IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 049/2012
SCZ/8/061/2012

(Civil Jurisdiction)

BETWEEN:

CHABANGA LODGE LIMITED **1ST APPELLANT**

GEORGE MUBANGA KAPASA **2ND APPELLANT**

AND

INVESTRUST BANK PLC **RESPONDENT**

CORAM: Mwanamwambwa, Chibomba, Musonda. J.J.S.

On 14th August, 2012 and 4th July 2014

For the Appellants: Mr. Magubbwi–Messrs. Magubbwi & Associates.

For the Respondent: No Appearance.

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

(1) **UNION BANK ZAMBIA LIMITED V SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED (1995-1997) ZR 207**

(2) **MATCH CORPORATION LIMITED V DEVELOPMENT BANK OF ZAMBIA AND ATTORNEY GENERAL (1999) ZR 15**

(3) **CREDIT AFRICA BANK LIMITED (IN LIQUIDATION) V JOHN DINGANI MUDENDA (2003) ZR 71**

(4) **RODGERS CHAMA PANDE AND FOUR OTHERS V ZAMBIA STATE INSURANCE CORPORATION LIMITED SCZ JUDGMENT NO. 16 OF 2004.**

(5) **PREMESH BHAI MEGAN PATEL V REPHIDIM INSTITUTE LIMITED SCZ JUDGMENT NO. 3 OF 2011.**

(6) **ATTORNEY GENERAL V ACHIUME (1983) ZR 61.**

(7) **ZULU V AVONDALE HOUSING PROJECT LIMITED (1983) ZR 172**

(8) **BANK OF AUSTRALASIA V PALMER (1897) AC 540.**

LEGISLATION REFERRED TO:

(1) **REGULATION 10(1) OF THE BANKING AND FINANCIAL SERVICES (COST OF BORROWING) REGULATIONS, S.I. NO. 179 OF 1995.**

Mr. Justice P. Musonda was part of the court that heard this appeal. He has since retired. Therefore, this judgment is by the majority.

This is an appeal against the judgment of the High Court entered in favour of the respondent against the appellants, in the sum of K1, 520,761,569.75 on a bank loan. The learned trial judge awarded 25% interest on that amount on a compounded basis as agreed by the parties. This was after the appellants had repeatedly defaulted on repaying the loan. The appellants objected to amounts which were dubbed as overdue charges on the bank statement. The trial Judge dismissed the objection. He stated that he arrived at his decision after considering Regulation 10 (a) of the Banking and Financial Services (Cost of Borrowing) Regulations, which permits on a lending institution to charge interests on an overdue payment on a loan. He further stated that the respondent in paragraph 7 of the affidavit in reply had explained the overdue charges

as such to his satisfaction. Aggrieved with the judgment of the court below, the appellants now appeal.

The appellants filed a memorandum of appeal which contained two grounds of appeal. The first ground is that the court below erred in law and fact when it adjudged that, the respondent was entitled to charge the appellant overdue charges as they were permissible under regulation 10 of the Banking and Financial (Cost of Borrowing) Regulations in total disregard of clause 7.3 of the loan facility agreement which provides for charges that are penal in nature. The second ground is that the court below erred in law and fact when it admitted the respondent's parol evidence contradicting the literal meaning and effect of clause 7.3 of the loan facility letter which provides for penalty charges in the event of default, in justifying its dismissal of the appellant's objection to overdue charges.

Although Mr. Kanja was not before court when we heard this appeal, he filed heads of arguments on behalf of the respondents. The appellants also filed written heads of arguments based on the two grounds of appeal. We will deal with them in the order they were argued by the parties.

On the first ground, Mr. Magubbwi on behalf of the appellants, submitted that the overdue charges shown on the loan account statement were penalty interest which generated from clause 7.3 of the

loan facility agreement which was signed by the parties. He referred us to clause 7.3 of the loan agreement. Counsel pointed out that the respondent in paragraph 7 of the affidavit in reply admitted that the overdue charges were levied pursuant to clause 7.3 of the loan facility agreement. The interest charged under that clause was triggered by the 1st appellant's default in repaying the loan because it categorically states that "*in the event of default...*" According to Mr. Magubbwi, the literal meaning and effect of that clause was that interest was to be charged upon default which amounted to a penalty charge for defaulting. Counsel submitted that this offended Regulation 10(1) of the Banking and Financial Services (Cost of Borrowing) Regulations, S.I. No. 179 of 1995 which provides that:

> "*A bank or financial institution shall not impose on a borrower any charge or penalty as a result of failure by the borrower to repay or pay in accordance with the contract governing the loan other than-*
>
> a. *Interest on an overdue payment on a loan*
>
> b. *Legal.....*"

He further submitted that the overdue charges on the bank statement levied under clause 7.3 of the loan agreement were actually penal interest proscribed by regulation 10(1) cited above. He relied on the cases of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited**[1], **Match Corporation Limited v**

Development Bank of Zambia and Attorney General[2] and **Credit Africa Bank Limited (in liquidation) v John Dingani Mudenda**[3] in support of his argument. He stated that the trial judge erred when he adjudged that Regulation 10 of the Banking and Financial Services (Cost of Borrowing) Regulations permitted the respondent to charge the overdue charges. Mr. Magubbwi argued that the statement of account needed to be recalculated for purposes of expunging all monies attributable to the inclusion of overdue charges in line with the case of **Match Corporation Limited v Development Bank of Zambia and Attorney General**[2]. He urged us to allow this ground of appeal.

In response to ground one, Mr. Kanja submitted that the court below was on firm ground when it held that the respondent was entitled to charge the appellants overdue charges as it was permissible under regulation 10 of the Banking and Financial Services (Cost of Borrowing) Regulations, Statutory Instrument No. 179 of 1995. That it is settled law that compound interest is outlawed unless it has been agreed upon by the parties in the loan agreement. Mr. Kanja cited the cases of **Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda**[3] and **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited**[1] for that proposition. According to counsel, clause 7.1 of the loan agreement entered into by the parties permitted the respondent to charge compound interest on a loan advanced to the

appellants. He referred us to clause 7.1 of the loan agreement facility which provides that:

"The term loan facility will attract interest at 25% per annum, being 6% above the Bank's base rate currently at 19% per annum to be charged and recovered monthly in arrears on the daily outstanding balances on compound basis to the debit of your account in our books"

Mr. Kanja argued that the respondent was for all intents and purposes entitled to charge compound interest on the loan repayments by the appellants. That the loan agreement facility entered into by the parties allowed the respondent to charge overdue charges on an overdue payment on the loan. He also referred us to clause 7.3 of the loan agreement facility. Counsel argued that regulation 10 of the Banking and Financial Services (Cost of Borrowing) Regulations allows a financial institution to charge overdue charges or interest on an overdue payment on a loan. He pointed out that the 1st appellant had consistently defaulted on the loan repayment plan. That the interest or overdue charges that the respondent levied or charged on the appellants for the delayed payment of interest on the loan agreement was not penal interest but were charges permitted by law. It was counsel's submission that the appellant's argument that overdue charges on interest are penal interest was misconceived in law and that it must be dismissed.

We have examined the issues raised, the evidence on record, the arguments and the authorities cited by counsel on both sides. Our perusal of the judgment entered by the court below at page 5 of this appeal, shows that the trial Judge did not award any penal interest against the appellants. Instead, he only awarded compound interest at the agreed rate of 25% per annum on the judgment sum of K1,520,761,569.74, which he entered in favour of the plaintiff against the defendant. We do not agree with counsel for the appellants that this interest which was awarded by the trial judge was penal in nature. The record actually shows that there was an express agreement to the charging of compound interest in clause 7.1 of the loan agreement, as awarded by the trial judge. For the avoidance of doubt, Clause 7 of the loan facility agreement, at page 82 of the record of appeal, reads as follows:

> **"7. Interest Rate**
>
> **7.1 The Term Loan Facility will attract interest at 25% per annum, being 6% above the Bank's base rate currently at 19% per annum to be charged and recovered monthly in arrears on the daily outstanding balances on compound basis to the debit of your account in our books.**
>
> **7.2 The Bank's base rates are subject to change at any time depending on market forces and such changes will be**

advertised in the press and posted on notices in the Bank's banking halls.

7.3. In the event of default, the Bank reserves the right to charge interest at 15% above the Bank's prevailing base rate."

The record also shows that the loan facility agreement containing this clause was duly signed by the parties to this case. We, therefore, have no doubt that the appellants agreed to the charging of compound interest at 25% as awarded by the trial judge. The position at law is that the charging of compound interest is permissible where there is an express agreement by the parties. This is what was held in the case of **Union Bank of Zambia Limited v Southern Province Co-operative Marketing Union Limited**[1] where it was stated that:

"The issue of real substance in this appeal concerns the charging and awarding of interests. A number of authorities were cited and we take this opportunity to affirm that there can hardly be any serious quarrel with the legal position as it emerges from the authorities. this is that – to borrow from the language of Haslbury's Laws of England(Vol. 3, Fourth Edition, para 160) – by the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts or loans. However, when it comes to an unusual rate of interests – such as compound interest –

express agreement is required, or in the alternative, evidence of consent or acquiescence to such a practice or custom.

In the case of **Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda**[3] **we held as follows:**

> **"On the charging of compound interest, we wish to reiterate our well known stand that the basis for charging such interest can only be sustained if there is express agreement between the parties to the charging of compound interest or if there is evidence of consent or acquiescence to the same"**

In this case, since the parties agreed to the charging of compound interest in clause 7.1 of the loan facility agreement, the appellants cannot be heard to repent at this stage. Although the gist of the appellant argument is that interest under clause 7.3 of the loan facility agreement was penal in nature, the trial judge did not award any interest pursuant to clause 7.3. He only awarded compound interest as stipulated under clause 7.1 of the loan facility agreement. In doing so, the learned trial judge was in our view, on firm ground.

In same vein, we cannot fault the learned trial judge for dismissing the appellant's argument that the respondent was not entitled to charge interest on an overdue payment on a loan. the trial judge explained that he arrived at his decision after considering regulation 10(1) of the Banking and Financial (Cost of Borrowing) Regulations, which permits a

lending institution to charge interest on an overdue payment on a loan. He added that the respondent, in paragraph 7 of the affidavit in reply had explained the overdue charges as such. Regulation 10(1) (a) of the Banking and Financial Services (Costs of Borrowing) Regulation, 1995 provides as follows:

"10. (1) A bank or financial institution shall not impose on a borrower any charge or penalty as a result of the failure by the borrower to repay or pay in accordance with the contract governing the loan other than –

(a) Interest on an overdue payment on a loan....."

Clearly, the above provision prohibits a bank or financial institution to charge interest on an overdue payment on a loan. This is what the trial judge meant. We have not found any basis for overturning his decision. We find no merit in ground one of this appeal, it is hereby dismissed.

On ground two, it was Mr. Magubbwi's contention that the trial judge admitted parol evidence when he relied on the respondent's evidence under paragraph 7 of the affidavit in reply, which contradicted the literal meaning and effect of clause 7.3 of the loan facility letter. He then referred us to what was deposed to in that paragraph and also what the learned trial judge stated in relying on it. Counsel pointed out that the respondent replaced the wording, meaning and effect of clause 7.3 of

the loan agreement with its own, so as to create a totally distinct effect of the clause. He urged that this was intended to create an impression that what was being charged was not default or penalty interest but overdue charges. Further, that the trial judge fell in the trap of acknowledging and authenticating the respondent's version of clause 7.3 of the loan agreement, which was at cross meaning and purpose with the actual meaning of the clause. He submitted that the legal position on parol evidence generally is that it is inadmissible. In support of this proposition, he cited the cases of **Rodgers Chama Pande and four others v Zambia State Insurance Corporation Limited**[4] and **Premesh Bhai Megan Patel v Rephidim Institute Limited**[5] in support of his argument.

According to Mr. Magubbwi, paragraph 7 of the affidavit in reply introduced or implied a new term to clause 7.3 of the loan agreement which constituted parol evidence and was inadmissible because it contradicted the express term of the agreement. He further argued that the glaring error by the trial judge allowed penal interest to be charged on the appellants' account based on the respondent's parol evidence that it were mere overdue charges. That the trial judge should be faulted for allowing the respondent to justify the charging of penal interest which was innovatively dubbed as overdue charges on the loan statement. Counsel submitted that the trial judge's finding that clause 7.3 permitted the charging of overdue charges was perverse and based on a complete

misapprehension of clause 7.3 which when properly viewed, no court acting correctly could have reasonably so found. In support of this argument, counsel relied on the cases of **Attorney General v Achiume**[6] and **Zulu v Avondale Housing Project Limited**[7]. Mr. Magubbwi urged us to reverse the findings of the learned trial judge and allow this appeal with costs.

In response to ground two, Mr. Kanja argued that the learned trial judge was on firm ground when he admitted the respondent's parol evidence contradicting the literal meaning and effect of clause 7.3 of the loan agreement which made provision for overdue charges in the event of default. He submitted that the sum of K510, 809,017.00 was not a charge for defaulting to pay the principal sum but was a charge on the delayed payment of the interest. That clause 7.3 of the loan facility agreement and Regulation 10 of the Banking and Financial Services (Cost of Borrowing) Regulations allowed the respondent to charge interest on the interest that was overdue on the loan. Counsel referred us to the loan repayment plan at pages 66, 115 and 128 of the record of appeal. He then pointed out that the appellants had never paid interest on time. That since the appellants defaulted in paying interest according to the scheduled loan payment plan, the respondent was entitled to charge interest amounting to K510, 809, 017.00 on the delayed payment. His submission was that overdue charges on the delayed payment of interest were permitted under the law. He stated that the second ground of

appeal was misconceived in law and the appeal should be dismissed with costs.

As we have already stated above, the judgment of the learned trial judge at pages 5 and 6 of the record of appeal, dismissed the appellants' argument and found that paragraph 7 of the respondent's affidavit in reply has explained the overdue charges. Paragraph 7 of the respondent's affidavit in reply at pages 125, to 126 of the record of appeal states that clause 7.3 of the loan agreement allowed the respondent to charge overdue charges or interest on overdue payment on the loan and that besides, the Banking and Financial Services (Cost of Borrowing) Regulations allows the charging of overdue charges. This explanation only underscored the right of a banker or financial institution to charge interest on an overdue payment on a loan as provided for under the law cited above.

We of course, have not quarrel with the authorities cited by the appellants on the inadmissibility of parol evidence, except their application to the present case. In our view, this explanation did not vary clause 7.3 of the loan facility agreement and hence, it does not amount to parol evidence. We do not, therefore agree with Mr Maggubwi that the learned trial judge misdirected himself when he accepted the respondent's explanation. In any event, the trial judge did not award any interest pursuant to clause 7.3 as we have shown above. We do not

therefore, see any merit in the second ground of appeal. it is accordingly dismissed.

In view of what we have stated above, this appeal is hereby dismissed with costs, to be taxed in default of agreement.

M.S. Mwanamwambwa
ACTING DEPUTY CHIEF JUSTICE

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H Chibomba
SUPREME COURT JUDGE

(Retired)

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P. Musonda
SUPREME COURT JUDGE