

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2016/HP/0592

BETWEEN:

**HALYONDA COSTAH CHIMS**

AND

**PULSE FINANCIAL SERVICES****SAMUEL MWANZA****PLAINTIFF****1<sup>st</sup> DEFENDANT****2<sup>nd</sup> DEFENDANT**

**BEFORE HON. MRS JUSTICE S. KAUNDA NEWA THIS 5<sup>th</sup> DAY OF  
SEPTEMBER, 2017**

*For the Plaintiff* : *In person*  
*For the 1<sup>st</sup> Defendant* : *Ms S. Kalima, J & M Advocates*  
*For the 2<sup>nd</sup> Defendant* : *No appearance*

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## **J U D G M E N T**

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CASES REFERRED TO:

1. *James V James 1873 L.R. 16 Eq 153*
2. *L'Estrange V F. Graucob Limited 1934 2 KB 394*
3. *Saunders V Anglia Building Society 1970 3 All ER 961*
4. *Brian Musonda (Receiver of First Merchant Bank Zambia Limited (in receivership)) V Hyper Food Products Limited and Two others*
5. *Zambia Export and Import Bank Limited V Mukuyu Farms and others 1993 - 1994 ZR 36*
6. *Credit Lyonnais Bank Nederlands NV V Burch 1997 1 ALL ER 144*
7. *Royal Bank of Scotland V Etridge and other Appeal 2001 4 ALL ER 499*
8. *Nkolongo Farm Limited V Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership) and Charles Haruperi 2005 ZR 78.*
9. *Sablehand Zambia Limited V Zambia Revenue Authority 2005 ZR 109*
10. *Nkongolo Farms Limited V Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Haruperi SCZ No 19 of 2007*

OTHER WORKS REFERRED TO:

1. **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 10**
2. **Halsbury's Laws of England, 4<sup>th</sup> Edition re-issue, Volume 20**
3. **Cheshire and Fifoot's Law of Contract, 4<sup>th</sup> Edition**
4. **Chitty on Contracts, 29<sup>th</sup> Edition, Volume 1**
5. **John Mc Ghee, Snell's Equity 31<sup>st</sup> Edition (Thomas Reuters (Legal) Limited, 2005**
6. **Mc Gregor on Damages, Harvey Mc Gregor, 16<sup>th</sup> Edition, 1997**

The Plaintiff commenced this action by way of writ of summons on 29<sup>th</sup> March, 2016, which was amended on 19<sup>th</sup> September, 2016 claiming;

1. *An order of interim injunction restraining the defendants by themselves, agents, directors, employees and debt collectors or whomsoever from causing trouble, injustices, discomfort to the Plaintiff by himself, his family, tenants, and from collection of interest on the debt until final determination of the matter.*
2. *Damages of K1, 185, 940.35 to be paid by the 1<sup>st</sup> Defendant to the Plaintiff for pecuniary injury, fraud, and discomfort caused to the Plaintiff, subject to the purported surreptitious guarantee agreement and obrepiteous fraud.*
3. *Solatum compensation of K1, 550, 000.00 be paid to the Plaintiff by the 2<sup>nd</sup> Defendant for cheating, misleading and swindling the Plaintiff or by way of solace to his wounded feelings and injuries*
4. *An order for the refund and restitution of interest paid of K9, 000.00 by the Plaintiff to the 1<sup>st</sup> Defendant*
5. *An order to set aside the purported agreement and remove the Plaintiff as the purported promisor or guarantor, and free the Plaintiff's house or any chattels, assets or pledges put by the 2<sup>nd</sup> Defendant in the Plaintiff's absence as mortuum vadium, interest be paid pursuant to Section 35A of the R.S.C 1981 as pleaded.*

6. *Costs*

7. *Any other relief that the court may deem fit*

According to the writ of summons and the evidence given by the Plaintiff, he was misled into signing a guarantee agreement on 19<sup>th</sup> May, 2015, and putting up his house as collateral for the loan obtained by the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> Defendant, in the amount of K30, 000.00. It was the Plaintiff's evidence that Mr Silumbwe, the Credit Manager of the 1<sup>st</sup> Defendant had called him on 19<sup>th</sup> May, 2017, and when he went there, he found Mr Simwanza, the 2<sup>nd</sup> Defendant.

That Mr Silumbwe had explained that the 2<sup>nd</sup> Defendant had applied for a loan, and that the Plaintiff should sign for him. He stated that he refused to do so because the previous day the 2<sup>nd</sup> Defendant had gone to take photographs of his house with officials from the 1<sup>st</sup> Defendant, and he did not know the connection between his house, and the 2<sup>nd</sup> Defendant's loan. Further in his evidence, the Plaintiff explained that Mr Silumbwe had told him that the purpose of having taken the photographs of his house was to enable the 2<sup>nd</sup> Defendant's loan to be approved.

He testified that the house was not his, but belonged to his late brother's children who were orphans, and that the 2<sup>nd</sup> Defendant was aware of this. That Mr Silumbwe had told him that the 2<sup>nd</sup> Defendant had won a tender in Muchinga Province, and he would re-pay the loan once he delivered the building materials, and that whatever happened at the end of the day, the Plaintiff would not be liable.

The Plaintiff told the court that Mr Silumbwe pleaded with him to sign the loan papers, and that is how he had signed the same. With reference to page 3 of the 1<sup>st</sup> Defendant's bundle of documents, the Plaintiff testified that this is the document that he had signed, adding that he

had wanted to read it before signing it, but Mr Silumbwe had told him that everything was okay. He stated that page 3 is a pledge of overall assets, and he had signed at the bottom of this page, as well as on page 4, and that he had signed on top of the 2<sup>nd</sup> Defendant's signature on page 5.

The Plaintiff also testified the rest of the document was blank as the witnesses had not signed. That page 6 was the specific guarantee agreement with his name on it, and lists assets such as a cooker and a fridge, which he does not have, but which were included by the 2<sup>nd</sup> Defendant. He explained that he was guided to sign at the bottom on that page, as well as at the bottom of page 7, and on top of the 2<sup>nd</sup> Defendant's name on page 8, who had already signed. He testified that the rest of the document was blank, as there were no witnesses to attest to the document.

With regard to page 9, the Plaintiff's testimony was that his name and a plot number were already on that document, but that the plot number was wrong, and there was a cooker and stove indicated, which he did not have. That he had signed on the bottom of that page, and page 10, and on top of the 2<sup>nd</sup> Defendant's signature on page 11. It was again his testimony that the rest of this page was blank, as no witnesses were present to sign.

Further in his evidence, the Plaintiff testified that page 12 is a power of attorney, and he told the court that he was guided to sign on the right hand corner of that page, as well as on page 13, but that the document was not commissioned when he signed it. The Plaintiff stated that when time to re-pay the loan came, the 2<sup>nd</sup> Defendant was left, and only he was pursued by the debt collectors.

It was his testimony that the debt collectors would approach him with force, stating that they would sell his house. He referred the court to page 29 of the 1<sup>st</sup> Defendant's bundle of documents, being the account statement for the loan obtained by the 2<sup>nd</sup> Defendant. He explained that the document shows that on 29<sup>th</sup> June, 2015, he paid K500.00 and that he subsequently made other payments, while the 2<sup>nd</sup> Defendant did not pay anything.

The Plaintiff testified that Mr Silumbwe and the 2<sup>nd</sup> Defendant connived so that the 2<sup>nd</sup> Defendant could not re-pay the loan, and because of the torture that he underwent, he commenced this action. He claims damages and compensation with interest thereon.

When cross examined the Plaintiff's testimony was that Mr Silumbwe had told him about the 2<sup>nd</sup> Defendant being awarded a tender, and when referred to page 53 of the Plaintiff's bundle of pleadings, he testified that it was a slip of the tongue for him to have said so. That in fact the 2<sup>nd</sup> Defendant had told him about the tender, but did not at that point ask him to be guarantor. It was his testimony that Mr Silumbwe had misled him when he told him that he would not be answerable for anything.

With reference to paragraph 3 of page 69 of the Plaintiff's bundle of documents, the Plaintiff testified that he had written the said letter to the 1<sup>st</sup> Defendant stating that he would not have signed, if he had known that things would turn out the way they did. He denied having been told his duties as guarantor.

He agreed that the address on page 9 of the 1<sup>st</sup> Defendant's bundle of documents was his, and that he had signed the document, but denied having read it. He also agreed that the house pledged as security for the 2<sup>nd</sup> Defendant's loan was his. The Plaintiff told the court that the 2<sup>nd</sup> Defendant is a businessman, and he had found him at Lusaka City

Council when he was changing ownership of the house, and that the 2<sup>nd</sup> Defendant had a tender to paint the toilets there. He further testified that he had bought the house from Sylvia Nonde in his name, and would change ownership when the last born child of his elder brother attained the age of majority.

That when he had met the 2<sup>nd</sup> Defendant at Lusaka City Council, the 2<sup>nd</sup> Defendant had volunteered to help him, and the 2<sup>nd</sup> Defendant later took the application to change ownership of the house to him on 10<sup>th</sup> April, 2015. The Plaintiff further testified in cross examination that he started paying the loan when the 1<sup>st</sup> Defendant followed him up, stating that they took advantage of his weakness. That he paid the loan over a period of ten months, as the 1<sup>st</sup> Defendant was forceful, and tried to evict the tenants.

He also testified that he only understood his duties as guarantor when the letter at page 33 of his bundle of documents was written. He maintained that he was misled, as he did not know that by signing, he was assuring payment. That he thought he was just helping a friend. It was his testimony that he did not dispute having signed the guarantee, and he stated that documents of ownership are submitted when property is mortgaged, and that the 2<sup>nd</sup> Defendant had submitted them in this case, even though he had opposed the same.

The Plaintiff agreed that he had signed the documents with the knowledge that the documents pertaining to the ownership of the house had been submitted to the 1<sup>st</sup> Defendant. He stated that the only relationship he had with the 2<sup>nd</sup> Defendant was that they were friends, even though he had given him the documents for the house. He added that he had left the documents for the house which belongs to his late

brother's children with the 1<sup>st</sup> Defendant, as he was assured that the 2<sup>nd</sup> Defendant would re-pay the loan.

The Plaintiff also maintained that Mr Silumbwe and the 2<sup>nd</sup> Defendant colluded, as Mr Silumbwe wrote the letter on 27 of his bundle of documents in response to the letter on page 10. That the letter on page 27 states that the 2<sup>nd</sup> Defendant was required to make monthly payment instalments of K1, 625.27, and that he should meet the Plaintiff to see how he would be paying the difference from the K700.00 that the 2<sup>nd</sup> Defendant would be paying.

The Plaintiff's first witness was Justin Sichamba. The evidence he gave was that the 2<sup>nd</sup> Defendant had gone with officers from the 1<sup>st</sup> Defendant to take photographs of the Plaintiff's house, where he is a tenant. He testified that he had declined to allow them, but the 2<sup>nd</sup> Defendant had by force taken the photographs.

PW2 in cross examination testified that the 2<sup>nd</sup> Defendant had told them that he was taking the photographs to Lusaka City Council. He agreed knowing the 2<sup>nd</sup> Defendant, stating that they both hail from Isoka, and that he knew him before he became the Plaintiff's tenant. It was also his testimony that he did not tell the Plaintiff about the 2<sup>nd</sup> Defendant having gone there to photograph the house, although the Plaintiff did ask him about the same. This witness had no knowledge of the loan obtained by the 2<sup>nd</sup> Defendant, and denied having introduced him to the Plaintiff.

The last witness was Conad Mweemba. The role that he had played in this matter was to escort the Plaintiff to the 1<sup>st</sup> Defendant's offices at Kulima Tower. That when they reached there the Plaintiff had phoned the 2<sup>nd</sup> Defendant who went and met them, and the Plaintiff and the 2<sup>nd</sup> Defendant had exchanged bad words. He then left after he was told that he had no business at the 1<sup>st</sup> Defendant.

In cross examination PW3 stated that the 2<sup>nd</sup> Defendant is the person who had first called the Plaintiff to go to the 1<sup>st</sup> Defendant's offices, but he did not know why they went there.

The 1<sup>st</sup> Defendant in the defence and counterclaim filed, denied that the Plaintiff was deceived into being a guarantor for the loan obtained by the 2<sup>nd</sup> Defendant from it, or that the Plaintiff was forced to sign the contract of guarantee, stating that he did so voluntarily. The defence by the 1<sup>st</sup> Defendant was that the loan agreement was entered into between itself and the 2<sup>nd</sup> Defendant, and the 2<sup>nd</sup> Defendant took the Plaintiff to it as guarantor for the amount borrowed. That the contents of the loan document were explained to the Plaintiff who voluntarily signed them, as a guarantor.

Further that due to the failure by the 1<sup>st</sup> Defendant to locate the 2<sup>nd</sup> Defendant, it collected the money due from the Plaintiff being a guarantor of the same, and that the Plaintiff did not make the monthly payments of K1, 635.27, but only made partial payments. That the visits made by the 1<sup>st</sup> Defendant's debt collectors to the Plaintiff were as per procedure, to remind him to make the payments which were due.

The 1<sup>st</sup> Defendant denied that there was fraud or deceit on its part in the execution of the guarantee by the Plaintiff. That the 2<sup>nd</sup> Defendant only made payment on 19<sup>th</sup> August, 2016, and had not made any payments since. The 1<sup>st</sup> Defendant counterclaims payment of K24, 701.22, being the balance outstanding on the loan, comprising the principal sum of K22, 422.28 and interest of K2, 278.94 against the Plaintiff jointly and severally as guarantor of the loan obtained by the 2<sup>nd</sup> Defendant.

Further that it is entitled as mortgagee of the property described in the agreements executed to exercise all the powers of a mortgagee including the power of sale, foreclosure and possession, and accordingly prays.



The only witness called by the 1<sup>st</sup> Defendant was Evans Chimfwembe, a legal officer there. He took the court through the procedure of obtaining loans from the 1<sup>st</sup> Defendant, stating that when someone wants to apply for a loan they are given conditions, and thereafter the client tells them how much they want to borrow. That the client is then given an application form to complete, which is taken to the Credit Committee for assessment, and the outcome communicated to the client.

DW1 explained that if the application is successful, the client is called in to sign the contract, and that before the loan is given out, the 1<sup>st</sup> Defendant ensures that the client has a guarantor, who will pay the loan, in the event of the client failing to do so. That the guarantee is in writing, and he identified the document at pages 6 to 14 of the 1<sup>st</sup> Defendant's bundle of documents, as the guarantee that was signed in this matter.

It was DW1's evidence that the guarantee agreement is explained to the guarantor, and if they can read they are asked if they would like to be given time to read the same. In relation to this matter, DW1 testified that the loan that was obtained by the 2<sup>nd</sup> Defendant was re-payable over a period of 36 months, commencing on 19<sup>th</sup> June, 2015. DW1 stated that the 2<sup>nd</sup> Defendant was due to make the first payment on 19<sup>th</sup> June, 2015 but did not, and when he was called, he stated that he was out of town for some time, and would send the money to the guarantor for payment.

It was also stated that the 2<sup>nd</sup> Defendant did not make any payments, and the 1<sup>st</sup> Defendant followed the Plaintiff who had guaranteed the loan, as he was a co-borrower. Further that this was on account of the fact that the 2<sup>nd</sup> Defendant stated that he would send the money to the guarantor. DW1 added that before following up with the Plaintiff as guarantor, they had issued notices to pay to the 2<sup>nd</sup> Defendant, which are on pages 22 to 25 of the 1<sup>st</sup> Defendant's bundle of documents. He

told the court that the said letters are copied to the guarantor, being the Plaintiff.

DW1 further in his testimony told the court that the guarantor's role was explained before the loan was signed, and he stated that guarantors are even verbally informed to obtain independent legal advice before executing the documents. He referred to page 8 of the 1<sup>st</sup> Defendant's bundle of documents, stating that it has a note to the effect of seeking independent legal advice, and the Plaintiff signed it. He concluded his evidence by testifying that when a notice to pay is issued, and no payment is made, debt collectors then follow up by reminding the client to make a payment.

In cross examination, DW1 testified that he does not know how long the Plaintiff spent in Mr Silumbwe's office, as documents are only signed by the legal office, and Mr Silumbwe was just a credit officer. DW1 maintained that the Plaintiff was given enough time to go through the loan contract as well as the guarantee, and he denied that the Plaintiff signed the contracts with Mr Silumbwe, but with the Legal Officer, Kabwe Chisausau.

When referred to page 22 of the 1<sup>st</sup> Defendant's bundle of documents, DW1 stated that the letter was addressed to the 2<sup>nd</sup> Defendant, but was copied to the Plaintiff. He further testified that the debt collectors could confirm how many times they went to the Plaintiff's house with locks. He expressed ignorance that in August 2015, the Plaintiff had slept in the shop. He further expressed ignorance on whether Mr Silumbwe had given the Plaintiff copies of the loan and guarantee, but stated that he should have been given. DW1 denied that the Plaintiff was tricked into signing the guarantee.

The 2<sup>nd</sup> Defendant did not file a defence or appear at the hearing.

I have considered the evidence. It is a fact that the 2<sup>nd</sup> Defendant did borrow money from the 1<sup>st</sup> Defendant in the amount of K30, 000.00, repayable in instalments with interest at 4.25 percent a month, over a period of 36 months. It is also a fact that the Plaintiff guaranteed the loan obtained by the 2<sup>nd</sup> Defendant. It is further a fact that the 2<sup>nd</sup> Defendant defaulted on his monthly re-payments, and the Plaintiff as guarantor of the loan was called upon to pay the same.

The question that arises is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are liable to the Plaintiff for the reliefs sought, and whether the 1<sup>st</sup> Defendant is also entitled to the relief counterclaimed?

The submissions filed by the 1<sup>st</sup> Defendant referred to Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 20 at paragraph 101 which defines a guarantee as;

***“a guarantee is an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person whose primary liability must exist or be contemplated”.***

That paragraph 104 of the said Halsbury's Laws of England, states that ***“the surety or guarantor is a person who engages with the creditor of a third party to be answerable in the second degree, for some debt, default or miscarriage for which the third party then is, or may be intended to become primarily liable to the creditor.....a person who provides a pledge or security for the performance of another's obligation is making himself, by means of that pledge or security, a surety for that other, just as much as if he pledges his personal debt”.***

That based on the above provisions, the Plaintiff as guarantor of the 2<sup>nd</sup> Defendant's debt was pursued, only after the 2<sup>nd</sup> Defendant defaulted.

That pages 6-8 of the 1<sup>st</sup> Defendant's bundle of documents show that the Plaintiff undertook to re-pay the K30, 000.00 borrowed by the 2<sup>nd</sup> Defendant on 19<sup>th</sup> May, 2015, with interest.

As to the allegations of misrepresentation and fraud made by the Plaintiff in paragraphs 1, 6 and 14 of his statement of claim to the effect that he only signed the guarantee after he was assured that he would not be held liable, but only to remind the 2<sup>nd</sup> Defendant of his obligation to re-pay the loan, the 1<sup>st</sup> Defendant relied on the case of **NKOLONGO FARM LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED, KENT CHOICE LIMITED (In receivership) AND CHARLES HARUPERI 2005 ZR 78**.

That it was stated in that case that the Plaintiff's directors were held to have voluntarily signed the documents as they chose not to read what they were signing, and that the explanation given to them by the 3<sup>rd</sup> Defendant was not ground to claim undue influence or misrepresentation. Further that the documents were clear that the third party mortgage was to secure the Plaintiff's Farm No 3342, Chisamba for a debt advanced to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant. Therefore the guarantors undertook to make good any default by the 2<sup>nd</sup> Defendant.

That the case had referred to the case of **ZAMBIA EXPORT AND IMPORT BANK LIMITED V MUKUYU FARMS AND OTHERS 1993-1994 ZR 36** which held that **"an agreement is signed freely if it is signed in the course of business practice and the respondent had a choice not to sign"**.

The submission was that in this case the Plaintiff had testified that he had signed the documents relating to the guarantee agreement knowing that the documents pertaining to ownership of his property were in the possession of the 1<sup>st</sup> Defendant, after he willingly gave them to the 2<sup>nd</sup>

Defendant. That the Plaintiff had also admitted that the documents pertaining to the ownership of the land had to be submitted in order for the mortgage to be created. Therefore there was no misrepresentation with regard to the third party mortgage that was created over the Plaintiff's property, and he is bound by the guarantor agreements that he had signed, even if he claimed not to have read the same.

Reliance was also placed on the case of **L'ESTRANGE V F. GRAUCOB LIMITED 1934 2 KB 394** where it was held that the fact that L' Estrange had not read the clause was immaterial, and the fact that she had signed it meant that she was bound by it, having been deemed to have read and agreed to the terms of the contract. Further that *Cheshire and Fifoot Law of Contract 4<sup>th</sup> Edition at page 25* states that **"a contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done"**.

The 1<sup>st</sup> Defendant also submitted that the Plaintiff having made payment for ten months acknowledged the fact that he had agreed to be a guarantor for the 2<sup>nd</sup> Defendant. That the case of **SABLEHAND ZAMBIA LIMITED V ZAMBIA REVENUE AUTHORITY 2005 ZR 109** held that a party alleging fraud must lead evidence so that the allegation is clearly and distinctly proved on a higher standard of proof than on a mere balance of probabilities, because the allegations are criminal in nature.

With regard to the rights of a mortgagee, the submission was that the evidence clearly shows that a third party mortgage was created to secure the loan obtained by the 2<sup>nd</sup> Defendant. Reference was made to Snell's Equity which states that **"a mortgage is a conveyance of some**

*interest in land or other property as a security for the payment of a debt or discharge of some other obligation for which it is given. On signifying the obligation in respect of which the mortgage was given, the mortgagor has a right to redeem that is to recover full ownership in the property”.*

The 1<sup>st</sup> Defendant also referred to Order 88 of the Rules of the Supreme Court, 1999 edition, and Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia on the rights of the mortgagor and mortgagee, stating that the mortgagee pursuant to these provisions, is not bound to select a specific remedy, and pursue a particular remedy exclusively, and is at liberty to employ one or all the remedies to enforce payment. The case of **BRIAN MUSONDA (Receiver of First Merchant Bank Zambia Limited (in receivership)) V HYPER FOOD PRODUCTS LIMITED AND TWO OTHERS**, was relied on as authority for this position.

That based on this, and the case of **JAMES V JAMES 1873 L.R. 16 Eq 153**, the Plaintiff as mortgagor should be ordered to convey the assets pledged as security to the mortgagee unconditionally, and the court should dismiss the Plaintiff's claim, and uphold the counterclaim, and order the payment of K14, 134.64, being the balance remaining unpaid on the loan obtained by the 2<sup>nd</sup> Defendant.

From the evidence and the submissions, the question that arises is whether the Plaintiff has successfully proved that he executed the guarantee as a result of fraud or misrepresentation, and on that basis the contracts of guarantee should be set aside? It has been seen from his evidence that he testified that the 2<sup>nd</sup> Defendant had taken him to Mr Silumbwe who is a Credit Officer for the 1<sup>st</sup> Defendant, where he was asked to execute the guarantee documents. He further testified that the

2<sup>nd</sup> Defendant was in possession of the documentation for his house, as he had met him at the Lusaka Civic Centre where he had gone to change ownership for the house, having bought it from Sylvia Nonde.

On pages 14 to 17 of the 1<sup>st</sup> Defendant's bundle of documents is the loan agreement between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant. It states that the 2<sup>nd</sup> Defendant on 19<sup>th</sup> May, 2015, borrowed K30, 000.00 from the 1<sup>st</sup> Defendant to be repaid at a monthly interest of 4.5 percent. This brought the total amount repayable to K59, 110.78, over a period of thirty six (36) months. Clause 5 of the loan agreement states that the borrower commits himself to give physical collateral, titled or invoiced assets. To this effect a number of household goods in the name of a kitchen unit, fridge, dvd player, cooker, television, and a sofa valued at K6000.00 were pledged as collateral by the 2<sup>nd</sup> Defendant in the agreement.

On pages 6 to 8 of the 1<sup>st</sup> Defendants bundle of documents is the guarantee agreement that the Plaintiff executed with the 1<sup>st</sup> Defendant for the loan obtained by the 2<sup>nd</sup> Defendant. On page 6 of that agreement the assets assigned to the 1<sup>st</sup> Defendant by the Plaintiff as guarantor were Stand No 69/06 John Laing, Lusaka, cooker, freezer and sofa.

Articles 3 and 4 of the agreement state that until the guarantee is terminated it would be unlimited, and would remain in force until revoked upon all the payments being effected. Under article 5 the guarantor waived all rights of subrogation and set off, until the sums due under the guarantee were paid in full.

*Halsbury's Laws of England Volume 20, 4<sup>th</sup> Edition re-issue* defines a guarantee as **"an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or**

***miscarriage of another person, whose primary liability to the promise must exist or be contemplated”.***

From the evidence on record it is in not in dispute that the Plaintiff executed the contract of guarantee and the pledge of overall assets with the 1<sup>st</sup> Defendant to secure the loan advanced to the 2<sup>nd</sup> Defendant. Paragraph 103 of the said *Halsbury's Laws of England* states that the person primarily liable to the creditor for the obligation guaranteed, is the principal debtor. The evidence in this case shows that the 2<sup>nd</sup> Defendant failed to honour the loan re-payments as contracted, and the 1<sup>st</sup> Defendant pursued the Plaintiff as guarantor of the repayment.

The Plaintiff stated that when he signed the contract of guarantee with the 1<sup>st</sup> Defendant, he was misled that he would not be liable for anything but would instead be confined to reminding the 2<sup>nd</sup> Defendant to re-pay the debt. The question is whether this evidence if true is sufficient to vitiate the agreement? *Halsbury's Laws of England Volume 20, 4<sup>th</sup> Edition re-issue* earlier referred to, at paragraph 121 states that a common mistake substantially shared by both parties and relating to the facts as they existed at the time the contract was made, which renders the subject matter of the contract essentially different from the subject matter which the parties reasonably believed to exist, may render an apparent contract of guarantee void at common law.

Paragraph 123 of the said *Halsbury's Laws of England* provides that a contract of guarantee like any other contract is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently. That the misrepresentation may be either written or oral consisting of a direct assertion by the creditor of a fact which is not a fact, and which is calculated to influence a person becoming a guarantor, or statements by the creditor which tell only a misleading part of the



truth, or arise from the creditor's failure to correct a statement which he believed to be true when he made it, but which he subsequently discovers to be untrue. Further it may be a statement which was true when made, but which has subsequently become, to his knowledge untrue.

Other instances in which a guarantee may be set aside are when the guarantee is procured by duress and undue influence. The Plaintiff alleges fraud and misrepresentation by the 1<sup>st</sup> Defendant in procuring the contract of guarantee. For him to succeed to vitiate the contract of guarantee on the ground of misrepresentation, he must prove that he was misled into thinking that his role as guarantor was limited to only reminding the 2<sup>nd</sup> Defendant to pay the debt, and that he as guarantor was not obliged to pay the monthly sums due, and payable by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant in denying the Plaintiff's assertions relied on the case of **NKOLONGO FARM LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED, KENT CHOICE LIMITED (In receivership) AND CHARLES HARUPERI 2005 ZR 78**, arguing that the Plaintiff in this case cannot escape liability as guarantor of the 2<sup>nd</sup> Defendant's debt, as failure to read the guarantee, did not amount to misrepresentation of facts.

It has already been seen that the Plaintiff in his testimony stated that when he had asked Mr Silumbwe if he could read the documents, he was told that everything was just okay, and he should just sign as the 2<sup>nd</sup> Defendant had won a tender in Muchinga Province, and he would be able to re-pay the loan, once he delivered the building materials, and the Plaintiff would not be answerable. When cross examined by the 1<sup>st</sup> Defendant, the Plaintiff was referred to page 69 of his bundle of

documents which is a letter dated 1<sup>st</sup> July, 2015 which he wrote to the 1<sup>st</sup> Defendant's credit supervisor.

The letter states that the Plaintiff was surprised that he was being made to pay the 2<sup>nd</sup> Defendant's debts, as it was against the instructions that were given, and he was misled to sign for the debts. Further that if he had known, he would not have listened to the instructions, and that he was told that he was only to remind the 2<sup>nd</sup> Defendant to pay the debt.

DW1 who testified on the 1<sup>st</sup> Defendant's behalf took the court through the procedure of obtaining loans and executing guarantees for the said loans. This witness told the court that a guarantor is told the purpose of the guarantee, and even given chance to obtain independent legal advice before executing the contract of guarantee and the pledge of overall assets. DW1 is not the person whom the Plaintiff dealt with when he signed the guarantee for the loan obtained by the 2<sup>nd</sup> Defendant, and DW1 in fact stated that Kabwe Chisausau is the Legal Officer who explained the duties of guarantor to the Plaintiff.

When the Plaintiff cross examined DW1, he had asked him how long he had spent in Mr Silumbwe's office, and DW1 had stated that he did not know. DW1 had also stated that documents are only signed by the Legal Officer, and not Mr Silumbwe who was the Credit Officer. He denied that the Plaintiff signed the documents with Mr Silumbwe. From the evidence it is clear that DW1 had no first-hand knowledge of the circumstances under which the Plaintiff signed the contract of guarantee, and consequently did not discredit the Plaintiff's evidence that he was not given an opportunity to read the guarantee documents, and that he was not advised to obtain independent legal advice before executing the documents.

Further the evidence given by the Plaintiff was that when he signed the guarantee agreements on pages 5 and 8 of the 1<sup>st</sup> Defendant's bundle of documents, he had signed above the 2<sup>nd</sup> Defendant's name, and that the bottom was blank. This bottom part that he referred to was the part where the 1<sup>st</sup> Defendant and its witnesses were to sign to execute the guarantee.

He was not challenged in cross examination on this evidence, and it is therefore unshaken and credible evidence. His assertions of having been misled into signing the guarantee and the pledge of overall assets are confirmed by the letter on page 69 of his bundle of documents, that he wrote to the 1<sup>st</sup> Defendant's Credit Supervisor to the effect that effect. I therefore find as a fact that the 1<sup>st</sup> Defendant did not explain the duties of guarantor to the Plaintiff when he signed the guarantee, or indeed ask him to obtain independent legal advice before doing so.

The case of **NKONGOLO FARMS LIMITED v ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (In Receivership) AND CHARLES HARUPERI 2005 ZR 78** relied on by the 1<sup>st</sup> Defendant was appealed against, and is reported as **NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (In Receivership) AND CHARLES HARUPERI SCZ No 19 of 2007**. In this appeal, the Supreme Court noted that;

*"The learned trial judge relying on the Halsbury Laws of England, 4th Edition Vol 36, para 36(2), where it is stated that: "...where a party relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence by another party, he must supply the necessary particulars of the allegation in his pleadings", held that it was vital for the appellant Company to specifically set out the particulars of*

*fraud alleged. We agree that the appellant did not plead fraud or misrepresentation with sub heads stating particularities of fraud or misrepresentation as provided under Order 18 rule 8(16) of the Rules of the Supreme Court, which states that, "misrepresentation should always be pleaded with proper particularity". However, looking at the five (5) paragraphs of the statement of claim quoted above, we hold the view that these paragraphs brought out sufficient details of fraud and misrepresentation in line with the Halsbury laws of England 4th Edition which states: "the court had never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes the form of a statement that it false or suppression of what is true. The withholding of information is not in general fraudulent unless there is special duty to disclose it".*

The Supreme Court had gone further in that case to consider the arguments advanced by the Appellant that the document it had signed through its directors, being a third party mortgage to secure the loan obtained by the 2<sup>nd</sup> Respondent, was signed after the 3<sup>rd</sup> Appellant misrepresented to them that he wanted to documents to secure a loan to purchase maize, and to obtain a loan to buy the property that they had offered him for sale. The Appellant had in the appeal pleaded non est factum.

Citing the English case of **SAUNDERS V ANGLIA BUILDING SOCIETY 1970 3 ALL ER 961**, where Lord Wilberforce in explaining this doctrine of non est factum said "*....the document should be held to be invalid only when the element of consent is totally lacking*", the Supreme Court had considered whether the consent of the Appellant was totally

lacking. It was stated in that case that ***“in the case of SAUNDERS V ANGLIA BUILDING SOCIETY 1970 3 ALL ER 961, Lord Reid explained the doctrine of non est factum in the following statement: “the doctrine or non est factum must be kept within narrow limits if it is not to shake the confidence of those who rely on signature when there is no obvious reason to doubt their validity”. We are inclined to be persuaded by this sound reasoning.***

***However, although we accept this sound reasoning, we are mindful of the fact that this doctrine of non est factum does not only apply to cases where fraud is pleaded and where fraud exists, the doctrine applies also to the validity of signatures where it is established that the mind of the signer never intended to sign that document in question.***

Applying the principles set out in the above case to this matter, it can be said that the Plaintiff did not plead misrepresentation or fraud with particularity in the writ of summons and statement of claim, but he did in paragraphs 1, 6 and 8 and 14 of the amended statement of claim make the said allegation. He therefore did plead misrepresentation and fraud, and as seen, this allegation has not been successfully rebutted by the Defendant. The Defendant instead argued that the Plaintiff is liable to pay the 2<sup>nd</sup> Defendant's debt as guarantor of the same, even though he did not read the guarantee documents.

In the ***NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (In Receivership) AND CHARLES HARUPERI SCZ No 19 of 2007*** case, similar arguments were advanced, and the court noted that the 1st Respondent had argued that the deception was self-induced by the

Appellant Company as they did not read the documents which were self-explanatory. However the view of the court was that it was common ground that there was close relationship between the two directors of the Appellant Company and the 3rd Respondent, and which was in fact brought to the fore in cross-examination when it was established that there was intimate relationship between one of the directors and the 3rd Respondent.

The court concluded on that basis that the transactions in question were manifestly disadvantageous to the directors of the Appellant. The issue of undue influence was also raised by the Appellant in that matter, and the Supreme Court stated that the current trend of the law on the application of the doctrine of undue influence is to ensure influence of one person over another person is not abused.

That in the early stages of development of this doctrine, its application was only confined to husband and wife relationships, but had been extended to other relationships over time. In considering whether there was undue influence in that case, the court referred to *Sir Tittle on the Law of Contract 1999, 3rd Edition page 380* which states that; ***“the question is not whether the relationship between the parties belongs to a certain category or type but rather whether one party reposed sufficient trust and confidence in the other”***. The Supreme Court noted that the book does not exhaust the list of what constitutes undue influence, because this principle has not been confined to cases of abuse of trust and confidence only, but also to cases where vulnerable persons have been exploited.

The court in that case stated that the facts narrated by PW1 revealed that deceit was the nature and character of the transactions in question, and following the reasoning in the case of **ROYAL BANK OF SCOTLAND**

**V ETRIDGE AND OTHER APPEAL 2001 4 ALL ER 499**, the court's view was that as there were a number of anomalies that were catalogued, plus the evidence by PW1, that there was deceit before this agreement was entered into, the case was proper case for applying the doctrine of undue influence.

The court went on to consider whether the doctrine of undue influence applied to the 1<sup>st</sup> Respondent, having established that it applied to the 3<sup>rd</sup> Respondent, and whether the 1<sup>st</sup> Respondent shared in the wrong doings of the 3<sup>rd</sup> Respondent. In establishing this, reference was to the case of **CREDIT LYONNAIS BANK NEDERLANDS NV V BURCH 1997 1 ALL ER 144**, where the court placed the responsibility on the Bank lending money to take reasonable steps to explain to the surety, the extent, and the implications of the transaction, and to make sure that the surety independently sought independent legal advice before committing itself to the transaction.

In the **CREDIT LYONNAIS BANK NEDERLANDS NV V BURCH 1997 1 ALL ER 144** case, the court held that it was not sufficient for the bank lending money just to have causal contact with the guarantor, but that the bank had a duty to make sure that the surety sought independent legal advice. It was stated in the **NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (In Receivership) AND CHARLES HARUPERI SCZ No 19 of 2007** case that *"the ratio of this English case is that, the creditor has the obligation to inform itself as to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that, relationship. The bank has an obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor"*.

Based on this, the Supreme Court in the ***NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (In Receivership) AND CHARLES HARUPERI SCZ No 19 of 2007*** case found that there was a relationship of trust and confidence between the Appellant Company directors and the 3rd Respondent. Further that the evidence showed that at no time did the 1st Respondent try to get in touch with the Appellant Company directors, and it ignored the anomalies found on the execution of the documents which would have put it on alert as to whether or not the Appellant Company directors voluntarily signed these documents, and handed them over to facilitate a loan facility for the benefit of the 3rd Respondent.

That the 1st Respondent failed to discharge its duty to ensure that the Appellant Company directors sought the required legal advice before committing themselves to the transaction which ended to their disadvantage. Therefore, at law the 1st Respondent was fixed with constructive notice of undue influence, which was obviously exercised by the 3rd Respondent on this elderly couple, and which was never rebutted.

The Supreme Court went further in that case to state that it was insufficient to argue, as argued by the 1st Respondent that, the Appellant had themselves to blame because they confessed not to have read the documents, as there was evidence by the 1st Respondent themselves that they had no contact whatsoever with the appellant's Directors, as they processed the credit facility to the 3rd Respondent up to the time that the appellant Company was called upon to honour the debt. It found that the case was proper case to invoke the doctrine of undue influence, and set aside the transaction.



In this case the Plaintiff has established that he was not given an opportunity to read the contract of guarantee and the pledge of overall assets, as he was told to just sign, as everything would be alright as the 2<sup>nd</sup> Defendant had won a tender in Muchinga Province, and he would be able to re-pay the loan. Applying the principle that undue influence is found to exist in relationships where there is trust and confidence, the Plaintiff in this case can be said to have trusted the 2<sup>nd</sup> Defendant, and had confidence in him when he was told that he had nothing to worry about, as the 2<sup>nd</sup> Defendant would pay back the money once he delivered the building materials to Muchinga Province.

This is because the evidence on record shows that the Plaintiff was merely assisted by the 2<sup>nd</sup> Defendant to change ownership of the house that he had bought for his late brother's children into his name, and he did in fact deliver the same, once the change of ownership was done. Further the Plaintiff was taken to Mr Silumbwe an officer of the 1<sup>st</sup> Defendant, by the 2<sup>nd</sup> Defendant and Mr Silumbwe gave the Plaintiff the said assurances. Therefore this is a case in which undue influence can be applied, and I accordingly find that the 2<sup>nd</sup> Defendant did exert undue influence over the Plaintiff.

With regard to the 1<sup>st</sup> Defendant, the evidence shows that its' Credit Officer Mr Silumbwe assured the Plaintiff that he would not be liable to pay the debt owed by the 2<sup>nd</sup> Defendant. While DW1 testified that the Plaintiff was given opportunity to read the contract of guarantee and the pledge of overall assets, and was advised to obtain independent legal advice, the Plaintiff's evidence that he was not taken before the Legal Officer who was to give him that advice. This evidence as already seen was not challenged.

Therefore applying the decision in the case of ***NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (In Receivership) AND CHARLES HARUPERI SCZ No 19 of 2007***, the 1<sup>st</sup> Defendant cannot argue that the Plaintiff is liable even if he did not read the documents before signing them, as it was under a duty to ensure that the Plaintiff was not in any way influenced into signing the contract of guarantee and the pledge of overall assets, by making sure that the Plaintiff obtained independent legal advice before executing the same.

This is on the basis that the rationale for giving such advice, as already seen, is that the creditor has the obligation to inform itself as to whether or not there is a relationship of trust and confidence between the borrower and guarantor, and the attendant risk to abuse that relationship.

Therefore as the 1<sup>st</sup> Defendant did not discharge its duty to advise the Plaintiff to obtain independent legal advice before executing the guarantee and the pledge of overall assets, as well as the fact that its officer and the 2<sup>nd</sup> Defendant did in fact misrepresent the duties of guarantor to the Plaintiff, there was misrepresentation or fraud, and the contract of guarantee is hereby set aside. The Plaintiff shall be refunded the K9, 000.00 paid towards liquidating the 2<sup>nd</sup> Defendant's debt by the 1<sup>st</sup> Defendant, which amount shall carry interest at the average short term deposit rate from date of issue of the writ until judgment, and thereafter at a rate of six percent per annum until payment.

The Plaintiff also claims damages for the fraud and solatium compensation. McGregor on Damages by Harvey McGregor 16<sup>th</sup> edition by Sweet and Maxwell, 1997 at paragraph 1962 states that the correct measure of damages in the tort of deceit is an award that serves to put

the plaintiff into the position he would have been in, if the representation had not been made to him. In this case if the misrepresentation had not been made to the Plaintiff, he would not have signed the guarantee and the pledge of overall assets, and consequently would not have paid the K9, 000.00 that he paid towards liquidating the 2<sup>nd</sup> Defendant's debt to the 1<sup>st</sup> Defendant.

Having ordered repayment of this amount to the Plaintiff, he has therefore been compensated for the misrepresentation. I am unable to find any authority on solatium compensation, but from the wording of the claim in the statement of claim, I assume it means compensation for the misrepresentation, which has already been awarded. The guarantee agreement having been set aside for misrepresentation, the counterclaim fails, and it is dismissed. The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 5<sup>th</sup> DAY OF SEPTEMBER, 2017**

S. Kaunda  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**