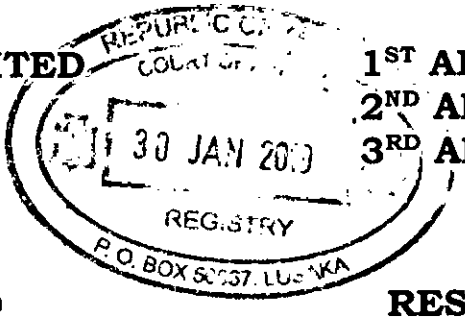
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 010/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

SPANCRETE ZAMBIA LIMITED **1ST APPELLANT**
DAVIES CHOLA KATAYA **2ND APPELLANT**
ANDISEN AILOSI PHIRI **3RD APPELLANT**



AND

CAVMONT BANK LIMITED **RESPONDENT**

Coram: Makungu, Kondolo, Majula, JJA

On the 27th day of March, 2018 and 30th day of January, 2019

For the Appellant: Mr. B. Mosha and Mr. M. Mwansa of Messrs Mosha & Co
For the Respondent: Mr. S.C. Mwanashiku of M & M Advocates

JUDGMENT

Makungu JA, delivered the judgment of the court.

Cases referred to:

1. *Owen (Edward) Engineering v. Barclays International Limited (1978) ALL ER, 976*
2. *Harbottle (R.D) Mercantile Limited v. National Invest minister Bank (1978)1 QB 146*
3. *Discount Records Limited v. Barclays Bank Limited (1975) 1 W.L.R 315*
4. *Investors Compensation Scheme Limited v. West Bromuch Building Society (1998) ALL ER 98*
5. *IE Contractors Limited v. Lloyd Bank PLC and Rafiden Bank (1990) Lloyds Report 496*

6. *Oakland Investment (Australia) Limited v. Certain Underwriters at Lloyds' and Another (2012) QSC 6*
7. *Robins v. National Trust Co (1927) AC 515*
8. *Hamzel Malas & Sons v. British Imex Industries Limited (1958) @Q. B 127*
9. *Barnabas Ngorima and Rose Mary Ngorima v. Zambia Consolidated Copper Mines Limited and Benson Chomba SCZ Appeal 121 of 2014.*
10. *Jefford and Another v. Gee (1970) IA ER 1202*
11. *Howe Richardson (1978) Lloyds L.R. 165*

Other authorities referred to:

1. *Linguard J.R 1993, Bank Security Documents, 3rd Edition paragraphs 13.81 and 13.84 at page 265,*
2. *Mark Hapgood Q.C - Pagets Law of Banking 12th Edition, Butterworths paragraph 34.*
3. *Chitty on Contracts General principles 27th Edition paragraph 12.039*

Legislation referred to:

1. *Law Reform Miscellaneous, Provisions Act, Chapter 74 of the Laws of Zambia*

This is an appeal against the judgment of the lower court dated 25th April, 2016. In the introductory part of this Judgment, we shall refer to the Appellants as the 1st, 2nd and 3rd Respondents respectively and the Respondent as the Applicant as these were their designations in the court below. By way of Originating Summons, made pursuant to Order 30 Rule 14 of the High Court Rules, the Applicant claimed the following reliefs:

1. Payment of all monies plus interest thereon and such costs as would be payable by the Respondents if this were the only relief granted;
2. Alternatively, delivery up by the Respondents to the Applicant of the mortgaged properties, foreclosure and an order to sale the same properties.
3. Any other relief.
4. Costs.

The affidavit evidence before the lower court was as follows:

In January 2015, the 1st Respondent applied to the Applicant for an advance bank guarantee in the sum of K7,787,436 in favor of ZESCO Limited (herein after referred to as ZESCO). The application was granted between March and April the same year. The purpose of the advance payment guarantee was to enable the 1st Respondent carry out its obligations under a contract described as ZESCO /003/214, for the supply of 1000 kilometers of ABC cable to ZESCO. The cable was to be imported from Zkngzhou Jin Hang High Tech Company Limited, a company based in China which trades as Jinshui Cable. Subsequently, a third-party mortgage was created over stand no. 1044/CL/4 Lusaka belonging to the 2nd Respondent to secure K1,130,000.00 and interest.

Acting on the 1st Respondent's instructions, the Applicant transferred the sum of US $168,600.00 to Jinshui Cable. Thereafter, the 1st Respondent deposited the sum of K5,800,000.00 into a fixed deposit account it held with the Applicant.

According to the terms and conditions of the advance payment guarantee, the Applicant was obliged to pay the said guarantee to ZESCO upon receipt of a written demand declaring that the 1st Respondent as a supplier was *"In breach of its obligations under the contract because it had used the advance payment for purposes other than towards delivery of the goods."*

On 14th October, 2015 the 1st Respondent provided further security in form of a third-party mortgage executed by the 3rd Respondent relating to subdivision No. 71 of subdivision "A" plot no. 437/M, Kitwe to secure K1,130,000.00 and interest. Both mortgages were registered at the Lands and Deed Registry on 27th April, 2015. In October 2015, the Applicant received a letter from ZESCO to the effect that the 1st Respondent had failed to deliver the cable and was in breach of its obligation and that payment be made in line with the bank guarantee. The Applicant honoured the advance payment guarantee by paying ZESCO the full amount. After paying the K5,800,000.00 provided by the 1st Respondent, there was an outstanding balance of K2,057,705.43 which the Respondents had not paid despite several reminders.

It was also in evidence that the 1st Respondent had purchased 250 kilometers of ABC cable and that pre-shipment inspection was required to be carried out by ZESCO on 15th February, 2015 at Jinshui Cable's in Henan Province, China. On 12th May, 2015, ZESCO carried out the pre-shipment inspection and as a consequence of the delayed shipment exercise, ZESCO incurred

losses in terms of forfeited deposit and storage charges amounting to US$ 404,000.00.

The 1st Respondent claimed that the Applicant negligently paid ZESCO under the guarantee and erred by calling on the sum of K5,800,000.00 standing to its credit in the fixed deposit account and debiting and overdrawing its current account by K1,987,436.00. That in its demand letter of 22nd October, 2015 to the Applicant, ZESCO had not indicated that the 1st Respondent had used the advance payment for purposes other than the performance of the contract and consequently failed to supply the 120mm ABC Cable and accessories to ZESCO thus being in breach of its obligations under the contract. The Respondents claimed that the Applicant was indebted to them and not vice versa.

In the affidavit in opposition, the Applicant stated that it was not obliged to investigate and verify the 1st Respondent's misapplication of funds when it failed to supply the cable. That the bank was duty bound to refund ZESCO the full amount of the advance payment upon receipt of a written notification that the 1st Respondent was in breach of its obligation on the premise that the advance payment was used for purposes other than delivery of the goods.

In the court below, the bank abandoned its claim relating to the third party mortgage on subdivision 71 of subdivision A of Lot 437 M, Kitwe.

The lower court found that what was executed between the parties was a "demand guarantee." That the Applicant assumed the financial payment obligations as security for the fulfilment of the Respondents' contractual obligation in the underlying contract arising in a separate contract made between ZESCO and the 1st Respondent and referenced in the advance payment guarantee as contract "NQ ZESCO/003/214."

Relying on the cases of ***Edward van Engineering v. Barclays International Limited,*** [1] ***Harbottle (R.D) Mercantile Limited v. National Investminister Bank*** [2] and ***Discount Records Limited v. Barclays Bank Limited*** [3] and other authorities, the trial court further found that the demand by ZESCO was valid and the Respondents argument that the Applicant negligently paid ZESCO was untenable. That the bank did not have to concern itself with judicial resolution of the dispute between the 1st Respondent and ZESCO. Further that the Applicant was bound by its undertaking.

The lower court considered the law on construction and interpretation of contractual terms as elucidated in ***Investors Compensation Scheme Limited v. West Bromuch Building Society*** [4] and ***IE Contractors Limited v. Lloyd Bank PLC and Rafiden Bank*** [5] that the intention of the parties should be ascertained on an objective basis in its factual and contractual context having regard to its common purpose. The Court went on to examine the relevant part of the advance payment guarantee which states as follows:

"At the request of the supplier, we Cavmont Bank Limited, represented by Mike Sikazwe and Martha Lungu Sichone in their respective capacity as Chief Credit Officer and Manager- Recoveries and Rehabilitation with our Head Office in Lusaka, Piziya office Park, Cavmont House P.O Box 38474, Thabo Mbeki Road, hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of ZMW 7,787,436 (Seven Million Seven Hundred and Eighty Seven Thousand Four Hundred and Thirty Six only) upon receipt by us of your first demand in writing declaring that the supplier is in breach of its obligation under the contract because the supplier used the advance payment for purposes other than towards delivery of the goods." (Underlined for court emphasis). (See page 34 of the record of appeal).

The lower court also construed the letter of demand from ZESCO to the Applicant dated 22nd October, 2016 which states among other things as follows:

"We write to notify you that Zesco Limited through this letter wishes to demand a full refund of the advance payment that was paid to your client Spancrete (z) Limited in the sum K7,787,436.00 against a bank guarantee dated 29th April, 2015 in the sum K7,787,436.00 drawn on Cavmont bank Limited which is due to expire on 29th October, 2015.

You may wish to know that the supplier has to-date failed to supply the 120mm ABC cables and accessories to ZESCO limited, thus being in breach of its obligations." (See page 34 of the record of appeal).

The learned trial Judge found that the words *"thus being in breach of its obligation"* give meaning and effect to the qualifying words in the advance payment guarantee *"..... in breach of its obligations under the contract ....."* She opined that the demand from Zesco not only asserted breach of the contract but went further to clarify that the breach arose from the failure to supply the said cable. She concluded that the Applicant made the payment in accordance with the advance payment guarantee and the 1st Respondent is indebted to the Appellant in the claimed amount of K2,057,705.43.

As regards the issue of how interest was arrived at, the Judge found that the Applicant had provided an explanation as to how the claimed amount was arrived at in exhibit **'DCK8'**. That the bank had the duty to provide bank statements to the 1st Respondent who had a corresponding duty to request for bank statements. A summary of the court's orders taken from the last page of the Judgment (J18) is as follows:

"1. The Applicant avails the bank statement to the 1st Respondent showing the interest charged on the claimed amount of K2,058,000. This is to be done within 14 days of this Judgment. Upon receipt of the bank statement, the 1st Respondent shall settle the claimed amount of K2,057,705.43 plus accrued interest calculated at the short term deposit rate from the date

of Originating Summons to the date of judgment and thereafter at the commercial lending rate until full payment. The claimed amount plus accrued interest is to be paid within fifty-five (55) days of receipt of the bank statement thereof. In default, the Applicant shall foreclose and take possession of the 2nd Respondent mortgaged property being stand number 1044/CL/4 Lusaka and exercise the power of sale."

"2. Costs to the Applicant to be taxed in default of agreement."

From this point onwards, the parties shall be referred to as they appear in this appeal. The appeal is based on the following grounds:

1. That the court below erred in law when it held that the guarantee issued by the Respondent in favour of ZESCO was payable on demand without proof or conditions.
2. That the learned trial judge erred in law when she construed the true nature of the guarantee and held that the demand from ZESCO did comply with the terms of the guarantee.
3. The learned trial judge erred in law in awarding the Respondent interest incorporated in the pre-litigated claim of K2,057,705.43 when the Respondent failed to show how the said interest was arrived at.
4. The learned trial judge erred in law by directing the Respondent to adduce evidence relating to its claimed interest on the sum of K2,057,705.43 post judgment.
5. The court below erred in law by awarding interest to the Respondent at the short term deposit rate.

According to the Appellant's Heads of Argument filed herein on 18th January, 2018 which were relied upon, the first ground of appeal was supported by the authority of ***Linguard J.R 1993, Bank Security Documents,*** [1] ***3rd edition, paragraph 13.81 and 13.84*** which state among other things:

Paragraph 13.81:

> ***"Once an unconditional bond or guarantee has been given by a bank, the bank itself will be liable to pay on demand and will only escape if it can show fraud or that the liability for which demand is made is outside the terms of the bond..."***

Paragraph 13.84:

> ***"Care must be taken in drafting bank guarantees to specify precisely what documentation.... the beneficiary must produce in order to be entitled to payment..."***

Counsel's interpretation of the above passages is that: notwithstanding primary default on the guarantee, the guaranteed party will not be entitled to payment under the guarantee if he fails to provide documentation to entitle him to such payment. He states that this entails that a payment guarantee by its very nature may be conditional, depending on its precise terms. That the court below quoted the learned authors of ***Pagets Law of Banking*** [2] in paragraph 34 as follows:

> ***"The principle which underlies demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by the disputes underlying***

the contract between the beneficiary and the principal. If the beneficiary makes an honest demand it matters not whether as between himself and the principal he must reimburse the guarantor (or counter guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of contract between them, must be resolved in separate proceedings to which the bank will be a party...."

In light of the foregoing, counsel for the Appellant stated that there is a very fine distinction between the terms of the guarantee and the terms of the contract underlying the guarantee. This is because a guarantee by its very nature is referred to as a collateral contract and as such, it is different from the original contract. He pointed out that the issue in contention is not the underlying contract, and whether or not there has been a breach, but whether there was an obligation by the bank to pay if the conditions precedent for settlement inherent in the guarantee, independent of the underlying contract had not been met. He contended that an obligation to pay on the basis of a payment guarantee does not arise if its inherent conditions precedent have not been met.

He went on to distinguish the facts of this case from the case of ***Owen (Edward) Engineering Limited v. Barclays Bank International Limited.***[1] In the present case, the guarantee was payable with conditions particularly that the demand letter had to comply with the specific wording of the guarantee. In the ***Owen Edward***[1] case, there

were no such conditions attached to the guarantee. Counsel therefore requested us to determine when an obligation to pay under a guarantee should arise if such guarantee has inherent conditions precedent which have not been met. He stated further that performance guarantees are effectively obligations to pay on demand on the terms of the guarantee, irrespective of any dispute between the beneficiary and principal under the terms of the separate contract, subject to fraud. In support of this, he relied on the case of ***Owen (Edward) Engineering v. Barclays Bank International Limited*** [(1)] the passage quoted by the trial judge on pages J11 and J12 of the judgment: per Lord Denning M.R:

> ***"The bank ought not to pay under the credit if it knows that the request for payment is made fraudulently in circumstances where there is no right to payment. A bank which gives a performance guarantee must honour that guarantee according to its terms.*** (underlined for court's emphasis).
>
> ***It must not be concerned in the least with the relations between the supplier and customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee if so stipulated, without proof or conditions. The only exception is where there is a clear fraud of which the bank has notice..."*** (underlined for court's emphasis only)

Counsel further argued that the guarantee in issue was not payable on demand, but on a condition, which was not met by ZESCO.

On the second ground of appeal, the appellant's submissions are that in the case of ***Investors Compensation Scheme Limited v. West Bronich Building Society*** [4] Lord Hoffman stated as follows:

> ***"Courts must look for the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract..."***

In light of the aforementioned authority, counsel contended that the plain meaning that the guarantee in issue would convey to a reasonable person is that the Respondent was primarily concerned about the application of the advance payment guarantee exclusively for purposes of delivery of the goods. The Respondent was not interested in any other breach although other events would have occurred which could have amounted to breach of the Appellants obligation to supply the materials in question: For instance, willful refusal by the 1st Appellant to approve the manufactured product. He went on to submit that the trial court gave a wider interpretation of the terms of the guarantee and ended up making findings which were not envisaged by the parties. He therefore urged us to consider the commercial purpose in interpreting the guarantee so as to discover the intentions of the parties, as stated in ***Chitty on***

Contracts General Principles [3] that the object of all construction is to discover the intentions of the parties.

He went on to state that in the case *of* ***I.E Contractors Limited v. Lloyd Bank PLC and Rafiden Bank*** [5] which was cited by the Court below, the Court was of the view that the question is one of contractual interpretation and that the degree of compliance required by the performance may be strict, or not so strict depending on the wording.

Counsel contended that the wording and conditions of the guarantee in question are specific, such that a strict construction is necessary. He therefore argued that the letter of demand issued by ZESCO was outside the terms of the guarantee. Whilst the parties cared to specify what documentation was required for ZESCO to be entitled to payment, the plaintiff did not ensure that ZESCO provided the required information in the letter of demand.

On the fourth ground of appeal, Mr. Mosha stated that the Order of the Court for the plaintiff to render a statement of account after Judgment was unjust and should be set aside.

The Appellant's arguments in support of the 3rd ground of appeal were that matters of interest by their very nature, are particularly contentions and as such documentation is cardinal in proving a claim for interest. To fortify this, he cited the case of ***Oakland Investment (Australia) Limited v. Certain Underwriters at***

Lloyds' and Another. [6] He concluded that the award of K2, 057, 705.43 inclusive of interest which was not proved was therefore contrary to legal principles.

On ground 4, Mr. Mosha counsel argued that the general rule is that the litigant who asserts the affirmative bears the burden of proving it. To support this, he relied on the case of ***Robins v. National Trust Co.*** [7] He contended therefore that the fact that the lower court requested the respondent to produce evidence of the alleged interest *post facto* was prejudicial to the appellants because evidence relied upon during trial was not authenticated and as such the appellants were not given an opportunity to rebut it.

As regards ground 5, he submitted further to the arguments in support of ground 4 that the learned Judge misdirected herself when she ordered that interest be paid to the Respondent at the short term deposit rate from the date of the originating summons to the date of the judgment and thereafter at the commercial lending rate until full payment owing to the fact that from the date of the summons, the amount to gain interest was that prevailing at the time. The interest claimed was an internal bank audit which the appellants herein were not given an opportunity to rebut during trial. Therefore, this ground should also succeed.

In response, learned counsel for the Respondent Mr. Mwanashiku contended that the first ground of appeal is misconceived because the lower court did not hold that the guarantee was payable on

demand without proof or conditions. Instead, the court held that the conditions set out in the guarantee had been met. This was after the court took into account the authorities setting out principles of honouring guarantees. Counsel relied on the case of ***Hamzel Malas & Sons v. British Imex Industries Limited*** [8] where Jenkins L.J stated as follows:

"... It seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborated commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my Judgment, it would be wrong for this court in the present case to interfere with their established practice."

In light of the foregoing, he elucidated that once the respondent received a letter of demand that complied with the terms of the guarantee, it was obliged to pay out without enquiring into the dispute between the Appellants and ZESCO. The respondent was not obliged to carry out investigations to ascertain the allegations that the appellants were in breach of their obligations under the contract or whether the appellants had actually used the advance payment for purposes other than towards the delivery of the goods. To buttress this, he also relied on the case of ***Edward Owen Engineering Limited v. Barclays Bank.***[1] He further submitted that the

guarantee did not stipulate that the demand letter should read exactly as stated in the guarantee. The Respondent honoured its undertaking to pay ZESCO upon receipt of the first written demand declaring that the appellants had breached its obligations.

Coming to the 2 ground of appeal; Mr. Mwanashiku reiterated his submissions in opposition to the first ground of appeal. With regard to the principles of interpretation of contracts referred to by the Appellant and found in Chitty on Contracts General principles, Counsel stated that the wording of the letter of demand conformed with the intentions of the parties to pay the guarantee in the event of default.

On the 3rd ground of appeal, he argued that the appellants did not raise any specific objection in the court below to the amount of interest claimed. The only complaint the appellant made in the court below was contained in their affidavit in opposition, that the respondent had claimed interest on the total amount paid out under the advance payment guarantee without providing a statement of account. The court below correctly pointed out that the appellants as borrowers had a duty to obtain bank statements for their own accounts. By law, the appellants are precluded from raising issues which were not raised in the court below at appeal stage. Reliance was placed on the case of ***Barnabas Ngorima and Rosemary Ngorima v. Zambia Consolidated Copper Mines Limited and Benson Chomba.*** [9]

As regards ground 4, it was argued that the court below did not direct the respondent to produce evidence post Judgment. That it was evident from the third-party mortgage that interest was chargeable.

He went on to rely on Chitty on Contracts – specific contracts where the learned authors stated at paragraph 3171 as follows:

> ***"At common law, the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some custom to that effect."***

He also relied on the case of ***Jefford and Another v. Gee*** [10] where Lord Denning stated as follows:

"The rule of common law of England was that in the absence of express agreement, interest could not be recovered on a debt or damages and equity in this respect followed the law."

In light of the foregoing, counsel submitted that there was an agreement to charge compound interest which was honoured and the Respondent provided the Appellants with bank statements. The Appellants were therefore given the opportunity to make an application to address any aspect of the interest before judgment was enforced.

In addressing the 5th ground of the appeal, the Respondent's counsel relied on the submissions advanced in response to ground 4. Additionally, that interest is discretionary under Section 4 of the Law

Reform (Miscellaneous Provisions) Act, Cap 74 which provides as follows:

> ***"In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of Judgment."***

At the hearing of the appeal both counsel relied on their heads of argument. Mr. Mosha augmented his written arguments by saying that in this case the guarantee specified the message to be conveyed in the letter of demand. However, the letter of demand did not convey such a message. It fell short of the conditions specified in the guarantee as it did not show the nature of the alleged breach.

In response Mr. Mwanashiku stated that although the letter of demand did not state that the 1st Appellant had used the advance payment for purposes other than towards the delivery of the goods, the Respondent was satisfied that the funds were misused.

We have considered the record of appeal and the arguments made by both advocates. We shall deal with the first two grounds together as they are interconnected. For the same reason, the 3rd, 4th and 5th grounds will be dealt with together. On the first two grounds, our views are as follows:

The lower court did not hold that the advance payment guarantee was payable on demand without proof or conditions. The lower court found at page 16 of the judgment that "although the demand letter of 15th October, 2016 did not use the exact words of the advance guarantee..." the latter part of the demand stating *"... thus being in breach of its obligations,"* gives meaning and effect to the qualifying words in the advance payment guarantee: *"... in breach of its obligations under the Contract...."* The court opined that the letter of demand from ZESCO did not only assert breach of contract but clarified that the breach arose from failure to supply the 120mm^2 ABC cables by the 1st Respondent/ now the 1st Appellant, encompassing the qualifying words of "breach of its obligations under the contract."

This entails that the lower court was aware of the conditions attached to the advance payment guarantee with regard to the demand for payment.

On pages 13 – 14 of the Judgment, the lower court found that "... the Applicant was triggered upon its receipt from ZESCO of the written demand without having to subject ZESCO being the beneficiary, to await a judicial resolution of a dispute as to who is at fault. That since the Applicant made an undertaking to refund ZESCO upon receipt of the first demand declaring that the supplier was in breach of its obligations, the Applicant was bound by such an undertaking. The lower court was therefore satisfied that the demand was valid

and found the Respondent's arguments that the Applicant negligently paid ZESCO untenable.

We take the position that the lower court had misapplied the principles laid down in ***Edward Owen Engineering Limited v. Barclays Bank International Limited.*** [1] We hasten to mention that the facts of the ***Edward Owen*** [1] case are different from the facts of the case before us: In the Edward Owen case the guarantee was expressly said to be *"payable on demand without proof or conditions."* In the present case, the guarantee was payable upon the first demand in writing declaring that the supplier was in breach of its obligations under the contract *because the supplier used the advance payment for purposes other than toward delivery of the goods.* Under the circumstances, we agree with learned counsel for the Appellant that in the present case, it was necessary for ZESCO to inform the respondent that the default was due to the 1st appellant having used the advance payment for purposes other than towards delivery of the cables because payment should have been triggered only by that specific breach. Other possible breaches such as wanton refusal by the 1st Appellant to approve of the manufactured product or mere delay in delivering the goods were not covered by the advance guarantee. As rightly stated by Mr. Mosha the intentions of the parties were to safe guard against the misuse of the funds. We have applied the commercial interpretation guided by the cases of ***Investors Compensation Scheme Limited v. West Bromuch Building Society*** [4] and ***I.E Constructions Limited v. Lloyd Bank PLC*** and ***Rafiden Bank.*** [5]

We take the view that unlike the Edward Owen case where the guarantee was payable on demand without proof or conditions, in this case the guarantee was payable on demand if the condition precedent had occurred. Despite the difference in the two cases, we take a leaf from Lord Denning M.R.'s statement in the Edward Owen case that *"A Bank which gives a performance guarantee must honour that guarantee according to its terms."*

"The bank must pay according to its guarantee on demand if so stipulated, without proof or conditions." *The only exception is when there's a clear fraud of which the bank has notice.* *(underlined by the Court for emphasis only)*

It follows that in the present case the Respondent (bank) should have paid particular attention to the terms of the Advance payment guarantee as it was imperative that the guarantee be honoured according to its terms. We note that the issue of fraud has not come up in this case.

Our examination of the letter of demand dated 22nd October, 2015 shows that it was not in compliance with the provisions of the Advance Payment Guarantee. The non-compliance should have put the Respondent on alert as to whether the demand was honest and valid. Our firm position is that it was invalid.

To clarify our position, we are not saying that the respondent was duty bound to investigate the matter to see to it that the supplier had misused the money.

We are further fortified by ***Howe Richardson*** [11] where Lord Justice Roskill stated that:

"Whether the obligations arise under a letter of credit or under a guarantee, the obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the surveyor or the buyer to the seller as the case may be under the sale and purchase contract, "The bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen." (underlined for court's emphasis only).

In ***IE Contractors Limited v. Lloyd Bank PLC and Rafiden Bank*** [5] the court stated that:

> ***"The question is one of contractual interpretation and that the degree of compliance required by a performance bond may be strict or not so strict depending on its wording."***

In the present case, the degree of compliance required by the guarantee was certainly strict on the basis of its wording.

For the foregoing reasons, we find merit in the first two grounds of appeal.

Coming to the 3rd 4th and 5th grounds of appeal, the issue of the interest payable was indeed raised by the appellant in the court below, in its affidavit in opposition. It was therefore incumbent upon the respondent to justify its claim for interest before the matter was determined, notwithstanding that the appellants were at liberty to request for bank statements. Since the issue was raised in the court below, it was properly raised on appeal. The Respondent's submissions that it was agreed by the parties that interest would accrue is irrelevant because it was not one of the disputes between the parties in the court below.

The lower court was under the circumstances, under a duty to satisfy itself that the bank had charged interest properly. The court did an injustice by granting unproved claims. Consequently, the court misdirected itself when it ordered the Respondent to prove its interest claim within 14 days post judgment. It follows that all the lower court's orders for payment of interest were erroneous.

For the foregoing reasons, the lower court's judgment is hereby quashed. The respondent should refund the appellants the sum of K5, 800,000.00. The respondent should also yield vacant possession of stand number 1044/CL/4 Makishi/Broads Road, Rhodes park, Lusaka which it took possession of by way of writ of possession on 1st August, 2017 and advertised for sale. If the property has been sold, the appellants are entitled to the market value thereof as at the time that execution took place. The appellant is also entitled to interest at the average short term deposit rate from the date of the

writ up to the date of this judgment, thereafter at the current commercial bank lending rate.

We refer the matter to the Deputy Registrar of the High Court for assessment of damages. Costs in the court below and for the appeal are granted to the appellants, the same to be agreed upon or taxed.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

.....

B.M. MAJULA
COURT OF APPEAL JUDGE