**IN THE SUPREME COURT OF ZAMBIA** **Appeal No.198/2009**

**HOLDEN AT KABWE AND LUSAKA** **SCZ/8/198/2009**

**(CIVIL JURISDICTION)**

**BETWEEN:-**

**IN THE MATTER OF**: **Property comprised of Certificate of Title relating to S/D No. 23 of S/D “D” of Farm No. 23a, Makeni, Lusaka**

**JAMES MUSONDA APPELLANT**

**AND**

**INVESTRUST BANK PLC RESPONDENT**

**CORAM: SAKALA, CJ., MWANAMWAMBWA AND WANKI, JJS.**

**ON 1ST NOVEMBER, 2011 AND 24TH MAY, 2012 at 09.00 HOURS**

**FOR THE APPELLANT: MR. D. E. MUPETA OF D. E. MUPETA AND COMPANY**

**FOR THE RESPONDENT: MR. A. SIWILA OF MESSRS MAAMBWE SIWILA AND PARTNERS**

**JUDGMENT**

**Sakala, CJ., delivered the Judgment of the Court.**

**Cases Referred:**

1. *Invest Merchant Bank vs Lilyiole Farm Limited (2002) Z.R.*

 *115,*

2. Wilson Masautso Zulu v Avondale Housing Project Limited

 (1982) ZR.172

This is an appeal against the Judgment of the High Court dismissing the Appellant’s ***Originating Notice of Motion*** for an Order for Reconciliation of Accounts and Refund for Excess paid.

The brief history leading to the appeal is that on or about 5th September, and 20th October, 2003, the Appellant was availed credit facilities in the sums of K15 million and K30 million by the Respondent Bank. The Facility Letters provided, among other things, that interest would be charged at 5% above the Respondent Bank’s base rate of 43%, which was subject to change at any time, depending on money market forces. The Facility Letters further provided for charging of compound interest. The Applicant executed both Facility Letters accepting the terms and conditions of the Facilities.

According to the Affidavit evidence on record, these Facilities were secured by a Third Party Legal Mortgage and a Legal Mortgage over Subdivision number 23 of Subdivision “**D**” of Farm number 23a, Makeni, Lusaka.

The Appellant did not pay back the amount as agreed. Consequently, sometime in 2007, the Respondent Bank commenced an action against the Appellant by an ***Originating Summons*** for ***foreclosure***. The Respondent Bank claimed all the monies due under the Third Party Legal Mortgage relating to Farm number 23a, Lusaka.

By consent, the parties agreed that the Appellant pays all the monies outstanding plus interest within the period of three (3) months from the date of the Consent Order; and that in default, the Appellant was to deliver the portion of subdivision 23 of subdivision “D” of Farm Number 23a, Lusaka, to the Respondent Bank for purposes of ***foreclosure*** and sale.

Subsequent to the consent order, the Appellant commenced an action against the Respondent Bank by an ***Originating Notice of Motion*** for an order for Reconciliation of Accounts and Refund for Excess paid. This is the action that led to this appeal.

The Appellant, as well as the Respondent Bank, filed Affidavits in support and in opposition to the Motion, respectively. The trial court reviewed and considered the Affidavit evidence, the Court found that there was an express agreement by the parties that compound interest would be charged on the Facilities availed to the Appellant and upheld the compound interest charge.

On the issue of whether the Appellant obtained a Loan or an overdraft, the Court found that the Appellant was given a loan and not an overdraft.

The Court also found that the Respondent Bank did not charge the Appellant interest on all Bank transactions that included service charges and arrangement fees. The Court concluded that the ***Originating Notice of Motion*** lacked merit and dismissed it with costs to the Respondent Bank.

The Appellant appealed to this Court. The Memorandum of Appeal on record contains six (6) grounds; but the last two were not grounds at all. Both parties filed written heads of argument. The written heads of argument on behalf of the Appellant were based on two grounds only:-

1. That the agreements between the Appellant and the Respondent Bank were for Loan Facilities and the unilateral switch to Overdrafts was a breach of the agreements; that the unauthorized increased interest was punitive and illegal; and
2. That the Court erred on interest charges.

The gist of the written heads of argument on the first ground that the agreements were for Loan Facilities and not Overdrafts, is that the trial court appeared to have been carried away by the compound interest more than with other equally important areas of the case before it; that in the process, the Court skipped some important points or did not accord the same reasoning. The case of ***Wilson Masautso Zulu v Avondale Housing project Limited1*** was cited in support of these arguments in which this the Court held that:-

***“the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality.”***

It was pointed out that all the facts before the trial court and this court are well documented; that on the issue of whether the agreements were for loans or overdrafts, it is documented as Personal Loans of K15,000,000.00 and short Term Loan of K30,000,000.00; that the contract was concluded and sealed that the borrowings were for loans and the Court properly so found.

It was contended that the first time the issue of overdrafts surfaced was 5 years later in the Respondent Bank’s letter by the company secretary in response to the Appellant’s complaint and his counsel’s letter. It was submitted that the language or words in the letter was ordinary to raise no difficulty in appreciating the contents; that as correctly observed by the trial Court; the difference between a loan and an overdraft is that an overdraft has a shorter period in which to pay, while for a loan, it is open. It was further submitted that for the Respondent Bank to switch to overdrafts, it did not act professionally, that the trial court, carried away by compound interest, which was not in dispute, overlooked the fundamental term of the contract of loans and not overdrafts; and that a departure from this term meant that the Respondent Bank was in breach of the contract.

It was contended that worse more, the Respondent Bank switched to overdraft facilities unilaterally; while the contract stated that the Respondent Bank would inform the Appellant of any changes. It was submitted that the trial court abdicated its duty ***“to adjudicate upon every aspect”.***

It was finally submitted that in summary, the switch to overdrafts was arbitral and in breach of the contract, and that the increased interest penalty was punitive and therefore illegal.

In his brief oral submissions on behalf of the Appellant, Mr. Mupeta reiterated that the agreements between the Appellant and the Respondent Bank were for loans and not overdrafts.

The gist of the written response to ground one, on behalf of the Respondent Bank; is that the Appellant had not offered any evidence to support the contention that the Respondent Bank unilaterally switched the Loan Facilities to Overdraft Facilities, thereby breaching the agreements between the parties. It was contended that the Respondent Bank by the Facility Letters dated 20th October, 2003, and 5th September, 2003, granted loan Facilities to Rubicon Minequip Limited (the Appellant’s Company) and to the Appellant in the sums of K30Million and K15Million, respectively; but that instead of opening a Loan Account, the Respondent Bank allowed the Company to operate the Account as an overdraft on the same terms and conditions contained in the Facility Letters.

It was submitted that in the light of the foregoing, the Respondent Bank did not unilaterally switch the Loan Facilities to overdraft Facilities resulting in the breach of the agreements as alleged by the Appellant. It was further submitted that the Respondent Bank did not depart from the terms and conditions contained in the Facility Letters as regards the operations of the Loan Facilities to constitute a breach of the agreement, and that whether the credit facilities were Overdraft or Loans, interest still accrued on the Facilities.

It was also submitted that going by clause 7 of the Facility Letters, the Respondent Bank was entitled to charge interest at the agreed rate depending on whether the Loans were performing; and at rates to be determined by the Respondent Bank in the event the Appellant and the company were in default, which they were.

It was contended that even assuming that the Respondent Bank charged interest, when the Appellant and Rubicon Minequip defaulted in the repayment of the Loans, the interest could not be termed as penal interest, unauthorized increased interest, punitive and illegal as submitted by the Appellant; and the same could not be classified as extravagant and unconscionable.

We have very carefully examined the affidavit and the documentary evidence on record, the judgment appealed against and the written heads of argument and the response on ground one.

It is not in dispute that the parties entered into agreements for Loan Facilities. The question for determination is whether there was a unilateral switch from Loan Facilities to Overdraft Facilities and hence a breach of the agreements.

As pointed out by the Appellant, the beauty of it all was that all the facts in this case are well documented.

The Respondent Bank’s letter to the Appellant dated 5th September, 2003 is headed as follows:-

 ***“BANKING FACILITIES: PERSONAL LOAN – K15,000,000”.***

Under ***TERMS AND CONDITIONS:*** Paragraph 3 reads: ***“Facility and Amount:* Loan (Kwacha fifteen Million only)”**

The Respondent Bank’s letter to the Managing Director of Rubicon Minequip Limited is headed as follows:-

**Facility: Short-Term Loan – K30,000,000 and** under **Facility and amount,** it reads:- **“Short term Loan of K30,000,000 (Kwacha Thirty Million only)”**

The Court found that what the Respondent Bank gave to the Appellant were Loans and not Overdrafts. On the documentary evidence on record, we totally agree with this finding. The question that follows from this finding is whether there was a switch from the Loan Facilities to Overdraft Facilities as contended by the Appellant? On behalf of the Appellant, it was submitted that the evidence of the switch from the Loan Facilities to Overdraft Facilities is contained in the Respondent Bank’s letter dated 22nd July, 2008, to the Managing Director of Rubicon Minequip Limited where it reads:-

***“Instead of the Bank opening a Loan Account, it only allowed you to operate the Loan facility as an overdraft on the same terms as was stated in the Loan Facility. This Loan Facility was to operate as an overdraft as a limit of K30million up to 31st December, 2003.”***

The contention of the Respondent Bank is that the foregoing passage meant that the Respondent Bank, by the Facility Letter dated 20th October 2003, granted a Loan Facility to Rubicon Minequip Limited for the sum of K30million and that by Facility Letter of 5th September, 2003, the Respondent Bank availed the Appellant a Loan Facility of K15 million plus interest at the rate of 48% subject to change at the Bank’s discretion.

 According to the Respondent Bank, instead of opening a Loan Account, it allowed the company to operate the account as an overdraft on the same terms and conditions contained in the Facility Letter.

We have very anxiously considered the issue of whether there was a unilaterally switch of the Loan Facilities to Overdraft Facilities. We note that the trial court, having found that the Appellant was given Loan Facilities, did not address itself to the issue of whether there was a switch from Loan Facilities to Overdraft Facilities. In our view, this was a serious oversight.

The documentary evidence, namely the Respondent Bank letters of 5th September, and 20th October, 2003, which were Facility Letters, whose terms and conditions were accepted and signed for by the Appellant, clearly established that the Appellant was given Loans. But then, five years later in 2008, the Respondent Bank claims that it allowed the company to operate the account as an overdraft on same terms and conditions contained in the Facility Letters. We have very serious doubts to accept this explanation. Certainly, there is no evidence that the Appellant accepted to have the Loan Facility to be operated as an Overdraft. What is clear on record is that the Respondent Bank unilaterally switched the Loan Facility to an Overdraft Facility. This was in our view, a breach of the agreements.

On the documentary evidence on record, we are satisfied that the Respondent Bank departed from the terms and conditions contained in the Facility Letters, which formed the loan agreements. It follows that the increased interest was, therefore, punitive and illegal. We find that there is merit in ground one of the appeal. This ground is, therefore, allowed.

Ground two relates to interest levied on other charges. Counsel for the Respondent Bank, properly so in our view, conceded that from the documentary evidence on record, the Respondent Bank levied interest on other charges to arrive at the principal sum owing, which practice is not allowed by law.

In the case of ***Invest Merchant Bank v Lilyvale Farm Limited,2*** a case cited by Counsel for the Appellant, this court held: ‘***Interest can only be charged on the actual amount utilized in the overdraft. Legal charges, commissions and usual bank charges cannot be capitalized into the principal sum to attract compound interest***.

We, therefore, allow ground two of appeal and order that the amount of the various charges levied by the Respondent Bank be paid to the Appellant.

The net result of this appeal is that all the two grounds of appeal are successful.

The whole appeal is allowed. Judgment is entered in favour of the Appellant with costs to be taxed in default of agreement.

E. L. SAKALA

**CHIEF JUSTICE**

M. S. MWANAMWAMBWA

**SUPREME COURT JUDGE**

M. E. WANKI

**SUPREME COURT JUDGE**