IN THE HIGH COURT FOR ZAMBIA **2010/HPC/0013**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

INVESTRUST BANK PLC **PLAINTIFF**

AND

CHICK MASTERS LIMITED **1ST DEFENDANT**

DR. MWILOLA IMAKANDO **2ND DEFENDANT**

LIANE MOOSHO IMAKANDO **CLAIMANT**

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka the 27th day of February, 2020.

For the Plaintiff: *Mr. C. Chonta of Messrs. C. Chonta Advocates*

For the 1st and 2nd Defendants and Claimant: *Mr. E. Tembo of ICN Legal Practitioners and Mr. W. Siyumbano of Messrs. Mutemwa Chambers*

RULING

Cases referred to:

1. *Tap Zambia Limited v. Percy Limbusha and Others, Selected Judgment No. 47 of 2017.*
2. *Chikuta v. Chipata Rural Council (1974) Z.R. 241 (S.C.).*
3. *Ludwig Sondashi v. Godfrey Miyanda (Sued as National Secretary of the Movement for Multi-Party Democracy) (1995) S.J. 1 (S.C.).*
4. *Zambia Revenue Authority v. Jayesh Shah (2001) Z.R. 60.*
5. *Mountstephen v. Lakeman (1871) LR 7 QB 196.*
6. *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1998) 1 All ER 98.*

7. *Great Western Rly Co and Midland Rly Co v. Bristol Corpn (1918) 87 LJCh 414, H.L.*
8. *IRC v. Raphael (1935) AC 96, H.L.*
9. *General Surety and Guarantee Co. Ltd v. Francis Parker Ltd (1977) 6 BLR 16.*

Legislation referred to:

1. *Order 47, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (White Book)*
2. *Practice Note 47/ 7/ 1(a) of the White Book.*
3. *Practice Note 47/ 1/ 8 of the White Book.*
4. *Section 14 (2) of the Sheriff's Act, Chapter 37 of the Laws of Zambia.*
5. *Order 14A of the White Book.*
6. *Order 17, rule 1 (3) of the White Book.*
7. *Order 33, 3 (1) of the White Book.*
8. *Section 17 of the Married Women's Property Act, 1882.*
9. *Order 18, rules 4 (2) and 11 of the White Book.*
10. *Order 10, rule 4 (1) of the Court of Appeal Rules, S. I. No. 65 of 2016 (the Court of Appeal Rules).*

Publications referred to:

1. *Halsbury's Laws of England, 5th Edition [London: Butterworths, LexisNexis (UK), 2015], Volume 49 paragraphs 638, 640, 641, 642, 718 and 719.*
2. *Bryan A. Garner (Ed), Black's Law Dictionary, 8th Edition [Thomson Reuters, 2004].*

There are three applications herein, namely:

(i) the application to stay execution of Writ of Fieri Facias (hereinafter referred to as "the First Application");

(ii) the application to set aside Writ of Fieri Facias for irregularity and for a claim of damages arising therefrom (hereinafter referred to as "the Second Application"); and

(iii) the notice of intention to raise a preliminary issue with regard to the Interpleader Summons (hereinafter referred to as "the Third Application").

The First Application was made pursuant to Order 47, rule 1 of the Rules of the Supreme Court of England and Wales, 1999 Edition (hereinafter referred to as "the White Book").

The First Application is supported by an affidavit (hereinafter referred to as "the First Affidavit in Support"), filed into court on 5th June, 2018, and sworn by one Mwilola Imakando, the 2nd Defendant herein. It was his testimony that the Plaintiff, through its advocates, have levied execution against the Defendants, on a supposed balance due to the Plaintiff, after sale of the mortgaged property. To support this assertion, the deponent produced exhibit "MI1", being a copy of the Sheriff's Seizure Form.

The deponent also deposed that by letter of offer dated 23rd June, 2009, the Plaintiff offered a facility of K250,000,000.00 to the 1st Defendant, whose security was the 1st Defendant's Farm 396a/78a, Makeni and the 2nd Defendant's property known as Stand F441/REM, Roma, Lusaka. As evidence of this assertion, the deponent produced exhibit "MI2", being a copy of the letter of offer. That, the said securities have since been sold, pursuant to the judgment of this Court and the attendant execution thereof.

It was the deponent's further testimony that his liability was only to the extent of the value of the mortgaged property as no guarantee was executed by him in favour of the Plaintiff, as he was not the borrower himself. That, his liability dissipated with the sale of his property following the judgment as the Plaintiff having seized and sold the deponent's property which was pledged as security for the

facility, no longer has a claim in respect of the deponent's personal and other property which was never pledged as security.

The First Application is augmented by Skeleton Arguments, also filed into court on 5th June, 2018. It was contended by Counsel for the Defendants, in the said Skeleton Arguments, that the First Application was precipitated by the Plaintiff's action to further seize the 2nd Defendant's property by way of Writ of Fieri Facias, on the basis of a disputed outstanding judgment debt which arose in the absence of the Plaintiff rendering an account of its sale of the Defendants' initially seized property. That, the initially seized and subsequently sold property was expressly spelt out in the judgment order and no application was made by the Plaintiff to warrant the subsequent seizure of the 2nd Defendant's property, especially, that he was never a party to the loan agreement between the Plaintiff and the 1st Defendant.

Citing Order 47, rule 1 of the White Book, Counsel for the Defendants submitted that the case before this Court presents special circumstances, in line with Practice Note 47/7/1(a) of the White Book, which render it inexpedient for the Plaintiff to execute the said Order 47, rule 1 of the White Book. That, the said circumstances are reinforced by the fact that the Plaintiff failed or neglected to respond to the Defendants' request for transparency in the manner in which it dealt with the sale of the mortgaged property. In this regard, Counsel for the Defendants submitted that the loan agreement which gave rise to this matter was between the Plaintiff as lender, and the 1st Defendant as the borrower. That, the 2nd Defendant only pledged

his property as further security for the said facility, in his capacity as a director of the 1st Defendant. Counsel thus, argued that it follows that the 2nd Defendant's liability with respect to the facility was only to the extent of the security that he pledged and that the difference if any, must be recovered from the 1st Defendant and not the 2nd Defendant.

Counsel for the Defendants submitted, therefore, that the Writ of Fieri Facias was irregular and that the same should be set aside, and the damages arising therefrom be awarded to the 2nd Defendant. Further, Counsel submitted that it was on the basis of the foregoing that the Defendants sought the indulgence of this Court to maintain the status quo, by granting a stay of execution of the Writ of Fieri Facias, to allow for the determination of the First Application.

The Second Application, as per the title of the application on the Summons, was made pursuant to Order 47/1/8. Counsel for the Defendant did not bother to state under which law the said Order being cited was, which makes for a very lax approach by Counsel for the Defendant in their attention to detail as they drafted the said Summons. Counsel for the Defendant, thus, is reminded of their duty as officers of the Court to take care to draft court documents that present as much information as possible for the court to deliberate on. Further, counsel for the Defendant is reminded of their duty as officers of the Court to ensure that summonses drafted on behalf of their clients cite clearly, the appropriate law, pursuant to which the particular summonses are made. It cannot be left to the Court to guess which law Counsel intends to rely on and this could amount

to an injustice even for their client if Counsel does not properly and clearly present their client's case. This notwithstanding, I shall proceed on the assumption that Counsel for the Defendant meant to cite Order 47, rule 1 of the White Book, as the same is the authority that has been cited in the Skeleton Arguments and List of Authorities accompanying the Second application. The Second Application was filed into court on 5th June, 2018.

The Second Application is supported by affidavit (hereafter referred to as "the Second Affidavit in Support"), also dated 5th June, 2018, and also sworn by the 2nd Defendant. It was his testimony that the 1st Defendant obtained a loan facility from the Plaintiff, in respect of which Farm 396a/78a, Makeni belonging to the 1st Defendant, and Stand F441/REM, Roma, Lusaka belonging to the 2nd Defendant, were pledged as security. To support this assertion, the deponent produced exhibit "MI1", being a copy of the facility letter.

It was the deponent's further testimony that the 1st Defendant defaulted on its repayment and by an order of this Court, under this cause, dated 6th April, 2010, the Plaintiff secured a foreclosure nisi against the Defendants, for the payment of money secured by the properties. That, following this Court's review of the 6th April, 2010 order, the order was reviewed to include the 2nd Defendant's property and the Court ordered vacant possession of the said property.

The deponent deposed that the Plaintiff proceeded to dispose of the two properties, but failed or neglected to render accounts of the said sales to the Defendants despite timely notifications from the latter, to involve them in the process leading to the sale of the said

properties. To support this assertion, the deponent produced exhibits "MI12" to "MI14", being copies of the said notifications.

The deponent averred that, having sold the 2nd Defendant's property, the Plaintiff has no further legal right to seize the 2nd Defendant's property which was never part of the security furnished by the 2nd Defendant. That, therefore, the Sheriff's seizure of the 2nd Defendant's property on 31st May, 2018, was irregular and should be set aside. As proof of his assertion, the deponent produced exhibit "MI15", being a copy of the Sheriff's Seizure Form.

The Second Affidavit in Support is augmented by Skeleton Arguments of even date and it was argued by Counsel for the Defendants, in the said Skeleton Arguments, that the Second Application was precipitated by the Plaintiff's action to further seize the 2nd Defendant's property by way of Writ of Fieri Facias, on the basis of an unverified outstanding judgment debt which arose in the absence of the Plaintiff rendering an account of its sale of the Defendants' initially seized and sold property. That, the borrower of the loan facility which was advanced by the Plaintiff, was the 1st Defendant, a distinct person at law, and the 2nd Defendant's security in respect of the said loan facility was seized and subsequently sold by the Plaintiff.

Counsel thus, submitted that it follows that any further execution in respect of the said loan facility must be levied upon the 1st Defendant's property and that this is primarily because the entrenched doctrine of privity of contract which precludes third parties from enjoying fruits or suffering burdens in respect of

contracts to which they are not party. That, it is on this basis that the 2nd Defendant moved this Court to set aside the Plaintiff's execution of 31st May, 2018, upon the 2nd Defendant's property and to claim for damages arising from such irregular execution.

Counsel for the Defendants indicated that he was relying on Practice Note 47/1/8 of the White Book and on the case of *Tap Zambia Limited v. Percy Limbusha and Others*[1]. He submitted in this regard, that an execution which has been improperly issued can be set aside at whatever stage of the execution process and that an improperly issued process of execution can give rise to liability.

Counsel for the Defendants contended that the Plaintiff's execution upon the 2nd Defendant's property rather than the 1st Defendant's property, was improper and that it would be unjust to allow the Plaintiff to proceed with the unlawful execution and deprive the 2nd Defendant of his property.

With respect to the 2nd Defendant's claim for damages, Counsel for the Defendants referred the Court to Section 14 (2) of the Sheriff's Act, Chapter 37 of the Laws of Zambia and the Tap Zambia Limited case, and submitted that since the alleged irregular execution in question was at the Plaintiff's instance, the Plaintiff should atone for all the damages which the 2nd Defendant has suffered, arising therefrom.

With this, Counsel for the Defendants urged the Court to set aside the Writ of Fieri Facias executed in respect of the 2nd Defendant's property, and that this Court order that the Plaintiff makes good the

damage occasioned on the 2nd Defendant as a result of the alleged improper execution.

The Second Application was opposed and to this end, an affidavit (hereinafter referred to as "the Second Affidavit in Opposition), was filed into court on 2nd October, 2018; and was sworn by one Charles Chileshe Chonta, the advocate seized with conduct of this matter on behalf of the Plaintiff.

It was Mr. Chonta's testimony that the Plaintiff has on numerous occasions rendered accounts to the Defendants through their advocates and to support this assertion, Mr, Chonta produced exhibit "CCC1", being copies of the letters to that effect.

Mr. Chonta averred that the 2nd Defendant did proffer a personal guarantee as security for the 1st Defendant's indebtedness. As proof of this assertion, Mr. Chonta referred the Court to the facility letter produced by the 1st Defendant in its affidavit in support, marked "MI1". He also produced exhibit "CCC2", being a copy of the guarantee signed by the 2nd Defendant.

Finally, Mr. Chonta averred that the 2nd Defendant's prayer for damages for purported irregular execution is, therefore, misconceived.

The Third Application was made by way of Notice, pursuant to Order 14A of the White Book, and filed into court on 7th August, 2018. The Notice of Intention to Raise a Preliminary Issue was accompanied a List of Authorities of even date, in which Counsel for the Plaintiff referred the Court to Order 17, rule 1 (3) of the White Book, as the

authority he intended to rely on at the hearing of the preliminary issue. I have observed from the record, however, that the Third Application was not accompanied by an affidavit, and further, that no affidavit in opposition was filed in respect of the said Application.

The above, notwithstanding, Counsel for the Defendants, who is also Counsel for the Claimant did file Heads of Argument on behalf of the Claimant, in respect of the Third Application.

It was stated, in the said arguments, by Counsel for the Defendants and Claimant that the Plaintiff has raised a preliminary issue on the ground that the proceedings are not properly before this Court for it to make the declaration and/or the orders sought. Counsel submitted that the Order 14 (a) of the White Book that the Plaintiff is purporting to rely on, does not exist and that if the intended Order is Order 14A (1) (a), the same relates to the question of law or construction where it appears to the Court that such question is suitable for determination without a full trial. In this regard, Counsel for the Defendants and the Claimant contended that they have not seen the question or issue of law or fact being raised and that what the Plaintiff seems to be raising are procedural rules on commencement of actions.

Referring the Court to the cases of *Chikuta v. Chipata Rural Council*[2], *Ludwig Sondashi v. Godfrey Miyanda (Sued as National Secretary of the Movement for Multi-Party Democracy)*[3] and *Zambia Revenue Authority v. Jayesh Shah*[4], Counsel for the Defendants and the Claimant submitted that when the matter has been commenced the

way it was done, the Court could direct that it be heard as if the matter was commenced by the Sheriff's Office. That, that is where the Court feels that for it to reach a just decision, evidence should be adduced and the matter decided on its substance and merit rather than having to dismiss the action.

Contending that the preliminary issue raised is not clear and that Order 14 (a), cited by the Plaintiff, is non-existent, Counsel for the Defendants and Claimant referred the Court to Order 33, rule 3 (1) of the White and submitted that a preliminary question of law should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as the preliminary issue. Counsel thus, argued that the preliminary issue raised and the Order relied upon raise difficulties of interpretation, let alone, comprehension.

It was Counsel's further submission that, in raising the preliminary issue, the Plaintiff should have sought guidance from Order 14A, Order 33, rule 3 (1) and Order 18, rules 4 (2) and 11 of the White Book, but failed to do so. With this, Counsel prayed that the preliminary issue be dismissed with costs for irregularity and that application for Interpleader be heard on the merits.

At the hearing of the First, Second and Third Applications, Counsel for the Defendants and the Claimant indicated that he would adopt the Skeleton Arguments on record, in respect of the First and Second Applications and added that in the alternative, should this Court find that indeed, the 2nd Defendant did execute a personal guarantee in

favour of the Plaintiff, the Defendants still maintain that the subsequent execution which is the subject of this matter was irregular on the basis that the Originating Summons and the final order of this Court, both did not make pronouncements on the guarantee. That, it is trite that an execution can only be effected pursuant to a court judgment or order.

In opposition, Mr. Chonta, Counsel for the Plaintiff submitted that proof had been supplied in the Affidavit in Opposition, that the 2nd Defendant signed what is in effect, a guarantee under the Statute of Frauds, 1677.

Mr. Chonta also urged the Court to take judicial notice of the proceedings in cause No. 2013/HPC/0081, and submitted that there has been a multiplicity of actions. That, in cause No. 2013/HPC/0081, what is being repeated here was tabulated and the matter is *res judicata* as the order of court therein, directed that the 1st and 2nd Defendants pay the judgment sum, interest and costs.

Mr. Chonta further contended that the Defendants had paid nothing following the order of court and that whatever had been recovered was through execution. With this, Mr. Chonta submitted that having demonstrated that there are no merits in the Second Application, the First Application should also fail and the *ex parte* stay discharged.

In response, Mr. Siyumbano stated that the 2nd Defendant was sued in his capacity as owner of Stand F441/REM, Roma, Lusaka, but that should what he executed amount to a Deed of Guarantee, the Defendants still maintained that there was no action which was

commenced by the Plaintiff to effect the said personal guarantee and there was no order to that effect. That, in the premises, the subsequent execution was irregular.

As regards the Third Application, which is the Plaintiff's application, Mr. Chonta opened by citing Order 17, rule 1 (3) of the White Book and submitted that Interpleader Summons can only be issued by a stakeholder or the Sheriff of Zambia. That, there is no stakeholder here and equally, no Sheriff of Zambia as the Summons had been issued by the Claimant. Mr. Chonta thus, contended that there being no stakeholder, there is only one fate for the Interpleader Summons herein which are tainted with the suspicion that the parties are colluding. Mr. Chonta thus, argued that, apart from there being no properly issued Interpleader Summons, there is clear proof of collusion and that the application for Interpleader must be dismissed with costs.

In opposition to Mr. Chonta's submissions on the Third Application, Mr. Tembo, submitting on behalf of the Defendants and Claimant, contended that the Claimant qualifies as a stakeholder. Counsel contended that the property belongs to the Claimant even if she is a shareholder in the 1st Defendant company. That, her property should not be mixed with the property of the 1st Defendant or the property which belongs to the 2nd Defendant, who happens to be the Claimant's husband. In this regard, Counsel for the Defendants and the Claimant referred the Court to Section 17 of the Married Women's Property Act, 1882, and submitted that the said piece of legislation protects property of a married woman which is distinguished from

matrimonial property. That, in the premises, the Claimant's claim for the property that is listed in the schedule is correct and that the seizure was erroneous.

In reply, Mr. Chonta contended that the real question is 'what is an Interpleader application'? in this regard, he submitted that to say that this claim qualifies as a stakeholder's Interpleader Application is very misleading. That, there are only two interpleaders, namely:

(i) when the Sheriff is holding on to goods which he has seized and the Claimant is at liberty to issue a notice of claim, and the Sheriff then issues a Sheriff's Interpleader Summons, calling on the Judgment Creditor and the Claimant to prove their respective cases (which is said to remove suspicion of collusion); and

(ii) when a third person has possession of the goods (giving rise to two adverse claims between the third person and the stakeholder/claimant) and then the stakeholder/claimant issues a Summons for Interpleader to serve his own interest.

Counsel thus submitted that the Claimant herein, should have withdrawn the Summons for Interpleader and let the Sheriff issue the said Summons, as the application for interpleader is incompetently before Court.

Counsel for the Plaintiff urged the Court to take judicial notice of cause No. 2013/HPC/0081, which he referred to earlier and that among other things, the Court will find that there were three guarantees.

As regards the Married Women Property Act, Counsel for the Plaintiff submitted that the same does not arise here.

I have carefully considered the First, Second and Third Applications herein and the documents filed in aid thereof. For recounting purposes, the three applications are as follows:

(i) application to stay execution of Writ of Fieri Facias (the First Application);

(ii) application to set aside Writ of Fieri Facias for irregularity and for a claim of damages arising therefrom (the Second Application); and

(iii) the notice of intention to raise a preliminary issue with regard to the Interpleader Summons (the Third Application).

It was stated by Counsel for the Plaintiff, at the hearing of the applications that the application for stay of execution of Writ of Fieri Facias can only succeed if the application to set aside Writ of Fieri Facias has merit. That, therefore, in considering whether or not the stay should be granted, the Court should consider the main application to set aside the Writ of Fieri Facias. Indeed, I agree with Counsel for the Plaintiff that this is so and therefore, I shall proceed to deal with the First and Second Applications accordingly, as the determination of the Second Application in effect, determines the fate of the First Application.

The chronology of how I will address the applications herein is such that I will first deal with the Second Application, which will in effect

decide the First Application; and then I will move on to deal with the Third Application.

The Second Application is the Defendants' application basically urging the Court to set aside the Writ of Fieri Facias executed in respect of the 2nd Defendant's property, and that this Court order that the Plaintiff makes good the damage occasioned on the 2nd Defendant as a result of the alleged improper execution. Counsel for the Defendants contended that the Plaintiff's execution upon the 2nd Defendant's property rather than the 1st Defendant's property was improper.

It is not in dispute that the Plaintiff advanced a loan to the 1st Defendant, and as security for the said loan, the 1st Defendant's property as well as the 2nd Defendant's property were pledged.

It is also not in dispute that the 1st Defendant defaulted on the said loan, thereby necessitating the Plaintiff to commence an action against the Defendants which culminated into an order allowing the Plaintiff to sell the two properties, which have since been sold.

It was contended by the Defendants that the borrower of the loan facility advanced by the Plaintiff, was the 1st Defendant, a distinct person at law, and the 2nd Defendant's security in respect of the said loan facility was seized and subsequently sold by the Plaintiff. That, the 2nd Defendant's liability as regards the said loan facility was limited to the security he had pledged and that any further execution in respect of the said loan facility must be levied upon the 1st Defendant's property. It was contended that that is so, because the

doctrine of privity of contract precludes third parties from enjoying fruits or suffering burdens in respect of contracts to which they are not party, and that beyond the pledged security the 2nd Defendant was not a party.

In rebuttal, the Plaintiff contended that the 2nd Defendant executed a personal guarantee as security for the 1st Defendant's indebtedness.

The 2nd Defendant, in turn, refuted the Plaintiff's contention and stated that no guarantee was executed by him in favour of the Plaintiff, as he was not the borrower himself, and that therefore, his liability was only to the extent of the value of the mortgaged property.

Paragraph 8 of Exhibit "MI1", which is the paragraph alluding to the security pledged under the loan facility provides as follows:

> *"8. Security*
>
> *8.1 Joint and individual Directors personal guarantee by Dr. Mwilola Imakando, Dr. Peter Gilbert Sinyangwe and Mrs. Mate Musokotwane for the K2,500,000,000.00 plus compound interest.*
>
> *8.2 First Legal Mortgage over Farm No. 396/78a Makeni and Stand No. F441/REM Roma, Lusaka, for K2,500,000,000.00.*
>
> *8.3 Debenture over fixed and floating assets of Chicks Masters Limited for K2,500,000,000.00, plus compound interest.*
>
> *8.4 Keyman insurance policies for K2.5 Billion in respect of Mrs. Mate Musokotwane and Barend Bothma in favour of Investrust Bank Plc."*

From the foregoing, the issue for determination under the Second Application, is whether or not the Defendants have advanced cogent grounds to warrant the setting aside of the Writ of Fieri Facias.

In resolving the issue above, and as it has been alleged by the Plaintiff that the 2nd Defendant executed a personal guarantee, it is imperative to address three pertinent questions, namely:

(1) What is the nature and effect of a guarantee?

(2) Does the document executed by the 2nd Defendant and identified as exhibit "MI1" of the Affidavit in Support of the Originating Summons satisfy the nature of a guarantee?

(3) What is effect of the said exhibit "MI1"?

To begin with, the learned authors of Halsbury's Laws of England, 5th Edition, volume 49, define a guarantee as follows, in paragraph 638:

> *"A guarantee is an accessory contract, by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated. As in the case of any other contract, a valid guarantee requires an agreement, made between two parties intending to create legal relations and having the capacity to contract, supported by consideration, actual or implied. An additional statutory requirement is that the contract must either be in writing or be evidenced by a written note or memorandum signed by or on behalf of the party to be charged."*

A guarantee, therefore, is essentially a contract of an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, without the support of which it must fail. This was stated in the case of *Mountstephen v. Lakeman*[5].

A guarantee agreement will, thus, involve three players, namely, the principal debtor, the creditor and the guarantor.

A guarantor has been defined in paragraph 642 of Halsbury's Laws of England as:

> *"The 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, or is intended to become, primarily liable to the creditor."*

The principal debtor has, in turn, been defined by the learned authors of Halsbury's Laws of England, in paragraph 640, as the person primarily liable to the creditor for the obligation guaranteed; while the creditor has been defined in paragraph 641 of the same text, as the person to whom the obligations of the principal debtor and guarantor are owed. This, I find, is the true nature and effect of a guarantee and there need not be any special form of words used in framing a guarantee; and the word 'guarantee' need not be employed, since what is material is the substance of the contract, not the name or form given to it by the parties. What is key, therefore, is that there must be some memorandum or note, in writing, of a special promise by someone to answer for the debt, default or miscarriage of another person, and such memorandum or note must be signed by the party making the promise or by some person lawfully authorised by him. In this regard, I dismiss the 2nd Defendant's argument that no guarantee was executed by him in favour of the Plaintiff, as he was not the borrower himself.

The learned authors of Halsbury's Laws of England go on to state that whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences which

flow from such a classification depends upon the words in which the parties have expressed the promise.

In terms of the construction of guarantees, it was stated in the case of *Investor's Compensation Scheme Ltd. v. West Bromwich Building Society*[6], that:

> *"The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they chose to express them; or perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing, by the words in which the promises on his part were expressed."*

As regards the meaning of the word 'intention', it was stated in the cases of *Great Western Rly Co and Midland Rly Co v. Bristol Corpn*[7] and *IRC v. Raphael*[8], that the question to be answered always is, "what is the meaning of what the parties have said?" not "what did the parties mean to say?".

It has been alleged by the Plaintiff, in *casu*, that the instrument executed by the 2nd Defendant herein, and exhibited as "MI1" amounts to a personal guarantee, while there has been dispute on the part of the 2nd Defendant that he did not execute any guarantee in favour of the Plaintiff, as he was not the borrower himself and that his liability was only to the extent of the value of the mortgaged property.

Suffice it to state that an agreement will not be a guarantee unless there exists or is contemplated some other principal obligation of

some other principal obligor, to which the guarantee is to be ancillary and subsidiary. It was thus, stated in the case of *General Surety and Guarantee Co. Ltd v. Francis Parker Ltd*[9], that there can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of a transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor, there can be no suretyship; nor can a person guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

The Security Clause in the loan facility in question provided as follows:

> *"8. Security*
>
> *8.1 Joint and individual Directors personal guarantee by Dr. Mwilola Imakando, Dr. Peter Gilbert Sinyangwe and Mrs. Mate Musokotwane for the K2,500,000,000.00 plus compound interest.*
>
> *8.2 First Legal Mortgage over Farm No. 396/78a Makeni and Stand No. F441/REM Roma, Lusaka, for K2,500,000,000.00.*
>
> *8.3 Debenture over fixed and floating assets of Chicks Masters Limited for K2,500,000,000.00, plus compound interest.*
>
> *8.4 Keyman insurance policies for K2.5 Billion in respect of Mrs. Mate Musokotwane and Barend Bothma in favour of Investrust Bank Plc."* (Emphasis mine)

I have perused the loan facility, upon which the proceedings herein were premised and which facility was exhibited as "MI1" in the Affidavit in Support of the Originating Summons in this matter. The Lender in the said loan facility is listed, in Clause 1, as Investrust Bank Plc, Plot 4527/8, P.O Box 32344, Freedom Way Lusaka; while

the Borrower is listed, in Clause 2, as Chick Masters Limited, P.O Box 51137, Lusaka. In Clause 3 of the letter, the facility amount is listed as K2,500,000.00. The security for the said loan is as stated in Clause 8, reproduced about. Although I have been referring to the 2nd Defendant's property as Stand No. 441/REM Roma, Lusaka, which is a misdescription of the said property, I am cognisant of the fact that this Court corrected the description of the said property, in its order of 29th August, 2011, to read as Subdivision A of subdivision 180 of Farm 441a, Lusaka. Therefore, any erroneous description of the property is merely for purposes of reproducing the original text in initial documents.

In addition to the loan facility, I have also had the opportunity to peruse exhibit "CCC3", being a copy of the memorandum of deposit of Title Deeds, which was exhibited in the Plaintiff's application for review of judgment, following an error in the court order, flowing from the Plaintiff's clerical error in its originating process. The text of the said memorandum is as follows:

> *"To Investrust Bank Plc*
>
> *Gentlemen*
>
> *In consideration of your granting banking facilities to the extent of K2,500,000.00 to Chick Masters of P.O. Box 51139, Lusaka, I.....of P.O. Box..... give this guarantee of K2,500,000.00 to you and in support of this guarantee, I hereby deposit Certificate of Title No. 70725 relating to Stand/Lot/Farm No. 441a and undertake to create a legal mortgage for K2,500,000.00 over this property in favour of the bank, if required to do so.*
>
> *Signed by the Guarantor.....*

Name of Guarantor.....

Witnessed by.....

Occupation.....

Address....." (Emphasis mine)

The guarantor in the said memorandum was Dr. Mwilola Imakando, the 2nd Defendant herein.

In light of the above, I am satisfied that the net result of reading the loan facility together with the memorandum of deposit is such that there is evidently a guarantee there.

This, now, leads me to consider the third question of what the effect of exhibit "MI1" is. From the provisions on the nature and construction of guarantees, it would appear that answering the question "what is the meaning of what the parties have said?" and not "what did the parties mean to say?", in respect of the facility letter would entail that the guarantee was limited. However, as already pointed out, the facility letter is not the only document making reference to the security offered for the loan, as far as the guarantee is concerned, and in this regard, the memorandum has provided the context to the guarantee referred to in Clause 8 of the loan facility.

Therefore, from the two exhibits it is clear that the 2nd Defendant guaranteed the loan amount by depositing the Certificate of Title to his property, Subdivision A of subdivision 180 of Farm 441a, Lusaka and undertook to create a first legal mortgage over the said property, for the amount guaranteed and in favour of the bank. This, then, leads us to the inquiry of whether or not the usage of the words in

the loan facility and the memorandum of deposit bring out any limitation in the guarantee that was made by the 2nd Defendant.

In terms of the extent of a guarantor's liability, the learned authors of Halsbury's Laws of England state as follows, in paragraph 718 and 719 of Volume 49:

> *"It has been said that a guarantor is a favoured debtor. He is entitled to insist upon a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken... the extent of the liability undertaken by the guarantor will depend upon the terms of the contract of guarantee. It need not be co-extensive with that of the principal debtor; but, in so far as it exceeds it, it is not a guarantee liability."* (Emphasis mine)

The ascertaining of the extent of liability undertaken by the guarantor will thus, depend upon the terms of the contract of guarantee. Therefore, in order to ascertain the extent of the guarantor's liability, if any, to the creditor, it is first necessary to determine the amount and nature of the principal debtor's debt to the creditor and the circumstances in which it has arisen. This having been done, the contract of guarantee should then be construed strictly to see whether it covers the nature, extent and circumstances of the principal debt sought to be recovered from the guarantor. The guarantor can, therefore, not be liable beyond the terms of a contract.

Applying the principles of construction that call for the courts to construe contracts of guarantee in a manner that may reflect what the parties may have fairly intended by their express words and to give effect to such words, rather than not, I find that the loan facility

as read together with the memorandum of deposit did give rise to a guarantee, although limited to the property pledged by the 2nd Defendant. In light of this, I agree with the argument on behalf of the 2nd Defendant that his liability dissipated with the sale of his property following the judgment as the Plaintiff having seized and sold the deponent's property which was pledged as security for the facility, no longer has a claim in respect of the deponent's personal and other property which was never pledged as security.

In view of the foregoing, I find merit in the second Application herein, which in effect translates into the unequivocal success of the First Application, which is now absolute by virtue of the success of the Second Application.

Practice Note 47/1/8 of the White Book, provides on the subject of setting aside execution, that:

> *"This may be done where execution has been improperly issued, even after execution has been levied."*

In this regard, the execution by Writ of Fieri Facias, on the balance of the judgment debt, after sale of the mortgaged properties, is hereby adjudged irregular and accordingly set aside. Damages arising from the said irregular execution are awarded to the 2nd Defendant.

The effect of an order to set aside a course of action has been described by Black's Law Dictionary as annulling or vacating a judgment or order. In other words, setting aside an order of court or some step taken by a party in the action, effectively cancels or renders such order or action void. This being the case, it goes without

saying that by my order herein, the execution upon the 2nd Defendant's property which is not part of the legal mortgage over the property pledged in the loan facility; and subsequent seizure of any goods, has been rendered void or of no legal effect.

There was also the issue of interpleader raised by virtue of the Third Application, which I indicated I would deal with. Given my findings above, with respect to the Second Application, I find that proceeding to considering the Third Application is unnecessary and otiose as the same has effectively been resolved by my order under the Second Application herein.

Costs of all three Applications are awarded to the Defendants to be agreed by the parties, or taxed in default thereof.

Further, leave to appeal is denied, and in this respect, I am fortified by Order 10, rule 4 (1) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016 (the Court of Appeal Rules), which states as follows:

> *"The High Court or a quasi-judicial body may grant or refuse leave to appeal to the Court without formal application at the time when judgment is given, and in that event the judgment shall record that leave has been granted or refused accordingly."*

Dated at Lusaka the 27th day of February, 2020.

W.S. MWENDA (Dr)
HIGH COURT JUDGE