above reasons we accordingly made the following order:

“The preliminary point raised by counsel for the respondents is dismissed. The application to amend the grounds of appeal and prayer is granted, save for ground 1.4 in the notice of amendment. The appellant is ordered to pay the respondents’ wasted costs.”

26. On the merits, counsel for the appellant argued that it was improper for the court *a quo* to grant counterclaims that were not filed in terms of r 121 of the High Court Rules, 1971 (‘the High Court Rules’). Counsel further argued that the judgment of the court made factual findings without hearing the evidence of the first respondent. The factual findings could only have been made after hearing the defence case. He also argued that the inference drawn by the court in respect of the statement of account was not the only inference in the circumstances of the case and, in any event did not prove that the debt owed by the respondents had been repaid. It was also counsel’s argument that the appellant proved a *prima facie* case in establishing that the loan facility was disbursed to the first respondent and it was for the respondents to prove that the loan was repaid in full. He prayed that the appeal be allowed with the matter being remitted to the court *a quo* for continuation of trial and an order for costs.
27. *Per contra*, counsel for the first, third to seventh respondents argued that the court *a quo* correctly found that the appellant failed to establish a *prima facie* case as there was no valid cause of action. Counsel further argued that the documentary evidence produced before the court *a quo* showed that the loan was repaid in full on 31 December 2015 and

as such the appellant had no basis to sue. He also argued that the appellant's witness Gunundu contradicted himself in his evidence and as such a *prima facie* case could not have had been established by the appellant. Counsel further argued that the purported sureties made in the names of the third to seventh respondents were invalid and void. Counsel prayed for the dismissal of the appeal.

28. Counsel for the second respondent also prayed for the dismissal of the appeal and argued that the appellant had no cause of action against the second respondent as no loan facility was ever advanced to it. Counsel submitted that the loan was repaid on 31 December 2015 and that the appellant had admitted that this was the position in evidence. He further submitted that there was no valid mortgage bond in the name of the second respondent upon which the appellant could execute. The mortgage bond made by the second respondent in favour of the appellant related to a 2011 loan facility and not the 2015 loan facility. Counsel further maintained that the second respondent had only one director in Zimbabwe and as such no valid resolution could have been made in the absence of the second director. As such counsel argued that the power of attorney and mortgage bond were not properly executed.

29. It is my view that the appellant's grounds of appeal raise a single issue, i.e. whether or not the court *a quo* erred in granting the application for absolution from the instance.

ANALYSIS

Whether or not the court *a quo* erred in granting the application for absolution from the instance.

30. The cause of action of the appellant against the first respondent was based on a credit facility dated 2 November 2015. It was alleged that the first respondent had failed to repay the loan advanced to it under that facility. The cause of action as against the second to seventh respondents was based on the various surety and mortgage bonds filed of record which were made in favour of the appellant by the respondents at different times. The court *a quo* in granting the respondents' application for absolution from the instance found that the loan advanced to the first respondent was repaid on 31 December 2015. The basis of this finding was an accounting entry made by the appellant in its statement of accounts which showed a credit entry in the sum borrowed as having been paid. On the basis of this entry the court reasoned that there was no cause of action upon which the appellant could claim as there was no outstanding debt.

31. The law to be applied in an application for absolution from the instance is well settled. In *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at pg 343 the Court held that:

“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 if, at the close of his case, 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 *Oesthuizen v Standard General Versekeringsmaa & Kappy BPK* 1981 (A) 1035 (H)).

In *Gordon Lloyd Page & Associates and Rireira & Another* 2001 (1) SA 88 (SCA) at 92 E-93 A it was held that:

“The test for absolution to be applied by a trial court 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 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 there is evidence relating to all elements of the claim...

32. Absolution from the instance is thus granted by the court when an application has been made by a defendant at the close of a plaintiff's case who fails to prove a *prima facie* case.

A *prima facie* case was noted in *Fillieks and Others v S* [2014] ZAWHC 34 as follows:

“*Prima facie* evidence in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive and the party giving it discharges his onus...”

In granting the application for absolution from the instance the court *a quo* thus had to be guided by the question of whether or not the appellant made out a *prima facie* case against the respondents on the basis of which the court could or might have found for the appellant. The appellant's cause of action was based on the credit facility which it advanced to the first respondent on the 2nd of November 2015 for the sum of US\$ 350 000. The purpose of the facility was to assist the first respondent in financing its working capital requirements. The facility further provided under clause 6 that the security for the amount advanced as the loan was secured by sureties and mortgage bonds registered in the names of the respondents in favour of the appellant. Under clause 12 of the facility all previous facility letters advanced to the first respondent by the appellant were cancelled.

33. The accounting statements of the appellant filed of record show that, on 17 November 2015 under transaction number LD1532460482 and described as “Loan Drawdown”, the appellant credited the first respondent's account with the sum of US\$ 350 000. On the 30th of December 2015 under transaction number LD1532460482 and described as

“Payment of Principal”, the sum of US\$ 350 000 was reversed from the first respondent’s account into the appellant’s account. The first respondent remained with a debit balance of US\$375 671.35.

34. The appellant’s witness, Gunundu, explained that the first entry meant that the appellant was crediting the first respondent with the proceeds of the loan. The second entry showed that those proceeds were meant to pay off an existing debt that the first respondent already had with the bank. It is important to quote the exchange between counsel for the appellant and the witness where he states that:

“Q. If you move further down you will see that the same \$350 000.00 appears on that page? A. Yes the second entry for \$350 000.00 which in this instance now appears as a debit on the borrowers account was passed on 30th December 2015. The second entry that was passed by the bank on the 30th of December 2015 for 350 000.00 entailed that the bank was now debiting the customer’s account to confirm that this was now a new loan agreement with terms as contained in the facility letter offer of 2nd November 2015.”

35. The first respondent however maintained the argument *a quo* and before this Court that the loan was repaid on the 30th of December 2015 under the transaction description of “Payment of Principal”.

On the basis of the above exchange, the court *a quo* found that the witness of the appellant did not establish its claim at all. The court concluded that Gunundu was not a credible witness and found that the appellant had failed to make out a *prima facie* case upon which the respondents could be placed on their defence. It is our view, however, that the court *a quo* fell into error in arriving at this finding.

36. It should be noted from the onset that the appellant and the first respondent have had a long standing relationship of a banking nature. The record shows that from 2011 to 2015 when the credit facility which is the subject of this appeal was entered into, the appellant was advancing the first respondent different loan facilities and overdrafts. These loan facilities were advanced on the basis of the securities which were made by the second to seventh respondents. For over 5 years the appellant was advancing money to the first respondent on the basis of those securities with no issues arising. Emails filed of record further show correspondence between the third respondent, the first respondent's Finance Manager one Jill Ngwerume Gunundu on behalf of the appellant and Nyangulu, which correspondence shows how some of the securities were registered. Emails between Rodney Callaghan and Darryn Blumears (acting on behalf of the second respondent) are also part of the record which shows the parties acknowledging that certain sums of money were owed and that the respondents would raise money to pay the debts. Although these emails were written in 2013 to 2014, this confirms the nature of the relationship between the appellant and the respondents, and that as at 2014 there was a debt owed to the appellant.
37. Having found that there existed a banking relationship between the appellant the respondents, the next question relates to the credit facility advanced to the first respondent on 2 November 2015 and whether or not that facility was repaid. There is no documentary evidence in the record which shows that the first respondent wrote to the appellant seeking a refinancing loan to cover its existing debts. However, given the history between the parties on how the appellant advanced several loans to the first respondent over the years, it can be taken that the first respondent must have approached the appellant seeking a loan to repay its outstanding debts.

38. A reading of the appellant's accounting statement shows that before the "loan drawdown" was made to the first respondent's account the account showed a debit balance of US\$ 367 981.74. When the loan sum was deposited the balance was reduced to US\$ 17 981.74. This means that the loan reduced an existing debt. When the loan was reversed back to the appellant's account on 30 December 2015 the balance returned to US\$ 375 671.35. This summary shows that the loan was advanced by the appellant to refinance an existing debt.
39. The credit facility, though not clearly labelled as a refinancing loan, appears to have been made in order to give the first respondent time to repay the loan. This explains the creation of a repayment plan on how the first respondent would repay its debt. In my view, the credit facility, though not specified as a refinancing loan, must have been made for the purpose of extending the period in which the first respondent had to repay its debts. It is important to borrow the words quoted with approval by Gubbay CJ in *Chikoma v Mukweza* 1998 (1) ZLR 541 (SC) at pg 544 wherein the Court noted that:

"Not to be overlooked, as well, are the wise words of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 (HL) at 503I; (1932) 147 LT 503 (HL) at 514:

'Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.*'

See also *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670G-H."

40. Thus, essentially what was before the court *a quo* was a claim for the repayment of a loan. The appellant had a duty, after all the evidence had been led by both appellant and the respondents, to prove its case on a balance of probabilities.
41. The argument in the respondents' plea that the loan was repaid in less than a month does not carry much weight and is an argument which the respondents had to prove in evidence. It is important to note that there was nothing in the record showing a deposit from the respondents to indicate that the first respondent had paid off the loan.
42. The court *a quo* fell into error in making its decision solely on the entry made on 30 December 2015 in the appellant's statement of account. That entry had to be read in conjunction with all the facts of the matter and the banking history which existed between the parties. The first respondent never denied owing the appellant but rather denied the sum claimed by the appellant and averred in its plea that if at all it owed the bank its debit balance was less than US\$ 109 000. All these are issues which the court *a quo* could not determine without putting the first respondent to its defence.
43. The court *a quo* further erred in making a finding that the appellant's witness was not a credible witness in circumstances when it had not heard evidence from the respondents. This was a clear error as there was nothing upon which the court could measure the appellant's evidence. In *Megalink Investments (Pvt) Ltd v Reserve Bank of Zimbabwe* HH 4/17 at pg 5 the court held that:

“I need to point out, too, that at this stage the court is not so much concerned with questions of the credibility of the witnesses and the probabilities of the case as there is nothing to measure those aspects against in the absence of the defendant's evidence. The court at this stage is presented with only one side of the story which alone must be examined to determine whether the requirements for absolution have been satisfied.”

In the case of *Professor Charles Nherera v Jayesh Shah* SC 51/19, GARWE JA as he then was, quoted the case of *Supreme Service Station 1969 (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) ZLR 1, in which BEADLE CJ highlighted some of the considerations that a court, faced with an application for absolution from the instance, ought to bear in mind. He pointed out that the court should always bear in mind that the defendant has not yet given evidence, or been cross-examined. Thus, the court should not dismiss the plaintiff's evidence unless it is glaringly incredible.

44. The court *a quo* thus misdirected itself by making a finding on the credibility of the appellant's witnesses in the absence of evidence from the respondents' witnesses. Gunundu explained how the transactions under the credit facilities were made and how they operated. He further explained how the appellant had always worked with the first respondent in trust and on the basis of the securities which had been lodged with the bank by the first respondent over the years. It seems to me that his evidence was sufficient to establish a *prima facie* case for the appellant with regard to whether or not the respondent owed the appellant.
45. It is common cause that the respondents agreed to be sureties and co-principal debtors in the event that the first respondent failed to repay the appellant. The security documents are part of the record. They have the signatures of the respondents. In making its claim in reconvention *a quo* the second respondent averred that the mortgage bonds in favour of the appellant were fraudulently acquired by the appellant.

Nyangulu testified on how he processed the registration of the mortgage bonds through the bank. Counsel for the second respondent however put him to task on the effect of the

mortgage bonds registered against the second respondent's property in favour of the appellant. The court *a quo* reasoned that, as Nyangulu had admitted under cross examination that there may have been shortcomings in the manner in which the mortgage bonds were registered, therefore they were invalid.

46. However, the record shows that as at 29 May 2014 Darryn Blumears, in an email to Rodney Callaghan, was having conversations as to “a figure breakdown for the loan against Pagomo”. Pagomo was one of the properties upon which a mortgage bond was registered by the second respondent in favour of the appellant. On the same day, in an email from Rodney Callaghan to Darryn Blumears, he was informed that: “The total loan is \$450 000 to NMB of which \$325 000 is against Pagomo and the balance of \$125 000 is against Tarlington Road.” This email is just but one of the correspondence in the record which suggest that there existed debts between the first respondent and the appellant and that those debts were covered by securities in the form of sureties and mortgages. This evidence in my view shows that there was an acceptance by the respondents that the loans were covered by the sureties and mortgage bonds. Thus, any denial of the proposition by the appellant that the mortgage bonds were valid should have been contradicted by the respondents in evidence.

47. It should also be noted that in making their pleas *a quo*, the respondents jointly made averments with regards to the sureties and mortgage bonds. Of note are the material allegations made by the respondents that the surety signed by the second respondent was signed by the daughter of the third and fourth respondents without a valid board resolution for her to do so. Further, the acknowledgment of debt was not signed by the first respondent and that an official of the appellant fraudulently made the third and

fourth respondent's daughter sign as surety on behalf of the second respondent. It was further averred that the appellant thus registered unauthorised mortgage bonds against the second respondent. All these averments made by the respondents in their pleas raise issues which were disputed by the appellant and therefore needed to be proved by way of *viva voce* evidence from the respondents. As such the court *a quo* could not grant absolution, as it did, without allowing the respondents to take to the stand to prove their claims.

48. The court *a quo* in making its determination found that the first and third to seventh respondents made claims in reconvention as to the invalidity of the sureties in their names. However, as submitted by counsel for the appellant, these respondents did not make any claims in reconvention in their pleas. The claim in reconvention which is in the record relates only to the second respondent. No amendment to the claim in reconvention was made to show that this was to cover all the respondents. As such the court *a quo* was clearly wrong and made a determination on an issue which was not properly placed before it. Rule 121 (1) of the High Court Rules provides that:

“A claim in reconvention shall be so described and shall be bound and filed with the defendant's plea.”

49. Only the second respondent properly made its claim in reconvention in its plea. The rest of the respondents only filed a notice of application to amend their pleas and claims in reconvention on the 30th of May 2017. The respondents' notice stated that at the pre-trial conference the respondents would apply to amend the pleas and make claims in reconvention. The record does not reflect whether or not the application for an amendment was motivated and if it was granted. More specifically, there is no order in the record to show that the amendment was granted at the pre-trial conference. The Pre Trial Conference

Minute is also silent on this issue. It seems to us that the court *a quo* could not make any finding on claims which were never raised in the papers before it by the respondents.

50. A court must determine a matter based on the papers and evidence placed before it by the parties. It cannot go on a frolic of its own (see *Nzara and Ors v Kashumba N.O. and Ors* SC 18/18 at pg 13). The court *a quo* fell into error when it granted claims in reconvention which were not properly pleaded by the respondents.

51. The sureties and mortgage bonds were signed by the respondents and they all had a provision for unlimited cover. The question of whether these sureties and mortgages were valid can only be answered when the issue of whether or not the first respondent owes the appellant the claimed sum of money has been answered. The invalidity of the security documents is an issue which the respondents should prove in their defence. In the same way that the appellant made its case that the security documents were valid as they were always used by the first respondent in acquiring loans over the years and were never questioned by the second to seventh respondents as being invalid, so too must the respondents show that the security documents were invalid and cannot relate to the loan facility dated 2 November 2015.

52. It is thus imperative that the court *a quo* makes a determination on whether or not the first respondent is liable to repay the loan advanced to it by the appellant on 2 November 2015. The determination will deal with the issue of whether or not the suretyships and mortgage bonds in favour of the appellant are valid or invalid. As long as the suretyships remained signed with a provision that they are of an unlimited nature and the appellant remains in possession of the title deeds to the properties under the mortgage bonds, the

security documents must be held as being valid. A final resolution of the matter can only be made after the defence case is heard.

DISPOSITION

53. The court *a quo* misdirected itself in granting the respondents' application for absolution from the instance in a case where the appellant had made a *prima facie* case upon which judgment might or could have been entered in its favour. The court *a quo* also erred in cancelling the surety and mortgage agreement in circumstances where there were no counterclaims filed by the third to seventh respondents seeking such relief. The justice of the case was one which required that the respondents be put to their defence. The appellant, having succeeded in the appeal, is entitled to its costs.

In the result, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“The defendants' application for absolution from the instance and second defendant's application for its claim in reconvention to be granted at the close of the plaintiff's case be and are hereby dismissed with costs.”

3. The matter is hereby remitted to the court *a quo* for continuation of trial.

GARWE JA : I agree

PATEL JA : I agree

Sawyer & Mkushi, appellant's legal practitioners

Sheshe & Mutoonono Attorneys, 1st, 3rd -7th respondent's legal practitioners

Thompson Stevenson & Associates, 2nd respondent's legal practitioners