

**IN THE COURT OF APPEAL FOR ZAMBIA**  
**HOLDEN AT KABWE**  
(Civil Jurisdiction)

**Appeal No. 133/2019**

**B E T W E E N :**

PULSE FINANCIAL SERVICES LIMITED  
(T/A Entrepreneurs Financial Centre "EFC")  
**AND**

ELAINE MUNGA  
JUSTINE MPUNDU  
ERNEST PHIRI

**APPELLANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**CORAM : Makungu, Chishimba and Ngulube, JJA**  
**On the 16<sup>th</sup> and 23<sup>rd</sup> October, 2019**

For the Appellant : Mr. G. Pindani – Messrs Chota, Musaila & Pindani  
Advocates

For the 1<sup>st</sup> Respondent : N/A

For the 2<sup>nd</sup> Respondent : Mr. N. K. R. Sambo of Messrs Sambo Kayula &  
Company.

For the 3<sup>rd</sup> Respondent : Ms. M. Kamangu of Messrs P.W Mwikisa & Company.

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

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**CHISHIMBA, JA, delivered the Judgment of the Court**

**CASES REFERRED TO:**

1. T.I Jem Enterprises Limited v. Children International Zambia Limited (2011) ZR 75
2. Mumba v. Zambia Fisheries and Fish Marketing Corporation Limited (1980) Z.R. 135
3. Holmes Limited v. Build Well Construction Company Limited (1973) Z.R.77
4. Zimba Jane Musanya v. Musanya Henry Chola (2012) Volume 1 Z.R. 372
5. L'estrage v. Graucob (1934) 2KB 394
6. Kalusha Bwalya v. Chadore Properties and Ian Chamunora Nyalungwe Haruperi SCZ Appeal No. 222/2013
7. Barclays Bank PLC v. O'Brien (1993) ER 417
8. Credit Lyonnais Bank Nederlands NV Burch (1997) 1 ALL ER 144
9. Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Limited in Receivership) and another SCZ No 19 of 2007



10. African Banking Corporation Zambia limited (T/A Bank ABC) v Plinth Technical Works and 5 others SCZ Selected Judgement No. 28 of 2015
11. Union Bank (Z) Limited (In Liquidation) v. Abraham Geevarghese 2005/HPC/0056 (unreported)
12. Nkhata and Others v Attorney General (1966) ZR 124
13. Examinations Council of Zambia v Reliance Technology Limited SCZ Judgment No. 46 of 2014 (Unreported)
14. Sablehand Zambia Limited v Zambia Revenue Authority (2005) ZR109 (S.C)
15. Sithole v The State Lotteries Board (1975) Z.R. 106 SC.
16. Collet Van Zyl Brothers Ltd (1996) ZR 65 (CA)
17. Scherer v. Counting Investments limited (1986) 1 WLR 615
18. Halyonda Costah Chims v Pulse Finance Services and another Appeal No. 101/2004
19. Saunders v Anglia Building Society (1970) 3 All ER 961
20. Kent Choice Limited (In Receivership) and Charles Haruperi SCZ No 19 of 2007
21. Credit Lyonnais Bank Nederlands v Burch 1997 1 ALL ER 144
22. Royal Bank of Scotland v Etridge 2001 UKHL 44
23. Brusewitz v Brown (1922) 42 NZLR 1106
24. Intermarket Banking Corp Zambia Ltd v Kasonde SCZ Judgment Appeal No. 44 of 2014
25. Afrope Zambia Limited Vs. Anthony Chate and Others SCZ Appeal Number 160 of 2016

#### **LEGISLATION AND OTHER WORKS REFERRED TO:**

1. Fisher and Lightwood's Law of Mortgages 14<sup>th</sup> Edition, 2014.
2. H. G. Beale, Chitty on Contracts 29<sup>th</sup> Edition, London, Sweet & Maxwell, 2004.
3. Ryan Murray's The Fundamentals of Contract Law, 3rd Edition, 2014
4. Statute of Frauds Amendment Act 1828
5. Encyclopedia of Banking Law 2001
6. Halsbury's Laws of England, 4th Edition, Volume 20
7. The Rules of the Supreme Court of England (White Book) 1999 Edition
8. Halsbury's Laws of England 4th Edition, Volume 31

#### **INTRODUCTION**

1. This is an appeal against the judgment of the High Court dismissing the Appellant's claim against the Respondents for foreclosure, possession and sale of security and enforcement of

personal guarantees. The lower Court upheld the counter claim by the 2<sup>nd</sup> Respondent, ordering the return of the occupancy licence held by the Appellant to the Respondent.

### **FACTS OF THE CASE**

2. The brief facts preceding the appeal are as follows; the 1<sup>st</sup> Respondent had obtained a loan facility from the Appellant which at the time of the action stood in the sum of K236, 857.68. The facility was secured by the 2<sup>nd</sup> Respondent's property namely, Stand No. 24/Block 118, Chipata compound, Lusaka. In addition, personal guarantees were executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.
3. The Appellant then sought an order of foreclosure, possession and sale of the 2<sup>nd</sup> Respondent's property, as well as the enforcement of the personal guarantees.
4. Prior to the above, the 2<sup>nd</sup> Respondent had commenced a separate action, in the Subordinate Court, against the 1<sup>st</sup> Respondent and the Appellant under cause number 2016/CRMP/1549. The 2<sup>nd</sup> Respondent sought a declaration that the property pledged as security was obtained fraudulently and an order the return of the occupancy licence. She also



claimed for damages and costs. The two matters were subsequently consolidated by the lower court.

**DEFENCE BY THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

5. The 2<sup>nd</sup> Respondent in her defence averred that she was deceived by the 1<sup>st</sup> Respondent with regards the nature of their transaction. She stated that the 1<sup>st</sup> Respondent had approached her at the time she was selling her property and offered to purchase her house at K40, 000.00. According, to the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent informed her that in order to finance the purchase of the property she needed to obtain a mortgage from the Appellant.
6. Consequently, the 2<sup>nd</sup> Respondent agreed to offer her property as security for the loan to enable the 1<sup>st</sup> Respondent obtain the loan. Further, that the 2<sup>nd</sup> Respondent was coerced into pledging her property as security for the loan due to fraud and misrepresentation by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent had reported the alleged fraud to the police.
7. The 3<sup>rd</sup> Respondent averred that he executed a guarantee in favour of the lender, which was limited to the goods listed therein. The said goods were seized and sold accordingly. He



stated that the Appellant did not advise him to seek independent legal advice.

**EVIDENCE AT TRIAL**

8. PW1 a loan officer from the Appellant, testified that the house she viewed as security was different from the security held by the lender. The viewed house, pink in colour, was a bigger house different from the one belonging to the 2<sup>nd</sup> Respondent. Further, that the guarantee by the 2<sup>nd</sup> Respondent was not signed at the Appellant's premises. Instead documentation was given to the borrower for the guarantor to execute.
9. The 2<sup>nd</sup> Respondent testified that the security by the Appellant referred to a three bedroomed house whilst her property is a two bedroomed house. One of the documents was forged. The 2<sup>nd</sup> Respondent stated that she had executed the letter authorizing the use of her house as collateral, as well as signing the third party mortgage, the guarantee and further giving the 1<sup>st</sup> Respondent her occupancy licence. She testified that she signed the above documents on account of deceit by the 1<sup>st</sup> Respondent.
10. The 3<sup>rd</sup> Respondent testified that he executed the guarantee pledging specific assets which were seized and sold. Though

he guaranteed the sum of K180,000.00 plus interest, the 1<sup>st</sup> Respondent lied to him that she was obtaining the sum of K80,000. The guarantee was not explained to him, neither was he advised to seek and obtain independent legal advice. He did not even read the agreement at the time of signing because he trusted the borrower who was like family and believed her word.

**DECISION BY THE COURT BELOW**

11. After identifying the issues for determination mainly whether there was deceit and misrepresentation of facts by the borrower to the lender and the guarantor, the court found that the 1<sup>st</sup> Respondent intentionally deceived both the 2<sup>nd</sup> Respondent and the Appellant by misrepresentation of facts as regards to the purpose of the loan as well as the actual property that was pledged as security for the loan and the one inspected. Further, that as a result of the 1<sup>st</sup> Respondent's misrepresentation, the Appellant mistakenly placed a 3<sup>rd</sup> party mortgage over the unintended subject property. In addition, that the actual national registration card of the 2<sup>nd</sup> Respondent bears a photograph different from the one attached to the guarantor

form purporting otherwise. In respect of the claim of undue influence allegedly exerted by the Appellant and 1<sup>st</sup> Respondent, the same was dismissed.

12. The lower court stated that the misrepresented facts to both the Appellant and the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent had a ripple effect on the whole transaction. Further, that the Appellant would not have availed the loan facility had the misrepresentation not been made.
13. The trial court set aside the third party mortgage on account of misrepresentation. As a result, the loan stood unsecured and the court declined to order foreclosure, possession and sale of the 2<sup>nd</sup> Respondent's property.
14. In respect of the guarantee by the 2<sup>nd</sup> Respondent, the same was set aside because the Appellant had not explained the nature/effect of the guarantee and the fact that there was misrepresentation by the 1<sup>st</sup> Respondent.
15. The lower court equally set aside the guarantee executed by the 3<sup>rd</sup> Respondent on account of the 1<sup>st</sup> Respondent's misrepresentation and the Appellant's failure to explain to the 3<sup>rd</sup> Respondent the implications of execution of the guarantee and failure to advise him to seek independent legal advice. The



court ordered damages for wrongful execution to the 3<sup>rd</sup> Respondent by the Appellant. The same was to be assessed by the Deputy Registrar.

16. In respect of the 2<sup>nd</sup> Respondent's counter claim for the return of the occupancy licence, the court below upheld the claim and ordered that the same be surrendered to her free from any encumbrance.
17. The court entered judgment against the 1<sup>st</sup> Respondent for payment, to the Appellant, of the sum of ZMW 236, 851.62. She awarded costs to the Appellant as against the 1<sup>st</sup> Respondent. The trial court further Ordered that costs for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be borne by the Appellant and the 1<sup>st</sup> Respondent.

### **THE APPEAL**

18. The Appellant, raised the following grounds of appeal namely that;

- i. *The learned trial Judge in the lower court erred in law and in fact when she declined to grant orders for foreclosure, possession and power of sale of the mortgaged property namely Plot/Stand No. 24/Block 118 Chipata Improvement Area, Lusaka on misrepresentation of facts.*
- ii. *The learned trial Judge in the Court below misdirected herself in law and in fact when she ordered the Appellant to surrender the Occupancy Licence relating to Plot/Stand No. 24/Block 118*

***Chipata Improvement Area, Lusaka free from any encumbrance to the 2<sup>nd</sup> Respondent.***

- iii. ***The learned trial Judge in the lower court erred in law and in fact when she declined to order the enforcement of personal guarantees against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.***
- iv. ***The learned trial Judge erred in law and in fact when she made perverse findings of fact.***
- v. ***The learned trial Judge in the lower court erred in law and in fact when she entertained the issues of misrepresentation and/or deceit and/or fraud when the same were not particularized in the pleadings and/or not perpetuated by the Appellant.***
- vi. ***The learned trial Judge in the lower court erred in law and in fact when she ordered the Appellant to bear the costs of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.***

### **THE ARGUMENTS ADVANCED BY THE PARTIES**

19. The Appellant filed into court heads of argument dated 6<sup>th</sup> August, 2019. The Appellant began by referring the court to several authorities regarding the nature of a mortgage as a contract as well as the principles governing creation of contracts, the obligations and duties imposed. The following cases were cited namely; ***T.I Jem Enterprises Limited v. Children International Zambia Limited*** <sup>(1)</sup>, ***Mumba v. Zambia Fisheries and Fish Marketing Corporation Limited*** <sup>(2)</sup>, ***Holmes Limited v. Build Well Construction Company Limited*** <sup>(3)</sup>, ***Zimba Jane Musanya v. Musanya***

*Henry Chola* <sup>(4)</sup>, *L'estrage v. Graucob* <sup>(5)</sup> and *Kalusha Bwalya v. Chadore Properties and Ian Chamunora Nyalungwe Haruperi* <sup>(6)</sup> We were also referred to extracts from **Fisher and Lightwoods Law of Mortgages 14<sup>th</sup> Edition 2014** and **Chitty on Contracts** in which the learned authors discuss the nature of a mortgage and contract respectively.

20. It was argued, by the Appellant, that there was evidence on record that the 1<sup>st</sup> Respondent obtained a loan of K180,000, secured by the 2<sup>nd</sup> Respondent who pledged her property as security. The Appellant proceeded to refer the court to the evidence appearing on pages 114, 116-120 and 121-125 of the record of appeal. Further the evidence of the 2<sup>nd</sup> Respondent appearing at pages 311-19 and the witness statement on record was referred to. In a nutshell, the Appellant submits that the 2<sup>nd</sup> Respondent authorized the use of her occupancy licence as collateral by signing the letter of consent and surrendered the said licence. Further, that it is inconsequential that the Appellant had viewed a different house as the property to be realized is the actual property identified from the occupancy licence. In addition, that whatever can be realized from the sale of the mortgaged property will go towards the liquidation of the



loan obtained by the 1<sup>st</sup> Respondent. In any event, consideration in a contract need not be adequate but sufficient.

21. The Appellant contended that had the 2<sup>nd</sup> Respondent not pledged the property as security, the Appellant would not have disbursed the money to the 1<sup>st</sup> Appellant.
22. With regard to the issue of misrepresentation, the Appellant argued that the trial court misapplied the principles of law. We were referred to a passage from **Ryan Murray's The Fundamentals of Contract Law, 3<sup>rd</sup> Edition, 2014** where the learned author defined misrepresentation as a false statement of fact and conditions to be satisfied for an action in misrepresentation to succeed.
23. The Appellant contended that it did not make any misrepresentations to the 2<sup>nd</sup> Respondent at all. Instead, they were made by the 1<sup>st</sup> Appellant. We were referred to **Section 6 of the Statute of Frauds Amendment Act 1828** which gives guidance as to when an action for any representation may be brought against a party. Further, that 2<sup>nd</sup> Respondent has not produced any document in writing showing that the Appellant made representations to her. The alleged misrepresentation is against the 1<sup>st</sup> Respondent as opposed to the Appellant.

Therefore, the trial court erred by relying on alleged misrepresentations made by the 1<sup>st</sup> Respondent to disentitle the Appellant of its right to foreclose, take possession and sale the mortgaged property.

24. It was the Appellant's argument that had the 2<sup>nd</sup> Respondent disclosed to the Appellant that she was selling the subject property, the Appellant would not have disbursed the funds to the 1<sup>st</sup> Respondent. The court cannot allow the 2<sup>nd</sup> Respondent to benefit from her own wrongdoing.
25. The Appellant contends that the lower court should not have relied on the cases of **Barclays Bank PLC v. O'Brien** <sup>(7)</sup>, **Credit Lyonnais Bank Nederlands NV Burch** <sup>(8)</sup> and **Nkongolo Farms Limited v Zambia National Commercial Bank, Kent Limited in Receivership and another** <sup>(9)</sup> as the said cases are distinguishable from the this case and have been overruled by subsequent decisions of the Supreme Court in **African Banking Corporation Zambia Limited (T/A Bank ABC) v Plinth Technical Works and 5 others** <sup>(10)</sup> and **Kalusha Bwalya v Chadore properties and Ian Chamunora Nyalungwe Haruperi** <sup>(6)</sup>.

Therefore, the lower court erred by directing the return of the Occupancy Licence to the 2<sup>nd</sup> Respondent when the same was security for a debt which was yet to be settled.

26. Under ground 3, in respect of personal guarantees, the Appellant submits that the same are binding and enforceable contracts. In support of this position we were referred to the cases of *L'estrage v. Graucob* <sup>(5)</sup>, *T.I Jem Enterprises limited v. Children International Zambia Limited* <sup>(1)</sup> and an extract from the **Encyclopedia of Banking Law 2001** on the definition of a guarantee. Further, the High Court case of *Union Bank (Z) Limited (In Liquidation) v. Abraham Geevarghese* <sup>(11)</sup> was cited in which it was held that a guarantee is a secondary contract arising upon the principal's default.
27. It was the Appellant's argument that both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent admitted having signed the personal guarantees. However, the lower court confused or misunderstood the guarantee appearing at pages 128-130 of the record of appeal which the 2<sup>nd</sup> Respondent admitted signing with the guarantor identification document on pages 126-127 of the record of appeal which is a totally different document. Reference was again made to the definition of a guarantee contained in a



passage from **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 20 at paragraph 101 and 104.**

28. It was the Appellant's contention that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents signed the guarantees with the full knowledge of the implications. In addition, that the Appellant has a policy of ensuring that the documents are explained to customers and they are informed of their right to seek independent legal counsel before signing the documents. This, according to the Appellant, was done. Reference was made to the evidence adduced by PW2 at page 306 of the record on the company policy. It was contended that the fact that both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents signed the contract is an indication that they agreed to the terms and conditions by which they are bound. They therefore cannot rely on the doctrine of "***non est factum***"
29. Under ground 4, the Appellant argued that this is a proper case for the appellate court to reverse the findings of fact made by the court below that the 2<sup>nd</sup> Respondent did not sign the personal guarantee as it was not supported by evidence on record. As authority the cases of ***Nkhata and Others v Attorney General*** <sup>(12)</sup> and ***Examinations Council of Zambia v Reliance Technology Limited*** <sup>(13)</sup> were referred to.

30. Under ground 5, the Appellant argued that the pleadings by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do not show the particulars of the alleged fraud and/or misrepresentation on the part of the Appellant. This, according to the Appellant, is contrary to the provisions of **Order 18 Rule 9(1) of the Rules of the Supreme Court of England (White Book) 1999 Edition** as well as the guidance of the Supreme Court in the cases of ***Sablehand Zambia Limited v Zambia Revenue Authority*** <sup>(14)</sup> and ***Sithole v The State Lotteries Board*** <sup>(15)</sup>.
31. The Appellant in ground six, submitted that a party should only be condemned in costs if he has been guilty of misconduct in the prosecution or defence of the proceedings. The Appellant having conducted itself properly should not have been condemned in costs but instead the 1<sup>st</sup> Respondent should have borne the costs. As authority the cases of ***Collet Van Zyl Brothers Ltd*** <sup>(16)</sup> and ***Scherer v. Counting Investments limited*** <sup>(17)</sup> were cited. We were urged to uphold the appeal with costs.
32. The 2<sup>nd</sup> Respondent filed heads of argument dated 30<sup>th</sup> September, 2019 and narrated the factual background. In response to grounds 1 and 2, the 2<sup>nd</sup> Respondent submitted

that the Appellant and the 2<sup>nd</sup> Respondent were deceived by the 1<sup>st</sup> Respondent. No legal right may be obtained from deceit and fraud. The court will only enforce a contract that is free from fraud or deceit.

33. According to the 2<sup>nd</sup> Respondent, the deceit was in respect of the fraudulently obtained guarantee, which was not signed at the Appellant's premises. Further, that the house that was viewed by the Appellant at the direction of the 1<sup>st</sup> Respondent was different from the one that was pledged as security. In addition, that the fraud was reported to the police and the Appellant was informed by the 2<sup>nd</sup> Respondent.
34. It was the 2<sup>nd</sup> Respondent's submission that all the facts pertaining to fraud were properly presented at trial. There was evidence of fraud in the fact that the photo that was '*purportedly*' the 2<sup>nd</sup> Respondent's, produced by the 1<sup>st</sup> Respondent was not hers. None of the Appellant's employees met with the 2<sup>nd</sup> Respondent during the processing of the 1<sup>st</sup> Respondent's loan.
35. In response to grounds 3, 4 and 5, the 2<sup>nd</sup> Respondent argued that the trial court's findings and refusal to enforce the personal guarantees as well as on the issue of misrepresentation cannot



be faulted. It was argued that it was in fact the Appellant's carelessness that perpetuated the 1<sup>st</sup> Respondent's deceit and fraud against the 2<sup>nd</sup> Respondent. The guarantee was signed without an explanation by the lender. Therefore, the findings by the lower court are not perverse to warrant interference by this court.

36. With regard to the issue of costs, it was argued that the court has discretion to award costs. The award of costs against the Appellant are justified on account that it refused to pursue the 1<sup>st</sup> Respondent and has insisted on enforcing security which was secured by fraud. We were urged to dismiss the appeal with costs.
37. The 3<sup>rd</sup> Respondent filed heads of argument dated 29<sup>th</sup> August, 2019. It was submitted that the learned trial Judge was on firm ground when she declined to order the enforcement of personal guarantees against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
38. The 3<sup>rd</sup> Respondent contended that the record shows that the 3<sup>rd</sup> Respondent signed the Specific Guarantor Agreement under a mistaken belief that the loan being obtained was worth K80, 000.00 as misrepresented by the 1<sup>st</sup> Respondent. Further, that the Appellant did not explain to the 3<sup>rd</sup> Respondent the contents

of the document he was asked to sign. In addition, the Appellant did not advise him to seek independent legal advice before executing the Specific Guarantor Agreement and no copy was availed to him.

39. The 3<sup>rd</sup> Respondent argued that but for the misrepresentation, he would not have signed the Specific Guarantor Agreement and pledged his household goods. As authority for this argument the case of ***Halyonda Costah Chims v Pulse Finance Services and another*** <sup>(18)</sup> was cited where the Supreme Court held that a guarantee agreement may be set aside for misrepresentation. We were further referred to the English case of ***Saunders v Anglia Building Society*** <sup>(19)</sup> on the doctrine of ***non est factus***, that it applies also to the validity of signatures where it is established that the mind of the signer never intended to sign the document in question. That the document should be held to be invalid only when the element of consent is lacking.
40. The 3<sup>rd</sup> Respondent contended that he did not intend to sign the Specific Guarantor Agreement in question as the amount of the loan and the terms of agreement were not known and the value of the loan was more than the goods that were seized. Therefore, the Specific Guarantor Agreement was rightly held to be invalid

by the lower court because the 3<sup>rd</sup> Respondent did not consent to it.

41. With regard to the duty to explain to customers the implications of the guarantee/surety, we were referred to the cases of *Barclays Bank PLC v OB'rien* <sup>(7)</sup>, *Nkongolo Farms Limited V Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) and Charles Haruperi* <sup>(9)</sup>, *Credit Lyonnais Bank Nederlands v Burch* <sup>(8)</sup> and *T.I Jem Enterprises v Children International Zambia Limited* <sup>(1)</sup>. The 3<sup>rd</sup> Respondent argued that the Appellant did not advise him on the nature and consequences of the guarantee, and neither was he advised to seek independent legal advice.
42. In response to ground 5, the 3<sup>rd</sup> Respondent argued that the trial Judge was on firm ground when she held that the guarantees could not be enforced on account of failure to advise the 3<sup>rd</sup> Respondent that he ought to seek independent advice. Further, that there was sufficient evidence on record showing that the 3<sup>rd</sup> Respondent was deceived by the 1<sup>st</sup> Respondent.
43. In response to the argument by the Appellant, that particulars of fraud or misrepresentation on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not particularized, it was submitted that is a



duty imposed on the Appellant by law to ensure that the 3<sup>rd</sup> Respondent understood the nature of the guarantee and the need to obtain independent legal counsel. We were referred to the cases of **Barclays Bank PLC v O'Brien** <sup>(7)</sup> and **Credit Lyonnais Bank Nederlands v Burch** <sup>(21)</sup> as authority for this argument.

44. The 3<sup>rd</sup> Respondent argued that the Appellant cannot argue that he had nothing to do with the purported undue influence or misrepresentation made by the 1<sup>st</sup> Respondent when a duty is imposed on it to explain to its customers the nature and implications of guarantees. As authority, the cases of **Royal Bank of Scotland v Etridge** <sup>(22)</sup> and **Brusewitz v Brown** <sup>(23)</sup> were cited.
45. It was argued that the Appellant had not taken any reasonable steps to avoid being fixed with constructive notice of that undue influence on the part of the 3<sup>rd</sup> Respondent *Viz a vis* the signing of the guarantee. Since neither the nature and consequences of the guarantor agreement had been explained nor had he been advised to seek independent legal advice, the Appellant is deemed to have constructive notice of the undue influence or misrepresentation made by the 1<sup>st</sup> Respondent on the 3<sup>rd</sup> Respondent.

46. In response to ground 6, it is contended that the Appellant cannot argue that it ought not to have been condemned in costs when there was evidence before the lower court that it was unable to discharge its duty to advise the 3<sup>rd</sup> Respondent on the nature and consequences of the Guarantor Agreement. Further, that since the Appellant unjustifiably brought an action against the 3<sup>rd</sup> Respondent; the Appellant ought to be condemned in costs.
47. At the hearing of the appeal, the parties' advocates augmented their arguments on record. The same are a repetition of the submissions contained in the heads of arguments and we will not restate them.

### **THE DECISION OF THE COURT**

48. We have considered the appeal, the evidence adduced in the court below, the authorities cited, and the submissions advanced by the Learned Counsel for the parties.
49. It is not in dispute that the 1<sup>st</sup> Respondent obtained a loan facility from the Appellant in the sum of K180,000. As security for the loan, the 2<sup>nd</sup> Respondent pledged her occupancy licence for Stand 24/Block 118 Chipata Compound, Lusaka. She also

executed a personal guarantee. It is further not in issue that this was done on the basis of representations made to her by the 1<sup>st</sup> Respondent who offered to buy her house at K40,000.00 and informed her that in order to purchase her property, she would obtain a loan from the Appellant. Further, that the Appellant required security before disbursing the funds. On that basis, the 2<sup>nd</sup> Respondent executed the third party mortgage, the letter of consent and the personal guarantee. All these documents drawn by the lender were given to the 1<sup>st</sup> Respondent to take to the 2<sup>nd</sup> Respondent for execution. The 2<sup>nd</sup> Respondent also gave the 1<sup>st</sup> Respondent her occupancy licence.

50. In respect of the 3<sup>rd</sup> Respondent, he executed a personal guarantee at the 1<sup>st</sup> Respondent's offices on the basis that the amount being obtained was K80, 000.00 and that the security was limited to the household goods listed in the guarantee.

51. The key issues for determination in this appeal are;

- (i) Whether the creditor has a duty to ensure that a surety has adequate understanding of the nature and effect of the transaction in question and was advised to seek independent legal advice.***
- (ii) Whether the Appellant as creditor did discharge the duty stated above.***



52. We will first address the issue of pleading of fraud raised by the Appellant. The Appellant argued that the 2<sup>nd</sup> Respondent did not plead the particulars of the alleged fraud/misrepresentation as required. The defence on record by the 2<sup>nd</sup> Respondent; particularly paragraphs 3, 5 and 6 plead deceit, and misrepresentation.
53. It is trite that a party wishing to rely on fraud/misrepresentation must ensure that it is clearly and distinctly alleged and at trial must lead evidence to prove the allegation clearly and distinctly.
54. We are of the view that paragraphs 3, 5 and 6 of the defence by the 2<sup>nd</sup> Respondent brought out details of the alleged fraud and misrepresentation. Further, at trial, the 2<sup>nd</sup> Respondent testified on the issue of misrepresentations made by the 1<sup>st</sup> Respondent to her and the lender. Therefore, the defence had brought out sufficient details of the alleged misrepresentation.
55. The other argument raised by the Appellant is that the 1<sup>st</sup> Respondent is the person that made representations to the 2<sup>nd</sup> Respondent and not itself therefore liability if any lies with the 1<sup>st</sup> Respondent and its security is not tainted with fraud, or misrepresentation.

56. The learned authors of **Chitty on Contracts: General Principles 25<sup>th</sup> Edition** at paragraph 394, define a representation as;

*"...must be a statement of fact, past or present, as distinct from a statement of opinion or of intention, of law ... Thus if it can be proved that the person who expressed the opinion did not hold it, or could not as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact."*

57. **Halsbury's laws of England 4<sup>th</sup> Edition** at paragraph 1005 volume 31 states that;

*"A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct. The representor and the representee must be distinct from one another in substance as well as in name..."*

58. And further at paragraph 1001(supra) the learned authors opine that;

*"Where fraud can be shown by a representee who has in any way altered his position for the worse, whether by entering into a contract or binding transaction, or otherwise, as a consequence of it, such damage as he has suffered may, in accordance with the general principles governing the award of damages be, recovered from the representor in an action of deceit."*

59. Therefore, for an action for misrepresentation to succeed, a party must show that a representation was made by another

party to him, of a statement of fact either oral, in writing or by conduct, which was relied upon to his detriment.

60. The court below held that the 1<sup>st</sup> Respondent intentionally deceived both the 2<sup>nd</sup> Respondent and the Appellant by misrepresentation of facts as regards the purpose of the loan and property pledged as security. As a result of the 1<sup>st</sup> Respondent's misrepresentation, the Appellant mistakenly placed a 3<sup>rd</sup> Party Mortgage over the unintended subject matter.
61. Though the Appellant argues strongly that it is the 1<sup>st</sup> Respondent who deceived and misrepresented facts to the 2<sup>nd</sup> Respondent, this issue is not in dispute. It is not disputed that it is the 1<sup>st</sup> Respondent who deceived the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent equally deceived the Appellant as to the property pledged as security. The property viewed as security is not the one actually pledged as security. Though the appellant argued that it is inconsequential that the property viewed is different from the property to be realized. We are of the view that this is consequential. It adds credence to the 2<sup>nd</sup> Respondent's assertion of misrepresentation by the 1<sup>st</sup> Respondent to both the lender and the surety. It, on the part of the Appellant, further shows that there was no accurate information obtained in



respect of the Third Party Mortgage it was obtaining as security. In the case of **Intermarket Banking Corporation (Z) Limited v. Kasonde** <sup>(24)</sup> which dealt with the issues of undue influence and setting aside of the equitable mortgage, the Supreme Court made the following observation that;

***“Whilst the certificate of title at p. 19 of the record shows Subdivision A of farm No. 378a Lusaka is situate in woodlands, the facility letter at page 23 shows that the property is in Avondale. It seems that the appellant did not even have accurate information concerning the property it was accepting as security for the loan advanced.”***

62. We, therefore agree with the court below that the misrepresented facts to both the lender and 2<sup>nd</sup> Respondent had a ripple effect on the whole transaction.
63. We now move on to determine the issue of the executed guarantees and the duty to explain the effect of a guarantee by a creditor. A guarantee is a form of security, executed by a third party who assumes the debt obligation for the principal debtor in the event that the borrower defaults. It is basically an accessory contract by the promisor to be answerable for the debt of another upon default. See **Halsbury's Laws of England** (supra).

64. It is trite that guarantees are contracts with significant legal and financial implications. Guarantors undertake huge risks such as losing their property in the event of default, without having obtained any tangible financial benefit from the loan.
65. Guarantors as 3<sup>rd</sup> parties to the loan contract in most instances do not have all the information leading to the borrowing such as the actual and potential liability to be incurred.
66. The important issue is whether a lender owes a duty to a guarantor to explain the meaning and effect of the guarantee. Tied to this is whether guarantors can escape liability on the basis that the lender did not explain the effect and implications of the guarantee to them. Related to the duty to explain the effect of guarantee, is the obligation by the lender to advise the surety to obtain independent legal advice, particularly when dealing with a surety who is in a significantly unequal bargaining position to the lender.
67. The evidence on record by both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in respect of the securities signed was that there was no explanation by the creditor to them as sureties on the implications and effects of signing the guarantees.

68. The 2<sup>nd</sup> Respondent testified that the documents were brought to her by the 1<sup>st</sup> Respondent and she signed them. This was confirmed by PW1, an employee of the Appellant, who gave the 1<sup>st</sup> Respondent the third party mortgage and guarantee to be signed by the surety then to be brought back to the lender.
69. The 3<sup>rd</sup> Respondent testified that he did execute the guarantee but there was no explanation by the lender of the effect and consequences of executing the document. Neither was he advised to seek independent legal advice.
70. The Appellant's evidence is that both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents executed the guarantee documents which had a clause to the effect that they were advised to seek independent legal advice and were aware of the consequences.
71. PW3 testified that it is a company policy of the Appellant that the surety is made aware of the implications of being a guarantor and the advice to seek independent legal advice. PW3 merely stated that this was company policy and was not there at the time the 2<sup>nd</sup> Respondent was executing the guarantee.
72. The Appellant submits strongly that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being fluent in English and having signed the



security documents, were made aware of the implications and advised to seek independent legal advice.

73. We are of the view that there is a duty imposed on creditors to explain to a surety the effects, implications and consequences of execution of mortgages and guarantees. And that it is important that creditors advise sureties/guarantors to seek/receive independent legal advice to help them understand the full nature of their commitment and implications of their decisions. This is particularly more so where the guarantee is non-commercial, that is where no pecuniary benefit is being received by the surety. See the cited English case of ***Royal Bank of Scotland V Etridge*** <sup>(22)</sup> (supra).

74. The duty by the creditor is to explain the nature of the document, the consequences of signing, that is, the possibility that the surety will lose his/her household property or goods etc. This entails pointing out the seriousness of the risks involved, the amount and terms of the loan being secured, and the amount of the surety's liability under the guarantee, amongst other material facts. This requires full disclosure on the creditor's part in respect of consequences and advice to seek independent advice.

75. Was there disclosure of the implications of signing the guarantees by the Appellant to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent?
76. We hold the view that there was no explanation of the effect and consequences of execution of the guarantee documents and third party mortgage to the sureties herein by the Appellant. Neither were the sureties informed to seek independent legal advice. What then is the effect of breach of the duty to explain the surety and the failure to advise the sureties to seek independent legal advice?
77. The Supreme Court in the case of **Nkongolo Farms Limited** (supra) held inter alia that;
- “The law imposes on a creditor a duty to take steps to ensure that not only does a borrower or debtor not exercise undue influence but also that the creditor has a duty to ensure that a surety has adequate understanding of the nature and effect of the transaction in question.”***
78. Though the above case dealt with the issue of undue influence, by virtue of a relationship of trust and confidence between the borrower and guarantor; the duty imposed on a creditor by law in respect of explaining to a surety the risks and consequences of the guarantee/third party mortgage to be executed applies *in casu*.

79. The Appellant argued that the ***Nkongolo Farms Limited*** case has been overruled by the case of ***African Bank Corporation Limited vs Plinth Technical Works Limited*** <sup>(10)</sup> (supra) therefore the lower court should not have relied upon it.
80. We have perused the case of ***African Bank Corporation Limited v. Plinth*** in which one of the issues considered was the claim of undue influence by the third party mortgagee by virtue of the relationship with his uncle involved in the business transaction.
81. The Supreme Court in resolving the issue whether the appellant bank discharged its duty to ensure that the 2<sup>nd</sup> Respondent had adequate understanding of the nature and effect of the third party mortgage, considered the evidence of the 2<sup>nd</sup> Respondent that he held a Bachelor of Science degree in economics and had previously pledged title deeds as security to the appellant bank before the mortgage in question and had signed a mortgage deed before and it was produced for him to read before signing. The Supreme court stated that;

***“From the evidence, and even if there was no evidence that the Appellant had advised the 2<sup>nd</sup> Respondent to seek independent advice, it is discernible that the 2<sup>nd</sup> Respondent is an adult of full capacity, who is well educated and who is highly literate and well exposed, having executed similar contracts or mortgages with the appellant bank previously.... and he cannot be heard to argue that***



***the Appellant did not ensure that his consent to execute the mortgage was obtained with undue influence.***"

82. In our view, the above cited case cannot be said to have overruled the decision in the ***Nkongolo Farms Limited*** case. The case of ***African Banking Corporation Limited vs Plinth Technical Works Limited and Others*** <sup>(10)</sup> merely expanded on the principle of duty and made the qualification that where the surety is highly literate (well educated and exposed), and has executed similar mortgage contracts, he cannot be heard to argue that the bank did not discharge its duty to ensure that he had adequate understanding of the nature and effect of the third party mortgage.
83. In the circumstances of the case before us, aside from the evidence that the two sureties were fluent in English, there was no evidence that they were familiar with the nature of the third party mortgage/guarantee documents or that they were advised before executing the documents to seek independent legal advice.
84. Therefore, the creditor having failed to discharge its duty to explain to the sureties the effect, implications and consequences of executing the securities in issue, and to advise them to seek independent legal advice, breached the said duty.

85. The effect of that is that the securities cannot be enforced. The lower court therefore was on firm ground to set aside the third party mortgage and the personal guarantees. Failure to discharge the duty imposed by law was and is at the creditor's peril.
86. The lower court was on firm ground to award costs against the Appellant for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent because of the failure to discharge the duty aforesated.

**CONCLUSION**

87. Having found no merit in the appeal, we accordingly dismiss it with costs to be borne by the Appellant.

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C. K. Makungu  
**COURT OF APPEAL JUDGE**

.....  
F. M. Chishimba  
**COURT OF APPEAL JUDGE**

.....  
P. C. M. Ngulube  
**COURT OF APPEAL JUDGE**