REPORTABLE (02)

(1) CALEB DENGU (2) CALEB DENGU FAMILY TRUST
v
(1) EASTERN & SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK t/a **PTA BANK (2) RESERVE BANK OF ZIMBABWE (3) REGISTRAR OF DEEDS N.O**

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAVANGIRA JA & CHITAKUNYE JA
HARARE, JUNE 15 2023 & 11 JANUARY 2024

B. Mtetwa, for the appellant.

R. H. Goba, for the first respondent.

T. Chihuta for the second respondent.

MAVANGIRA JA:

1. This is an appeal against the whole judgment of the High Court (the court *a quo*) wherein the court dismissed the appellants' claim. The claim was for the cancellation of mortgage bond 11422/2001 registered over a certain piece of land situate in the District of Salisbury called Stand 731 Glen Lorne Township 15 of Lot 41 of Glen Lorne measuring 5 960 square metres held under deed of transfer No. 11317/2000 dated 31 November, 2001 and alternative declaratory relief confirming the abandonment or waiver of rights by the first respondent. Additionally, the appellants sought an order declaring any cession of rights between the first and second respondents to be null, void and of no effect.

FACTUAL BACKGROUND

2. The first appellant in this matter is a trustee of the second appellant, which is a family trust duly registered in accordance with the laws of Zimbabwe. The first respondent is an international financial institution sued along with the Reserve Bank of Zimbabwe, as the second respondent and the Registrar of Deeds N.O. as the third respondent.

3. A company called Thirdline Trading (Pvt) Ltd (Thirdline), in which the first appellant was a director, was registered with the intention of reviving the then defunct Boka Auction Floors. For the purposes of achieving this objective, Thirdline registered Onclass Investments (Pvt) Ltd (Onclass) as a wholly owned subsidiary, to conduct tobacco trading at Boka Auction Floors. Onclass applied for a loan of UAPTA 585 000.00 from the first respondent.

4. On 12 June 2001, the first respondent and a now-defunct Onclass entered into a loan agreement for UAPTA 585, 000.00. The abbreviated term UAPTA meant the Unit of Account of the Preferential Trade Area. Onclass would be extended the loan facility in their currency of preference. The value of the loan was then approximated at US$600 000.00.

5. As a condition precedent for the release of the loan amount, the directors and/or shareholders of Onclass were requested and they agreed to provide personal guarantees as additional security for the loan. The first appellant fulfilled this requirement, in his capacity as a director of Onclass' holding company, by seeking and obtaining the second appellant's authority to use the second its immovable property known as Stand 731 Glen Helen Way, Glen Lorne, as security. Thereafter, a mortgage bond in favour of the first respondent was registered over the said property

in the sum of ZW$50 million. Notably, the immovable property exclusively belonged to the second appellant with the first appellant having no property rights in it save for his status as a trustee of the former.

6. The arrangement later on became untenable after Onclass failed to fulfil its obligations in terms of the loan agreement and defaulted on payment for the same. This was in 2005 and it resulted in the loan facility extended to the company being withdrawn.

7. The first respondent refused the tenders made by the appellants on two occasions in May 2006 to pay off the debt using the local currency. It insisted that the debt in terms of the loan could only be paid off in terms of the currency that was used to disburse the loan facility. Its position was based on the terms of the loan agreement with Onclass. Section 13 of the agreement stipulated that repayment was to be denominated in the currency of disbursement and into an account in the name of the first respondent and that no obligation would be deemed satisfied by tender made in any other currency or place.

8. On the contrary, the appellants' view was that the mortgaged sum of ZWL$50 million represented the full extent of their liability to the first respondent as they believed that such a tender in local currency ought to extinguish their obligations. In addition, they interpreted the refusal by the first respondent to accept their tender as a waiver of its rights under the loan agreement.

9. The appellants made various unsuccessful attempts to cancel the mortgage bond granted in favour of the first respondent.

10. Subsequently, the appellants and the other directors of Onclass instituted legal proceedings and obtained a court order under HC 1791/2006 for the cancellation of the securities held by the first respondent upon payment, in Zimbabwean dollars, of the debt owed; this being contrary to the terms of the loan agreement which required payment in the currency of **disbursement**. (check)

11. Because of that, the first respondent, who at the time was the only institution prepared to extend credit to the Government of Zimbabwe and other corporate entities, became reluctant to continue extending such credit. This resulted in an agreement being reached in 2006 in terms of which the second respondent would pay off Onclass' indebtedness to the first respondent and in return, the first respondent would surrender all securities held by it to the second respondent.

12. In 2007, the second respondent paid a discounted figure of US$500 000-00 to the first respondent in full and final settlement of the debt owed by Onclass. Thereafter, and in that same year, 2007, the second respondent engaged the appellants and Onclass advising them of the payment made and of the need for them to make a payment plan to it. There ensued an extensive exchange of correspondence between the first appellant and Onclass through one Mr Nyabonda. In the said correspondence either a payment plan was being proposed or assertions were being made that the debt had been paid through lawyers or through bankers. Despite a request for proof of such payment, no proof was ever availed.

13. Onclass went into liquidation. The second respondent submitted a claim which remains unpaid.

14. Having failed to produce any proof of payment, the appellants proceeded to launch the proceedings in the court a quo which now form the basis of this appeal.

15. The first respondent refused the tenders made by the appellants on two occasions in May 2006 to pay off the debt using the local currency. It insisted that the debt in terms of the loan could only be paid off in terms of the currency that was used to disburse the loan facility. Its position was based on the terms of the loan agreement with Onclass. Section 13 of the agreement stipulated that repayment was to be denominated in the currency of disbursement and into an account in the name of the first respondent and that no obligation would be deemed satisfied by tender made in any other currency or place.

16. On the contrary, the appellants' view was that the mortgaged sum of ZWL$50 million represented the full extent of their liability to the first respondent as they believed that such a tender in local currency ought to extinguish their obligations. In addition, they interpreted the refusal by the first respondent to accept their tender as a waiver of its rights under the loan agreement.

17. It was only much later that the appellants were advised of a cession of the mortgage bond to the second respondent by the first respondent. In terms of the cession, the second respondent having paid out US$500, 000.00, replaced the first respondent as the principal creditor of the loan agreement. It was on this basis that the appellants filed the summons in the court *a quo* against the respondents in a bid to cancel the mortgage bond over the second appellant's property or alternatively have it declared that their rejected tenders had extinguished their obligations in terms of the loan facility.

COURT *A QUO'S* DETERMINATION

18. The court *a quo* dismissed the appellants' claim. It noted that in proceedings under HC 1971/2006, the appellants had conceded that the loan was expressly payable in US Dollars. Furthermore, it held that the purported tender in local currency could not extinguish the appellants' obligations as it was not an accurate representation of the full sum owed to the first respondent.

19. The court *a quo* held that the first appellant had failed to prove that there was any valid tender made to any of the respondents. The court *a quo* also made the determination that the impugned cession agreement between the first and second respondents was valid. It also dispelled the appellants' argument that the respondents did not lodge any claim upon the liquidation of Onclass in 2011.

THIS APPEAL

20. Aggrieved by the decision of the court *a quo*, the appellants noted this appeal on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* erred and misdirected itself when it held that the mortgage bond registered against the 2nd appellant's property in favour of the 1st respondent constituted security for the entire loan amount advanced to Onclass Investments [Pvt] Ltd when in fact the amount of the bond was only ZWL$50 million.

2. The court *a quo* erred and misdirected itself when it held that the appellants were bound by the terms of the loan agreement between Onclass Investments

[Pvt] Ltd and the 1st respondent when in fact the appellants were not parties to that agreement.

3. The court *a quo* erred and further misdirected itself when it conflated the identities of Onclass Investments [Pvt] Ltd with that of its directors in relation to the loan agreement between the 1st respondent and Onclass Investments.

4. The court *a quo* erred and misdirected itself when it held that the appellants in HC 1791/2006 acknowledged owing the 1st respondent an amount denominated in the United States Dollars when in actual fact there is a court order in HC 1791/2006 that ordered the 2nd appellant and the other appellants to pay the 1st respondent in Zimbabwean dollars.

5. The court *a quo* further erred and misdirected itself when it failed to consider and take into account that case no. HC 1791/2006 related entirely to the amounts of the mortgage bonds mentioned in that case and not to the loan amount in the agreement between Onclass Investments and the 1st respondent.

6. The court *a quo* further erred and misdirected itself in its failure to consider and take into account that the appellants were never a party to the agreement between Onclass Investments and 1st respondent and that they never guaranteed its payment.

7. The court *a quo* erred and misdirected itself when it failed to find that on the evidence presented by the appellants there was a valid tender and or payment that liquidated the amount in the mortgage bond.

8. The court *a quo* erred and misdirected itself when it held that a valid cession of appellants' obligations to 1st respondent had taken place as a result of correspondence dated 1st November 2007 when in actual fact that

correspondence was between Onclass Investments [Pvt] Ltd and the 2nd respondent and had nothing whatsoever to do with the mortgage bond registered against the 2nd appellant's property.

9. The court *a quo* erred and misdirected itself when it held that a valid cession took place in terms of section 51 of the Deeds Registries Act [Chapter 20:05] without appreciating that the provisions of section 51 apply to the substitution of a debtor and do not apply to the relationship between the appellants and the 1st and 2nd respondents.

10. The court *a quo* further erred and misdirected itself when it failed to consider and take into account the legal requirements for the cession of a mortgage bond.

11. The court *a quo* erred and misdirected itself in its general failure to consider and properly interpret the documents relating to the loan agreement.

ISSUES FOR DETERMINATION

21. Most of the grounds of appeal are rather prolix and repetitive. This is highly undesirable as enunciated by this court in a number of authorities. See, *inter alia*, *Chikura N.O. & Anor v Al Shams Global BVI Ltd*, SC 17/17. However, and regardless of this, several issues arise for determination from the grounds of appeal and the submissions by counsel before this Court. The pertinent issues for determination can be distilled to be as follows:

    1. Whether the mortgage bond registered against the second appellant's property in favour of the first respondent constituted security for the

entire loan amount advance to Onclass Investments (Pvt) Ltd, when the amount of the bond was only ZW$50 million.

2. Whether or not the terms of the loan agreement were enforceable against any or both of the appellants.
3. Whether or not the court *a quo* erred in its determination that there was a valid cession of the first respondent's rights to the second respondent.
4. Whether or not the purported tender of payment by the appellants to the first respondent was valid.

SUBMISSIONS BEFORE THE COURT

22. Mrs *Mtetwa* for the appellants, submitted that the matter was about a conflation of a company called Onclass Investments (Pvt) Ltd with the appellants. She submitted that the court a quo applied an agreement between Onclass and the first respondent as if it relates to the appellants. She contended that the loan agreement did not bind any of the appellants as surety. She also submitted that the second appellant had only authorised the registration of an ordinary mortgage bond in the sum of ZWL $50 million which is the extent of its indebtedness to the first respondent. She insisted that at the material time, Zimbabwean citizens could not consent to loan agreements expressed in foreign currency without the consent of the Reserve Bank of Zimbabwe.

23. Counsel further argued that at any rate, as the terms of the mortgage bond had been drafted by the first respondent's legal representatives, the *contra proferentem* rule ought to be applied. It was her argument that in *casu*, the terms of the mortgage bond did not spell out the appellants' liability in terms of the loan agreement and that therefore they ought not to be bound as co-principal debtors. Mrs *Mtetwa* also disputed the alleged cession between the first and second respondents because the

appellants were never served with notice of such. In addition, she submitted that the appellants had made a valid tender under HC 1791/06 of the guaranteed ZWL $50 million and were therefore entitled to a cancellation of the mortgage bond. This was regardless of the fact that the order did not indicate who the respondents to the suit were.

24. *Per contra,* Mr *Goba*, for the first respondent, submitted that the order granted by the court *a quo* could not be overturned because the appellants had failed to establish a proper cause of action. He submitted that the contested mortgage bond was intrinsically connected to the loan agreement since a guarantee of security was a condition precedent to the execution of the loan agreement. It was his argument that at the relevant time, the ZWL $50 million secured by the mortgage bond was sufficient security for the loan agreement. He submitted that the Deeds Registries Act [*Chapter 20:05*] did not require any formalities for the registration of a cession agreement. Counsel also asserted that the purported tender by the appellants was invalid because it was not effected in terms of the loan agreement.

25. Mr *Chihuta*, for the second respondent, insisted on the validity of the cession agreement concluded with the first respondent in respect of the mortgage bond. He submitted that it was common cause that the second respondent had settled the debt arising from the loan facility extended to Onclass by the first respondent. He further submitted that the appellants sought to belatedly resile from an admission made in their declaration before the court *a quo* that the first appellant had bound himself as surety to the loan agreement. He added that the purported tender by the appellants related to different parties other than those before this Court.

APPLICATION OF THE LAW TO THE FACTS

1. **Whether the mortgage bond registered against the second appellant's property in favour of the first respondent constituted security for the entire loan amount advanced to Onclass Investments (Pvt) Ltd, when the amount of the bond was only ZW$50 million.**

26. This issue emanates from the appellants' first ground of appeal in which the court *a quo* is criticised for holding that the mortgage bond registered against the second appellant's property in favour of the first respondent constituted security for the entire loan amount advanced to Onclass.

The nature of the dispute or contesting contentions in this matter might require a brief recap on the nature of a mortgage bond. The learned authors Silberberg & Schoeman in The Law of Property, 2ed at p 427 state:

> "The term 'mortgage' is used in two senses. As a generic term it covers every form of hypothecation of property and in this sense it includes every real right which one person has in and over another person's property for the purpose of securing the payment of a debt or generally the performance of an obligation. In a more restricted sense the expression 'mortgage' signifies a special security over immovable property as opposed to a 'pledge' which denotes a special security over movable property."

R.H. Christie in Business Law in Zimbabwe at p 447 stated:

> "The word 'mortgage' is sometimes used in a wide sense to include pledge, notarial bond and tacit hypothec, but the narrower and more usual meaning, which is adopted here, is confined to a special mortgage of immovable property. This is generally accepted to be the soundest of all forms of security. In essence, it enables a creditor, as a mortgagee, to obtain an order of court for the sale of the mortgaged property in satisfaction of the mortgagor's indebtedness to him.
>
> …….
>
> The validity of a mortgage bond is no greater than the validity of the debt it covers …"

27. The appellant's contentions ought to be viewed, *inter alia*, with the above statements of the law in mind. In their (plaintiffs') declaration in the court *a quo*, the appellants stated the following, *inter alia*, in paras 6, 7, 8 and 9:

> "6. Sometime in 2001, the 1st Defendant and ONCLASS INVESTMENT (PRIVATE) LIMITED (Hereinafter referred to as "ONCLASS") entered into a written loan agreement in terms of which the 1st Defendant agreed to lend ONCLASS the sum of UPTA (sic) 585,000.00.
> 7. The agreement was subject to, among other things, a suspensive condition that required an individual and personal limited guarantee by each of the directors of THIRDLINE TRADING (PRIVATE) LIMITED the holding company of ONCLASS (Hereinafter referred to as "THIRDLINE") being the majority shareholder of ONCLASS.
> 8. The 1st applicant, in his personal capacity as one of the directors of THIRDLINE, fulfilled the suspensive condition by:-
>
> 8.1 signing a limited personal guarantee in favour of the 1st Defendant **binding himself as surety and co-principal debtor for ONCLASS' indebtedness**, and
>
> 8.2 obtaining the necessary consent for purposes of registering a limited mortgage bond over a certain piece of land situate in the district of Salisbury called stand 731 Glen Lorne Township 15 of Lot 41 of Glen Lorne measuring 5 960 square metres held under deed of transfer 11317/2001 dated 13/11/2001. This property belongs to the 2nd Plaintiff.

> 9. The mortgage bond 114422/2001 (hereinafter referred to as "the mortgage bond') was registered in the limited amount of Fifty Million Zimbabwean dollars (hereinafter referred to as "ZW$") (the emphasis is added)"

28. The plaintiffs' claim therein was for:

> "(a) An order directing the Defendants to cancel mortgage bond 11422/2001 registered over a certain piece of land situate in the district of Salisbury called stand 731 Glen Lorne Township 15 of Lot 41 of Glen Lorne measuring 5 960 square metres held under deed of transfer No. 11317/2000 dated 31/11/2001 following the abandonment of the secured amount of the loan agreement by the 1st Defendant.
> (b) ALTERNATIVELY, a declaratory order confirming the abandonment or waiver of rights by 1st Defendant when it failed to respond to the tenders of 10th and 22nd May, 2006 in Case No. HC 3252/05 arising from the mortgage bond registered against STAND 731 GLEN LORNE measuring 5960 square metres held under Deed of Transfer No. 11317/2000.
> (c) An order declaring any cession of rights or other transfer of rights from the 1st Defendant to the 2nd defendant at any time after May, 2006, null and void and of no effect.
> (d) In the event of the 1st and 2nd defendants failing to cancel the mortgage bond 11422/2001 aforesaid within 14 (fourteen) days of the service of

this order on them, that the Deputy Sheriff be and is hereby authorised to sign all documents necessary to enable 3rd Respondent (sic) to cancel the aforesaid mortgage bond.

(e) Costs of suit."

29. In its plea in the court *a quo*, the second respondent responded as follows:

"Ad Paragraph 7-8

i) It should be emphasised that the Mortgage Bond which the 1st and 2nd Plaintiffs caused to be executed in favour of the Defendants are ancillary to the main loan agreement. (the emphasis is added)

ii) The loan agreement has not been discharged, that is. The 1st Plaintiff has not discharged its duties in terms of the Mortgage Bond.

iii) The mortgage bond can only be cancelled when the whole debt has been paid up.

iv) It is common cause that at no time did the parties intend to release any of the securities before the debt is liquidated. The substratum of the mortgage bond still subsists.

v) It is apparent that while the property belongs to 2nd Plaintiff, the latter gave the necessary consent for the property to **be pledged,** and acting on that consent, the 1st Plaintiff legally mortgaged the said property.

vi) There is no privity of contract between the 2nd Plaintiff and the 2nd Defendant.

"5. Ad paragraph 9

i) No issues save to add that while the mortgage bond was registered in the then Zimbabwean dollars, it secured a debt denominated in United States dollars. (the emphasis is added)

ii) 2nd defendant avers that the said mortgage bond cannot be read in isolation from the loan agreement which the mortgage bond secures. In any case the terms of the mortgage bond cannot be read as to alter the terms of the main agreement. (the emphasis is added)

iii) In particular, the debt secured is US$585 000 which is the currency of disbursement and the amount secured by the Mortgage Bond."

30. This may be a fitting juncture to have regard to the pertinent clause in the loan agreement which the second respondent cited in support of its responses to the appellants' averments. Clause 8.1 of the loan agreement stands out for relevance. It provides:

"8.1 Notwithstanding the foregoing provisions of this agreement, in any of the following events, PTA Bank shall by notice to the Borrower, suspend the right of the Borrower to make withdrawals on account of the PTA Bank Loan or declare the principal amount of the PTA Bank Loan then outstanding together with all unpaid interest which has accrued and which is due and payable immediately in which latter case the security or securities issued hereunder

shall become enforceable **and all sums due** by the Borrower to PTA Bank under this agreement shall become payable forthwith notwithstanding anything to the contrary or in the security documents contained." (the emphasis is added)

31. The appellants' contentions also ought to be viewed, as was correctly done by the court *a quo*, with the contents of clause 8.1 in mind. As aptly observed by the learned Judge in the court *a quo* at p 7 of the judgment:

> "The agreement … clarifies the commitment made by the plaintiffs to pay back (that) the loan and interest in full AND to enforce the securities given. The mortgage bonds merely motivated the first defendant's decision to extend the loan to the plaintiffs. To that end, liquidating the mortgage bond did not in itself fully discharge the plaintiff's obligation toward the first defendant. The wording in the loan agreement specifically allows the first defendant to demand payment in full and reduce the sum owed by liquidating the security bond in its favour. It was never intended by the parties when they signed the loan agreement that the mortgage bond could be taken in isolation as being the sole means of repayment of the loan. The parties did not agree that the enforcement of the securities (in this case the mortgage on the Glen Lorne property) was to be taken as being a full and final payment of the loan agreement itself. The position is thus that the tender of the value of the mortgage bond does not constitute full and final payment of the loaned sums due to the first defendant."

The court *a quo*'s analysis as quoted above is sound. It is supported by the law and accords with the facts, with particular regard to clause 8.1 also quoted above. It is a lucid and wholesome analysis that does not exhibit any error or misdirection at all. Clause 8.1 significantly empowered the first respondent in the given circumstances to declare the principal amount together with all unpaid interest which has accrued, due and payable immediately, with the securities becoming enforceable and all sums due under the agreement becoming payable forthwith **"notwithstanding anything to the contrary or in the security documents contained."** Bearing in mind the nature and purpose of a mortgage bond as well as the particular provision of the loan agreement in clause 8.1, it therefore follows that the mortgage bond in the value of ZW$50

million registered against the second appellant's property in favour of the first respondent did not constitute security for the entire loan amount that was advanced to Onclass.

2. Whether or not the terms of the loan agreement were enforceable against any or both of the appellants.

32. The appellants' objection to/grievance against the dismissal of their claim before the court *a quo* largely rests upon the determination of this central issue. The issue is canvassed under grounds of appeal two, three, six and eleven and its effect is to impugn the factual findings of the court *a quo*. However, a perusal of the court *a quo*'s judgment reveals that this was never an issue specifically referred to trial in terms of the pre–trial conference minute. A perusal of the same shows that the appellants acknowledged their obligation to the first respondent but disputed only issue related to the *quantum* of their indebtedness and the exact currency. However, the issue is covered sufficiently in the record of proceedings and the pleadings before this Court. In their heads of argument, the appellants submitted that they were not privy to the loan agreement but that the first appellant had simply provided the property as security in response to the first respondent's request that the directors/shareholders of Onclass guarantee the agreement.

(vii) Their insistence was that the mortgage bond and the resolution which authorised the first appellant to sign all the papers necessary to register the mortgage bond do not make any reference to the loan agreement nor list the appellants as guarantors of the same. I daresay that the appellants' stance is contradicted by their very own founding papers before the court *a quo*.

(viii) Paragraph 8 of their declaration is, for convenience, repeated hereunder:

"8. **The 1st applicant [first appellant], in his personal capacity as one of the directors of THIRDLINE, fulfilled the suspensive condition by; -**

> **8.1 signing a limited personal guarantee in favour of the 1st Defendant [first respondent] binding himself as surety and co-principal debtor for ONCLASS' indebtedness**, and
>
> 8.2 **obtaining the necessary consent for purposes of registering a limited mortgage bond** over a certain piece of land situate in the district of Salisbury called stand 731 Glen Lorne Township 15 of lot 41 of Glen Lorne measuring 5 960 square metres held under deed of transfer 11317/2001 dated 13/11/2001. **This property belongs to the 2nd Plaintiff** [second appellant]." (the emphasis is added)

(ix) In my view, this admission before the court *a quo* cannot be overlooked and neither can the appellants succeed in their attempts to distance themselves from the loan agreement on appeal. The quoted excerpt shows that it was the intention of the first appellant to be bound as surety and co-principal debtor in respect of the loan facility that was extended to Onclass by the first respondent. The encumbrance of the property with the mortgage bond was done with the full consent of the second appellant. In the circumstances, the court *a quo* correctly observed that:

"**One main condition for securing the loan was that the debtors had to put up security for the loans advanced, as is common business practice.** The plaintiff and the other Directors agreed to the first defendant's requirement and accordingly, they put up various securities in order to be granted the loan facility. **On the part of the plaintiffs, the 1st plaintiff signed a limited personal guarantee; and registered a mortgage bond in the sum of ZW50 million dollars on the 2nd plaintiff's immoveable property described as Stand 731 Glen Lorne Township 15 of lot 41 of Glen Lorne in favour of the 1st defendant to that limit.** The Glen Lorne property is the property of the 2nd plaintiff. The Glen Lorne property remains encumbered by the mortgage bond." (the emphasis is added)

(x) Although counsel for the appellants put up a spirited argument regarding the privity of the contract between the first respondent and Onclass, the factual findings of the court *a quo* cannot be impugned in this case. Its reasoning regarding the enforceability of the loan agreement against the first appellant in particular, is consistent with the appellants' own deposition in their declaration. The factual findings of the court *a quo* on this account were based on a clear admission by the appellants.

(xi) In the recent case of *Manyenga v Petrozim (Pvt) Ltd* SC 40/23, this Court went to great lengths in articulating the effect of an admission by a party. It held that:

"32. The effect of an admission has been held to be the following in the case of *Potato Seed Production (Proprietary) Ltd v Princewood Enterprises (Pvt) Ltd & Ors* HH 45-17 at p 4;

"**Indeed the effect of an admission is settled law. Once made it binds its maker with the attendant consequences** see *Kettex Holdings P/L v S Kencor Management Services P/L* HH 236-15."

33. The consequences of making an admission which is not withdrawn is that it will not be necessary to prove the admitted fact(s): *Adler v Elliot* 1988 (2) ZLR 283 (S) at 288C. In addition, this Court, in the case of *Mashoko v Mashoko & Ors* SC 114-22, held that:

"**The law on admissions in pleadings and indeed in evidence, is also settled. A party to civil proceedings may not, without the leave of the court, withdraw an admission made, nor may it lead evidence to contradict any admission the party would have made. By equal measure, a party is not permitted to attempt to disprove admissions made**."

34. The above position is also provided for in s 36 of the Civil Evidence Act [*Chapter 8:01*] in the following manner:

"**36. Admissions**

1) **An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made** orally or **in writing or otherwise.**

(2) …

(3) It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings." (the emphasis is added)

35. The cited authorities are conclusive and it is unnecessary to belabour this point. The appellants have not at any point sought to withdraw their admission in this regard and the inevitable result is that the court *a quo*'s factual findings cannot be vacated. I am inclined to agree with the first and second respondents' joint position that by virtue of binding themselves as surety and co-principal debtors, the appellants became privy to the loan agreement concluded with the now defunct entity, Onclass.

36. The import of the concept of a "surety and co-principal debtor" in contractual agreements was addressed in the case of *Makgatho v Old Mutual Life Assurance (Zimbabwe) Ltd* SC 2015 (2) ZLR 5 (S) at 10F-G, wherein GARWE JA (as he then was) stated the following:

> "The position is now settled that the liability of a surety and co-principal debtor is joint and several with that of the principal debtor and is no more, nor less than, nor different from, that of the latter- *Neon and Cold Cathod Illuminations (Pty) Limited v Ephron* 1978 (1) SA 463,473 B-C. *Union Government v Van der Merwe* 1921 7PD 318,322."

More recently, in *Manokore v Law Society of Zimbabwe* SC 70/22, CHITAKUNYE JA underscored the following regarding the characterisation of a surety and co-principal debtor:

> "The distinction between liability as a surety and liability as a surety and co-principal debtor was elucidated in Caney's supra at pg. 56-57 as follows:
>
> "**One who has bound himself as surety and co-principal debtor is…a surety who has undertaken the obligations of a co-debtor: his obligations in the latter respect are co-equal in extent with those of the principal debtor and thus of the same scope and nature; he is liable with him jointly and severally.** The obligation of the surety and co-principal debtor becomes enforceable at the same time as that of the principal debtor. But he does not ertake a separate independent liability as a principal debtor; he is a surety." (the emphasis is added)

37. Accordingly, on a balance of probabilities it is evident that *in casu,* the appellants were bound by the terms of the loan agreement as admitted in their declaration before the court *a quo*. Further, Mrs *Mtetwa*'s submission in which reliance was placed on the technical argument that neither the mortgage bond nor the resolution which authorised the first appellant to encumber the property make reference to the loan agreement, is contrary to the apparent intentions of the parties as highlighted by the provision of security by the first appellant.

38. Additionally, the *contra proferentem* rule cannot be applied in the present matter because the terms of the loan agreement are relatively clear and have been clarified by the apparent, if not clearly expressed intentions of the parties. In the case of *Old Mutual Property Investments v Metro International (Pvt) Ltd & Anor* 2006 (1) 442 (H) at p 447 at para C - E, PATEL J (as he then was) stated the following regarding the application of the rule:

> "As a rule, where there is some ambiguity in the use of a word or choice of expression which leaves the court unable to decide which of two meanings is correct, the word or expression ought to be construed against the party who was responsible for drafting the document in question. See *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A), at 123; *Commercial Union Fire, Marine & General Insurance Co Ltd v Fawcett Security Organisation Bulawayo (Pvt) Ltd* 1985 (2) ZLR 31 (S); *Presbyterian Church of Southern Africa v Shield of Zimbabwe Insurance Co Ltd* 1991 (2) ZLR 261 (H).
>
> It is to be cautioned, however, that **the rule is one of last resort and is only to be applied where it is not possible to ascertain the proper meaning of the contractual provision in question, after having exhausted all the ordinary rules of interpretation.** See in this respect the Cairns case, supra, cited in *Jonnes v Anglo-African Shipping Co Ltd* 1972 (2) SA 827(A)." (the emphasis is added).

39. In the result, there can therefore be no merit in the argument that the appellants were not bound by the loan agreement. The appeal thus lacks merit on this issue.

(XII) WHETHER OR NOT THE COURT *A QUO* ERRED IN ITS DETERMINATION THAT THERE WAS A VALID CESSION OF THE FIRST RESPONDENT'S RIGHTS TO THE SECOND RESPONDENT.

40. To begin with, it is evident that the court *a quo*'s reliance on s 51 of the Deeds Registries Act [*Chapter 20:05*] was misplaced because the subject matter of the provision enjoys no co-relation with the substitution of a creditor through the medium of a cession agreement. Section 51 is focused squarely on the substitution of a debtor in the event that the owner of hypothecated land disposes of all his rights in an encumbered property. However, the acceptance of this elementary point does not provide enough scope to rule in favour of the appellant on this issue. The reasons for such a position follow hereunder.

The constitutive elements of a valid cession agreement were highlighted in the case of *Mangwiza v Ziumbe N.O & Anor* 2000 (2) ZLR 489 (S) wherein this Court held that:

> "In The Law of Contract in South Africa 3 ed, by Christie, the learned author describes cession at p 515 as follows:
>
> ". . . **it involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same.** If the effect of the transaction is not to divest the cedent of his right to sue the debtor, it is not a cession, but a cedent may sue as agent for the cessionary" …As Christie, op cit, states at p 520:
>
> > 'A restriction on the general power to cede is that part of a claim cannot validly be ceded without the debtor's consent. In *Spies v Hansford and Hansford Ltd* 1940 TPD 1 at 7-9, Schreiner J based this restriction on the historical origin of our cession of rights as a cession of actions, and the rule against multiplicity of actions, while recognising that this was only one manifestation of a wider rule that the creditor may not by cession without the debtor's consent increase the existing burden on the debtor . . .'" (the emphasis is added)

41. Of notable significance in *casu*, is the point also canvassed by the South African Supreme Court in *Lynn & Main Incorporated v Brits Community Sandworks* CC 2009

(1) SA 308 (SCA), where it was held that no notice is required for a valid cession to be effected. MPATI P, JA at paras [6] and [7] stated the following:

> "[6] It is trite that a cession is a method by which incorporeal rights are transferred from one party to another. It is an act of transfer from a creditor, as cedent, to the cessionary, of a right to recover a debt (vorderingsreg) from a debtor. **Although it entails a triangle of parties, viz the cedent, cessionary and debtor, the cession takes place without the concurrence of the debtor. The transfer of the right is effected by the mere agreement between the transferor (cedent) and the transferee (cessionary). Notice to the debtor is not a prerequisite for the validity of the cession 'but a precaution to pre-empt the debtor from dealing with the cedent to the detriment of the cessionary'**.
> [7] **In the instance of cession of a principal debt, payment of which had been guaranteed by a surety, 'the cessionary, by reason of cession of the principal debt or obligation, acquires rights in respect of the surety agreement as well'. A formal cession of the rights against the surety is unnecessary.** It follows, as a matter of logic, that since notice to the principal debtor of cession of the principal debt is not a prerequisite for the validity of the cession, **notice to the surety is also not a prerequisite for the acquisition of the rights in respect of the surety agreement**" (the emphasis is added)

42. The above *dicta* applies to the present proceedings. Mrs. Mateveke for the appellant objected to the first and second respondents' purported cession agreement on the basis that there was no prior notification. However, the above authorities make it clear that notification of or to the debtor is not a relevant consideration in determining the validity of a cession of rights. This general rule has been recognised in our jurisdiction subject to certain exceptions which relate to splitting of the debt or owed obligations to multiple cessionaries. In such instances, the cession requires both notification and the consent of the third-party debtor since there is a probability of prejudice. See the following cases on this aspect: *Tirzah (Pvt) Ltd & Other Companies, Liquidators of* v *Merchant Bank of Central Africa Ltd & Ors* 2003 (1) ZLR 294 (S); *Mountain Lodge Hotel (1979) (Private) Limited v McLoughlin* 1983 (2) ZLR 238 (SC) at p 246C; *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor* 1977 (1) RLR 259.

43. The second leg of the appellants' objection relates to the purported non – compliance with the statutory provisions of the Deeds Registries Act. The appellants' position is that the aforementioned cession agreement ought to have been registered in terms of s 14 (b) of the Deed Registries Act. The cited provision stipulates the following:

> "**14 How real rights shall be transferred**
>
> Subject to this Act or any other law—
>
> (a) the ownership of land may be conveyed from one person to another only ZLR by means of a deed of transfer executed or attested by a registrar;
>
> (b) **other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by a registrar:**
>
> Provided that attestation by a notary public shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond" (the emphasis is added)

44. The appellants' interpretation regarding the nature of cession agreements does not accord with our settled jurisprudence. In the case of *Zimbabwe Banking Corporation and Anor* v *Shiku Distributors (Pvt) Ltd & Ors* 2000 (2) ZLR 11 (HC) on pp 14 – 15, it was established that:

> "**The contract of cession is one whereby a personal right and not a real right against a debtor is transferred from the creditor (cedent) to the new creditor (cessionary).** In *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A), which is a judgment in Afrikaans, the headnote reads as follows:
>
> > "Cession, in our modern law, can be seen as an act of transfer to enable the transfer of a right to claim *(translatio juris*) to take place. It is accomplished by means of an agreement of transfer (. . .) between the cedent and the cessionary arising out of a *justa causa* from which the intention of the cedent to transfer the right to claim to the cessionary (*animus transferendi*) and the intention of the cessionary to become the holder of the right to claim (*animus acquirendi*) appears or can be inferred. **The agreement of transfer can coincide with or be preceded by, a *justa causa* which can be an obligatory agreement (. . .) such as e.g. a contract of sale, a contract of exchange, a contract of donation, an agreement of settlement or even a payment (*solutio*).**"

> The intention of a cession must be to divest the cedent of his rights against the debtor, hence the out and out cessionary would in law be entitled to enforce the claim and retain the proceeds thereof for its own benefit. It would be entitled to accept any amount it pleased in settlement of the claim or it may abandon the claim altogether (*Skjelbreds Rederi A/S & Ors v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) at 630F-G). In *Waikiwi Shipping Co v Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A), it was stated at 675D that:
>
> > "Today, a cession, absolute in terms, does serve to divest a cedent completely of his right of action even of the *actio directa* which at one time was thought to remain in the cedent, albeit temporarily." (the emphasis is added)

45. Generally, it is trite that cession agreements involve the transfer of personal rights and not real rights as intimated by the appellants. Therefore, the provisions that Mrs *Mtetwa* sought to base her argument on, regarding the purported need for registration of the mortgage bond, are inapplicable in the present context. In *casu*, the cession agreement is also undergirded by a valid *justa causa*. Mr *Chihuta* for the second respondent, submitted that it was common cause that the Reserve Bank of Zimbabwe settled the indebtedness of Onclass and its co-principal debtors to the first respondent. This was done in order to ensure that local corporate entities and institutions have access to international credit facilities. It was upon this basis that the first respondent ceded its rights arising from the mortgage bond in question to the second respondent. The settlement of the debt was not seriously or vehemently contested by the appellants who, as evinced from their declaration before the court *a quo*, were co-principal debtors to the loan agreement.

46. Furthermore, the objection relating to non-registration of the cession agreement is vitiated by the acknowledgement that such registration only serves as *prima facie* evidence. Registration *per se* is not an indicator of substantive rights. This was highlighted in *CBZ Bank Ltd v Moyo & Anor* SC 17/18, wherein UCHENA JA stated the following:

> "I must state that a deed of transfer or registration of cession is not conclusive proof of ownership or the rights of a cessionary. See the cases of *Young v Van Rensburg* 1991 (2) ZLR 149 (S) at 156 D-G and *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 237 B-D. **It simply raises a presumption in favour of the holder of the title deed or the rights of a cessionary until the claimant proves on a balance of probabilities that he innocently bought the property or cessionary rights from the owner of the property or cedent.** See the case of *Cunning v Cunning* 1984 (4) SA 585 (T). In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable. The fact that it can be challenged is vital for the disposal of this appeal." (the emphasis is added)

47. Thus, it is evident that the formalities referred to by Mrs *Mtetwa* in impugning the validity of the cession agreement cannot feasibly be relied upon. The non-registration cannot result in the nullification of the cession agreement between the first and second respondents. The reasoning for this conclusion is twofold. Firstly, as earlier highlighted, the provisions of the Deeds Registries Act relied upon are not peremptory or binding in this instance. Secondly, and more importantly, as illustrated by the aforementioned authority, registration only establishes a *prima facie* case which can be set aside on good cause by the courts of justice. The attack on the purported oral nature of the cession agreement is also negated by the correspondence on record between the aforesaid respondents which is indicative of a cession agreement. In addition, the Court is also alive to the validity of the underlying reasons, as articulated by Mr *Chihuta,* for the cession agreement between the respondents. There is also no merit in the appeal on this issue.

WHETHER OR NOT THE PURPORTED TENDER OF PAYMENT BY THE APPELLANTS TO THE FIRST RESPONDENT WAS VALID.

48. The appellants also contend that the first respondent refused their tender of payment and that this constituted an abandonment of the claim. In the case of *Matukutire v Makwasha & Ors* SC 92/21, it was said that:

> "In *Mbayiwa v Chitakunye & Anor* SC 43/08 the following was stated at pp 6-8 of the judgment:
> "**In Anson's Law of Contract 26 ed at p 425 it is pointed out that: 'Tender of payment to be a valid performance must observe exactly any special terms which the contract may contain as to time, place and mode of payment**.'
>
> In Halsbury's Laws of England Vol 9 para 523 it is stated that:
>
> A tender of performance which is not in accordance with the terms of the contract may be withdrawn and may not preclude the promissor from subsequently making within the time limited, a tender of performance in a proper manner; but this will not be the case where the incorrect tender is to be construed as a repudiation of the contract.
>
> R H Christie in The Law of Contract in South Africa 3 ed at p448 states that:
>
> '**To be a valid tender it must comply with all the requirements of a valid performance, since the basis of the effect which the law gives to a valid tender of performance is that the debtor was correct in thinking that what he was attempting to achieve amounted to proper performance and that it was due to no fault of his own that he was unable to achieve it. Therefore, when performance is to be made at a specified time and place, a tender will not be valid unless it is made at that time and place**."
>
> 31.??? The bold statement at para 15 of the founding affidavit that "(T)he Applicants fully paid the full purchase price in terms of the agreement of sale" is not supported by the first and second respondents' own averments with regard to payments allegedly made. They did not perform in accordance with the terms of the contract that they seek to enforce." (the emphasis is added)

49. In *casu*, clause 13 of the loan agreement stipulated the formalities that ought to have been satisfied when effecting repayment of the loan facility. Effective repayment was to be made in the denomination of disbursement and into an account in the name of the first respondent. At the hearing before the court *a quo*, the first appellant conceded that he was not even aware whether the amount alleged to have been tendered had reached the respondents. Thus, it was not in dispute that the appellants

did not make any tender consistent with the terms of the loan agreement to which the first appellant was bound as a co-principal debtor.

50. It must have been the recognition of this fact that prompted Mrs *Mtetwa* for the appellants to base her argument before this court regarding tender of the owed amount, on the proceedings under HC 1791/06. The order with specific reference to para 1.2 stipulated the following:

> "**IT IS ORDERED THAT**:
>
> 1. Against payment in the currency of Zimbabwe dollars such sums as are currently due to the first respondent: -
>
> …
>
> 1.2 by the second applicant under mortgage bond 11422/2001 hypothecating the immovable property called stand 731 Glen Lorne Township 15 of Lot 41 of Glen Lorne in the district of Salisbury held under Deed of Transfer 11317/2001."

51. Mrs *Mtetwa* persisted with the submission that the appellants had tendered ZW$ 50 million to the first respondent in compliance with the aforesaid order. She urged this Court to find that the refusal by the first respondent to accept a tender made pursuant to the High Court order amounted to a waiver of the amount due in terms of the mortgage bond. Mr *Chihuta* for the second respondent also conceded that the court order had not been set aside and was still extant despite contending that the purported tender did not relate to the impugned court order. However, a perusal of the order reveals that it does not indicate the names of the respondents to the suit. Mrs *Mtetwa* urged this Court to find that the unnamed first respondent under HC 1791/06 was the first respondent before this court. She pointed to certain extracts in the record of proceedings which preceded the grant of the said order.

52. In my view, the order under HC 1791/06 cannot be validly enforced without spelling out the respondents to the suit, especially when taking into account the staunch opposition from the first and second respondents. It is clear that the defect makes the order patently irregular and, as a consequence, the purported tender by the appellant cannot be hinged on the same. This position is supported by the case of *Muchakata v Nertherburn Mine* 1996 (2) ZLR 153 (S), 157 B-C, wherein KORSAH JA stated the following:

> "**If the order was void *ab in initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it.** As Lord Denning MR so exquisitely put it in *MacFoy v United Africa* Co Ltd **(1**961) 3 All ER 1169 at 1172 I
>
> > 'If an act is void then it is in law a nullity. It is not only bad but incurably bad … 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'" (the emphasis is added)
>
> See also *Folly Cornishe (Pvt) Ltd & Anor v Tapomwa N.O & Ors* SC 26/14

53. In her closing submissions before this Court, Mrs *Mtetwa* emphasised that the appellants' cause of action was that they had tendered the amount due in terms of the order under HC 1791/06. It was upon this basis that it was contended that the appellants ought to have the mortgage bond encumbering their property cancelled. However, it is evident to this court that the order upon which the appellants have based their claim is patently irregular. It did not state the respondents against whom the order was granted.

54. In any event, the excerpt from the judgment of the court *a quo* quoted in para 31 above remains pertinent. The finding recorded therein that "the tender of the value of the mortgage bond does not constitute full and final payment of the loaned sums due to

the first defendant" cannot be impugned as it accords with the proven facts and the applicable law. In addition, the court *a quo* also notably observed as follows:

> "Returning to the issue of the tender, it is my view, however, that even if the tender had been made and communicated to the defendants; such a communication did not bind the defendants into relinquishing their claim that the loan debt was repayable in foreign currency. The effect of any such tender was ineffectual in discharging the plaintiffs' obligation to the first defendant in full or at all. In fact when looking at the Order of the Court in HC 1971/2006, it was intended that the value of the ZW$50 million be calculated in US dollars first; and then only when that was done would the value of the Zimbabwe Dollars in foreign currency be made manifest. The use of the words in the Court Order make it clear by specifically stating that
>
> '1. Against **payment in the currency** of Zimbabwe Dollars of such sums as are currently due to the first respondent:
>
> 1.1 …
>
> 1.2 …
>
> 1.3 By the third applicant under mortgage bond, first respondent shall take all steps as are necessary to effect cancellation of the said mortgages and to return (to) the applicants their title deeds."

55. There having been no valid tender, let alone payment of all sums due, the appellants failed to establish a basis for the cancellation of mortgage bond 11422/2001 (fully described earlier in this judgment) nor for declaratory relief confirming abandonment or waiver of rights by the first respondent. They also failed to establish any basis for an order declaring any cession of rights between the first and second respondents to be null and void. Therefore, the appeal must fail. In their totality, the grounds of appeal raised before this court have no merit.

56. For the above reasons, it is accordingly ordered as follows:

> "The appeal be and is hereby dismissed with costs."

GWAUNZA DCJ : I agree

CHITAKUNYE JA : I agree

Mtetwa & Nyambirai, appellants' legal practitioners

Ziumbe & Partners, first respondent's legal practitioners

Chinamasa, Mudimu & Maguranyanga, second respondent's legal practitioners