IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2012/HPC/0577

BETWEEN:

DIMITRIOS MONOKANDILOS **1ST PLAINTIFF**

FILANDRIA KOURI **2ND PLAINTIFF**

AND

FINANCE BANK ZAMBIA LIMITED **DEFENDANT**

Before the Honourable Mr Justice W.S. Mweemba at Lusaka in Open Court

For the Plaintiffs : *Mr Sakwiba Sikota, SC- Central Chambers*
Mr S. Mambwe- Messrs Mambwe Siwila & Lisimba Advocates.

For the Defendant : *Mr J. Sangwa, SC - Messrs Simeza Sangwa & Associates.*

JUDGMENT

LEGISLATION REFERRED TO:

1. **Order 14 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**

CASES REFERRED TO:

1. **Base Aroso V Coutts & Co (2002) All ER 241.**
2. **Catlin V Cyprus Finance Corporation (London) Limited (1983) QB 759.**
3. **Royal Bank of Scotland PLC V Fielding (2004) ECWA Civ 64.**
4. **Nkongolo Farms Limited V Zambia National Commercial Bank Limited Kent Choice Limited (in Receivership) V Charles Huruperi SCZ Number 19 of 2007.**
5. **Khalid Mohamed V the Attorney General (1982) ZR 49.**
6. **Brewer V Westminister Bank Limited (1952) 2 All ER 650.**
7. **London Ngoma and Others V LCM Company Limited and United Bus Company of Zambia Ltd (Liquidator) (1999) ZR 75.**
8. **The Attorney General V Aboubarcar Tall and Zambia Airways Corporation Limited (1995-1997) ZR 54.**
9. **Re Harrison (1920) 90 L. J.(Ch) 186.**

OTHER WORKS REFERRED TO:

1. **Halsbury's Laws of England Volume 42**
2. **Sheldon (1962) The Practice and Law of Banking**
3. **Pagets Law of Banking**
4. **Chitty on Contracts Vol 2: Specific Contracts, London Sweet & Maxwell, 1999.**
5. **Maurice Megrah, The Institute of Bankers' Legal Decisions Affecting Bankers Volume 5 1947-1954, Reprint 1988 Professional Books' Limited, England.**

By a Writ of Summons filed on 30th March, 2010, the Plaintiffs are claiming the following from the Defendant:

1. *Payment of US$949,933.87 with interest at the agreed rate of 7% from March 1996 up to date of payment.*
2. *Further or other relief.*
3. *Costs.*

According to the Statement of Claim, on 20th November, 1995 the 1st Plaintiff and the Defendant signed an agreement which stipulated inter alia that the Kwacha call account held with the Defendant by the Plaintiffs should be converted to US Dollar account No. 880012002 and that it shall be earning a monthly interest of 42.5% per annum subject to market rate change.

It was further stated that as at 4th March 1996, the Plaintiffs had accumulated a total of US$983, 858.74 in the said account with the Defendant whose deposit terms were that interest be charged at 7% per annum.

However, on 26th February, 1996 the Defendant without lawful authority or instructions from the Plaintiffs wrongly debited the Plaintiff's Joint Dollar account with the sum of US$949,933.87 and all efforts to have the money paid to the Plaintiffs have failed.

That as a result of the Defendant's action, the Plaintiff has suffered loss and damage.

The Defendant filed a Defence on 7th March, 2013 and it is averred that the Account in question was solely in the name of the 1st Plaintiff and at no time was it joint and all transactions thereon clearly indicated the fact that it was being operated solely by the 1st Plaintiff.

It is also stated that the 1st Plaintiff's Account had a total sum of USD643,501.36 and the Defendant lawfully exercised its right of set off against the 1st Plaintiff's Account arising from the personal guarantee the Plaintiff had given in respect of a credit facility that had been granted to a Company called International Investments and Financings Limited. Moreover that the 1st Plaintiff gave a personal guarantee in favour of the Defendant in the sum of USD$1,200,000.00 which gave the Defendant the right to set off against his two foreign currency dollar accounts including the Account in question. That the 1st Plaintiff was a Director in the Company and the Defendant rightly exercised its right of set off against the 1st Plaintiff's Account who had given a personal guarantee.

According to the Defendant the set off was exercised on the sum of USD$ 643, 501.36 which was in the 1st Plaintiff's Bank Account held with the Defendant at the material time.

The Plaintiff filed one Amended Witness Statement on 6th September, 2016. It stated that he and his wife the 2nd Plaintiff maintained a joint account with the Defendant Bank in their personal names.

That by a letter dated 20th November, 1995 on page 1 of the Plaintiff's Bundle of Documents the parties agreed to convert their Kwacha Call Account to a United States Dollar Account.

It further stated that at the time of conversion, the interest rate applicable on the Kwacha Call Account was 42.5% per annum and by 23rd February, 1996, the interest rate was 47.5% per annum.

Furthermore, that by a letter dated 26th February, 1996 the Defendant confirmed that it had converted the Kwacha in the Plaintiff's Account and the amount outstanding in Dollars was US$949,933.81.

That as at 4th March, 1996 he and his wife had accumulated a total of US$983,858.74 in the said Account whose deposit terms were that interest be charged at the rate of 7% per annum.

That he and his wife came to learn with shock that the Defendant had without their authority, debited their entire account to the credit of a third party namely International Investments and Financing Limited.

Further that although he was a Director in the said third party Company, his wife had completely nothing to do with the same and that neither his wife, him or both of them at the time authorized the Defendant to debit their account to the said Company or to anyone at all.

That International Investments and Financings Limited was an incorporated Company and as further shown, the money borrowed by the said Company was borrowed by the said Company in its own name and had nothing to do with the Plaintiffs.

He averred that he and his wife now humbly sought that this Court orders the Defendant to pay back their money with interest at the agreed rate of 7% per annum from March 1996 to date of payment.

In cross examination **PW1** stated that he and his wife opened and maintained an account with the Defendant between 1994 and 1996 and they deposited $US1,000,000.00. That they did so by going to the Bank where they were given an account opening form which he completed and put both their names.

Further that the joint account was the issue that had brought them before Court and that the account opening form only showed his signature and that although it set out the names of the 2nd Plaintiff at the beginning it did not set out any of her details or signature.

That page 21 of the Defendants Bundle of Documents showed the specimen signature card with his signature... of Account No. 0101800121000 and he did not know why his wife did not sign it.

Moreover, that his wife signed another specimen signature card and he withdrew money from the account, neither did they both sign any money instruments and he had no knowledge on whether his wife signed any or how many.

It was also his evidence that he only had one forex account which was the subject of this action and that he had not given his lawyer any documents signed by his wife to the Defendant Bank.

Further that he was one of the shareholders of International Investments and Financing Limited.

That the letter to Bank of Zambia dated 30th November, 1995 indicated that he borrowed money on behalf of the Company to import maize and the bank approved US$2,190,000.00.

He aso added that the Letter of Guarantee bore his signature and was dated 28th November, 1995 and as the Chairman of the Company he went to the Defendant Bank to borrow US$2,100,000 to import maize from Tanzania.

That he was acting on behalf of LM Comert International and had an interest in both International Investment & Financing Limited and LM Comert International as Shareholder and Director.

It was also his testimony that he owned 20% shares in LM Comert International and part of the loan of US$2,190,00000 was paid by International Investments and Financing Limited and he did not remember being sued by Finance Bank but he had been deported.

Lastly he stated that there was no document to indicate that his wife was a party to the Account.

In Re- examination, the witness told the Court that the application form signed by his wife remained with the Bank and the letter of undertaking related to overdraft facilities on the Joint Account.

The Defendant also filed one Witness Statement from Barkat Ali on 23rd September, 2016. He stated that he had been employed by the Defendant Bank since its inception in 1987.

That he had worked in various positions and the last one he had from 2011 to 2016 was that of Managing Director and Chief Executive Officer and given the passage of time in giving this statement, he had to rely on his own recollection of the events surrounding this case and documentation in the custody of the Defendant. That it had been difficult to find all the original documents and that the files on this case had passed though many hands.

That initially the case was handled by the Defendant's own Counsel but was later passed on to Mwanawasa & Co, then the late Steven Malama S.C of Jacques & Partners and it went dormant for almost 13 years following the deportation of the Plaintiff from Zambia. Further that some of the Defendant's files on the case had been archived and it had not been possible to trace them in the time available.

When the case was revived it was under the care of Mulenga Mundashi, Kasonde Legal Practitioners and some of the documents relevant to the case had been photocopied several times and it had not been possible to locate all the original documents.

The First Plaintiff was at the material time the majority shareholder and Chairman of a Company called International Investments and Financing Limited, which he referred to as *"the Company."*

That he could not remember the exact month, but between 1994 and 1995, the First Plaintiff, on his own behalf and on behalf of the Company, applied to open bank accounts with the Defendant. That in his own name the First Plaintiff opened accounts denominated in Zambian Kwacha and in US$.

At the instance of the First Plaintiff, a number of bank accounts were opened in the name of the Company. That he had therefore divided this witness statement into two parts.

In the first part he testified to the relationship between the Defendant and the Company and in the second he testified to the relationship between the Defendant and the Plaintiffs.

Part One: Relationship between the Defendant and the Company

According to the documents presented to the Defendant by the 1st Plaintiff, to support the Company's application to open bank accounts with the Defendant; the Company was incorporated on 27th January, 1994 and its line of business was summed up in a letter written by the Company and signed by the 1st Plaintiff as Chairman of the Company and sent to the Bank of Zambia on 30th November, 1995.

He also stated that the business relationship between the Company and the Defendant was created with the opening of its bank accounts and business between them in the initial stages was very good and the Company had a

healthy cash flow which made the Defendant trust it with the 1st Plaintiff as its Chairman.

According to **DW1**, the divide between the 1st Plaintiff as an individual and the Company was blurred and there were more activities on the accounts of the 1st Plaintiff than the Company when the converse should have been the case.

That despite this the Defendant on 16th February, 1996 wrote a letter which confirmed that the 1st Plaintiff was one of its esteemed customers and had an active account with the Defendant with a turnover of more than ZK5 Billion (approximately US$5 million) in his personal account.

The Defendant also confirmed that as at that date it was holding about K1.9 Billion or approximately US$2million of the 1st Plaintiffs money.

That after opening the Bank accounts the Company approached the Defendant and it gave them a number of credit facilities. The company with the help of the 1st Plaintiff was able to service them to the satisfaction of the Defendant such that in 1995 given the activities on the 1st Plaintiff's account the Defendant felt comfortable enough to advance the Company a credit facility in the sum of US$2,190,000.00.

That the background to this facility was worth restating. As stated in the letter the Company was said to have been involved in the business of marketing maize for twenty (20) years and was at the time registered as a grain trader with the Ministry of Agriculture, Food and Fisheries.

It was also his evidence that in 1995, Zambia had a poor harvest of maize and the situation required the Government of the Republic of Zambia to take measures to avert possible shortages of maize meal and in September, 1995 the Government through the Ministry of Agriculture, Food and Fisheries established a Maize Import Credit Scheme to fund the importation of maize into the country.

This scheme was administered by the Bank of Zambia and Commercial Banks like the Defendant were invited to participate in it as it was widely publicized even in the newspaper as shown in the bundle of documents.

Once the agreement was put in place the 1st Plaintiff on behalf of the Company approached the Defendant with an application by the Company for the Defendant to secure USD$5,120,000.00 from the Bank of Zambia under the Maize Import Credit Scheme.

After evaluating the application and based on the securities available, the Defendant agreed to secure and advance to the Company only the sum of US$2,190,000.00. In November, 1995 the 1st Plaintiff acting for the Company presented a Pro Forma invoice No. 896 dated 3rd November, 1995, issued by M. L. Comert International to supply 10,000 metric tonnes of maize for the Company at the total cost of US$2,190,000.00. The payment was to be made by 'Irrevocable and Confirmed Letter of Credit.'

The witness also stated that as far as the Bank of Zambia was concerned in this transaction, the borrower was the Defendant who had to repay the money drawn from the scheme and advanced to its customers. In the books of the Defendant the Company was the borrower and it was therefore the responsibility of the Defendant to recover money advanced to its customers under the scheme and repay the same to Bank of Zambia.

Moreover that the Company did not have adequate security to cover the facility and the Defendant working with the 1st Plaintiff in his own right and as an officer of the Company put together a number of securities to the satisfaction of the Defendant.

So it was agreed between the Defendant and the 1st Plaintiff that the latter would maintain in his personal account a fixed deposit in Kwacha equivalent to USD$1,000,000.00 and the Defendant was to hold these funds as security for the facility of US$2, 190,000.00.

That the background to this arrangement worth noting was that this form of collateral had been tried before between the 1st Plaintiff and the Defendant. In the dealings with the Defendant, the line between the Defendant's relationship with the 1st Plaintiff and the Company was indistinct. The 1st Plaintiff had better balances in his US$ accounts than in his Kwacha accounts and his personal accounts had better balances than the Companys.'

That arrangements were made to allow the 1st Plaintiff's Kwacha accounts to be overdrawn and the funds in his US$ accounts used as collateral for the overdraft. On 28th April, 1995 the 1st Plaintiff signed a Letter of Undertaking in which he confirmed that the funds held in his two accounts could be used to secure the overdraft facilities extended to him by the Bank.

That the Company was also allowed to overdraw its position with the Defendant on the strength of this undertaking and with this course of dealing in mind that it was agreed that the 1st Plaintiff should maintain a fixed amount equivalent to US$1,000,000 in his US$ Account as collateral for the sum of US$2,190,000 the Defendant was to advance to the Company.

This position was also confirmed in a memorandum dated 4th January 1996 which also shows that the total assets of the Company were less than K500million.

It was also agreed that the 1st Plaintiff together with another shareholder and director, a Mr Kosmas Mastrokolias were to individually execute personal guarantees each limited to the sum of US$1,200,000.00.

That the two officers of the Company executed both guarantees on 28th November, 1995 and the 1st Plaintiff guaranteed to repay the Defendant within two days from the date of demand all the monies due to the Defendant from the Company at any time. The 1st Plaintiff also committed himself as a principal debtor primarily responsible for the debt of the Company.

This guarantee was satisfactory to the Defendant given the turnover in the accounts of the 1st Plaintiff and that he was to maintain a fixed Kwacha deposit equivalent to US$1,000,000.00.

Another security provided was the 10,000 metric tonnes of grain to be imported by the Company, which were to be consigned to the Defendant. The Company was also to execute the usual debenture on its fixed and floating assets.

That once the issue of security was settled the Defendant opened a Letter of Credit on 19th December, 1995 in the sum of US$2,190,000 on behalf of the Company as the Applicant and ML Comert International as the beneficiary whose address was given as Drukpers Straats No. 5 Brusells, Belgium.

Moreover that it was part of the agreement that 40% of the value of the goods would be paid to the beneficiaries as advance payment. In January 1996 the beneficiary ML Comert International received the sum of US$876,000 (being 40% of the value of the Letter of Credit.) and issued Receipt No. 8 dated 8th January, 1996.

That 10,000 metric tonnes of maize were to arrive in Zambia on or before 31st March, 1996 and the money covered by the letter of credit was to be released by the Defendant's overseas correspondent Bank, Citibank London to the beneficiary's (ML Comert International)Bank, Bank Belgolaise Cantersteen in Brussels.

That the balance of US$1,314,000 was to be paid to the beneficiary on presentation of the Road Consignment Note showing that the goods had been consigned to the Defendant.

After the Bank of Zambia credited the Defendants composite account at Citibank London with the sum of US$2,190,000 and the sum of US$876,000 was paid to the beneficiaries, the 1st Plaintiff wrote to the Defendant stating that the suppliers of the maize in Tanzania were not going to accept the Letters of Credit and instead wanted cash.

In March, 1996, the beneficiary generated Commercial Invoice No. 3872-96 dated 19th March, 1996 for the sum of US$1,314,000 and the Road Consignment Note dated 19th March, 1996 which were presented to the Defendant's correspondent bank for payment. According to the Road Consignment Note D.P.M Makambako was the transporter of the maize which was to depart Tanzania on 9th March, 1996 to Kapiri Mposhi which was within the contracted period.

On the strength of these documents the balance of the value of the Letters of Credit (US$1,314,000) was paid to the beneficiary. After the money had been disbursed, the maize was expected in Zambia by 31st March, 1996, however by 30th April, 1996 it had not been delivered as was evident from the letter written by the Company to TAZARA area Manager and copied to the Defendant.

Further that sometime in May, 1996 the Defendant wrote to the 1st Plaintiff requesting further details on the actual importation of the maize and documents that would prove that it had been ordered by the Company and there was no response from the 1st Plaintiff or anyone from the Company which prompted the Defendant to send another letter to the 1st Plaintiff dated 19th June, 1996 which was followed by a fax message from the Defendant to the beneficiary's Bank in Brussells asking them to help the Defendant recover the money which had been disbursed but for which goods had not been supplied.

That by this time, it had become evident that the Defendant had been defrauded by the 1st Plaintiff and no maize was going to be delivered by the Company.

That the Beneficiary ML Comert International like the Company incorporated in Zambia was also founded by the 1st Plaintiff.

At the time of applying for the money from the Maize Import Credit Scheme, the 1st Plaintiff represented to the Bank that the sum of US$2,190,000 was to be repaid as follows:

Date of LC	19/12/95	Amount due	
After 90 days	18/03/96	425,000.00	Plus Interest
After 120 days	17/04/96	425,000.00	Plus Interest
After 180 days	16/06/96	425,000.00	Plus Interest
After 210 days	16/07/96	425,000.00	Plus Interest
After 250 days	25/08/96	490,000.00	Plus Interest
		2, 190,000.00	

That this commitment was contained in the letter from the Company signed by the 1st Plaintiff to Bank of Zambia dated 27th November, 1995 and by a letter dated 29th March, 1996, the 1st Plaintiff was reminded about the Company's obligations to the Defendant but there was no reply to this letter.

By a letter dated 10th June, 1996 from the Bank of Zambia to the Defendant the latter was informed that its current account with the Central Bank was going to be debited with the Kwacha equivalent of US$850,000 being overdue repayment on the loan as by that date the Company should have repaid US$1,275,000.

Moreover that the letter of 29th March, 1996 was followed by another of 20th June, 1996 in which the 1st Plaintiff was reminded about the commitment he made to the Bank of Zambia in his letter of 27th November, 1995. Based on the obligation made the sum of US$1,275,000 was due and payable and in October, 1996 the Defendant sent a letter of Demand to the 1st Plaintiff in which it was pointed out that Bank of Zambia had collected the sum of US$1,500,000 from the Defendant.

This left a balance of US$690,000 which was going to be debited from the Defendants current account with the Bank of Zambia in the month of October, 1996.

The Defendant advised the 1st Plaintiff to normalize the Company's account within 14 days from the date of the letter. This letter dated 16th October, 1996 did not elicit response from the 1st Plaintiff or any other officer of the Company.

That on the strength of the letter of Undertaking dated 28th April, 1995 and the Deed of Guarantee, the Defendant debited the 1st Plaintiffs Accounts leaving a balance of US$1,200,000 payable to the Defendant by the Company.

That on 22nd November 1996 the Defendant commenced legal proceedings under Cause No. 1996/ HP/4739 against the 1st Plaintiff and Mr Kosmas Mastrokolias, as guarantors of the Company's liabilities with the Defendant.

The claim was for the sum of US$1,200,000 being the balance of the amount due to the Defendant from the Company, which amount the 1st Plaintiff and Mr Kosmas Mastrokolias guaranteed to repay.

The Defendant placed the Company under receivership but nothing was recovered since the Company's assets did not exceed more than K500 million in value and the few assets which existed were encumbered by other creditors.

By Gazette Notices No. 313 and 314 of 1998 published in the Government Gazette dated 10th July, 1998 the 1st Plaintiff and Mr Kosmas Montrokolias were both deported from Zambia on the ground that they were a danger to good order and peace which was after it was reported in the newspapers that the two had been on the run for several months.

On 17th May, 1999 the Defendant obtained judgment against the 1st Defenant and Mr Kosmas Montrokolias in the sum of USD$1,200,000 plus interest. The 1st Plaintiff and Mr Kosmas Mastrokolias now owed the Defendant well in excess of US$4,000,000.

To this day the Company ML Comert International had never shipped nor had the First Plaintiff made any effort to ship the maize to Zambia or refund the money.

The Defendant met its obligations to Bank of Zambia and paid the funds to the scheme in full.

Part Two: Dimitrious Monokandilos and Filandria Kouri Account

According to the witness, as stated above the relationship between the Defendant and 1st Plaintiff was very good in the beginning and not only did the 1st Plaintiff open accounts for the Company, but also a number of personal accounts and the title of one of them was *"Mr Dimitrious Monokandilos and Mrs Filandria Kouri."*

Further that although the procedure for opening accounts with the Defendant had somewhat changed over the years, the fundamental requirements had remained the same as a person wishing to open an account with the Defendant was required to obtain an Account Opening Form.

This Form was used for opening different types of accounts,joint or personal and the only requirement was that one must complete parts relevant to the type of account they wished to open beginning with the title of the account in Part A of the Form.

However when a husband and a wife wished to open a Joint Account they had to complete part A by specifying the name of the beneficiaries of the account and part E where they were required to sign for the *"Joint Mandate"* of the Joint Account.

In August, 1994 the 1st Plaintiff obtained and completed the Account Opening Form and he completed Part A where he indicated the title of the account as *"Mr Dimitrious Monokandilos and Mrs Kouri Filandria."*

The 1st Plaintiff also included his details only without adding those of the 2nd Plaintiff. He also indicated his Nationality as Greek and his Passport Number as ZG17534 and the place of issue as Luxemburg, whilst his date of birth as 16th January 1954.

However no such details were given for the 2nd Plaintiff. Furthermore the 1st Plaintiff signed part A of the Form but the 2nd Plaintiff did not sign it as the second beneficiary of the account.

According to **DW1**, joint account holders were expected to complete Part A by stating the *"special instructions for the operation of the Account"* which was never completed by the Plaintiffs.

Neither the 1st nor the 2nd Plaintiff signed or completed part E of the Form which deals with the Joint Mandate and they were also expected to complete specimen signatures card so that the Defendant would honour instructions bearing the signatures appearing on the card. The Account opening Form was used to open US$ Account No. 0101800121000.

Further that the card was signed by the 1st Plaintiff only whilst *"Mr Dimitrious Monokandilos and Mrs Kouri Finadria"* was simply the title of the account, which was opened by the 1st Plaintiff with the Defendant.

The account was opened and operated as an individual account owned by the 1st Plaintiff. Throughout, the period that the relationship between the 1st Plaintiff and the Defendant subsisted, all transactions on the accounts were carried out on the instructions of the 1st Plaintiff, as owner of the account.

That the letter of undertaking dated 28th April, 1995 was signed by the 1st Plaintiff only and referred to **"my two foreign exchange accounts..."**. There was no mention of the funds in these accounts being joint funds. The 2nd Plaintiff never signed the letter of undertaking.

He lastly stated that throughout the period that the 1st Plaintiff dealt with the Defendant there was never an assertion that the Plaintiffs jointly owned the said Account.

In cross examination **DW1** stated that he did not personally deal with the Plaintiffs account nor that of International Investments and Financing Limited as these were handled by Branch Managers.

In addition that he did not recall the exact date when the loan agreement was signed between Bank of Zambia and the Defendant, and that he did not see the original agreement but could only recall that it was made.

Moreover that one of the securities required was a deposit of US$1 million in the Dollar Account and all joint accounts were expected to have Joint holders as signatories. Under Banking Practice, if an account is joint it must have signatures of both parties and if this was not the case, it could not be treated as such.

The Witness also told the Court that he was aware of the account known as Dimitrios Monokandilos and Filandria Kouri as the bank did not allow anyone to open an account in a non- existent name. That there were people by the name of Dimitrios Monokandilos and Filandria Kouri Monokandilos in the bank but he had only met Dimitrios Monokandilos a long time ago when he used to go to the Bank.

In addition it was his testimony that the account opening form stated that it was opened on 29th August, 1994 by Mrs. Katepa who he was not sure was still with the Bank as he did not know him personally.

It was also his evidence that the Bank should have ensured that details such as the name were correctly filled out and it should have advised those that were opening accounts on the qualifications of signatories to those accounts.

Further that there could be multiple accounts in the same name but he could not remember the other names that appeared on those accounts and if this account was only to belong to the 1st Plaintiff then it should not have been opened in both names.

That the Form and the Bank Statement indicated that two people were on that statement and the bank did not write that the names should be changed and he could not recall such a record from the files.

According to **DW1** as long as the account opening form was signed by all the signatories and a clear mandate given it could be opened and that he had not managed to determine whether the person that opened this account was still working for the bank and he was no longer in a position to determine if someone from the Bank could come and give evidence in that regard since he left the Defendant Bank on 30th June, 2016 after it was sold.

He also confirmed that requirements necessary to opening the account would be more in the knowledge of the bank officials than the customer and he had been a banker for almost 30 years and was very conversant with the various types of account openings and that a joint account is one owned by at least two people or entities.

However that the account in question was not Joint although from what he had seen on the Joint Statement Mr and Mrs meant two individuals and whether a joint account could be credited with the permission of both owners clearly depended on the account opening mandate as the account opening form governed it's operations.

DW1 further stated that he did not know if he had come across instructions on the mandate form that permitted only one account holder to pledge the funds as security and that the Letter of Guarantee was only signed by one person whilst the Bank Statement was prepared by the Bank.

That they treated the personal and business accounts of the Plaintiff in the same way and this entirely depended on who owned the company account and they were also the same shareholder, as banks generally treat these as one person although there were modalities and instructions on the account.

He lastly stated that International Investments and Financings Limited Account was treated as such because the owners of the same account were atleast two people.

In Re-examination **DW1** told the Court that he would describe the account in question since its account opening form had no mandate and only had one signature which belonged to the 1st Plaintiff.

The Plaintiff's Counsel filed Skeleton Arguments on 5th June, 2017. According to him, there were two issues in dispute, the first being whether or not the account in issue was Joint and second whether or not the Defendant had the right to set off the monies in the account on the basis of the alleged guarantee. Counsel for the Plaintiff went on to define a Joint account as one that was shared by two or more individuals which he submitted was also agreed to by **DW1** under cross examination.

Further that such an account was likely to be used by relatives, couples or business partners who had a level of maturity and trust for each other as it typically allowed anyone named therein to access funds within it.

Further that at law a joint account was simply a debt owed to the account holders jointly and would raise the obvious questions as to the rights of one of the joint creditors if the bank wrongly paid the other.

Learned Counsel went on to state that the principles governing joint accounts and set off had been variously stated and he cited Sheldon, the learned author of "The Practice and Law of Banking" who stated that:

> **"Set- Off is the legal right by which a debtor is entitled to take into account a debt owing to him by a creditor when being sued for a debt due from him to the Creditor. In order that this right of set- off may be exercised, the debt must be a sum certain, due by and to the same parties, and in the same right..."**

"When a Joint account is opened, it is advisable to get all the parties concerned to state in writing what signatures are necessary for the operations on the account."

"The fact that persons have jointly opened an account does not imply that they have power to pledge each other's credit. If therefore an overdraft is required, the banker should see that all the joint parties concur in the request. For if this is not done only those who are responsible for the borrowing can be made liable to repay the sum borrowed."

"...Another advantage of securing the joint and several liability of the parties is that it will also enable the banker, after reasonable notice to set off a credit balance on the private accounts of any of the parties against an overdraft on the joint account. Otherwise he is not entiled to exercise his right of set off between the accounts..."

Counsel further cited the case of **AROSO V COUTTS & CO (1)** where it was held that, the fact that one of the joint account holders did not contribute to or draw upon the joint account did not prevent that person from having a beneficial interest.

He also cited the learned author of Paget's Law of Banking who state that:

"Nor does it matter if such a person does not even know of the existence of the joint account. Moreover, the fact that a joint account holder was never intended to use the account while the other was still alive would not prevent the former succeeding to the whole account by survivorship."

Counsel also relied on the **Halsbury's Laws of England Volume 42** in paragraph **435** which provides that:

"Subject to certain exceptions, a set- off may be maintained where the claims to be set off against each other exist between the same parties and in the same right."

In **CATLIN V CYPRUS FINANCE CORPORATION (LONDON) LIMITED (2)** it was held that as between a Banker and Joint account holders, the Banker had a duty of care to the account holders and each of them separately.

Counsel also relied on the case of **ROYAL BANK OF SCOTLAND PLC V FIELDING (3)** in which the Court of Appeal held that unless the Bank was aware of some limitation agreed between joint account holders who are husband and wife, it was no concern of the bank how a husband and wife chose to operate a joint account, provided that such operation was in accordance with the express terms of the mandate.

It was further held that where the account holder was a commercial enterprise there was a scope for contending that in so far as the mandate relating to that account authorizes the bank to lend money on overdraft, there was an implied qualification that in so far as the mandate relating to that account authorized the bank to lend money on overdraft, there was an implied qualification that any such lending had to be for legitimate purposes of that enterprise. Similarly, the bank would be at risk in acting on authority of its mandate where it had notice that a fraud was being committed.

Regarding the first issue in dispute of whether or not the account in issue was Joint, Counsel contended the following. First that the Bundle of Documents filed into Court on 6th September, 2016 contained a Bank Statement in the name of *"Mr/ Mrs Monokandilos Dimitios & Fil."*

That in the top far right of the Statement it was designated as *"0880012002 USD Current Account Demand Deposits Personal"* whilst pages 3 and 5 of the

Plaintiff's Bundle on the top right corner, cited the same account number and names the account as *"Mr/Mrs Monokandilos Dimitrios Fil, Current Accounts – Individuals."*

He also noted that Page 7 of the Plaintiff's Bundle of Documents filed on 30th October, 2013 styled the account statement as *"Monokandilos D & F US A/C."* Further that page 17 of the Defendant's own Bundle of Documents was even more forthcoming as it contained the names of *"Dimitrious Monokandilos and Kouri Filandria."*

Counsel pointed out that in Cross Examination **DW1** confirmed that the Bank Account Statements appearing in the Further Bundle of Documents were from the Defendant Bank and no issue had ever been raised on the authenticity of the Bank Account Statements.

That it was quite clear that the Bank Statement in issue was in the names of two different individuals and therefore met the requirements of a joint account as stated in the definition of a joint account which **DW1** consented to.

This is more so that under Cross Examination by Mr Sikota, SC **DW1** testified that the Defendant never opened accounts in the names of non- existent entities. It is clear that the Plaintiff's hereto were the ones whose names were referred to as non – existent entities. It was contended that clearly the Plaintiffs were the ones whose names were appearing on the Bank Statements which showed that it was a joint account. Further the owners of the account themselves, the Plaintiffs assert that it was so.

Further that under cross examination, **DW1** confessed that he was not present at the time the account in issue was opened and could not have known what was discussed between the Bank officer who supervised the opening of the account and the 1st Plaintiff when the said signature card was signed.

It is submitted that **DW1** admitted the obvious: that the duty to ensure that the relevant account holders signed the necessary documents before styling the account in both their names lay with the Bank and not with the Plaintiffs as customers of the bank.

In addition that it was worth noting that custody of the account- opening documents remains with the Bank and not with the customer. That he had sufficiently shown compelling reasons to find that the account in issue should attract the requirements for the operation of a joint bank account.

On the second issue of whether or not the Defendant had a right to set off the monies in the account on the basis of the alleged guarantee.
It was argued by Counsel that the Defendant had advanced that they debited the subject account on the basis of the Letter of Guarantee and on the Letter of Undertaking.

The 1st Plaintiff did not dispute having signed the Letter of Undertaking. However it is clear from the document itself and as admitted by **DW1** under cross examination by Mr Sikota. SC that the letter relates to Kwacha Accounts and not the Dollar Account in issue.

Further it relates to Overdraft Facilities enjoyed by the 1st Plaintiff and not loans or facilities contracted by third parties such as International Investments and Financings Limited.

That **DW1** confirmed that the 1st Plaintiff had several other accounts with the Defendant which this Letter of Undertaking could have related to. It was also contended that in any event, neither the Letter of Undertaking nor the Personal Guarantee being relied upon were signed by the 2nd Plaintiff.

Further that as shown above, the fact that persons had jointly opened an account did not entail that they had power to pledge each other's credit.

If therefore an overdraft was required, the banker had the responsibility to see to it that all the joint parties concurred in the request.

For if this was not done, only those who were responsible for the borrowing could be made liable to repay the sum borrowed. It is also submitted by Counsel that if it was the intention of the Bank and indeed the Plaintiffs that monies contained in the joint account were to be used as security for the borrowings of International Investment and Financing Limited then the Defendant had a legal duty to secure the concurrence of both Plaintiffs to the Guarantee and Undertaking.

In this regard Counsel relied on the case of **NKONGOLO FARMS LIMITED V ZAMBIA NATIONAL COMMERCIAL BANK LIMITED KENT CHOICE LIMITED (IN RECEIVERSHIP) CHARLES HURUPERI (4)** where it was held that a Creditor had the obligation to inform the borrower and guarantor of the effect of the security being signed and the attendant risk of abusing that relationship; and that a Bank had the further obligation to ensure that the guarantee did not in any way exercise undue influence on the guarantor.

It is also contended that with regard to the alleged right of set off, they wished to emphasize with regard to the authority cited in Halsbury's Laws of England that a set off could only be maintained where the claims to be set off against each other existed between the same parties and in the same right. In applying this principle to this case it was argued that the parties to the account in issue were totally different from the parties to the International Investment & Financing Limited Account.

Therefore the Defendant had no right of set off and this Court was urged to find as such. Further that as was apparent from paragraph 14 and 27 of **DW1's** Witness Statement where it was strangely asserted that the divide between the 1st Plaintiff as an individual and the Company was blurred/indistinct the Defendant Bank engaged in imprudent banking when it debited the funds in the joint account to the credit of a totally different entity without the authority of its owners.

That it had already been shown that the Company in question was incorporated and was a distinct legal person at law from its Directors and Shareholders.

It was lastly prayed by Counsel that this claim be upheld with interest at the agreed rate of 7% as confirmed by the undisputed statement appearing at page 6 of the Plaintiff's Bundle of Documents.
Counsel for the Defendants joined issues with the Plaintiff in this matter and also added an extra one to do with the fact that the 2nd Plaintiff never testified before court to prove her claims.

According to Counsel for the Defendant, this was not a representative action but one in which the Plaintiffs had sued the Defendant individually. It follows that each of the parties had the right to prove his or her own case against the Defendant and in this case, no evidence had been submitted by the 2nd Plaintiff to prove her case against the Defendant.

That there were a number of decisions that supported the proposition that the Plaintiff must prove his case before judgment can be given in his favour. Counsel relied on the case of **KHALID MOHAMED V THE ATTORNEY GENERAL (5)** in which there was a proposition by Counsel that in every case where the defence is defeated, the Plaintiff ought to succeed in his claim as a

matter of course. Ngulube DCJ rejected this proposition and said that it was not acceptable.

Counsel further pointed out that the 2nd Plaintiff did not prepare and submit her Witness Statement before Court to establish the assertions contained in the first paragraph of the Statement of Claim.

On the second issue of whether or not Account number 0101800121000 was a Joint Account, it was submitted that the resolution of this issue was purely a matter of fact or evidence and not law.

Further that the learned authors of Chitty on Contracts define a joint account as follows:

> **"An account opened in the names for two or more customers is known as a joint account. The customers, in the instructions given to the bank when the account is opened, may stipulate that cheques may be signed by any one of them, by two or more of them signing together or by all of them jointly."**

According to Counsel for the Defendant it is not enough that the account be in the name of two or more persons. The instructions or mandate given to the bank at the time of opening the account has to be taken into account.

That since the account was in the name of more than one person the bank needed instructions on how parties had determined that the account ought to be operated.

That the learned authors went on to state that *"A bank's main duty, though is to adhere to the terms of its mandate."*

It is contended that it is the mandate given to the bank that determines the character of the bank account and this is invariably contained in the documents that are presented to the bank at the time of opening of the account. This is evident from various cases some of which had been cited on behalf of the Plaintiff.

Moreover that in the case of **CATLIN V CYPRUS FINANCE CORPORATION (LONDON) LTD (2)**, a case which dealt with a joint deposit account opened on terms that no payment should be made out except on joint signatures it was pointed out that the mandate was a single document, signed by each joint account holder and containing no hint of anything other than a joint obligation save where a joint and several responsibility for any overdraft was expressly provided for. That as the defendants agreed to honour instructions signed by both account holders, this imported a negative duty not to honour instructions not signed by both account holders.

Further that the mandate given to the bank defined the character of the bank account that was opened. In the case just cited as in this case the mandate which clients of the bank signed on 2nd February, 1973 was on bank's standard form of application to open a joint account adapted for use by the bank.

Similarly in the case of **BREWER V WESTMINISTER BANK LIMITED (6)** the Plaintiff and the 2nd Defendant applied to the Defendant bank for a joint account using the banks standard form known as *"Mandate for joint Account."*

Learned Counsel submitted that in the case before Court the position was totally different. The 1st Plaintiff confirmed in cross- examination that he approached the Defendant bank with a view to opening a bank account. He was given the Account Opening Form for him to complete and submit to the Defendant and this document was before Court.

Moreover that as explained by the Defendant's witness there is a procedure for opening accounts with the Defendant bank. The 1st Plaintiff opened a number of personal accounts and the title of one of them was *"Mr Dimitrios Monokandilos and Mrs Filandria Kouri."*

That from the Defendant's practice which was unchallenged, a person wishing to open an account with the Defendant was required to obtain an *"Account Opening Form"* which catered for all different types of accounts for companies limited by shares private or public, joint or personal accounts and the only requirement is that one must complete the parts of the document relevant to the type of the account he wants to open.

All Applicants are expected to provide the title of the account in Part A of the form, Partnerships had to complete Part C whilst Individuals had to complete part A to open personal accounts.

That if people want to open a joint account they have to complete part A by specifying the name of the beneficiaries of the account and part E, where they are required to sign for the Joint Mandate on the joint account.

That in August, 1994 the 1st Plaintiff obtained and completed the Account Opening Form at page 17 of the Bundle. The 1st Plaintiff completed part A where he indicated the title of the account as *"Mr Dimitrios Monokandilos and Mrs Kouri Filandria."*

That the 1st Plaintiff included his details only without those of the 2nd Plaintiff and appended his signature on part A of the form whilst the 2nd Plaintiff did sign the form as the second beneficiary of the account.

Moreover, that the joint account holders were also expected to complete part A by stating the *"special instructions for the operation of the Account,"* which part was never completed by the Plaintiffs. That neither the 1st nor 2nd Plaintiff signed or completed part E of the form which dealt with the Joint Mandate.

Apart from completing the Account Opening Form, applicants are expected to complete and submit to the Defendant a *"Specimen Signature's"* card. In the case of a joint account the two beneficiaries may sign the card and the implication was that the Defendant would honour instructions bearing the signatures appearing on the card and without the joint mandate being given to the Defendant, the said account could not be said to be a joint account.

According to Counsel it is important to note that the Specimen Signatures Card was only signed by the 1st Plaintiff and that the manner in which this account operated was also crucial. That it was not disputed that the account was opened and operated as an individual account owned by the 1st Plaintiff.

Throughout the period that the relationship between the 1st Plaintiff and the Defendant subsisted, all transactions on the account were carried out on the instructions of the 1st Plaintiff as the owner of the account.

The Letter of Undertaking of 28th April, 1995 was signed by the 1st Plaintiff only and it referred to money held in *"my two foreign exchange accounts..."* There was no mention of the funds in these accounts being joint funds. The 2nd plaintiff never signed the Letter of Undertaking.

Based on this it was submitted that there was no evidence before Court to support the Plaintiff's proposition that this was a joint account. This Court was accordingly implored to hold that the account in issue was never joint but an individual account held by the 1st Plaintiff.

On the second issue of whether the Defendant had the right to access the funds in the Account learned Counsel said that this question is answered in the affirmative. That it is important to note that the Defendant's evidence on this issue was never contested by the Plaintiffs. That the 1st Plaintiff treated the Defendant's evidence on this point as inconsequential. The Defendant's Witness Statement testimony was that the 1st Plaintiff was a major shareholder and director of a company called International Investments and Financings Limited (the Company).

According to the documents presented to the Defendant by the 1st Plaintiff in support of the Company's application to open bank accounts with the Defendant, the Company was incorporated on 27th January, 1994 and its line of business was summed up in a letter written by the Company, signed by the 1st Plaintiff as Chairman of the Company and sent to the Bank dated 30th November, 1995.

That the business relationship between the Company and the Defendant was created with the opening of bank accounts in favour of the Company. The business in the initial stages of the relationship was very good. The Company had a very healthy cash flow position which made the Defendant trust it as well as the 1st Plaintiff as its Chairman.

Counsel further stated that the Defendant was able to write a letter dated 16th February, 1996 headed *"To whom it may concern,"* in which the Defendant confirmed that the 1st Plaintiff was one of its esteemed customers. That he had an active account with the Defendant and as at the date of the letter, there had been a turnover of more than ZK5billion (approximately US$5million) in his personal account.

That the Defendant went on to confirm that as at the date of the letter, the Defendant was holding about K1.9 billion, which was approximately US$2 million of the 1st Plaintiff's money.

That after opening the bank accounts, the Company approached the Defendant and the Defendant gave the Company a number of credit facilities. The Company with the help of the 1st Plaintiff, was able to service them to the satisfaction of the Defendant such that in 1995, given the activities on the 1st Plaintiff's accounts, the Defendant felt comfortable enough to advance the Company a credit facility of US$2,190,000.00.

Further that the Company was said to have been involved in the business of marketing maize for 20 years and was at the time registered as a maize trader with the Ministry of Agriculture, Food and Fisheries.

That in September 1995 after a poor harvest of maize the Government through the Ministry of Agriculture, Food and Fisheries established a Maize Import Credit Scheme to fund the importation of maize into the country which was administered by the Bank of Zambia and Commercial banks like the Defendant were invited to participate in it by borrowing money from Bank of Zambia and in turn lending it to their customers registered with the Ministry aforesaid to finance the importation of maize into the Country.

That after the Company applied, the Defendant evaluated its application and based on the securities available, the Defendant agreed to secure and advance to the Company the sum of US$ 2, 190,000 and not the US$5,120,00 it had asked for.

In November, 1995 the 1st Plaintiff acting for the Company presented a Pro-Forma invoice No. 896 dated 3rd November 1995, issued by ML Comert

International to supply 10,000 metric tonnes of maize at the total cost of US$2,190,000.

The payment was to be made by *"Irrevocable and Confirmed Letter of Credit"* and as far as Bank of Zambia was concerned the borrower was the Defendant who had to repay the money drawn from the scheme and advanced to its customers whilst in the books of the Defendant, the Company was the borrower.

It was therefore the responsibility of the Defendant to recover the money advanced to it's customers under the scheme and repay the same to Bank of Zambia.

Since the Company did not have adequate security to cover the facility the Defendant working with the 1st Plaintiff, in his own right and as an officer of the Company, put together a number of securities to the satisfaction of the Defendant and it was agreed between them that the 1st Plaintiff would maintain in his personal account a fixed deposit in kwacha equivalent to US$1,000,000.00 and the Defendant would hold these funds as security for the facility of the US$2,190,000.00.

According to the Defendant the 1st Plaintiff even signed a Letter of Undertaking on 28th April 1995 in which he confirmed that the funds held in his two US$ accounts could be used to secure the overdraft facilities extended to him by the Bank which also allowed the Company to overdraw its account on the strength of this undertaking.

This position was further confirmed by a Memorandum dated 4th January, 1996 which also showed that the total assets of the Company was less than K500 million and it was agreed that the 1st Plaintiff together with another

shareholder and Director a Mr Kosmas Mastokolias were to individually execute personal guarantees each limited to the sum of US$1,200,000.00.

The 1st Plaintiff guaranteed to repay the Defendant within two days from the date of demand and stated that his liability was that of a principal debtor primarily responsible for the Company's debt.

Another security provided was the 10,000 metric Tonnes of Maize to be imported by the Company and consigned to the Defendant and the Company was to execute the usual debenture on the fixed and floating assets of the company.

Once the security was settled the Defendant on 19th December, 1995 opened a Letter of Credit of US $2,190,000.00 on behalf of the Company as the Applicant and ML Comert International as the Beneficiary and it was agreed that 40% of the value of the goods would be paid to the beneficiaries as advance payment. In January 1996, the beneficiary M. L. Comert International received the sum of US $876,000 being 40% of the value of the Letter of Credit / and issued Receipt No. 8 dated 8th January, 1996. The balance of the value of the Letter of Credit in the sum of the US $1,314,000 was paid to the beneficiary in March 1996. The maize was expected in Zambia by 31st March, 1996.

However the said maize was not delivered to Zambia and when the Defendnat made a follow up there was no response from the 1st Plaintiff or the Company.

It is also contended that the manner in which the 1st Plaintiff had presented the debt to be paid in the letter dated 27th November, 1995 to Bank of Zambia had been disregarded and the Bank of Zambia eventually began to debit the current account the Defendant held with it.

When there was completely no response to the several remiders made to the 1st Plaintiff by the Defendant it in turn debited the 1st Plaintiff's Fixed Deposit Account on the strength of the Letter of Undertaking and the Deed of Guarantee which left a balance of US$1,200,000.00 payable to the Defendant by the Company.

Moreover on 22nd November, 1996 the Defendant commenced legal proceedings under Cause No. 1996/HP/4739 against the 1st Plaintiff and Mr Kosmas Mastrokolias, as guarantors of the Companies Liabilities with the Defendant claiming US$1,200,000.00. Although the Company was placed under Receivership nothing was recovered since its assets did not exceed K500million in value and in 1998 both the 1st Plaintiff and Mr Mastrokolias were deported from Zambia.

On 17th May, 1999 the Defendant obtained judgment against the 1st Plaintiff and Mr Mastrkolias and to date the two owed the Defendant over US$4,000,000.00 and the Company and ML Comert International had not shipped the maize to Zambia or refunded the monies. Thus the fact that the Company was indebted to the Defendant was not in dispute.

Learned, Counsel stated that the 1st Plaintiff signed a *"Letter of Undertaking"* dated 28th April, 1995 in which he confirmed that the funds held in his two US $ personal accounts could be used to secure the overdraft facilities given to him by the Defendant.

However the claim of the Plaintiffs was that the Plaintiff wrongly debited their account in the sum of US$949, 933.87 whilst the Defendant in its Defence was asserting that it exercised its right of set off that arose from a personal guarantee.

That a guarantee was defined as:

> **"A contract of guarantee in the true sense was a contract whereby the surety (or guarantor) promises to the creditor to be responsible, in addition to the principal for the due performance by the principal of his existing or future obligations to the creditor, if the principle failed to perform those obligations."**

In this case, Counsel for the Defendant stated that the 1st Plaintiff signed a document headed *"Letter of Guarantee"* and as guarantor, the said document held him personally liable in the sum of US$1,200,000.00 upon the Company failing to pay the said sum.

That in cross examination the 1st Plaintiff admitted that he was the chairman of the Company on whose behalf he had made the personal guarantee therefore by virtue of this guarantee the Defendant was perfectly at liberty to utilize the funds held in the 1st Plaintiff's account to mitigate the debt owed by the Company.

It was lastly stated that the Plaintiffs had failed to prove their claims against the Defendant and that the case be dismissed and the Defendnat awarded costs.

Counsel for the Plaintiffs also filed a Reply to the Defendant's submissions. On the issue raised by the Defendant that a Plaintiff must give evidence personally in a civil case, it was stated that at times, the person wronged would not even be able to give evidence for various reasons including death, mental incapacity, inconvenience or some other reason.

In this case the 1st Plaintiff gave evidence on behalf of both himself and the 2nd Plaintiff as he is the one that had the best first hand knowledge of the facts in this case.

On the second issue of whether the 2nd Plaintiff had a claim learned Counsel stated that the Plaintiffs held a joint account at all material times. That although it is not in dispute that the 1st Plaintiff operated the account at all times, this did not extinguish the 2nd Plaintiff from being a party to the joint account based on the case of **ROYAL BANK OF SCOTLAND PLC V FIELDING (3)** where the Court of Appeal held that unless the Bank was aware of some limitation agreed between joint account holders who are husband and wife, it was no concern of the bank how a husband and wife chose to operate a joint account, provided that such operation was in accordance with the express terms of the mandate.

That further authorities already cited by the Plaintiff had indicated that even if a joint account holder did not know that an account was opened on their behalf it would still be a joint account and the Defendant had not brought any authority to counter this assertion.

Coming to the issue of whether the Account in question was joint, Counsel argued that the Defendants stated that it was not sufficient according to their forms which bore two names that the account was joint. This was because the specimen signature card had to be signed by both parties and the mandate form was supposed to set out how the parties had determined to operate the account.

Counsel pointed this Court to the fact that the Defendant did not call Mrs M. Katepa the banker who had opened the account to come and testify and that the only person present when it was being opened was the 1st Plaintiff who clearly stated that it had been opened as a joint account.

That the bank also printed bank statements in both names of the Plaintiffs and it was also confirmed under cross examination that the Defendant never opened accounts in the names of non existent entities and the duty to ensure that the account holders signed all the necessary documents in both their names was with the Bank.

Coming to the last issue of whether the bank had the right to access the monies in the Account it was contended that the Defendant did not have the right to do so and had lamentably failed to demonstrate that it had any legal right to take the money out of a joint account to cater for the loan the Company may have had with them.

It was lastly prayed that Judgment be given in favour of the Plaintiff and costs taxed in default of agreement.

I am grateful to both Counsel for their written submissions which I have considered together with the evidence on record.

It is not in dispute that the Defendant Bank lent the Company in which the 1st Plaintiff was shareholder and director the sum of US$2,190,000.00 and that he gave a Personal Guarantee to secure this loan.

It is also not in dispute that an account in the names of Dimitios Monokandilos and Filandria Kouri was opened by the Defendant between 1994 and 1996.

It is further a fact that the Defendant on the strength of the Letter of Undertaking made by the 1st Plaintiff on 28th April 1995 as well as the Deed of Guarantee dated 28th November, 1995 debited the Fixed Deposit Account in the names of the Plaintiffs.

The issues in dispute brought to the fore by both parties are whether or not the account in question was a joint account. Secondly whether the the Defendant had the right to access the monies in the said account. A third issue was

whether the 2nd Plaintiff had a claim in the matter even if she did not come to give evidence before Court.

I will deal with the first issue of whether the Account No. 0101800121000 with the Defendant Bank was joint or not. According to the Plaintiffs this account was joint because at law a joint account was simply a debt owed to the account holders jointly and would raise the obvious questions as to the rights of one of the joint creditors if the bank wrongly paid the other.

Counsel for the Plaintiffs cited the case of **AROSO V COUTTS & CO (1)** where it was held that the fact that one of the joint account holders did not contribute to or draw upon the joint account did not prevent that person from having a beneficial interest.

He also added that the learned author of Paget's Law of Banking 12th Edition at page 177 also states that:

> **"Nor does it matter if such a person does not even know of the existence of the joint account. Moreover, the fact that a joint account holder was never intended to use the account while the other was still alive would not prevent the former succeeding to the whole account by survivorship."**

The Defendant on the other hand stated that the account was not joint since there was only one specimen signature of the 1st Plaintiff and not that of the 2nd Plaintiff. Moreover that although it was opened in the names of both Plaintiffs this account had no mandate and was not operated by both of them.

The Defendants Counsel also brought to the Court's attention another definition of a joint account according to the learned authors of Chitty on Contracts at paragraph 34 - 330 as:

> **"An account opened in the names for two or more customers is known as a joint account. The customers, in the instructions given**

to the bank when the account is opened, may stipulate that cheques may be signed by any one of them, by two or more of them signing together or by all of them jointly."

According to Counsel for the Defendant it is not enough that the account be in the name of two or more persons. The instructions or mandate given to the bank at the time of opening the account had to be taken into account.

Moreover, that since the account was in the name of more than one person the bank needed instructions on how parties had determined that the account ought to be operated.

The Defendant's Counsel also added that the learned authors off Chitty on Contracts went on to state that *"A bank's main duty, though is to adhere to the terms of its mandate."*

While I agree with both definitions of what a joint account is, I am of the considered view that the Defendant Bank and its officers has the responsibility and obligation to ensure that once a prospective account holder states that they would like a certain type of an account to be opened the Bank and its officers must ensure that the customer fulfils all the opening and operation requirements as set out by the Bank. **DW1** the Defendant's only witness also testified that the Bank should have ensured that Account Opening Forms were correctly completed; details such as the names were correctly filled out; it should have advised those that were opening accounts on the qualifications of their signatories; ensured that all signatories signed the Mandate Form; and ensured that the Account was opened in the name of a person or persons who exist.

Counsel for the Plaintiff also submitted that it was worth noting that custody of the account- opening documents remained with the Bank and not with the customer which simply supports my view.

The Record shows that the Account Opening Form filled by the 1st Plaintiff to open the Account in issue was provided by the Defendant Bank. The Form was used to open different accounts both personal or joint. Where a joint account was to be opened Part A and Part E of the Form had to be completed. In *Casu* the 1st Plaintiff indicated that the title of the Account was *"Mr Dimitrios Monokandilos and Mrs. Kouri Filandra"*. He filled in his own details but did not fill in his wife's details. Part E which provides for the Joint Account Mandate was not completed.

Regarding the opening of Joint Accounts J. M. Holden the learned author of The Law and Practice of Banking Volume 1 at pages 412 and 413 states that:

> **"11-66 When application is made to a bank to open a joint account, the same four questions arise as have already been noted when opening an account for an individual, namely the questions relating to the customers' authority, identity, integrity and employment. In practice one often finds that one of the parties to a new joint account is already well known to the bank in which case his introduction of the other or others will usually be considered sufficient to establishing their identity and integrity.**
>
> **11-67 Before a joint account is opened, it is usual for the bank to supply the proposed customers with a printed form for completion. This form will embody the instructions of the account holders to the bank, and it is commonly referred to as a mandate for joint account:"**

It is trite that banks use printed account opening forms which prospective customers complete. The banks issue rules and instructions to the staff on how these printed account opening forms must be completed to ensure that the customers requirements are satisfied. In the case of **LLOYDS BANK LIMITED V E. B. SAVOY AND COMPANY (7)** the House of Lords stressed the duty of the bank to insist upon the observance of rules and instructions which it had

issued for the guidance of its staff. Lawrence, L.J., in the Court of Appeal said that the fact that a breach of the bank's own rules had been committed did not necessarily prove that the bank had been guilty of negligence, as the rule which had been broken might have been made from excessive caution: but he added that in most cases the breach would furnish a strong prima facie ground for holding that the bank had not acted without negligence.

In *casu*, I find that the Defendant bank did not act properly and without negligence in opening the Account in the name of *"DIMITRIOS MONOKANDILOS and FILANDRIA KOURI."* Upon being informed by the 1st Plaintiff that he wished to open a joint account in his names and those of his wife, the Bank Officer who attended to him ought to have advised him of the Bank's requirements for opening a joint account, namely that apart from the names of the joint account holders, details of both account holders were required as were the specimen signatures of both account holders. Further Part E of the Defendant's Account Opening Form which embody the instructions of the account holders to the Bank, i.e. the mandate for joint account ought to have been completed before the account was opened.

It is clear that the Defendant Bank was negligent in the way it opened the Account in issue as well as the way it allowed it to operate without obtaining the required personal details of Filandria Kouri and her specimen signature. Further to this the Defendant Bank should have obtained a clear joint account mandate from the 2 persons named as Account Holders in accordance with its own rules and the printed Account Opening Form.

I accept the Defendant Bank's submission that since the Account in issue was in the name of more than one person the bank needed instructions on how the parties had determined that the Account ought to be operated. I do not however accept the argument that the Account in issue was opened and operated as an individual account owned by the 1st Plaintiff. In cross-examination **DW1** the Defendants only witness told the Court that he did not

personally deal with the Plaintiff's Account nor that of International Investments and Financing Limited as these accounts were handled by Branch Managers. I do not therefore accept the contention that the Account in Issue was opened and operated as a personal account belonging to the 1st Plaintiff based on **DW1's** testimony. The Defendant ought to have called as its witness Mrs M. Katepa the Bank Official who opened the Account and/or the Branch Manager who was handling the Account in issue to come and testify as to what type of Account it was.

I am of the considered view that the Defendant Bank was put on inquiry by the name of the Account. The name of the Account made it clear that it was a joint account and as such the Bank should have taken steps to ensure that all the requirements of a joint account were met by the Plaintiffs. At page 17 of the Defendant's Bundle of Documents – is the Account Opening Form which just above *"Part A"* under the heading *"Indicate Form of Ownership"* there are the following categories to be chosen from:

Individual

Joint – in addition complete Part E

Proprietorship

Partnership – in addition complete Part B

Club, Society or Association – in addition complete Part D

The only category ticked is the second one which is *"Joint"*.

That both the 1st and 2nd Plaintiffs' names appear on the Account Opening Form, the Account itself, the Account Statements and that the category of account ticked on the Account Opening Form was *'Joint'* is in my view enough to show that the account held by the Plaintiffs was a Joint Account.

The only evidence on record on what happened at the time of opening the account comes from the testimony of **PW1** who said that he went to the Defendant Bank to open a joint account in his names and those of his wife.

The Bank Statement clearly shows that the name of the account was in both Plaintiff's names and therefore supports his testimony. **DW1** also testified that the Bank did not open accounts in the names of non existent customers.

As alluded to by Counsel for the Plaintiffs the only person that was present at the time this account was being opned was the 1st Plaintiff so I accept his evidence on this aspect totally.

I also accept the legal position pronounced in the case of **AROSO V COUTTS & CO (1)** and by the learned authors of **Paget's Law of Banking** cited above who stated that the fact that one of the joint account holders did not contribute to or draw upon the joint account did not prevent that person from having a beneficial interest.

Although the record shows that when the account was opened the Account Opening Form was only filled up by 1st Plaintiff without the details or signature of 2nd Plaintiff, this could have been corrected by the Bank itself which should have merely informed the Customer of these requirements as I have stated above.

I accept State Counsel John Sangwa's submission that resolution of whether the account in issue was a joint account or not is a matter purely of fact or evidence and not law. In this respect the learned authors of The Institute of Bankers: Legal Decision Affecting Bankers, Volume IV at page 454 state thus:

> **"The point of interest to bankers in this case – i.e. what were the rights of the son in regard to the deposit in joint names after the father's death – was not unanimously decided... It is a question of fact, and one with which a bank ought not to be faced. Banks' forms of mandate in this matter are designed to free them from any doubt**

of the rights of survivors in joint account but if,.. one has to look at the intentions of the parties notwithstanding the mandate, then the position of the bankers is precarious".

In RE HARRISON (9) the headnote is as follows:

"A husband, in 1908, transferred the money standing to a current account at his bank in his own name into the joint names of himself and his wife. He did not inform his wife of the joint account, and always drew cheques on the account himself. He died in November, 1919. The wife never drew any cheque on the account until shortly before his death, when he was in failing health and unable to attend to business. The bank manager then informed her of the joint account, and advised her to draw a cheque, which she did.

The husband had also from time to time made deposits in the joint names of himself and his wife, and in August, 1919, consolidated them into one deposit in the joint names. The wife never knew of this deposit until after the husband's death".

Russell, J said that:

"... it is difficult here to find any motive for transferring the account from the husband's name into the joint names, except that the wife should take the money if she survived the husband".

Russell, J concluded his judgment by saying:

"If I am to infer from the surrounding circumstances what the motive of the transaction was, I hold that it was intended by the husband that the moneys standing on current account in the joint names were intended to belong to the survivor. The case for the defendants as regards the deposit account is much more difficult than that as regards the current account, and I can see nothing to

displace the wife's claim. I hold, therefore, that the moneys standing to the credit of both accounts belong to the wife".

On the facts before me and the surrounding circumstances, I find and hold that it was intended by the 1st Plaintiff that the moneys standing on Account No. 010180012100 in the joint names of himself and his wife were intended to belong to both of them.

I therefore find and hold that the account in question was Joint and belonged to both Plaintiffs herein.

On the second issue of whether the Defendant had the right to access the funds in the Account in issue. The Defendant claims that it had the right to these funds on the strength of the Letter of Undertaking as well as the Deed of Guarantee which made the 1st Plaintiff the Principal Debtor of the Company's debt to the Defendant Bank.

According to Counsel for the Plaintiff it is important to note the wording of the Letter of Undertaking which stated that the 1st Plaintiff *confirmed that the money held in his two foreign exchange accounts should secure the overdraft facilities he enjoyed in the books of Finance Bank Zambia Limited.*

Counsel for the Plaintiff pointed to the fact that there had been no evidence adduced to show which accounts the 1st Plaintiff was referring to and the only inference was that these should be in his names.

Evidence on record and particularly **DW1's** testimony has shown that the 1st Plaintiff opened a number of personal and business accounts with the Defendant Bank and this meant that he could have been referring to any of his personal accounts. The Letter of Undertaking did not expressly refer to the Joint Account in this case.

It is clear from the Letter of Undertaking dated 28th April, 1995 that the 1st Plaintiff was securing overdraft facilities enjoyed by himself and not overdraft

or other credit facilities availed by the Defendant to any third party such as International Investments and Financing Limited (the Company). Learned Counsel for the Plaintiff was therefore on firm ground when he submitted that in the Letter of Undertaking the 1st Plaintiff was referring to his own overdraft facilities and not those of the Company which is a separate legal entiry even though the 1st Plaintiff was its Chairman and Shareholder.

DW1's testimony that in the dealings with the Defendant, the line between the Defendant's relationship with the 1st Plaintiff and the Company was indistinct does not change the fact that the two customers were separate and distinct and as such the credit facilities availed to them and the security taken by the Defendant to secure such credit facilities were also separate and distinct.

As the Letter of Undertaking signed by the 1st Plaintiff secured overdraft facilities granted to him by the Defendant and not those granted to the Company the credit balances on the Plainfiff's personal accounts are not available for set-off against the Company's debit balances on its accounts with the Defendant bank.

Having found that the Account in dispute is a Joint Account, the Defendant had no right to access the funds therein. This would have been so even if the 1st Plaintiff had by the Letter of Undertaking dated 28th April, 1995 secured credit facilities availed to the Company by the Defendant. This is so because joint account holders do not have power to pledge each others credit. The 2nd Plaintiff did not sign the said Letter of Undertaking and as such the Defendant can not set-off its claim against the company or indeed its claim against the 1st Plaintiff against the credit balance on the Joint Account.

As stated by the Learned authors of Halsbury's Laws of England, Valume 42 at paragraph 435, a set-off may only be maintained where the claims to be set-off against each other exist between the same parties and in the same right. That is not the case in Casu and the Defendant can not therefore set-off the Company's debit balance against the credit balance on the Joint Account.

The Deed of Guarantee executed by the 1st Plaintiff in favour of the Defendant with respect to the Company's indebtedness to the Defendant does not entitle the Defendant to take monies from the Joint Account to cater for any loan the Defendant granted to the Company.

The record shows that the Defendant sued the 1st Plaintiff and one Kosmas Mastrokolia under their respective Deeds of Guarantee and obtained Judgment in the sum of US $1,200,000.00 under Cause No. 1996/HP/4739. This is as it should be and the Defendant should pursue the 1st Plaintiff and Kosmas Mastrokolia under its Judgment aforesaid.

In view of the foregoing, I find and hold that the Defendant wrongfully debited the Plaintiffs Joint US Dollar Account with the sum of US $949,933.81 on 26th February, 1996.

I now turn to the submission by learned Counsel for the Defendant that the 2nd Plaintiff has failed to prove on a balance of probability her claims against the Defendant and the same should be dismissed.

The authorities cited for this submission clearly state that the Plaintiff has a duty of proving his case if he is to be granted judgment. The said duty continues even where a Defendant does not put up a defence. The authorities do not however state that the Plaintiff must personally give evidence in order to establish the claim and succeed.

I have found and held that the 1st and 2nd Plaintiffs hold a Joint Account with the Defendant, namely Account No. 0101800121000. It follows that the 2nd Plaintiff is part of the Joint Account in dispute and as such she has sufficient interest to be party to this suit on the authority of **Order 14 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** and the cases of **LONDON NGOMA AND OTHERS V LCM COMPANY LIMITED AND UNITED BUS COMPANY OF ZAMBIA LTD (IN LIQUIDATION (7)** and **THE ATTORNEY**

GENERAL V ABOUBACAR TALL AND ZAMBIA AIRWAYS CORPORATION LIMITED (8).

I accept the submission by learned Counsel for the Plaintiffs that the 2nd Plaintiff does not need to prepare her own witness statement to establish the assertions contained in the first paragraph of the Statement of Claim. In my view the evidence given by the 1st Plaintiff, **DW1** and documentary evidence before the Court is what I looked at in making my finding that Account No. 0101800121000 is a Joint Account.

I have considered the pleadings and evidence and the view I take is that the Plaintiffs have proved their case against the Defendant on a balance of probabilities.

I therefore enter Judgment in favour of the Plaintiffs against the Defendant in the sum claimed of US $949,933.81. The said sum is to attract interest of 7% per annum from 26th February, 1996 to date of Judgment, thereafter at the current bank lending rate as determined by Bank of Zambia.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Delivered this 29th day of March, 2018.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE