IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0427**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN: -

FOCUS FINANCIAL SERVICES LIMITED **PLAINTIFF**

AND

BISONITE ZAMBIA LIMITED (IN LIQUIDATION) **1ST DEFENDANT**

KAITANO CHUNGU **2ND DEFENDANT**

CORAM: The Hon. Lady Justice Dr. W. S. Mwenda in Chambers at Lusaka the 25th day of January, 2018.

For the Plaintiff: Mr. L. Phiri of Messrs Chonta, Musaila and Pindani Advocates.

For the 1st Defendant: Mr. C. Muneku of Messrs. Charles and Charles Advocates

For the 2nd Defendant: Mr. Z. Mwandenga of Messrs M. Z. Mwandenga and Company

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Cases referred to:

1. *Kalyoto Muhalyo Paluku v. Grannys Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council (2006) Z.R. 119.*
2. *Mcfoy v. United Insurance Company Limited (1961) 1. ALL E.R. 1169.*
3. *The Post Newspapers Limited v. The Attorney General 2016/HP/1921.*
4. *Tweddle v. Atkinson (1861) 1 B & S 393.*
5. *Price v. Easton (1833) 4 B & Ad 433.*
6. *Golden v. Metropolitan Police Chief (1910) 2 K B 1080.*
7. *Paul Kazembe v. Fines Himweene S.C. Appeal No. 142 of 2006.*
8. *Richards v. Naum (1966) 3 ALL E.R. 812 (CA).*
9. *Tilling v. Whiteman (1980) 1 ALL E.R. 59.*
10. *Base Chemical Zambia Limited and Mazzonites Limited v. Zambia Air Force & Attorney General (2011) Z.R. Vol. 2, 34.*
11. *Zambia Revenue Authority v. Hitech Trading Company Limited (2001) Z.R. 17.*

12. *Sun Country Limited v. Charles Kearney and Another, SJZ No. 20 of 2017.*
13. *International Fund for Agricultural Development v. Ahmed Jazayeri (2001) All ER 161.*
14. *Admark Limited v. Zambia Revenue Authority (2006) Z.R. 43.*

Legislation referred to:

1. *Orders 14A and 33, rule 3 of the Rules of the Supreme Court, 1999 Edition (White Book).*
2. *Sections 2, 206 and 203 of the Companies Act, Chapter 388 of the Laws of Zambia.*
3. *Sections 7 (1) and (2); 22 (3) and 215 (2) of the Companies Act, Chapter 388 of the Laws of Zambia.*
4. *Sections 23 and 24 of the Companies Act, chapter 388 of the Laws of Zambia.*
5. *Order 5, Rules 14 and 15 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
6. *Editorial Note 14A/2/3 of the White Book.*
7. *Order 14A (2) of the White Book.*
8. *Order 18, rule 8 (1) of the White Book.*
9. *Sections 23 & 24 of the Companies Act, Chapter 388 of the Laws of Zambia.*

Publication referred to:

John O'hare and Robert N. Hill, Civil Litigation, 7th Edition (FT Law & Tax, 1996).

By way of Writ of Summons and accompanying Statement of Claim, the Plaintiff claims the following relief: -

i. The sum of K5,971,826.00 due to the Plaintiff by the 1st Defendant in respect of various bridge finance facilities granted to the 1st Defendant at its own request;
ii. Interest on any sums found due;
iii. An order that the 2nd Defendant be held personally liable for the debts of the 1st Defendant;
iv. Any other relief the Court may deem fit; and
v. Costs.

By a Notice of Intention to Raise Preliminary issues pursuant to Orders 14A and 33, Rule 3 of the Rules of the Supreme Court, 1999 Edition (White Book), the 1st Defendant raised the following issues on a point of law, namely: -

(a) That the 1st Defendant is not a party to the bridge finance facilities made between the Plaintiff and its directors and General Manager.
(b) That the 1st Defendant has taken the position that the bridge finance facilities made between the Plaintiff and its directors and General Manager were *ultra vires* clause 13 of its Articles of Association which limited its capacity to borrow.
(c) That legally the 1st Defendant has no liability in this matter.

The Notice of Intention to Raise Preliminary Issues was filed into Court on 16th June, 2017 together with a verifying affidavit (hereafter referred to as "the Affidavit in Support"), sworn by one Chintu Youngson Mulendema, the liquidator of the 1st Defendant. The 1st Defendant filed a List of Authorities in Support of Intention To Raise Preliminary Issues on 19th June, 2017 and 1st Defendant's Skeleton Arguments on 26th June, 2017.

The Affidavit in Support discloses that the 1st Defendant is not a party to the bridge finance facilities made between the Plaintiff and the 1st Defendant's directors and General Manager because they entered into the same in their personal capacities without any authority from the company. That the 1st Defendant has taken the position that the bridge finance facilities made between the Plaintiff and the 1st Defendant, its directors and General Manager were *ultra vires* clause 13 of its Articles of Association which limited its capacity to borrow. In support of the aforesaid, the deponent produced as exhibits marked "CYM1" to "CYM3", copies of printouts from the Patents and Companies Registration Agency (PACRA) and the 1st Defendant's Articles of Association.

The 1st Defendant argued in its Skeleton Arguments that a preliminary issue can be raised at any stage of the proceedings as determined in the case of *Kalyoto Muhalyo Paluku v. Grannys Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council*[1]. It was further argued that the 1st Defendant who has raised the preliminary issue is a limited liability

company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia with capacity to sue and be sued. That the 2nd Defendant, without the approval of the Board of Directors of the 1st Defendant, executed an unlimited guarantee on behalf of the two directors in their personal capacity without a power of attorney from them in support of the various banking facilities granted by the Plaintiff.

According to the 1st Defendant, this action by the 2nd Defendant was tantamount to fraud and should therefore be found to be null and void *ab initio* for all intents and purposes. In support of this contention, the 1st Defendant relied on the decision in the case of *Mcfoy v. United Insurance Limited*[2] which was adopted in the local case of *The Post Newspapers Limited v. The Attorney General*[3], where the court held that: -

> *"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".*

It was the 1st Defendant's submission that the unlimited guarantee which was obtained for the borrowings was not supported by the requisite authorisation of the Board of Directors of the 1st Defendant Company and by extension, the 1st Defendant is not therefore, a party to the contract. It was further argued that under part 1 section 2 of the Companies Act, Chapter 388 of the Laws of Zambia, "director" means a person appointed as a director of a company under section 206 and the directors refer to directors acting collectively as provided for in section 203 of the Act. The 1st Defendant argued that at no time did the directors act collectively to approve the financing by the Plaintiff. It was further argued that the action by the 2nd Defendant, who is not defined as a director, was tantamount to fraud.

Regarding the common law principle of privity of contract, the 1st Defendant referred this Court to the case of *Tweddle v. Atkinson*[4] where the court held that no one may be entitled to or bound by the terms of a contract to which he is not an original party. To fortify its argument, the 1st Defendant also referred to the case of *Price v. Easton*[5].

The 1st Defendant submitted further, that clause 13 (b) of the Company's Articles of Association on the borrowing powers of the directors of the company provides that *"the amount of any borrowings outstanding at any time shall not exceed the amount of issued share capital of the company at the time."* That at the time of the borrowings in issue in this matter, the amount of the 1st Defendant's issued share capital was only Two Thousand Kwacha (K2,000.00) as evident from the printout on record which was issued after a search conducted at PACRA in Lusaka.

It was the 1st Defendant's contention that the Plaintiff's claim of Five Million Nine Hundred and Seventy-One Thousand Eight Hundred and Twenty-Six Kwacha (K5,971,826.00) in respect of various bridging finance facilities granted clearly exceeded the issued share capital of the company, contrary to clause 13 (b) of the said Articles of Association. The 1st Defendant also referred to section 7(1) and (2) as read with section 22(3) and section 215 (2) of the Companies Act which restrict the conduct of business by the company or powers of the directors where the articles expressly state so as per clause 13 (b) of the 1st Defendant's Articles of Association.

It was the 1st Defendant's further contention that its position is fortified by the Plaintiff's own averment in its Statement of Claim in paragraph 6 where it states as follows: -

> *"As security for the foregoing facility, the 2nd Defendant in his capacity as Chief Executive Officer of the 1st Defendant Company purported to sign per procurationem, an unlimited guarantee dated 19th August, 2014 in the names of Oliver Saasa and Chris Q. Mtonga".*

Further, that in paragraph 7 of its Statement of Claim, the Plaintiff averred that the 2nd Defendant had no authority express or implied to sign the said unlimited guarantee on behalf of the aforementioned.

In addition, in paragraph 8 of the Statement of Claim, the Plaintiff averred that the action by the 2nd Defendant in signing the unlimited guarantee on behalf of the aforementioned without authority amounted to fraud.

It was the 1st Defendant's submission that based on the above, the Plaintiff admitted having actual knowledge and actual notice of the lack of authority by the 2nd Defendant to execute the said unlimited guarantee which, according to the 1st Defendant, is contrary to sections 23 and 24 of the Companies Act, Chapter 388 of the Laws of Zambia. It is thus the 1st Defendant's argument that in light of the above, the Plaintiff cannot rely on the unlimited guarantee contract because it is unenforceable at law as it is null and void *ab initio.*

According to the 1st Defendant, the bridging finance facilities made between the Plaintiff and the 2nd Defendant were *ultra vires* Clause 13 (b) of the 1st Defendant's Articles of Association and should, therefore, be found to be null and void *ab initio.* Further, that no person can claim any right or remedy, whatsoever, from an illegal transaction as was established in the case of *Golden v. Metropolitan Police Chief*[6], which expounded the principle of *"ex turpi causa non oritur actio"* meaning, the court is bound to veto the enforcement of a contract once it knows that it is illegal. According to the 1st Defendant, the above principle was followed by the Supreme Court of Zambia in the case of *Paul Kazenene v. Fines Himweene.*[7] It was thus, the 1st Defendant's prayer that the application be granted.

In the Affidavit in Opposition to Notice of Intention To Raise Preliminary Issues (hereinafter referred to as "the Affidavit in Opposition") sworn by one Mudford Zachariah Mwandenga, the deponent, an advocate of the High Court for Zambia having conduct of the matter on behalf of the 2nd Defendant,

deposed that the 1st Defendant did not serve the 2nd Defendant with its Memorandum of Appearance and Defence. That on 21st June, 2017 he conducted a search on the Court record for the 1st Defendant's Memorandum of Appearance and Defence which revealed that the 1st Defendant filed a Conditional Appearance on 12th October, 2016 which was to remain unconditional if an appropriate application to set aside the writ was not made within fourteen (14) days from 12th October, 2016. That on 25th October, 2016, the 1st Defendant filed a Notice to Raise Preliminary Issues and its supporting documents. That the said Notice to Raise Preliminary Issues and supporting documents were not served on the 2nd Defendant by the 1st Defendant.

The deponent averred further that the Notice to Raise Preliminary Issues of 25th October, 2016 has since been overtaken by events. That on 16th June, 2017 the 1st Defendant filed another Notice to Raise Preliminary Issues but that the Affidavit in Support of the said Notice to Raise Preliminary Issues is defective. Thus, he verily believes that the Notice to Raise Preliminary Issues filed on 16th June, 2017 is misconceived.

The 2nd Defendant argues in his Skeleton Arguments that the Affidavit in Support contains extraneous matters contrary to the rules of this Court. Thus the 2nd Defendant quotes paragraph 4 of the affidavit which reads as follows: -

> *"That the 1st Defendant is not a party to the bridge finance facilities made between the Plaintiff and its directors and General Manager because they entered into the same in their personal capacities without any authority from the company."*

According to the 2nd Defendant, the above is legal argument or conclusion which does not sit well with Order 5, rule 14 of the Rules of the High Court, Chapter 27 of the Laws of Zambia which provides in crystal clear terms that:

> *"An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion."*

It is the 2nd Defendant's prayer that paragraph 4 of the Affidavit in Support be expunged from the affidavit on the ground that it contains a legal argument or conclusion in violation of Order 5, rule 14 of the High Court Rules. The 2nd Defendant submits that in the alternative, a critical study of paragraph 4 of the Affidavit in Support reveals that it makes reference to bridge finance facilities made between the Plaintiff and the 1st Defendant's directors and General Manager without indicating whether the same were made orally or in writing; that if they had been made in writing they ought to have been exhibited in the affidavit as guided by John O'hare and Robert N. Hill in their publication called 'Civil Litigation' where, writing on the subject of drafting affidavits, they say at page 170 the following: -

> *"If any facts arise from or are supported by documents, bring these documents in evidence by 'exhibiting' them to the affidavit: e.g. the deponent may refer to a written agreement between the parties and state "The agreement is now produced and shown to me marked "A"..."*

The 2nd Defendant contends that the failure by the 1st Defendant to exhibit the bridge finance facilities means that paragraph 4 in question is incomplete and/or presumptuous and if the said paragraph is not expunged as prayed, it has no evidential value because the bridge finance facilities referred to therein have not been brought to the attention of the court and consequently, the court has been denied vital evidence upon which to decide the issue allegedly in contention.

With regards to paragraph 5 of the Affidavit in Support which talks about the bridge finance facilities being *ultra vires* clause 13 of the 1st Defendant's Articles of Association, the argument given above in relation to paragraph 4 is again advanced by the 2nd Defendant who concludes that the evidential value of the said paragraph is nil.

In relation to paragraph 6 of the Affidavit in Support, the 2nd Defendant submits that the said paragraph refers to exhibits "CYM1" and "CYM2" without the said exhibits being mentioned or referred to by the deponent and that therefore, they must be expunged from the Affidavit in Support for being irrelevant thereto.

With regards to paragraph 7 of the Affidavit in Support which provides that:

> *"That in the premises, I urge this honourable court to remove the 1st Defendant from this matter."*

The 2nd Defendant submits that this is a prayer and as such is contrary to Order 5, rule 15 of the High Court Rules. It is therefore, the 2nd Defendant's prayer that paragraph 7 of the Affidavit in Support be expunged from the affidavit. The 2nd Defendant contends that because the Affidavit in Support is fatally defective, the 1st Defendant's application is not supported by the requisite evidence contrary to the requirements of Order 14A of the Rules of the Supreme Court, 1999 Edition (hereinafter referred to as "the White Book"). As such the preliminary issue has no legs to stand on and the application arising therefrom must be dismissed.

It is the 2nd Defendant's further contention that the 1st Defendant's notice to raise preliminary issues is misconceived. That since under order 14A of the Rules of the Supreme Court the court can decide any question of law at any stage of the proceedings if the question is suitable for determination without a full trial of the action if such determination will finally determine the entire action or any claim or issue therein, the said order is not apt for determining a question which involves a question of fact. The 2nd Defendant submitted that in the matter at hand the facts of the matter are not agreed and this court will have to delve into the matter through a full trial in order to ascertain the facts. Thus this case is not suitable for determination without a trial. The 2nd Defendant cited the White Book at page 644 where, relying on the case of *Richards v. Naum*[8], it is stated thus: -

> *"Where for purposes of deciding questions of law it is necessary or desirable to ascertain the facts beyond those that appear in the pleadings, the court should not order the trial of those questions as a preliminary point of law, especially where the law is itself unsettled or obscure..."*

It is the 2nd Defendant's argument that the above citation is apt for the case in casu. To augment the argument, the 2nd Defendant brought the attention of this Court to the case of *Tilling v. Whiteman*[9] where the House of Lords protested strongly against the practice of the court of first instance of allowing preliminary points of law to be tried before and instead of first finding the facts since this course frequently adds to difficulties of the Court of Appeal and tends to increase the cost and time of legal proceedings (per Lord Wilberforce). Lord Scarman described preliminary points of law as being *"too often treacherous short cuts.* Their price can only be delay, anxiety and expense."

The 2nd Defendant submitted further that the 1st Defendant also appears to have brought the application under Order 33, rule 3 of the Rules of the Supreme Court but argued that the 1st Defendant did not proceed under the said Order because it did not ask the court to make the requisite order under Order 33, rule 3 of the White Book.

It is the 2nd Defendant's further contention that the 1st Defendant did not file any memorandum of appearance and defence. That while the 1st Defendant filed a conditional appearance it became unconditional after the expiration of 14 days since the 1st Defendant did not file the appropriate application to set aside the writ for irregularity. Since a memorandum of appearance is supposed to be accompanied by a defence and since the 1st Defendant did not file any defence, it failed to file its intention to defend the matter, which failure has serious repercussions in an application under Order 14A of the White Book since the filing of a Notice of Intention to defend is one of the requirements for one to make an application under the said Order. The 2nd

Defendant referred the court to Editorial Note 14A/2/3 of the White Book which *inter alia,* provides as follows: -

(a) the defendant must have given notice of intention to defend ..."

While acknowledging that in the *Kalyoto Muhalyo Paluku v. Granny's Bakery Limited* case the Supreme Court decided that it is settled law that a preliminary issue can be raised at any stage of the proceedings, even at the outset of the case, the 2nd Defendant still argued that if a party decides to raise a preliminary issue under Order 14A of the White Book, the party is required to strictly adhere to the requirement of Order 14A; failure to do so renders the application for preliminary issue misconceived. That had the 1st Defendant been desirous of raising preliminary issues without the inconvenience of filing the necessary supporting documents, it should have made the application *viva voce* at the hearing of some interlocutory application in these proceedings. To this end Order 14A (2) of the White Book was called to the aid of the 2nd Defendant. The Order provides that: -

> *"An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) maybe made orally in the course of any interlocutory application to the Court."*

It was thus, the 2nd Defendant's submission that in the Zambian context failure to file a memorandum of appearance and defence is fatal to an application under Order 14A of the White Book.

The 2nd Defendant submitted in addition, that the 1st Defendant's Skeleton Arguments should be ignored by this Court because the Affidavit in Support does not speak to the fact that the 1st Defendant is a limited liability company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia with capacity to sue and be Sued. Thus, according to the 2nd Defendant, Counsel for the 1st Defendant, the author of the Skeleton Arguments, is adducing evidence at the bar.

Similarly, according to the 2nd Defendant, the 1st Defendant submitted that the 2nd Defendant, without approval of the Board of Directors of the 1st Defendant, executed an unlimited guarantee on behalf of the two directors in their personal capacity without a power of attorney from them in supporting various banking facilities granted by the Plaintiff. According to the 2nd Defendant, again, the affidavit does not speak to the matter. Therefore, Counsel is again adducing evidence at the bar.

In further opposition to the 1st Defendant's application, the 2nd Defendant states that the 1st Defendant in the Skeleton Arguments imputes fraud on the 2nd Defendant. That the record will show that the 1st Defendant has not pleaded fraud and this, according to the 2nd Defendant, is a violation of Order 18, rule 8 (1) of the White Book which states that: -

> *"A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, the expiry of any relevant period of limitation, fraud or any fact showing illegality –*
> *(a) Which he alleges makes any claim or defence of the opposite party not maintainable; or*
> *(b) Which, if not specifically pleaded, might take the opposite party by surprise;*
> *(c) Which raises issues of fact not arising out of the preceding pleading."*

The 2nd Defendant cited the case of *Base Chemicals Zambia Limited & Mazzonites Limited v. Zambia Air Force and Attorney General.*[10] where the Supreme Court held, *inter alia*, that: -

> *"A party wishing to rely on the defence of fraud must ensure that is clearly and distinctly alleged."*

In view of the above authorities, the 2nd Defendant submitted that the 1st Defendant in this case cannot rely on fraud and further, the 1st Defendant has not provided any iota of evidence suggesting that the 2nd Defendant was guilty of fraud as alleged or at all. As for the 1st Defendant's submission that the unlimited guarantee that was obtained for the borrowings was not

supported by the requisite authorisation of the Board of Directors of the 1st Defendant and by extension the 1st Defendant is not, therefore, a party to the contract, it is the 2nd Defendant's contention that the Affidavit in Support does not speak to this matter and therefore, Counsel for the 1st Defendant is adducing evidence from the bar.

With regards to the 1st Defendant's submission on privity of contract, the 2nd Defendant argues that the same are irrelevant because the 1st Defendant has not adduced any evidence that can be called in support of its position on the doctrine. The 2nd Defendant further argues that the issue concerning the K2,000.00 share capital is unsupported by the evidence properly before this Court.

Reacting to the 1st Defendant's submission on the Plaintiff's averments in its Statement of Claim, the 2nd Defendant submitted that the said averments are yet to be proved and proof can only be provided through the matter going through a full trial. That an application under Order 14A of the Rules of the Supreme Court is therefore, not appropriate in the circumstances of this case.

In sum, the 2nd Defendant argued that the common thread that runs through the 1st Defendant's Skeleton Arguments is that they are based on matters not pleaded and hence the 1st Defendant's application has no base upon which they can be raised at this point in the proceedings. Another common thread that runs through the 1st Defendant's Skeleton Arguments, according to the 2nd Defendant, is that arguments therein are not based on evidence before this Court, but are based on evidence adduced by Counsel at the bar, a practice frowned upon by the Supreme Court in the case of *Zambia Revenue Authority v. Hitech Trading Company Limited*[11]. which stated that "arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence."

In the circumstances Counsel submitted, the 1st Defendant's Skeleton Arguments should be ignored altogether because they are anchored on evidence adduced by Counsel at the bar. Further, that the evidence or facts that the 1st Defendant seeks to rely on are not on the court's record. Therefore, it would not be proper for this court to make use of it. In view of the foregoing, it is the 2nd Defendant's prayer that the application to raise preliminary issues be dismissed with costs.

The Plaintiff also filed Skeleton Arguments in Opposition to Notice of Intention To Raise Preliminary Issues wherein it argued that in order for Order 14A of the White Book to be properly applied, the issues raised must be determined without a full trial and they must determine the entire cause or matter. It was the Plaintiff's contention that from its pleadings and the Affidavit in Opposition herein, it is clear that triable issues have been raised whose facts can only be settled by this court after a full trial. Further, if the preliminary issues raised were to succeed; the entire cause would not be determined as the 1st Defendant is more or less shifting the alleged liability onto the 2nd Defendant.

It was the Plaintiff's view that the preliminary issues raised by the 1st Defendant ought not to be considered at this stage due to the fact that the 1st Defendant has not filed a defence into court and has thus not properly "alleged" any facts that need determination. According to the Plaintiff, this also means that the court does not have the opportunity to ascertain whether there are any facts that need to be proved beyond those that appear in the 1st Defendant's pleadings as there are none. Further, the question of law allegedly raised by the 1st Defendant is not carefully and precisely framed.

It was the Plaintiff's further argument in response to the 1st Defendant's argument that it is not liable for the indebtedness relating to the bridge finance facilities afforded by the Plaintiff because the 2nd Defendant had no authority to execute the same, that firstly, a company can only act through

its officers or agents and secondly, that the 2nd Defendant was at all material times held out to be a representative of the Company who had the requisite authority. That the document exhibited as "DB2" in the Affidavit in Opposition is at the very least, evidence of implied authority that the 2nd Defendant was clothed with.

The Plaintiff went further to argue that section 23 of the Companies Act, Chapter 388 of the Laws of Zambia provides that: -

> *"No act of a company, including any transfer of property to or by a company, shall be invalid by reason only that the act or transfer is contrary to its articles or this Act."*

It was the Plaintiff's submission that having established that a company can only operate through its agents or employees, where those representatives allegedly perform an act which is contrary to the company's articles that act, by law, is not considered invalid by reason only that it is contrary to the company's articles or indeed the Companies Act itself. According to the Plaintiff, the use of the term "by reason only" suggests that for a company to allege that its representative had no authority due to a restriction as provided by its articles, that company must show "something more." The Plaintiff strongly argued that the preliminary issue as it is couched and the documents and its arguments in support, fall well short of establishing "something more" for this court to properly conclude that the 2nd Defendant had no authority to bind the 1st Defendant.

The Plaintiff argued in addition, that in accordance with section 24 of the Companies Act, the 1st Defendant cannot simply rely on its articles as evidence that the 2nd Defendant had no authority to bind the 1st Defendant as notice of the contents of the articles cannot be presumed by reason only that the articles were filed with PACRA and as such, available for inspection. That the 1st Defendant has not established that "something more" that would suggest that the Plaintiff had actual notice of this restriction.

In further opposition to the Notice of Intention to Raise Preliminary Issues, the Plaintiff argued that the 1st Defendant has placed immense emphasis on the unlimited guarantee signed by the 2nd Defendant as a basis for coming to the conclusion that the said 2nd Defendant had no authority to bind the 1st Defendant. It was the Plaintiff's further argument that the unlimited guarantee was executed as security for the facilities and not the facility itself. That in fact, it is the argument of the Plaintiff that the 2nd Defendant although binding the company by executing the bridge finance facilities and assignment of contract debt, is personally liable as well for signing the unlimited guarantee *per procurationem.* That this is separate from the documents creating the facilities.

The Plaintiff invited the court to take note that the 2nd Defendant in his pleadings has alleged that he did in fact have authority not only to execute the bridge finance facilities but also to execute the unlimited guarantee. This, according to the Plaintiff, is a clear disclosure of a triable issue that must be determined at trial. The Plaintiff thus prayed that the preliminary issues raised by the 1st Defendant be dismissed and the matter be heard on its merits.

In response to the Plaintiff and 2nd Defendant's objection to the preliminary issues on a point of law, the 1st Defendant filed into court composite skeleton arguments in reply wherein it condensed the three issues it raised into one legal issue, namely, whether the Plaintiff has a cause of action against the 1st Defendant in view of the Plaintiff's alleged own unequivocal acknowledgement and admission as contained in paragraphs 6, 7 and 8 of the Statement of Claim to the effect that the 2nd Defendant did not have express or implied authority to bind the 1st Defendant.

The 1st Defendant denied the assertion that its Affidavit in Support is incurably defective, thereby leaving the preliminary issue with no leg to stand on and cited the Supreme Court case of *Sun Country Limited v. Charles*

Kearney & Another[12] where, delivering the judgment of the Court, his Lordship Justice Malila, stated as follows: -

> *"An affidavit afflicted by such a defect is receivable under Order 5, rule 13 of the High Court Rules which Counsel for the Appellant quoted. The rule authorises the court to receive affidavits despite irregularities in form."*

It is thus the 1st Defendant's argument that should this court be of the view that the 1st Defendant's liquidator's affidavit is indeed defective, the same is still receivable as guided by the Supreme Court. That it is therefore incorrect to argue, as does the 2nd Defendant, that an irregular affidavit is incurably fatal.

As regards the second head of objection, namely, that the preliminary issue raised by the 1st Defendant cannot be properly determined under the provisions of Order 14A of the White Book, the 1st Defendant does not agree with the Plaintiff and 2nd Defendant's interpretation of Order 14A (1) (b) of the White Book and argues that the question at hand, a serious point of law, namely, whether or not the Plaintiff has a cause of action against the 1st Defendant, is one which can be determined without requiring a full trial. While admitting that the determination of the preliminary issue raised by the 1st Defendant may not result in the determination of the entire cause, the 1st Defendant argued that it need not result in the determination of the entire cause and to this end, relied on the decision of the Supreme Court in the case of *Kalyoto Muhalyo Paluku v. Granny's Bakery Limited, Ishaq Musa, Attorney General and Lusaka City Council* (cited above) which stated that an action can be determined either in part or in whole if a preliminary issue is upheld and especially if it goes to the root of the matter, the subject of the proceedings.

The 1st Defendant argued that since a preliminary issue on a point of law raised under Order 14A need not determine the entire cause, it is the 1st Defendant's submission that the question whether or not the Plaintiff has a

cause of action against the 1st Defendant would determine the Plaintiff's claim against the 1st Defendant.

The 1st Defendant submitted that given the fact that the Plaintiff unequivocally admits that the 2nd Defendant did not have authority to bind the 1st Defendant, summary judgment via disposal of the matter on a point of law is more appropriate. The 1st Defendant submitted further that based on the case of *International Fund for Agricultural Development v. Ahmad Jazayeri*[13], there must be some evidence which rebuts the Applicant's (in this case the 1st Defendant's) position at the time the application for summary judgment is made in order for the other party (the Plaintiff in this case) to successfully defend the application. That the Plaintiff and 2nd Defendant cannot merely rely on the hope that evidence will emerge in its favour during cross examination or trial.

While agreeing with the Plaintiff's advocates that for a company to escape liability under section 23 of the Companies Act it must show "something more", the 1st Defendant argued that the Plaintiff's knowledge of the limitations imposed on the 2nd Defendant prevents it from relying on or benefiting from the provisions of section 24 of the Companies Act. The 1st Defendant submitted that, that fact on its own constitutes something more. In other words, that despite being aware of the limitations imposed on the 2nd Defendant, the Plaintiff went ahead to disburse funds.

Reacting to head three of the Plaintiff and 2nd Defendant's ground of opposition to the preliminary issue, namely, that the 1st Defendant did not file a memorandum of appearance and defence, the 1st Defendant argued that a party need not file pleadings in order to raise a preliminary issue on a point of law. That with or without pleadings a party is at liberty to raise a point of law at any stage of the proceedings, including trial as per the holding of the Supreme Court in the case of *Admark Limited v. Zambia Revenue Authority*[14], which stated that the requirement that a party should plead his point of law in his pleadings is not mandatory. It is thus the 1st

Defendant's contention that the 2nd Defendant's objection under this head, is misconceived as it flies in the face of the Supreme Court decision in *Admark Limited v. ZRA.*

As regards the 2nd Defendant's argument that the 1st Defendant's Skeleton Arguments should be ignored as they amount to adducing evidence from the bar, the 1st Defendant disagreed with that position and submitted that the argument is oblivious to the distinction between facts and evidence. That the 1st Defendant is a limited company is a fact and not evidence. In any event, the 1st Defendant argued, it has exhibited documentary evidence to that effect in its liquidator's affidavit in support. That to suggest that the 1st Defendant cannot and should not be allowed to make reference to facts laid before court in advancing its argument on account that it has not "pleaded" those facts in its affidavit is without legal basis. It is the 1st Defendant's argument that since the preliminary issue has arisen from the facts pleaded by the Plaintiff, the 1st Defendant is at liberty to raise a preliminary question of law raised either on the pleadings or otherwise. The 1st Defendant prayed that the court grants its application with costs.

After perusing the documents filed by the parties for and against the application before this Court, I am of the considered view that the only question to be determined in this application is whether or not the issues that have been raised in the application are suitable for determination under Order 14A of the Rules of the White Book. For this reason, I will not delve into the arguments regarding the contents of the Affidavit in Support, namely, whether they offend the provisions of Order 5 of the High Court Rules; the arguments relating to the 1st Defendant's Skeleton Arguments and whether the same should be ignored by Court; and the other arguments that touch on the merits of the case.

It may be recalled that the 1st Defendant in its composite Skeleton Arguments condensed the three issues raised in the preliminary issue into one, being; whether the Plaintiff has a cause of action against the 1st

Defendant in view of the Plaintiff's alleged own unequivocal acknowledgment and admission as contained in paragraphs 6, 7 and 8 of the Statement of Claim to the effect that the 2nd Defendant did not have express or implied authority to bind the 1st Defendant.

Order 14A of the Rules of the Supreme Court provides as follows: -

> *"1. The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that: -*
>
> *(a) Such question is suitable for determination without a full trial of the action; and*
>
> *(b) Such determination will finally determine (subject only to any possible appeal) the entire cause or any claim or issue therein.*
>
> *2. Upon such determination, the Court may dismiss the cause or matter, or make such order or judgment as it thinks just..."*

It is clear from Order 14A quoted above, that a preliminary issue can be raised at any stage of the proceedings and its determination need not result in the determination of the entire cause. The above provision was upheld by our own court in *Kalyoto Muhalyo Paluka v. Granny's Baking and Others*, cited above. Therefore, the Plaintiff's submission that in order for Order 14A of the Rules of the Supreme Court to be properly applied, they must determine the entire cause or matter is incorrect.

It is my considered view that notwithstanding the Plaintiff's alleged unequivocal acknowledgment and admission in paragraphs 6, 7 and 8 of the Statement of Claim, the Plaintiff has in its Skeleton Arguments put forward arguments that show that it has recanted on its alleged unequivocal acknowledgment and admissions in paragraphs 6, 7 and 8 of the Statement of Claim. Thus, The Plaintiff is alleging that the 2nd Defendant bound the 1st Defendant by executing the bridge finance facilities and assignment of

contract debt, but is holding the 2nd Defendant personally liable as well for signing the unlimited guarantee *per procurationem.*

Further, while allegations of lack of authority on the part of the 2nd Defendant to bind the 1st Defendant have been made, the Plaintiff has argued that a company can only act through its officers and agents and that the 2nd Defendant was at all material times held out as a representative of the company with the requisite authority. In addition, there have been allegations of fraud against the 2nd Defendant who has in turn taken issue with the said allegations, namely, that the same has not been specifically pleaded. Further, and as the Plaintiff rightly argued, the 2nd Defendant's allegation in his pleadings that he did in fact have authority not only to execute the bridge finance facilities but also the unlimited guarantee, is a clear disclosure of another triable issue that must be determined at trial.

Given the above scenario, I am left with no doubt that this application has highlighted contentious issues which can only be determined at a full trial.

For the above reasons, I am inclined to dismiss the preliminary issue and do so accordingly. I condemn the 1st Defendant in costs, to be agreed by the parties or taxed in default of agreement.

Dated at Lusaka the 25th day of January, 2018.

W. S. Mwenda (Dr)
HIGH COURT JUDGE