COMMERCE BANK LIMITED AND GANSON LOTTIE SIMFUKWE AND ARUNDEL INTERNATIONAL INVESTMENTS

SUPREME COURT
SAKALA ACTING D.C.J.
8TH NOVEMBER, 2000 AND 18TH JANUARY, 2001
APPEAL . NO. 181/99

Flynote
Civil Law - Mortgage deed - default in payment - whether Mortgage deed provided for charging of compound interest - statutory interpretation.

Headnote
The Respondent obtained a sum of K20 million from the Appellants under a covenant in a third party Mortgage deed. The Appellants commenced an action by an Originating Summons claiming payment of the monies due. After considering the provisions of the Mortgage deed the Court found that clause 2 of the deed did not provide an agreement for compound interest. The claim for compound interest was therefore refused, hence the appeal.

Held:
The respondent agreed to the provision in the Mortgage deed. The clause entitled the Appellant to recover compound interest. Appeal allowed.

Case referred to:
Union Bank v. Southern Province Co-operative Union Ltd. 1995/97 Z.R. 207.

For the Appellant N. Nchito of M.N.B.
For the Respondent N/A

Judgment
SAKALA, ACTING D.C.J.: delivered the judgment of the court.

We heard this appeal in the absence of the Respondent in terms of Rule 71 (1)(b) of our Supreme Court Rules. We were satisfied by the explanation by counsel for the Appellant that the Respondents were aware of the hearing date but they were seeking for an adjournment to engage counsel. The position taken by counsel for the Appellant was that he was objecting to any adjournment since the appeal had been filed in February, 2000 and if the Respondents were aware that they had no counsel, they had enough time to engage one. This appeal was filed on the 24th February, 2000. It came up for first hearing on 1st August, 2000. On that date the Respondents did not appear. Mr. MATIBINI then, appearing for the Appellant, explained that although the record showed that the Respondents were represented by Simeza, Sangwa and Associates, the correct position was that they were no longer representing them, as the record of appeal served on them was returned. Mr. MATIBINI also informed the court that on 1st August, 2000, he had served the record directly. The matter adjourned to a date to be fixed. The matter then came up on 8th November, 2000. On that date, we ordered that the appeal be heard in the absence of the Respondents as we saw no sufficient reason for adjourning the matter any further.

On the day we heard this appeal at Kabwe, we allowed the appeal with costs to be taxed in default of agreement. We said then that we shall give our reasons in a written judgment later. We now give our reasons.

This an appeal against the judgment of the High Court denying the Appellant's claim for compound interest on the Respondent's account. Although the trial court's judgment, running into thirteen pages citing a number of decided cases including the Banking and Financial Services Act, Cap. 387 and Companies Act Cap. 388, the issue for determination was very narrow and simple. All the relevant facts were not in dispute. Simply stated, these facts were

that the Respondent obtained a sum of K20 million from the Appellants under a covenant in a third Party Mortgage deed dated 20th April, 1994 between the parties.

On 7th September, 1995 the Appellant commenced an action by an originating summons claiming payment of the monies due. By way of special case stated by consent of all the parties questions of law were set out for the opinion of the court. One of the questions was to the effect that "whether the court should have stopped the parties applying the rate of interest agreed in the Third Party Mortgage Deed from the date of notice of demand."

After considering the provisions of the mortgage deed, the court found that Clause 2 of that Mortgage Deed did not provide an agreement for compound interest as it was not clearly stated. The claim for compound interest was therefore refused, hence this appeal.

On behalf of the Appellant, written heads of arguments were filed based on two grounds of appeal complaining of the trial judge's finding in relation to the interest as provided in the Mortgage Deed. The short summary of the only argument by Mr. NCHITO was that as provided in Clause 2 of the Mortgage Deed, the Appellant was entitled to charge compound interest. The submission was that the correct interpretation of Clause 2 is to the effect that the total sum of money included the principal sum which plus interest owing, meant charging of compound interest. He urged the court to allow the appeal and also allow the Appellant to recover the sum due. This appeal centres on the interpretation of Clause 2 of the Mortgage Deed which reads:-

"2. From the time when any demand for payment of any monies herein due for payment shall be made the customer and the Mortgagor shall until payment to the bank in full of the total sum or on so much thereof as shall remain owing from time to time at Ruling Base Rate such interest to be computed from the time when such demand shall be made and to accrue from day to day and payable on demand."

We have considered this Clause. It is very clear that the Respondent agreed to this provision in the Mortgage Deed. The Clause entitled the Appellant to recover compound interest. In our view, the Appellant was on firm ground to claim compound interest and this is the position which was explained in our decision in the case of *Union Bank v. Southern Province Co-Operative Union LTD.* (1) 1995/97 Z.R. 207. The trial judge was therefore wrong to deny the Appellants compound interest in the face of a clear provision stating that the parties agreed to the charging of compound interest. For the foregoing reasons, we allowed the appeal with costs to be taxed in default of agreement.
