IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 198/2015**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

INVESTRUST BANK PLC **APPELLANT**

AND

SAMUEL BANDA **1ST RESPONDENT**
(T/A LUKUSU GENERAL SUPPLIERS)

AND

FORD BENJAMIN TEMBO **2ND RESPONDENT**

Coram: **Chibomba, Malila, Kaoma, JJS.**

On 1st March, 2016 and on 9th March, 2016.

For the Appellant: Mr. O. Sitimela, of Messrs, Fraser Associates.
For the 1st and 2nd Respondents: Dr. Bishop S. Chirambo, of Messrs, Stembridge Chirambo & Company Legal Practitioners.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Union Bank Zambia Limited vs. Southern Province Co-operative Marketing Union Limited (1997) Z.L.R. 30.**
2. **Credit Africa Bank Limited (In Liquidation) vs. John Dingani Mudenda (2003) Z.L.R. 71.**

3. **Chabanga Lodge Limited and George Mubanga Kapasa vs. Investrust Bank PLC Appeal No. 49/2012.**
4. **Dunlop Pneumatic Tyre Co. vs. New Garage and Motor Co. (1915) A.C. 79.**
5. **Nkhata and Others vs. Attorney General (1966) Z.L.R. 147.**
6. **The Attorney General vs. Marcus Kampumba Achiume (1983) Z.L.R. 1.**
7. **Collett vs. Van Zyl Brothers Limited (1966) Z.L.R. 56.**
8. **J.K. Rambai Patel vs. Mukesh Kumar Patel (1985) Z.L.R 220.**
9. **Buchman vs. Attorney General (1993-1994) Z.R. 131.**
10. **Masusu Kalenga Building Limited vs. Richmans Money Lenders Enterprises (1999) Z.R. 27.**
11. **Colgate Palmolive (Z) Limited vs. Able Shemu and Others. Appeal No. 11 of 2005.**
12. **Printing and Numerical Registration Company vs. Simpson [1875] L.R. 19 E.Q.462.**

Legislation referred to:

1. **High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Judgments Act, Chapter 81 of the Laws of Zambia.**
3. **Money-Lenders Act, Chapter 398 of the Laws of Zambia.**
4. **Banking and Financial Services Act, Chapter 387 of the Laws of Zambia.**
5. **Competition and Consumer Protection Act, No 24 of 2010 of the Laws of Zambia.**
6. **Statutory Instrument No. 179 of 1995 of the Banking and Financial Services (Cost of Borrowing) 1995 Regulations.**

Other Materials referred to:

1. **Halsbury's Laws of England, Volume 3, 4th Edition, paragraph 160.**

The Appellant appeals against the Ruling of the High Court at Lusaka, dated 20th August, 2015, which *inter alia*, ordered that the interest charged by the Appellant on the 1st Respondent's overdraft facility be struck down for being exorbitant, unconscionable, illegal and a penalty that is objectionable at common law and cannot be enforced.

The events leading to this Appeal are that the Appellant provided a credit facility to the 1st Respondent through a facility letter dated 24th April,

2006 in the sum of K15,000.00. Interest on the facility was pegged at 37 percent per annum, which was 10 percent above the bank's base rate at that time. As security, the 2nd Respondent deposited his Certificate of Title No. 24331 over Stand No. 1123, Chipata, and to this effect, the 2nd Respondent executed a Memorandum of Deposit of title deeds to the Appellant. The 1st Respondent was supposed to repay the principal and interest thereof by or before 31st August, 2006. The 1st Respondent, however, defaulted in repayment as only K6,000.00 was paid leaving the balance of K9,000.00 outstanding. As at 27th November, 2015 the sum of K139,911.23 was outstanding and despite demand, the 1st Respondent failed to pay.

By Originating Summons filed pursuant to Order 30 Rule 14 of the **High Court Rules**, Chapter 27 of the Laws of Zambia, the Appellant claimed the following reliefs from the Respondents:-

> **"1. Payment of all monies secured by the mortgage which at the commencement of these proceedings stood at ZMW139,911.30;**
>
> **2. Delivery and possession of Stand Number 1123, Chipata;**
>
> **3. Sale of Stand Number 1123, Chipata;**
>
> **4. Foreclosure Order on Stand Number 1123, Chipata;**
> **5. Further or other relief, and**
> **6. Costs."**

Although the Respondents did not file an Affidavit in Opposition, at the hearing of the Originating Summons, the learned Counsel for the Respondents, Dr. Bishop Chirambo, had this to say:-

> **"We concede that there is nothing much the Defendants can do other than allow the Court to make an order to sell the house. The money realized will go to clear the claim which we suggested in our arguments that it be calculated. We do not know how the figure in the claim was arrived at. The balance should be given to the owner of the house..."**

The response by Counsel for the Appellant was *inter alia*, that the Respondents had admitted the Appellant's claim. The learned Judge then reserved the matter for judgment to a later date. In the Judgment dated 20th March, 2014, the learned Judge entered Judgment on admission on the following terms:-

> **"1. In principle the Applicant's application for Judgment on Admission succeeds.**
> **2. The claim shall be recalculated in simple detail for me to be able to understand and appreciate how the claim as endorsed was arrived at.**
> **3. The recalculation shall be conducted with the participation of the Respondents and their Counsel.**
> **4. As a consequence of 2 and 3 above Judgment on Admission granted herein is stayed pending the recalculation of the claim as indicated above which shall be submitted in writing.**
> **5. The Return date to receive the recalculated claim shall be 15th May, 2014 at 14.30 hours at which date the specific details in the Judgment on Admission shall be determined depending on the recalculation as above."**

On the return date, the learned trial Judge heard both parties and reserved the matter for Ruling to a later date. In her Ruling dated 20th

August, 2015, the subject of this Appeal, she found as a fact that the cause of the escalation of the loan from K15,000.00 borrowed and reduced to K9,000.00 to the sum of K139,911.23 claimed, was the compound interest charged on the account by the Appellant. She observed that this had come to her with a sense of shock as to how a loan of K15,000.00, which was reduced to K9,000.00 could escalate to the astronomical sum of K139,911.23 claimed. On this basis, the learned Judge ordered a revaluation of the account to establish the proper amount of interest charged and to thereafter knock out all penal/compound interest charged to the account. She also ordered that any amounts that would be found to have been illegally charged to the Respondents' account after re-evaluation be refunded to the Respondents forthwith. In default thereof, she ordered interest at the current Bank of Zambia lending rate.

The learned Judge also ordered any amount due to the Appellant after re-evaluation to attract interest in accordance with the **Judgments Act**, Chapter 81 of the Laws of Zambia from the date of cause of action till final settlement. She also ordered the Respondent to repay the sum owing within three months from the date of re-evaluation. In default thereof, she ordered that the Applicant should foreclose, take possession and sale the

mortgaged property without any further Court Order. She also set aside the Judgment on Admission dated 20th March, 2014 pending re-evaluation.

As regards costs, the learned Judge was of the view that on account of the unnecessary stress caused as a result of the Appellant's misapplication of the interest rate, the Appellant should bear the cost of the claim and awarded costs to the Respondent to be taxed in default of agreement.

Dissatisfied with the Ruling by the learned trial Judge, the Appellant has appealed to the Supreme Court, advancing five grounds of appeal as follows:-

"1. **The Court below erred in law and fact in striking down interest charged as being exorbitant, unconscionable, illegal and a penalty objectionable at common law when the Appellant and the Respondents had expressly agreed by contract to charge compound interest, thereby being contractually bound.**

2. **The holding by the lower Court that the interest charged cannot be enforced was in error in both law and fact as levying an unusual rate of interest such as compound interest has never been outlawed provided there is evidence of express agreement, among others, as was the case herein.**

3. **The Court below fell in error in both law and fact in finding that the Appellant's real loss is the sum K9,000.00 when the claim amount of K139,911.23 was the real loss on account of time value of money which the lower Court failed to take into account.**

4. **The lower Court erred in both law and fact in ordering a revaluation of the account in the face of overwhelming evidence before it of a recalculation of the account conducted by both the Appellant and the Respondents on the basis of contractual terms as per direction by the Court itself.**

5. **The condemning of the Appellant to costs by the lower Court on account of its holding that the Appellant had caused unnecessary stress owing to the Appellant's misapplication of interest rate was in error in both law and fact seeing that there was neither a finding of fact that stress had indeed been occasioned and to whom nor was the interest rate misapplied at all as the Appellant based its calculation of interest on the agreed contractual terms."**

In support of this Appeal, the learned Counsel for the Appellant, Mr. Sitimela, relied on the Appellant's Heads of Argument which he augmented with oral submissions. Grounds one and two and Grounds three and four were respectively argued together on ground that they were interrelated while Ground five was argued separately.

Grounds one and two of this appeal attacks the learned Judge for finding that at law, the Appellant was not authorized to charge compound interest on the overdraft facility. In support of the above position, Counsel referred us to exhibit "EM1" to the Affidavit in Support of Originating Summons, the overdraft facility letter and in particular clause 7 which provides for interest.

Counsel argued that from the evidence on Record, there is no doubt that the charging of compound interest on the overdraft facility was agreed between the parties. Counsel also referred us to the case of **Union Bank Zambia Limited vs. Southern Province Co-operative Marketing Union Limited**[1] in which we held that an unusual rate of interest, such as

compound interest requires express agreement, or in the alternative, evidence of consent or acquiescence to such practice or custom. He pointed out that this position was restated in **Credit Africa Bank Limited (In Liquidation) vs. John Dingani Mudenda**[2]. Counsel, therefore, submitted that the above authorities clearly demonstrate that compound interest is chargeable and allowable at law provided there is express agreement or evidence of consent or acquiescence to such a practice or custom.

In support of his argument that the charging of compound interest was agreed in this matter, Counsel referred us to clause 7 of the overdraft facility letter which provides as follows:-

> **"7. Interest Rate**
>
> **The overdraft facility will attract interest at 37% per annum, being 10% above the bank's base rate currently at 27%, 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. 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 our banking halls. In the event of default the facility will attract interest at a rate to be determined by the bank."**

Counsel also cited the case of **Chabanga Lodge Limited and George Mubanga Kapasa vs. Investrust Bank PLC**[3] in which the facility letter had a similar clause to clause 7 of the credit facility in casu.

As regards the trial Judge's holding that compound interest is penal interest or same as penal interest, Counsel pointed out that there is a difference between compound interest and penal interest. He argued that compound interest is permissible by law, while penal interest is not as was held in **Union Bank Zambia Limited vs. Southern Province Co-operative Marketing Union Limited**[1]. Counsel also referred us to the case of **Dunlop Pneumatic Tyre Co. vs. New Garage and Motor Company**[4] which describes penal interest as being extravagant and unconscionable, that it was a sum in *terrorem* of the other party rather than a genuine pre-estimate of loss. Counsel argued that the 1st Respondent was not charged any penal interest when he defaulted on the overdraft facility save for compound interest. And hence the Appellant was well within the confines of the law to have charged compound interest as agreed with the 1st Respondent at 37 percent.

The thrust of the Appellant's argument as regards Grounds three and four, was to fault the learned Judge for finding that the Appellant's real loss is the sum of K9,000.00 and not the sum of K139,911.23 claimed and also for ordering revaluation of the account despite the overwhelming evidence before her of the recalculation conducted by both parties as earlier directed by the Court itself.

Counsel submitted that the Court below ordered the recalculation of the claim so that it could understand and appreciate how the claim as endorsed in the Originating Summons was arrived at; the recalculation was done with the participation of the Respondents and their Counsel and an Affidavit confirming the recalculation of claim and the reports and minutes of the meeting that was held by the parties on the 8th November, 2013 were filed and that the minutes show that the 1st Respondent confirmed his understanding of how the claim was arrived at. And that a detailed investigation of the interest rate that was applied to the facility on a monthly basis was made.

Counsel pointed out that paragraph 5 to 11 of the Further Affidavit contains uncontroverted evidence of how the 1st Respondent's indebtedness to the Appellant from 24th April, 2006, when the 1st Respondent withdrew the sum of K15,000.00 in line with the overdraft facility as evidenced by a comprehensive statement of the 1st Respondent's account, rose to the sum claimed. Therefore, that the learned Judge took a dim view of this evidence when she ought to have placed much reliance on it and therefore, that on the basis of the above evidence, there was no need for the Judge to order a revaluation of interest charged to the account.

On the above arguments, Counsel urged us to overturn the above finding by the learned trial Judge in line with the decisions in **Nkhata and Others vs. Attorney General**[5] and **The Attorney General vs. Marcus Kampumba Achiume**[6] as there was no further requirement for the revaluation of interest.

Ground five attacks the trial Judge for condemning the Appellant to costs and for holding that the Appellant had caused unnecessary stress to the 1st Respondent by the misapplication of interest. Counsel argued that there was neither a finding of fact that stress had been occasioned and to whom. And that the interest rate was not misapplied as the Appellant based its calculations of interest on the agreed contractual terms.

Counsel pointed out that he was alive to the law that costs are at the discretion of the Court as was held in **Collett vs. Van Zyl Brothers Limited**[7]. However, that such discretion must be judiciously exercised. Counsel also cited the case of **J.K. Rambai Patel vs. Mukesh Kumar Patel**[8] in which it was held that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs.

In opposing this Appeal, the learned Counsel for the Respondents, Dr. Bishop Chirambo, relied on the Respondents Heads of Argument filed which he augmented with oral submissions.

In response to the Appellant's arguments under Grounds one and two of this Appeal, Counsel for the Respondents conceded that there was express agreement for an overdraft facility for the 1st Respondent. His argument was however, that the terms of the said facility were unfair and hence, the learned trial Judge was on firm ground when she struck down the interest charged by the Appellant as it was exorbitant, unconscionable, illegal, unfair and penal in nature. That the trial Court did not misdirect itself when it ordered that the interest charged cannot be enforced as the levying of unusual rates of interest such as compound interest which is penal in nature is outlawed.

Counsel also referred to Section 53(1) of the **Competition and Consumer Protection Act, No. 24 of 2010** of the Laws of Zambia, which provides that in a contract between an enterprise and a consumer, the contract or a term of the contract shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer and the same shall not be binding.

As regards clause 7 of the overdraft facility letter, Counsel pointed out that the interest rate charged by the Appellant at 37 percent was extremely high resulting into it being exorbitant, unconscionable, and illegal and a penalty objectionable at law as it is an unfair term of a contract.

In support of this argument, Counsel cited the case of **Dunlop Pneumatic Tryre Co. v New Garage and Motor Company**[4], in which it was stated that a sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from a breach of contract. It was Counsel's contention that in the case in *casu*, interest of 37 percent per annum on an overdraft facility contracted in 2006 was penal in that even this year, 2016, no bank offers an overdraft facility at the rate of more than 27.5 percent as that is not allowed under the Banking and Financial Regulations. In this regard, Counsel drew our attention to Regulation 10 of **Statutory Instrument No. 179 of 1995 of the Banking and Financial Services (Cost of Borrowing) 1995 Regulations**, which prohibits the charging of penal interest. Counsel argued that the Appellant breached the above Regulation by charging or imposing interest which was penal in nature. He also argued that clause 7 had an unfair term which caused

imbalances on the rights of the Respondents as consumers as the interest charged was penal in nature.

Counsel argued that since the Appellant prepared the overdraft facility letter without any negotiation with the 1st Respondent on how the terms and conditions should be the claim by the Appellant should fail.

Counsel then proceeded to draw our attention to the document used to investigate the interest rates charged and specifically to the last column called "interest rates" which shows that the interest charged kept fluctuating. He argued that the Respondents were not informed in writing as agreed in clause 7 of the overdraft facility that interest may change at any time depending on the market forces and that should that happen, the client will be informed about the development. That however, there was no notification, in writing or orally regarding changes in market forces and that interest will be increased. That this clearly offends clause 7 of the overdraft facility.

Counsel argued that the trial Judge was therefore on firm ground when she ordered the striking down of the interest charged as the charging of compound interest has been outlawed. Counsel submitted that on the basis of the arguments above, Ground one and two of this appeal have no merit and should be dismissed.

In response to Ground three of this Appeal, Counsel for the Respondent argued that the trial Judge was on firm ground when she ruled that the Appellant's real loss was the sum of K9,000.00 as the 1st Respondent had paid back a sum of K6,000.00 thereby reducing the principal amount owed. Counsel submitted that the real loss can be said to be the loss of the actual amount invested. And that in the case in *casu*, the actual money invested by the Appellant to the Respondents was K15,000.00 which was reduced to K9,000.00 through the payment of K6,000.00. Therefore, that the sum of K139,911.23 cannot be the real loss to the Appellant, but merely loss of profit and hence, the trial Court did not err in its finding. Hence, this Ground of Appeal lacks merit and should be dismissed.

In response to Ground four, Counsel contended that the trial Judge did not err in both law and fact by ordering a revaluation in order to establish the proper amount of interest charged to the account and by ordering the knocking out of all penal and compound interest. Counsel argued that the interest in the recalculation of the account conducted by both the Appellant and Respondents as per Order of the lower Court prior to the Ruling was for compound interest, whilst the interest ordered by the Court below to be recalculated was for simple interest. Counsel drew our

attention to the Record of Appeal at pages 73 to 75 where it is clearly shown that the interest calculated in the revaluation as per order of the Court below was for the compound interest which is outlawed. Counsel argued that what should be enforced and is allowed by law is simple interest. Hence, Ground four also has no merit and must fail.

In response to Ground five, Counsel contended that the trial Judge did not err in law and fact by ordering the Appellant to bear the costs for causing unnecessary stress to the Respondents by the misapplication of interest. Counsel argued that the Respondents were stressed trying to figure out how the loan of K15,000.00 could escalate to the amount claimed even after making payments towards reducing it. And that the travelling from Chipata to Lusaka to attend Court sessions pertaining to the case in *casu* was stressing as the state of the roads were bad and under construction, thus, making the Respondents stressed and uncomfortable. Hence Ground five of this appeal lacks merit and should be dismissed.

In his oral submissions, Counsel for the Respondents agreed that the learned Judge did equate compound interest to penal interest and that he too felt that they were the same.

When questioned by the Court as to why he was raising arguments on issues that were not raised in the Court below, Counsel responded by

stating that after going through the Judgment in the Court below and conducting some research, he was compelled to add these arguments before this Court. Counsel reiterated his argument that despite charging of compound interest being agreed upon, there was no prior discussion between the "lender", and the "consumer", and that this resulted in the 1st Respondent not knowing or fully understanding what he was signing for.

In reply, Counsel for the Appellant submitted in response to the Respondents' reliance on Section 10 of the **Money-Lenders Act**, Chapter 398 of the Laws of Zambia that the **Money-Lenders Act** does not apply to the Appellant as confirmed by Section 2(b) of that Act but that the Appellant is regulated by the **Banking and Financial Services Act**, Chapter 387 of the Laws of Zambia. That as such, the reliance on the **Money-Lenders Act** is misconceived.

We have considered the Appellant's Grounds of Appeal, the written Heads of Argument for the parties, the authorities cited, the record of proceedings in the court below, and the Ruling by the learned Judge in the court below. It is our firm view that Grounds one and two are interrelated as they raise similar issues. Therefore, for convenience and for avoidance of repetition, we shall consider them together. The two Grounds raise the question whether, in the circumstances of this case, the learned Judge was

on firm ground when she held that the interest that was charged by the Appellant in this case was penal in nature and therefore illegal and could not be enforced on ground that it was exorbitant, unconscionable and objectionable at common law.

In support of his position that the learned Judge erred when she held that the interest charged by the Applicant in this case was penal and illegal and that it could not be enforced on ground that it was exorbitant, unconscionable and objectionable at common law, Mr. Sitimela took the position that compound interest is distinguishable from penal interest. The thrust of Mr. Sitimela's arguments in this respect, was that compound interest is chargeable and allowable at law provided that there is an express agreement or evidence of consent or acquiescence to such a practice or custom and that in the current case, there is evidence of an express agreement between the parties to levy compound interest on the overdraft facility which was availed to the 1st Respondent by the Appellant.

The gist of Dr. Bishop Chirambo's arguments in response was that the interest charged by the Appellant was penal in nature as it was against the law regulating the provision of loan facilities by the Banking and Financial Institutions.

We have considered the above arguments. We want to state from the outset that in arriving at her decision, the learned Judge referred to and relied on a number of decisions. One of those decisions is the case of **Dunlop Pneumatic Tyre Company vs. New Garage and Motor Company**[4] which describes penal interest as being extravagant, unconscionable, and a sum in *terrorem* of the other party rather than a genuine pre-estimate of loss. In that case, the court in England put it thus:-

> **"A sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from a breach of contract or if the breach consists only in not paying the sum of money and the sum stipulated is greater than the sum which ought to have been paid."**

The learned Judge also relied on the case of **Union Bank Zambia Limited vs. Southern Province Co-operative Marketing Union Limited**[1]. In that case, we stated that when it comes to an unusual rate of interest, such as compound interest, express agreement is required, or in the alternative, evidence of consent or acquiescence to such a practice or custom. We held in that case that:-

> **"Penal interest is certainly not part of the banking practice and custom in Zambia and, even if there had been an agreement to pay penal interest, such would have been liable to be struck down for being a penalty objectionable at common law."**

We restated our position on compound interest in **Credit Africa Bank Limited (In Liquidation) vs. Joseph Dingani Mudenda**[2] where we put it thus:

> **"The charging of compound 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."**

From the authorities we have referred to above, it is clear that, the learned Judge misdirected herself when she found that the interest charged by the Appellant on the amount owing by the 1st Respondent was exorbitant, unconscionable, illegal and a penalty objectionable at common law. The effect of the finding by the learned Judge is that compound interest and penal interest were one and the same thing and that compound interest is penal in nature and therefore, illegal. However, the correct position of the law as laid down in the authorities referred to above is that compound interest is recoverable where there is evidence of either an express agreement between the parties or evidence of consent or evidence of acquiescence to the charging of such interest. Penal interest on the other hand, is illegal even where there is an express agreement between the parties allowing the charging of such interest. It is unenforceable. This position is fortified by Regulation 10 of **Statutory Instrument No. 179 of 1995 of the Banking and Financial Services**

(Cost of Borrowing) 1995 Regulations which outlawed penal interest. Regulation 10 provides as follows:-

> **"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."**

In the current case, the Appellant's Affidavit in Support of the Originating Summons is to the effect that by facility letter dated 24th April, 2006 the Appellant granted the facility in question to the 1st Respondent. Clause 7 of the facility letter provides for the agreed interest rate applicable to or payable under the facility. The said facility letter is produced as exhibit "EM1" to the Affidavit in Support of Originating Summons. Clause 7 of the facility letter provides that the overdraft facility would attract interest at 37 percent per annum, which was 10 percent above the bank's base rate which was at 27 percent at that time. And that interest was to be charged and recovered monthly in arrears on the daily outstanding balances on the 1st Respondent's account and on compound basis. And that the bank's base rates were subject to change at any time depending on market forces and that such changes would be advertised in the press and posted on notices in the bank's banking halls. And that in the event of default, the facility would attract interest at a rate to be determined by the bank.

In the Appellant's Heads of Argument, Dr. Bishop Chirambo confirmed that there was a contract between the parties for the provision of an overdraft facility to the 1st Respondent. It is therefore, clear from the evidence on Record that the charging of compound interest was agreed to by the parties as it was a term of the facility agreement in question. It is also clear that under the interest clause of the contract, the charging of compound interest was allowed.

It is also our view that the agreed rate of interest in this case does not amount to a penalty in terms of the authorities we have referred to above.

For the reasons stated above, we do not agree with the finding by the learned trial Judge that the interest charged by the Appellant in this case was illegal and a penalty which could not be enforced on ground of being exorbitant, unconscionable and objectionable at common law and therefore, could not be enforced as the finding is not supported by the evidence on Record.

Further, as has been correctly submitted, by Counsel for the Appellant, in **Chabanga Lodge Limited and George Mubanga Kapasa vs. Investrust Bank PLC**[3], we dealt with an appeal containing a similar provision to Clause 7 of the current facility. We stated in that case that:-

> **"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...The Record 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 UNION BANK ZAMBIA LIMITED vs. SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED..."**

We reiterate the above in the current case as Clause 7 in the current case provides for charging of compound interest.

Therefore, on the basis of the above quoted case, we find merit in Grounds one and two of this Appeal. We uphold them both.

As regards the other arguments by Dr. Bishop Chirambo raised in his Heads of Argument concerning the claim that Clause 7 of the overdraft facility letter contains unfair terms as the interest rate of 37 percent was too high and therefore exorbitant, unconscionable, illegal and a penalty objectionable at law; and his position that the agreed rate was contrary to the provisions of Section 53 (1) of the **Competition and Consumer Protection Act** and Section 10 of the **Money- Lenders Act** as well as Regulation 10 of **Statutory Instrument No. 179 of 1995 of the Banking and Financial Services (Cost of Borrowing) 1995 Regulations**; and his further argument that the Appellant prepared the overdraft facility letter without any negotiations with the 1st Respondent on how the terms and

conditions should be and the claim that the Respondents were not advised in writing about the fluctuation of the interest rates; our short response is that since the above claims were not raised in the Court below, it is not competent for Counsel for the Respondents to raise them before us in this Appeal. We have time again repeatedly in plethora of cases including the case of **Buchman vs. Attorney General**[9] and the case of **Mususu Kalenga Building Limited and Another vs. Richmans Money Lenders Enterprises**[10], guided that it is not competent to raise matters not raised in the court below before the appellate court. We still stand by that position. Therefore, we shall not delve into these issues as clearly, Dr. Bishop Chirambo was out of order by raising those issues. We say so because perusal of the Ruling summed up above, shows that the Respondents did not file any Affidavit in Opposition to the Originating Summons. The Respondents through their same Counsel did not also dispute liability in the court below.

Further, the Respondents cannot now be heard to complain that they did not understand what they signed for as that would certainly be contrary to the principle of freedom of contract elucidated clearly in **Colgate Palmolive (Z) INC vs. Shemu and Others**[11], where it was stated that *if there is one thing more than another which public policy requires it is that*

men of full age and competent understanding shall have the utmost liberty in contracting and their contract when entered into freely and voluntarily shall be enforced by courts of justice.

Grounds three and four are interrelated and we shall consider them together. These two Grounds attack the learned Judge for finding that the Appellant's real loss was the sum of K9, 000.00 and for ordering a revaluation of the 1st Respondent's account.

Counsel for the Appellant argued that recalculation was done in the presence of the Respondents and their Counsel and the Appellant's branch manager and that all parties appreciated and understood the claim as endorsed and how it came to be. The response by Dr. Bishop Chirambo was to support the holdings of the learned Judge and to add that the trial Judge was on firm ground as the 1st Respondent had made a payment of K6, 000.00 towards the overdraft facility leaving a balance of K9, 000.00 and that the sum claimed as endorsed in the Appellant's pleadings is not the real loss to the Appellant but rather its loss of profit.

We have considered the above arguments. The undisputed facts establish clearly that the 1st Respondent withdrew the sum of K15, 000.00 advanced on 24th April, 2006. The 1st Respondent was supposed to repay the principal sum plus interest by 31st August, 2006. Exhibit "EM" of the

Appellant's Further Affidavit shows that the account remained overdrawn up to the time the Appellant filed the Originating Summons on 27th November, 2013, which is almost seven years and that during this period, only the sum of K6, 000.00 was paid towards settling the overdraft leaving the sum of K9, 000.00, together with contractual interest as agreed under Clause 7 outstanding. So interest on compounded basis continued accruing on the outstanding principals over the period resulting in the outstanding balance escalating to the sum of K139, 911.23 claimed. Clearly, it was misdirection for the learned Judge to hold that the said sum was far greater than the sum of K9, 000.00 which ought to have been paid back after default as it ignores the fact that the default was for a considerable number of years through which interest on a compounded basis continued to accrue to the account as provided for under clause 7 of the facility letter thereby resulting into the so called 'small' amount of K9, 000.00 to escalate to the sum claimed. Therefore, the Respondents cannot now be allowed to take advantage of the misdirection by the learned Judge resulting from her failure to distinguish between compound interest and penal interest.

Therefore, on the basis of our decision in **The Attorney General vs. Marcus Kampumba Achiume**[6], this is a proper case in which we, as the

appellate court can reverse the trial court's findings of fact as the findings that compound interest is the same as penal interest which cannot be enforced on account that it is illegal is wrong at law and clearly contradicts our decisions in the cases of **Union Bank Zambia Limited vs. Southern Province Co-operative Marketing Union Limited**[1] and **Credit Africa Bank Limited (In Liquidation) vs. Joseph Dingani Mudenda**[2] which the learned Judge wrongly applied to support the erroneous position that compound interest like penal interest is illegal despite the express agreement between the parties that it would apply to their contract.

For the reasons given above, we find merit in Grounds three and four of this Appeal. We uphold them both.

Ground five attacks the learned Judge for condemning the Appellant to costs on account of having caused unnecessary stress to the Respondents by misapplying the interest rate on the 1st Respondent's facility. In support of this Ground of Appeal, Counsel for the Appellant argued that although he was alive to the fact that the award of costs is at the discretion of the court and that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs, in this case, since the trial court did not make any finding of fact

on whether stress had been occasioned on the Respondents and by whom and since the Appellant's claim was successful in the court below, there was no viable reason why the learned Judge awarded the costs to the Respondents and for denying the Appellant its costs. In response, Counsel for the Respondents, agreed with the award of costs by the court below. He added that the stress was compounded by how a loan of K9,000.00 escalated to K139,911.23 despite making payments to reduce the same and further that travelling between Chipata and Lusaka to attend court sessions pertaining to the case added further to the Respondents' stress and discomfort coupled with the bad state of the roads.

We have considered the above arguments. As regards the award of costs, we totally agree with the submissions by the learned Counsel for the Appellant that the award of costs is in the court's discretion and that usually, a successful party will not normally be deprived of his costs unless there is something in the nature of his claim or in his conduct which make it improper for him to be granted the costs. The case of **Collett vs. Van Zyl Brothers Limited**[7] and the case of **J.K. Rambai Patel vs. Mukesh Kumar Patel**[8], fortify the above position as the decisions state that costs are awarded at the discretion of the Court and that such discretion must however, be exercised judiciously and that a successful party will not

normally be deprived of his costs without good reasons which make it improper for him to be granted costs.

In the current case, the reason given by the learned trial Judge for depriving the Appellant of its costs was that it had caused undue stress on the Respondents. Such a finding, however, ought to have been based on some tangible evidence to support the award. The finding that the Respondents suffered stress as a result of the interest rate being charged to their account is not supported by the evidence on Record. So on the basis of our decision in the case of **The Attorney General vs. Marcus Kampumba Achiume**[6], we reverse and set aside the award of costs to the Respondents and in its place, we award the costs of this Appeal and the costs in the court below to the Appellant to be taxed in default of agreement.

In sum, all the five Grounds of this Appeal have merit and succeed.

Having found merit in all the five Grounds of Appeal argued, we set aside the Order by the learned trial Judge that there should be a revaluation to establish the proper amount of interest charged to the account and that thereafter all penal/compound interest charged to the account should be knocked out. We also set aside the Order by the learned trial Judge that any amounts found to have been illegally charged to the

account after revaluation shall be refunded to the Respondent forthwith and that in default, the same shall attract interest at the current Bank of Zambia lending rate.

In place of the above Orders, we enter Judgment in favour of the Appellant against the 1st Respondent in the sum of K139, 911.23 being the principal sum and interest outstanding as at the date of filing of the Originating Summons. The said sum shall attract contractual interest as agreed under Clause 7 of the facility letter up to date of final payment. We further order that the said sum plus interest shall be paid within 30 days from today. In default thereof, the Appellant shall be at liberty to foreclose, take possession and sale the mortgaged property, being Stand No. 1123, Chipata.

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H. Chibomba
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE