IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 574 OF 1988

BETWEEN:

SEDOM.....PLAINTIFF

- and -

J E CHINTHULI.....DEFENDANT

CORAM: **TAMBALA, J.**
Tembenu, of Counsel, for the Plaintiff
Chizeze/Kapanda, of Counsel, for the Defendant
Chigaru, Official Court Interpreter
Longwe, Court Reporter

J U D G M E N T

The action is based on guaranty which was executed by the defendant. He guaranteed several "mini" loans which SEDOM granted to a lady called Regina Buledi. The guaranty consisted of some four documents. There is a document dated 21st February 1985. In this document the defendant guaranteed a loan of K2,000.00. There are two similar documents dated 4th December 1985 and 8th January 1985. In each of these documents he became a surety for a loan of K1,000.00. Finally, in another document dated 2nd July 1985 he guaranteed a loan for K500.00. The total sums of money which Regina Buledi borrowed from SEDOM and which were guaranteed by the defendant came to K4,500.00. This sum grew, it would seem, to K5,239.41 at the time of the commencement of the action by reason of interest which the loans attracted.

The defendant duly signed the four guarantee forms. The documents also purport to have been signed by the loanee herself. It is not disputed that the K4,500.00 was received by the loanee. The evidence of Mr D A Nyirenda, a Senior Loans Officer employed by SEDOM, was that he was taken to the defendant's house in Area 10 in the City of Lilongwe, by the defendant himself where he was introduced, again, by the defendant, to a lady called Regina Buledi. He said that the defendant told him that the lady was his wife. At that time the defendant was working as Deputy Secretary in the Ministry of Trade and Industry, the parent Ministry of SEDOM. He was also a member of the Loans Committee which had approved the loans granted to Regina Buledi. The

witness said that he made Regina Buledi sign the loan agreements. He said that he believed that Regina Buledi was the wife of the defendant.

When he gave his evidence, the defendant denied that Regina Buledi was his wife at the material time. He said that his wife whom he married in 1964 is Grace Fairton. At one point he disputed the existence of a person called Regina Buledi. When he was cross-examined, he conceded that during court proceedings in a similar case he had told the Court that Regina Buledi was a casual friend. When he was pressed further, he stated that this person probably existed. I was convinced that the defendant was capable of pointing at his wife and telling Mr Nyirenda that the lady was Regina Buledi. It is probable that the defendant deliberately concealed the true particulars of his wife because, owing to his position both in the Ministry of Trade and Industry and in the Loans Committee of SEDOM, he did not want such particulars to appear in the records of SEDOM.

The defendant said in his evidence that the practice of SEDOM was that before a loan was granted, officials of SEDOM had to appraise the project for which the loan was sought and they had to monitor the progress of the project. From the evidence of Mr Nyirenda, I am satisfied that, that was not necessary, especially in the case of small loans of about K2,000.00.

The defendant has raised two defences. The first defence is that the terms of the guaranty required that a demand should be made by the plaintiff requiring the defendant to pay the sum secured. It was argued that the making of the demand was a condition precedent for the liability of the defendant. It was pointed out that the plaintiff failed to make the demand. The second defence was that the guarantee was based on illegal contract.

I shall begin to consider the second defence. The defendant argues that there is no Regina Buledi in existence. He contends that Regina Buledi is fictitious. The suggestion here is that SEDOM did not advance the money to a person called Regina Buledi, but to a person whose identity was concealed. The terms of the loan agreements, as well as the guarantee forms, are deceptive and misleading.

There is no evidence regarding the negotiations which led to the granting of the loans and the execution of the guarantees. There is no evidence to prove that both parties agreed to conceal the real identity of the loanee; again, the object of the concealment has not been proved. It is probable that it was the defendant who decided to conceal the true particulars of the borrower of the money. He probably did this on his own and without the assistance of officials from SEDOM. From the evidence of Mr Nyirenda, I am satisfied that this witness believed that the loanee was the wife of the defendant and thought that she chose to use her maiden name when she signed the loan agreements.

A contract can be illegal on several grounds. It can be considered illegal because its object is to commit a crime, a tort or a fraud upon a third party. It can be illegal because it is sexually immoral. It may be held illegal because it is prejudicial to the administration of justice: **Cheshire and Fifoot's LAW of CONTRACT, 9th Edn pp 333-338**. Counsel for the defendant did not indicate on what ground the contract of guarantee could be held to be illegal. I am, myself unable to find on what basis the guarantee agreements executed by the defendant can be said to be illegal, especially if SEDOM officials were not a party to the concealment of the identity of the loanee. It has not been proved in evidence that SEDOM was a party to such concealment. I am of the view that the defence based on illegality of contract is invalid.

The other defence is that the liability of the defendant was dependent upon a demand for the payment of the secured sum being made. This is a formidable defence. The law seems settled that when the terms of a contract for surety stipulate that the surety shall pay the secured sum upon a demand being made, the liability of the surety does not arise until the demand is made.

The case of **Bradford Old Bank Ltd -v- Sutcliffe (1918) 2 K.B. 833** shows the following facts: In 1894 the plaintiffs agreed to grant to a company a total loan of £6100. The loan was secured by certain debentures issued by the company in favour of the plaintiff. To protect the plaintiffs from loss occasioned in the course of realising the debentures, the directors of the company gave a guarantee agreeing to pay on demand all the sums not exceeding £6100 owing by the company. In 1899 the plaintiffs had notice that one of the directors of the company became insane. From that time, the guarantee ceased to be a continuing security and the debt crystallised as against this director. There was at that time £3400 due from the company. In 1912 the plaintiffs demanded payment of the sum. In 1915 they commenced action against a committee for the director who had become insane to recover the sum secured by the guarantee. The defendant pleaded that the action was statute barred, in that it was commenced after six years since the cause of action arose. This defence would have succeeded if the Court held that the cause of action arose in 1899 when the debt crystallised. The Court of Appeal held that the cause of action did not accrue in 1899, but that it arose in 1912 when demand for the payment of the money was made. The action was, therefore, commenced within three years from the time that the cause of action accrued.

The remarks of **Scrutton, L.J.** are instructive. His Lordship said at page 848 -

> "Was it here necessary for the plaintiff to prove demand? Generally, a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated it should be made. Even if the word "demand" is used in the case of a present debt, it is meaningless, and express demand is not necessary, as in the case of a promissory note payable on demand. But it is otherwise where the debt is not present but to accrue, as in the case of a note payable three months after demand; or where the debt is not a present debt, but a collateral promise. The promise of a surety to pay on demand if his principal does not, appears to me to be a collateral promise within the authorities; and I entertain no doubt that in this guarantee the provisions about demand are a real stipulation, and not mere words.... I am of opinion that the creditor must prove a real demand, and therefore, that the statute of limitations did not run till the demand had been made. The plea of the statute therefore fails."

The same decision was reached in the case of **Re Brown Estate (1893) 2 C.H. 300.**

In the present case the guarantee states in clause 1 that the guarantor undertakes to pay the sum secured "on demand in writing made" on the guarantor. According to a letter dated 2nd September 1987, addressed to Regina Buledi, the plaintiff made a clear demand for the payment of the sums due from Regina Buledi. Regrettably, no similar demand was sent to the defendant. Counsel for the plaintiff tried to rely on a letter dated 2nd September 1985, addressed to the defendant, as proving that a demand for the sums secured was made. Unfortunately, the letter is not couched in the same terms as the one of 2nd September 1987 - Exh.P9. The letter which was addressed to the defendant simply notified him about the default made by Regina Buledi, and asked him to assist in ensuring that the principal debtor paid the loan. The plaintiff did not, therefore, demand in writing, from the defendant, payment of the secured loans. Ordinarily, this failure to make a written demand would, on the available authorities, have defeated the plaintiff's action.

It would, however, seem to me that this is not an ordinary case of a guaranty. The defendant deliberately concealed the true identity of the loanee. He pointed to his wife and told Mr Nyirenda that that was Regina Buledi. He now tells the Court that his wife is not Regina Buledi, but Grace Fairton. By his conduct, the defendant has made it very difficult for the plaintiff to recover the debt from the principal debtor. From the evidence before me, I get the distinct feeling that the defendant was the actual debtor. He received the money from SEDOM and used it for his personal ends. Regina Buledi was just a mask which he

devised and behind which he was able to obtain a loan of K4,500.00 without disclosing that he was the debtor. He has spent the money and he does not want to repay it. He seeks the assistance of the defence of lack of written demand. I do not think that will assist him. That defence is intended to assist genuine guarantors. The defendant was not a genuine guarantor. The guarantees which he executed in favour of SEDOM were not real. They were a sham. They were devices intended to enable him to obtain loans which he did not intend to repay. They were tools for defrauding SEDOM. The law does not protect such persons. I am satified that by his conduct, the defendant forfeited his right to a written demand before he was required to pay the secured loans.

I am, therefore, of the view that the plaintiff's action must succeed. The writ seems to claim K5,239.41 and interest at the rate of 15% per annum with effect from 1st December 1985. The letter of demand - Exh.P9, shows that as at 31st July 1987 the total sum of the principal and interest came to K5,102.04. Clearly, the total sum could not be greater in December 1985. The writ was filed in Court on 5th October 1988. I am prepared to find that the total debt, including interest, grew to K5,239.41 as at 5th October 1988. I would award 15% simple interest per annum on this amount up to 4th October 1992. The total principal sum and interest comes to K8,383.05. I enter judgment for the sum of K8.383.05 in favour of the plaintiff. This judgment sum shall carry simple interest at the rate of 15% per annum with effect from 5th October 1992 till the whole amount is fully paid. The plaintiff is also awarded costs of this action.

PRONOUNCED in open Court this 8th day of December 1992, at Blantyre.

D G Tambala
JUDGE