IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 195/2015
SCZ/8/317/2015

B E T W E E N :

INVESTRUST BANK PLC **APPELLANT**

AND

ALICE SAKALA T/A MATUNGA ENTERPRISES **RESPONDENT**

Coram: **Chibomba, Malila and Kaoma, JJS.**
On 1st March, 2016 and 9th March, 2016

For the Appellant: Mr. O. Sitimela of Messrs Frazer and Associates.

For the Respondent: No Appearance (Messrs H.B.A Advocates).

J U D G M E N T

Malila, JS delivered the judgment of the Court.

Cases referred to:

1. *Union Bank Zambia Limited v. Southern Province Co-operative Markerting Union Limited (1997) S.J. 30 (S.C.)*
2. *Credit Africa Bank Limited (In Liquidation) v. John Dingani Mudenda (2003) Z.R 71*
3. *Credit Africa Bank v. George K. Kalunga and Terry Simwanza (SCZ Appeal No. 144/1997)*
4. *Chabanga Lodge Limited and George Mubanga Kapasa v. Investrust Bank Limited PLC (SCZ No. 49/2012)*
5. *Llods Bank Limited v. Bundly (1975) Q.B 326*

6. *Mususu Kalenga Building limited, Winnie Kalenga and Richmans Money Lenders Enterprises (1999) Z.R 27*
7. *Colgate Palmolive (Z) Inc. v. Shemu and Others, Appeal Number 11 of 2005 (unreported)*
8. *Zambia Export And Import Bank Limited v. Mkuyu Farms Limited And Ellias Andrew Spyron And Mary Ann Langley Spyron (1993 - 1994) Z.R. 36 (S.C.)*
9. *Alech Lobb v Total Oil G.B. Limited [1983] ALL E.R. 944*
10. *The Attorney General v. Marcus Kampumba Achiume (1983) Z.R. 1(S.C.)*
11. *B.P. Zambia Plc v. Zambia Competition Commission Total Aviation And Export Limited Total Zambia Limited (S.C.Z. Judgment No. 22 of 2011)*
12. *Mutale v. Zambia Consolidated Copper Mines (1993 - 1994) ZR 94 (SC)*
13. *Alech Lobb v Total Oil G.B. Limited [1983] ALL E.R. 944.*

Legislation referred to:

1. *Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia*
2. *Banking and Financial Services (Cost of Borrowing) Regulations*

Other work referred to:

Black's law Dictionary (9th Edition)

This appeal is against a judgment of the High Court given on 11th September, 2015 in favour of the respondent.

The background facts giving rise to the action in the High Court are simply that the appellant, by way of facility letters, advanced three (3) overdraft facilities to the respondent to cover the period of six (6) months , namely 12th December, 2008 to 20th June, 2009. The first facility letter was for K5, 000.00 and was dated 12th December, 2008 while the second was for K10, 000.00 and was

dated 31st December, 2008. The third was for K25,000.00 and was dated 10th March, 2009. The first two loans were due for review on 31st January, 2009 while the third was due for review on 30th June, 2009. The loan facilities were secured by a legal mortgage over Stand No. 1025, Kalongwezi Road, Chipata.

All the overdraft facilities had a clause regarding interest, couched in substantially identical terms, as follows:

> **"the overdraft facility will attract interest of 34% per annum, being 15% above the Bank's base rate currently at 21% per annum to be charged and recovered monthly in areas on the daily outstanding balances on compounded basis to the debit of your account in our books"**

On default by the respondent to honour her obligation under the facilities, the appellant issued an originating summons pursuant to Order 30 Rule 14 of the High Court Rules, claiming for payment of the monies accrued under the mortgage which stood at K139,792.20, as at the date of the originating summons, or an order for possession, sale or foreclosure on the mortgaged property.

Before the learned High Court Judge, the appellant contended that the amount outstanding had accumulated owing to the application of compound interest which had been applied to the facilities. The respondent, on the other hand, claimed that she was unaware that compound interest was being charged to the accounts. In further disputing the amount claimed, the respondent's contention was that, having made a deposit of K21, 000.00 towards the first two loans on 24th February, 2009 and 18th March, 2009 those loans had been fully paid off. With regard to the third loan, the respondent argued that she had made substantial payments which had not been taken into account when the appellant calculated its claim.

It was rightly common cause between the parties that the loans were advanced and that the facilities letters had specific clauses allowing the charging of compound interest, and equally that the respondent had made substantial payments towards the settlement of the loans. However the issue of interest remained contentious between the parties.

In her judgment, which is the subject of this appeal, the learned High Court Judge found that the three facility letters were not descriptive enough to enable the respondent know that compound interest was being charged to the facilities. She held further, that the evidence of bank statements before her, did not show that compound interest was being applied and therefore, that the respondent had a reasonable belief that the interest that was charged was simple. In the learned Judge's opinion, when the respondent paid K21,000.00 towards the first two facilities, the respondent made a reasonable income of K6,000 which should have been considered to have fully settled the first two loans whose total amounted to K15,000.00.

As regards the third loan, the court ordered that the interest and the balance be recalculated to establish how much compound interest had been charged with a view of removing all such compound interest.

In the learned Judge's understanding, compound interest as defined under section 4 of the **Law Reforms (Miscellaneous Provisions) Act**[1] and penal interest as explained in **Union Bank Zambia Limited v. Southern Province Co-operative Marketing Union Limited**[1], are one and the same thing and are both illegal. The appellant's claim was, therefore, dismissed on the aforementioned grounds.

The learned judge further held that the appellant was not entitled to charge any monthly service charges, quarterly fees on guarantee, company search fees nor any other charges of whatever description as this was contrary to the **Banking and Financial Services (Cost of Borrowing) Regulations**[2] as well as the terms of agreement in the facility letters.

It is against that judgment that the appellant has appealed fronting six grounds of appeal structured as follows:

> **"1. The court below erred in both law and fact when it found that there was no specific agreement to the charging of Compound interest on the three (3) Overdraft facilities availed to the respondent by the appellant when there was documentary evidence glaring in the fact of the court to the contrary.**

2. **The lower court erred in both law and fact when it adjudged that the appellant was at law not authorized and or entitled to charge compound interest and for equating compound interest to penal interest as this was/is against the weight of evidence of an express agreement to charge compound interest and also is contrary to the law.**

3. **The lower court erred in both law and fact in finding that the facilities of K5,000.00 and K10,000.00 respectively have been repaid in full when, given the nature of the facilities being Overdrafts, the respondent overdrew her account and was running the account in a debit or negative balance.**

4. **The court below misdirected itself in both law and fact when it adjudged that the appellant was not entitled to charge any monthly service charges, quarterly fees on guarantee, company search fees nor any other charges of whatever description as this is against the terms of the facility letters signed between the appellant and the respondent and provisions of the law.**

5. **The lower court erred in law and fact in finding that the principal outstanding the sum K130,060.00 as this was against the weight of evidence before it confirming that as the facilities were overdrafts and that the respondent made more cash withdraws from her account than deposits this distorted the account by leaving the account with a debit or negative balance which balance had risen to K139,792.20 as at date of commencement of suit.**

6. **The condemning of the appellant to costs by the lower court on the basis that the matter proceeded to court on the erroneous application of interest and other charge by the appellant was in error in both law and fact."**

Both parties filed their heads of arguments. At the hearing, Mr. Sitimela, learned counsel for the appellant, relied on the written heads filed on 9th December, 2015 while counsel for the respondent was not in attendance. Rather than file a notice of non-appearance pursuant to Rules 69 of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, the learned counsel for the respondent unconventionally included a statement in his submission that-

> **"We would in the first place like to inform the court that due to financial constraints on behalf of our client, we will not attend court sessions and pray that we rely on our submissions."**

The main point taken by Mr. Sitimela in arguing ground one, was that it was a misdirection on the part of the learned Judge below to hold that there was no express agreement between the parties to charge compound interest on the loan facilities. The learned counsel argued that clause 7 of all the three overdraft facility letters, which had been duly signed by the respondent, provided for compound interest with variation as to the rates

applicable. He submitted that although the learned Judge heavily relied on the case of **Union Bank Zambia Limited**[1], that case was distinguishable from the case before us in that, the appellant in that case had charged penal interest. He further amplified the principle stated in the **Union Bank Zambia Limited**[1] case and restated in **Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda**[2] that-

> **"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."**

Further that-

> **"A customer must be made aware of the intention of the Bank to charge an unusual rate of interest such as compound interest."**

His submission was that the law clearly allows for compound interest to be charged, provided that there is an express agreement or evidence of acquiescence to such practice, by the parties. Further, that such interest is due and payable until the loan has been paid on the agreed terms, as expounded in **Credit Africa Bank v. George K. Kalunga and Terry Simwanza**[3].

Mr. Sitimela contended that the appellant was well within the law in charging compound interest following the express agreement in the facility letters duly executed by the respondent.

Under ground two, the lower court's judgment was assailed for equating penal interest to compound interest. At page J14 of the judgment, the court cited section 4 of the Law Reform (Miscellaneous Provisions) Act[1], which provides that-

> **"4. In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:**
> **Provided that nothing in the section-**
> **(i) shall authorise the giving of interest upon interest..."**

The learned counsel contended that it was erroneous for the court to place reliance on section 4 aforesaid, in forming an opinion that compound interest is the same as penal interest and, is therefore, outlawed. It was counsel's submission that the section applies to an award of interest by the courts where interest has not been agreed to by the parties. Under that section, the courts have

discretion to give interest in a claim for recovery of debt or damages, but are prohibited from imposing interest upon interest. His contention was that the provisions under section 4 of the Law Reform (Miscellaneous Provisions) Act are inapplicable to interest agreed to by parties under a contract. According to counsel, penal interest is not the same as compound interest.

Under ground three, Mr. Sitimela alleged a misdirection on the part of the learned Judge when she erroneously assessed the evidence in the manner she did and without due regard to the appellant's evidence before her, and consequently holding that the respondent had paid the first two loans in full. The learned counsel submitted that the affidavits filed before the learned Judge clearly showed that despite the respondent making a deposit of K21,000 into her account, the account was running into a negative or debit balance as the facility, being an overdraft, allowed her to withdraw from her account an amount in excess of the balance. This she did by withdrawing K40,350 thereby leaving a balance of K25,271.780. Mr. Sitimela urged us to overturn this finding of fact and consider

the exhibits that were before the learned Judge in confirming that the two facilities were not paid in full.

As regards ground four, the learned counsel for the appellant submitted that the court seriously misdirected itself when it held that the monthly service charges and fees charged to the respondent's account were illegal, unenforceable and were liable to be refunded to the respondent. It was submitted that according to the **Banking and Financial Services (Cost of Borrowing) Regulations[2]**, it is lawful to charge monthly charges. For this submission, the learned counsel called in aid the case of **Chabanga Lodge Limited and George Mubanga Kapasa v. Investrust Bank Limited Plc[4]**.

In ground five, the learned counsel's argument was that contrary to the evidence adduced before it, the learnt court found the outstanding sum on the third loan facility as K130, 060.00. The learned counsel contended that the evidence before the learned Judge clearly challenged the evidence adduced by the respondent, in that, it was shown that the payments made by the respondent were taken into account when computing the claim except that the deposits had been consumed by the compound interest charges and

other bank charges, thereby leaving the balance in the negative. He submitted that, had the court considered the evidence before it, it would have come to a different conclusion. From the foregoing, he urged us to reverse the finding of fact and confirm the amount claimed.

Mr. Sitimela finally attacked the trial court's order in awarding costs to the respondent based on her finding that the matter proceeded on an erroneous application of interest and other charges by the appellant. It was his contention that having argued in the preceding grounds that the appellant acted within the law in charging compound interest and other charges, the order as to costs ought to be reversed. He prayed that we instead make an award for costs in favour of the appellant. We were beseeched to uphold this ground of appeal too.

As we have stated already, the learned counsel for the respondent filed the heads of arguments on 9th February, 2016 which we now consider.

Regarding grounds one and two, the learned counsel for the respondent supported the lower court's finding that there was no agreement to charge compound interest and that compound interest and penal interest were against the law. It was argued on behalf of the respondent that the respondent was unaware that the appellant was charging compound interest, and that she did not know what it was until after the matter was brought to court.

Quoting Lord's Denning's sentiments in **Lloyds Bank Limited v. Bundly**[5], the learned counsel submitted that the underlying concern of uncoscientiuos dealing doctrine was to remedy inequality of bargaining power, and that this was true of the rules relating to duress, undue influence, undue pressure and savage cases. It was submitted that it is on this principle of equity that the **Union Bank** case[1] and **Credit Africa Bank Limited v Mudenda**[2] were based, but that shockingly, in **Credit Africa Bank Limited v. Kalunga and Simwanza**[3], this Court departed from that long standing principle. It was counsel's further submission that the **Chabanga** case[4] cited by the appellant was irrelevant to the case before us.

In response to ground three, the learned counsel lacornically submitted that the learned Judge was on firm ground in accepting that the payments made by the respondent fully paid the first and second loan facility but that the appellant did not want to accept that payments were made towards the overdrafts.

The learned counsel argued grounds four and five together. According to counsel, the over drawings being canvassed by the appellant were unsupported by any evidence. To the contrary, what was on record were compounded charges. He urged us to fix the interest rate to be applied to the outstanding amount.

As to the question of costs, the respondent's reaction was that costs were in the discretion of the court and as such, the learned Judge used her discretion in awarding costs to the respondent.

We have carefully considered the evidence on the record of appeal, the judgment of the learned Judge in the court below as well as the arguments advanced to us by the learned counsel for the parties.

There is undisputed evidence on the record that compound interest was charged to the overdraft facilities. The simple but pertinent issue to be resolved is whether it was lawful for the appellant to charge such interest.

We have clearly stated in a number of cases including that of **Credit Africa Bank Limited**[2], which was cited by counsel for the appellant that-

> **"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."**

Clause 7 was a common clause in the facility letters and it dealt with the interest to be charged. We have quoted this provision earlier on in this judgment.

In our view, this clause speaks eloquently and unambiguous for itself. It is clear from the clause that compound interest was incorporated in the agreement. As rightly submitted by the learned counsel for the appellant, the respondent did in fact duly sign the

overdraft facility agreements. The respondent, being of contractual capacity, competent to sign a binding contract, ought to have known the terms of the contract she signed. She is bound by those terms. There was no claim in the court below that there was unfairness or duress, coercion or undue pressure on the part of the respondent when entering into the agreement. We, therefore, find that the respondent willingly contracted with the appellant with actual or imputed knowledge of the terms upon which she was contracting. In **Colgate Palmolive (Z) Inc. v Shemu and Others**[7], we restated the often quoted dicta on freedom of contract as follows:

> **"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 that their contract when entered into freely and voluntarily shall be enforced by Courts of justice."**

With regard to the respondent's submission on the doctrine of uncoscientiuos dealing, the learned counsel for the appellant, in his response, stated that the issues of inequality bargaining power and the doctrine of unconscionable bargains dealing, were not raised in the court below and, therefore, cannot be raised before us. We have laid down the principle of law in a plethora of authorities that in

order not to ambush the other party, a party to an appeal can only raise issues that were pleaded and raised in the court below. In **Mususu Kalenga Building Limited, Winnie Kalenga v. Richmans Money Lenders Enterprises**, we stated that-

> **"We have said before and we wish to reiterate here that where an issue was not raised in the court below it is not competent for any party to raise it in this court."**

Although it was raised before the learned lower court that the respondent did not know what compound interest was, or that it was being charged, we do not consider counsel's submission before us, on inequality of bargaining power, to be a further development of the issues raised before the learned court below. We, therefore, hold that this issue was not raised before the court below and appellant is precluded from raising it before us.

In our considered view, the appellant was within the confines of the law in applying compound interest. We uphold ground one of the appeal accordingly.

With regard to ground two, we have no hesitation in holding that the learned Judge's view that compound interest and penal interest are one and same, was a misdirection. Penal interest is a more extraordinary or unusual type of interest than compound interest. In **Union Bank Zambia Limited case**[2] we observed-

> **"that the appellant was charging interest by adding to the balance due, interest of over 100% at monthly or fortnightly intervals and to the resultant compounded balance would then be added penal interest of 150% over the monthly or fortnightly periods to produce a new and twice compounded balance; and so repeated, until the respondent made payment on its guarantee."**

Penal interest is what we depicted as an extravagant and unconscionable sum and is not to be entertained at law. Even in the face of an agreement between parties, penal interest is frowned upon by the law. Having perused the record of appeal, we find that the appellant did not charge any penal interest to the overdraft facilities. Ground two has merit and we uphold it.

In grounds three and five the appellant has impugned the holding of the learned trial Judge for not considering the evidence adduced before it in holding that the respondent had paid in full the first two overdrafts, and with regard to the third overdraft, that the

amount outstanding was K130,060.00. The learned counsel for the appellant has invited us to overturn these findings of the learned lower court based on our decision in the case of **Attorney General v. Marcus Kampumba Achiume**[10], as being either perverse or made in the absence of any relevant evidence, or upon misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court, acting correctly, can reasonably make.

We have perused the various account statements for the respondent in the record of appeal. They appear at pages 72-76 and were referred to by both the appellant and the respondent in their respective affidavits filed in the court below. It is evident that the respondent did make deposits on diverse occasions into the account. It is also apparent that some withdrawals were made from the same account during the same period. In relation to the deposits towards the first two overdrafts specifically, it is evident that a deposit was made on 24th February, 2009 after the date for review. It is also clear that withdrawals of over K20,000 were made before the next deposit of K1000 was made on 18th March, 2009. The statement further shows that the next deposits were sparsely

made towards the third overdraft between March, 2010 and November, 2010 and then between 4th January, 2011 to September, 2011, all amounting to K11,930.00. The statements also show that all the while, interest on compounded basis and service charges were charged every month.

We are of the view that the statements of account, had sufficient details reflected that compound interest had been charged. We further find that the transactions on the statements resulted in a negative balance which effectively could not settle the K15,000.00 overdraft and interest accumulated over time. The same is said regarding the claim on the third overdraft.

In view of what we have found, we hold that the first two overdrafts were not paid in full and the amount deposited towards the third overdraft was insufficient to reduce the respondent's indebtedness.

Further, having held that compound interest was agreed by the parties and duly charged, we agree with counsel for the appellant that it is the compound interest which was applied to the

loan facilities which escalated the accumulated balance on the loan facilities. We are, therefore, inclined to overturn the findings of fact by the learned Judge and uphold the amount as claimed by the appellant, being K139,436.19.

In ground four, counsel for the appellant has argued that monthly charges were lawfully charged as authorized by law and as agreed by the parties. We have considered Regulation 10 (i) of the **Banking and Financial Services (Cost of Borrowing) Regulations**[2] made pursuant to the **Banking and Financial Services Act, Chapter 397** of the Laws of Zambia which counsel for the appellant relied on in his argument, and it states 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;**
>
> **(b) legal costs incurred in collecting or attempting to collect a payment on a loan; or**
>
> **(c) costs, including legal costs, incurred in protecting or realising the security on a loan.**

We note that the regulation deals with the imposition of charges or penalties on the borrower for late repayments or payments made contrary to a contract agreement governing the loan, and it makes such charges or penalties unlawful, save for the exceptions provided. We do not agree with counsel's proposition that this provision authorizes the charging of service charges. Service charges, to us, are a part of normal administrative charges imposed on an account as part of the cost of maintaining it. According to regulation 2 of the Banking and Financial Services (Cost of Borrowing) Regulations, the cost of borrowing includes administrative charges for services or transactions and any similar changes.

We have perused the account statements on the record of appeal and are satisfied that the charges imposed by the appellant were charged as part of the administrative costs under regulation 2 of the Banking and Finance Services (Cost of Borrowing) Regulations and not as penalty for late payment or payment contrary to the contract between the appellant and the respondent and are, therefore, not outlawed.

With regard to the sixth ground of appeal, the appellant has urged us to reverse the learned court's order awarding costs, on the basis that it did not exercise its discretionary powers judicially. Our position as to costs is as we held in **B.P. Zambia Plc v. Zambia Competition Commission Total Aviation And Export Limited Total Zambia Limited** [11] that-

> **'the award of costs is in the discretion of the Court and it is also trite law that this discretion should be exercised judiciously."**

At page 33 of the record of appeal, the learned Judge, having found as she did, condemned the appellant to costs as follows:

> **"The matter proceeded to court on account of the erroneous application of interest and other charges by the applicant, the respondent is awarded costs to be taxed in default of agreement."**

Having allowed the appeal, we reiterate what we said in **Mutale v Zambia Consolidated Copper Mines**[12] that-

> **"the general rule is that a successful party should not be deprived of his costs unless his conduct in the course of the proceedings merits the court's displeasure or unless his success is more apparent than real, for instance where only nominal damages are awarded."**

We hold that there is nothing in the circumstances of this case that would merit an order otherwise than to award costs to the successful party. We, accordingly, reverse the award of costs and order that costs should follow the event and the same are to be taxed in default of agreement.

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H. Chibomba

SUPREME COURT JUDGE

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M. Malila, SC

SUPREME COURT JUDGE

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R. M. C. Kaoma

SUPREME COURT JUDGE