IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 95/2018**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

FINANCE BANK ZAMBIA LIMITED **APPELLANT**

AND

DIMITRIOS MONOKANDILOS **1ST RESPONDENT**
FILANDRA KOURI **2ND RESPONDENT**

Coram: Makungu, Sichinga and Ngulube J.J.A

On the 23rd day of January, 2019 and the 29th day of November, 2019

For the Appellants: *Mr. J. Sangwa, SC and Mrs. J. Chimankata of Simeza Sangwa & Associates*

For the 1st and 2nd Respondents: *Mr. S. Mambwe and Mr. A. Siwila of Mambwe Siwila & Lisimba Advocates*

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Aroso v. Coutts & Co (2002) ALL ER (comm) 241*
2. *Mulenga v. Mumbi, Ex-parte Mhango (1975) ZR 78*
3. *Savenda Management Services Limited v. Stanbic Bank Zambia Limited – SCZ Selected Judgment No. 10 of 2018*
4. *Catlin v. Cyprus Finance Corporation (London) Limited (1983) 1QB 759*
5. *Brewer v. Westminister Bank Limited (1952) 2 ALL ER 650*
6. *Fielding v. Royal Bank of Scotland PLC (2004) ECWA civ 64*
7. *Communications Authority of Zambia v. Vodacom Zambia Limited (2009) ZR 196*

8. *Khalid Mohamed v. The Attorney General (1982) ZR 49*
9. *Lloyds Bank Limited v. EB Savory and Company (1932) ALL ER 105*
10. *Finance Bank v. Mirriam Muzeya + 4 others – SCZ Appeal No. 115 of 2017*
11. *Robert Mbonani Simeza and another v. Ital Terrazzo Limited - SCZ/08/194/2009*
12. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172*

Legislation referred to:

1. *The Court of Appeal Act No. 7 of 2016*

Works referred to:

1. *Halsbury's Laws of England, Volume 42*
2. *The Practice and Law of Banking, H.P Sheldon, 9th Edition (revised) published by Macdonald & Evans, 1962*
3. *Wikapedia.com*

1.0 INTRODUCTION AND BACKGROUND

1.1 On 29th August, 1994 when both respondents as a married couple went to the appellant with the intention of opening a joint account in US dollars, Account No. 010800121000 was opened through a bank official by the name of M. Katepa. The 1st respondent had on the said date filled in an account opening form indicating; form of ownership as "Joint." The title of the account as Mr. Domitrios Monokandilos and Mrs. Kouri Filandra. The 1st respondent only indicated his own particulars

and not his wife's and he signed the account opening form but his wife did not.

1.2 According to the instructions written on the form, part E which was the "joint mandate" was supposed to be completed, but it was not. However, M. Katepa signed at the end of part E as the account opener. The 1st respondent gave the bank samples of his signature. Samples of his wife's signature were not taken. Both respondents were not consulted before the set off was made. Two different account numbers were mentioned in evidence; 0101800121000 and 01018001202 as the joint account.

1.3 On 20th November, 1995, the 1st respondent and the appellant signed an agreement stipulating among other things that the kwacha call account held with the appellant by the respondents' should be converted into US dollar account No. 880012002. As at 4th March, 1996, the respondents had accumulated a total of US$983,858.74 which balance the appellant confirmed by letter dated 26th February, 1996. The deposit terms were that interest would be charged at 7% per annum throughout the period that the relationship between the respondents' and appellant subsisted. All transactions on the

accounts were done on the instructions of the 1st respondent. The 2nd respondent did not personally make any transaction on the account in issue.

1.4 The background to the letter of guarantee dated 28th November, 1995 made by the 1st respondent, was that, as the Chairman of the International Investment and Financing Limited acting on behalf of LM Comert International of Belgium wherein he was also a shareholder and director, he borrowed US$2,190,000.00 to import maize from Tanzania. LM Comert International was to import 10,000 metric tons of maize for International Financing Limited at the cost of US$2, 190, 00.00. The maize was supposed to be consigned to the appellant. A debenture was also issued. After the money was disbursed, the maize was expected in Zambia by 31st March, 1996 but was not delivered. Part of the loan was paid by International Investment and Financing Limited.

1.5 Another director of International Investment and Financing Company, Mr. Kosmas Mastrokolias also executed a personal guarantee in the sum of US$ 1,200,000.00 on 28th November, 1995.

1.6 The 1st respondent had other bank accounts with the appellant. In the dealings in issue, the appellant did not define the difference between the 1st respondent as an individual and International Investment and Financing Limited, because there were more activities on the personal accounts of the 1st respondent than the company and more money in the 1st respondent's account than the company accounts.

1.7 The company did not have adequate assets to cover the facility. The appellant worked with the 1st respondent in his own right and as an officer of the company to put together a number of securities to the satisfaction of the appellant. It was agreed between the appellant and the 1st respondent that the latter would maintain in his personal account a fixed deposit in Kwacha equivalent to US$ 1 million and the appellant would hold those funds as security for his own debt with the appellant. Arrangements were made to allow the 1st respondent's kwacha accounts to be overdrawn and the funds in his dollar accounts used as collateral for the overdraft.

1.8 On 28th April, 1995, the 1st respondent signed a letter of undertaking in which he stated that the funds held in his two

US dollar accounts could be used to secure the overdraft facilities extended to him by the bank.

1.9 The appellant had written a letter dated 16th October, 1996 to the 1st respondent to normalize the company's account within 14 days but he did not reply. It was on the strength of the letter of undertaking dated 28th April, 1995 and the deed of guarantee, signed by the 1st respondent that the appellant debited the "Joint account" on 16th July, 1996 with US$850, 000.00 as loan repayment. On 29th August, 1996 the account was debited with US$650, 00.00 as "Loan repayment BOZ/maize thereby overdrawing the account by US$643, 501.36. This was purported to be an offset against the money owed to the appellant by International Investment and Financing Limited.

1.10 The appellant was at the time being pursued by Bank of Zambia (BOZ) from whom the money was secured by the appellant under the maize purchase scheme.

1.11 The appellant sued the 1st respondent and Kosmas Mastrokolias, as guarantors of the company's liabilities with the defendant in cause no. 1996/HP/4739 and obtained judgment in its favour on 17th May, 1999 in the sum of US$ 1,

200,000.00, with interest. The International Investment and Financing Limited was placed under receivership but the debt was not recovered since the company assets were insufficient.

1.12 Disgruntled with the appellants conduct, the respondents instituted an action in the lower court on 30th March, 2010 claiming US$949, 933.87, unlawfully debited to the Joint account on 26th February, 1996 with interest at the agreed rate of 7% from March, 1996 up to date of payment, any other relief and costs.

2.0 LOWER COURT'S DECISION

2.1 The judgment dated 30th March, 2018 shows that in determining the matter, Mr. Justice William S. Mweemba opined that the bank and its officers had the responsibility and obligation to ensure that the customer fulfills all the opening and operational requirements as set out by the bank but it failed to do so as the account opening form was incomplete.

2.2 The court found that it was clear that the bank was negligent in the way it opened the account as well as the way it allowed it to operate without obtaining the required personal details of Filandra Kouri and her specimen signature. The bank should

have obtained a clear joint account mandate from the two persons named as account holders in accordance with the printed account opening form.

2.3 The judge further found that the account was not opened and operated as the 1st respondent's individual account. The appellant ought to have called one M. Katepa, the bank official who opened the account and/or the Branch Manager who was handling the account to testify as to what type of account it was. The bank was put on inquiry by the name of the account and the category account ticked on the Account Opening Form: "joint." The two points sufficiently showed that it was a joint account.

2.4 The judge applied the case of ***Aroso v. Coutts*** [1] to come to the conclusion that the fact that one of the joint account holders did not contribute to or draw upon the joint account did not entail that she had no beneficial interest in the account. The 1st respondent's intention was that the moneys in the joint account no. 0101800121000 should belong to both respondents.

2.5 The lower court went on to determine that it was clear from the letter of undertaking dated 28th April, 1995 that the 1st

respondent was securing overdraft facilities enjoyed by himself and not overdraft facilities availed by the appellant to any third party such as International Investment and Financing Limited. Therefore, the credit balances on the respondent's personal accounts were not available for set-off against the company's loan. Since it was a joint account, the appellant had no right to access the funds therein. Further, that the 2nd respondent did not sign the letter of undertaking and as such the appellant could not offset its claim against the company or indeed its claim against the credit balance on the joint account.

2.6 The deed of guarantee executed by the 1st respondent in favour of the appellant with respect to the company's indebtedness to the appellant did not entitle the appellant to take monies from the joint account to cater for the loan.

2.7 The court pointed out that the appellant should have pursued the 1st respondent and Kosmas Mastrokolias as guarantors of the loan given to the company under its judgment in cause no. 1996/HP/4738. In view of the foregoing, it was found that the defendant wrongfully debited the plaintiffs joint US$ account with the sum of US$ 949, 933. 81 on 26th February, 1996.

2.8 On the issue of whether the 2nd respondent had failed to prove her case, the lower court found that no authority was cited to the effect that a plaintiff must personally give evidence in order to establish the claim and succeed. The 2nd respondent did not need to prepare her own witness statement. The evidence given by the 1st plaintiff, DW1 and the documentary evidence, formed the basis of the court's decision that the plaintiffs had proved their case on the balance of probabilities.

2.9 Judgment was therefore entered against the defendant for payment of US$949, 933.87 with interest at 7% per annum from 26th February, 1996 to date of judgment, thereafter at the current bank lending rate as determined by the Bank of Zambia, plus costs.

3.0 THE APPEAL

3.1 The appellant has advanced five grounds of appeal framed as follows:

1. *The court below erred in law and in fact by holding that the appellant bank was negligent in the way it opened the account in issue as well as the way it allowed it to operate without*

obtaining the required personal details of the 2nd respondent and her specimen signature.

2. *The court below erred both in law and in fact by holding that the account in question was joint and belonged to both respondents.*
3. *The court below erred both in law and in fact by holding that the appellant wrongly debited the respondent's joint US dollar account with the sum of US$949,933.81 on 26th February, 1996.*
4. *The court below erred in fact and in law by holding that the respondents had proven their case against the appellant on a balance of probabilities.*
5. *The court below erred both in law and in fact by entering judgment in favour of the respondents against the appellant in the sum of US$949,933.81 with interest at 7% per annum from 26th February, 1996 to date of judgment.*

4.0 APPELLANT'S ARGUMENTS

4.1 In support of ground one, counsel for the appellant, Mr. Sangwa submitted that the judgment was contrary to the rules of natural justice. No order should be made to the detriment of an individual unless he was a party to the proceedings and was given an opportunity to be heard. Anything done to the

contrary would be a breach of the rules of natural justice as stated in the case of ***Mulenga v. Mumbi, Ex-parte Mhango.*** [2]

4.2 The issue of negligence was not tried in the court below since the respondents had not pleaded or otherwise raised it and naturally the appellant did not tender any defence in rebuttal. Despite this, the court below on its own motion proceeded to introduce the issue of negligence and to condemn the appellant. Reference was made to the case of ***Savenda Management Services Limited v. Stanbic Bank Zambia Limited*** [3] in which the Supreme Court frowned upon a trial court raising issues which were not pleaded and tried before them. The court also emphasized that parties should at least be heard on such issues.

4.3 On ground two, we were referred to the case of ***Catlin v. Cyprus Finance Corporation (London) Limited*** [4] dealing with a joint deposit account opened on terms that no payment should be made out except on joint signatures. He also referred to the case of ***Brewer v. Westminister Bank Limited*** [5] where the plaintiff and 2nd defendant applied to the defendant bank for a joint account using the bank's standard form known as

'Mandate for joint Account.' Also, the case of ***Fielding v. Royal Bank of Scotland PLC*** [6] which highlights that the mandate is key in determining the nature and classification of an account.

4.4 Mr. Sangwa went on to submit that as regards opening a joint account, the practice of the appellant was that part A and part E of the account opening form had to be completed. However, in this case, only part A of the form was completed by the 1st respondent alone and neither the 1st nor 2nd respondent filled in part E of the form which deals with joint mandate. He argued that without the joint mandate being communicated to the appellant, the account could not be said to be a joint account.

4.5 Apart from the account opening forms, the applicants were expected to complete and submit to the appellant a "specimen signatures" card and in the case of a joint account, the two beneficiaries were to sign the card and the appellant was to honour instructions bearing the signatures appearing on the card. However, in this case, the "specimen signatures" card was only signed by the 1st respondent. It was contended that there was no evidence before the lower court that the account in

issue was a joint account. We were urged to hold that it was never a joint account but the 1st respondent's personal account.

4.6 He contended further that, the action in the court below and the foundation claim of a joint account were nothing but a ploy for the 1st respondent to balance off his indebtedness to the appellant under the judgment in cause no. 1993/HP/4739.

4.7 In support of grounds three and five, reference was made to ***Communications Authority of Zambia v. Vodacom Zambia Limited*** [7] where the Supreme Court held among other things that an appellate court can only reverse the lower court's findings of fact if satisfied that the findings in question are either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could have reasonably made. On the strength of this case, Mr. Sangwa submitted that we should reverse the findings of fact made by the lower court under the first and second grounds of appeal because they were made in the absence of relevant evidence and based on a misapprehension of the evidence on record.

4.8 In support of ground four, it was submitted that the respondents had sued the appellant in their own rights. Therefore, each had an obligation to prove the case. Reliance was placed on the case of ***Khalid Mohamed v. The Attorney General,*** [8] where it was held among other things that the burden is on the plaintiff to prove his case. It was contended that since it was not a representative action, the court below erroneously held that the 2nd respondent did not need to prepare her own witness statement.

4.9 He further submitted that by virtue of the guarantee signed by the 1st respondent, the appellant was entitled to utilize the funds held in his account to defray the guaranteed debt owed by the company in the event that it failed to pay. Further that the 1st respondent in a letter of undertaking gave the appellant a contractual right to debit his account in order to recover any dues to the appellant under overdraft facilities provided to him. Therefore, he cannot escape the clear-cut continuing obligations which he signed up for in the guarantee and letter of undertaking.

4.10 Mr. Sangwa thus prayed that the appeal be allowed on all five grounds and that the decision of the lower court be reversed.

5.0 RESPONDENT'S ARGUMENTS

5.1 Counsel for the respondents, Mr. Mambwe relied on the heads of argument filed on 20th June, 2018. In countering ground one, he submitted that the alleged finding of negligence had no impact whatsoever on the core issues which the judge below was called upon to determine. The question of negligence arose when the judge was considering whether the account was "joint". The finding was merely obiter dictum.

5.2 In any event, the appellant's witness confirmed during cross-examination that the bank bears the responsibility of ensuring that the account opening forms are correctly completed, all signatories sign the mandate and that the account is opened in the name of a person who exists. In re-examination, no attempt was made to clarify these admissions. Therefore, it is clear that the appellant was given an opportunity to be heard as set out in the case of ***Mulenga v. Mumbi Ex-parte Mhango.*** [2] Mr. Mambwe therefore urged us to dismiss the first ground of appeal.

5.3 Coming to ground two, Mr. Mambwe conceded that the resolution of the issue as to whether the account was "joint" or not was purely of fact or evidence and not law. He submitted that the finding that it was a joint account was made on the basis of available evidence and not on a misapprehension of facts. There is therefore no basis for upsetting the findings.

5.4 He further submitted that a joint account can be opened and styled as such even without the knowledge of one of the account holders as was the case in ***Aroso v. Coutts & Co.*** [1]

5.5 On grounds 3 and 5, it was submitted that the appellant seemed to have an issue with the court finding for the respondents in the sum of US$ 949, 933.81 with interest at 7% from 26th February 1996 on the basis that this sum in actual fact appears as a credit on the account statement. He submitted that this figure was endorsed both on the writ of summons and statement of claim. PW1 was not cross examined on that claim which was supported by the account statement. Counsel drew our attention to the appellant's bank statement which shows that there was a debit of US$850, 000 whose details were loan repayment on 16th July, 1996 and another

debit of US$ 650, 000 whose details were loan repayment BOZ/MAIZE FA on 29th August 1996. He stated that from these entries, it would appear that in fact, the appellant debited the account with a total of US$1, 500, 000 and the claim of US$949, 933.87 was understated. The appellant in its defence as pleaded, admitted having debited the joint account with US$643, 501.36 but this figure is not supported by the evidence on record.

5.6 Under **Section 24 of the Court of Appeal Act, 2016** this court has power to confirm, vary, amend or set aside the judgment appealed against or give judgment as the case may be. On this basis, he urged us to substitute US$ 949, 933.87 with the figure supported by the evidence being US$1, 500, 000 composed of US$850, 000 debited on 16th July, 1996 and US$650,000 debited on 29th August, 1996. In the circumstances, we were urged to dismiss grounds 3 and 5 for lack of merit.

5.7 With regards to ground 4, on the lack of evidence from the 2nd respondent, Mr. Mambwe submitted that the case for the respondents was one as it related to the single asset owned by

both of them, namely, a joint account. The evidence to be given was therefore similar if not the same and there was nothing wrong with the 1st appellant alone giving evidence. Counsel submitted that it has never been the law that a litigant must personally testify in order to succeed. He relied on the case of ***Robert Mbonani Simeza & Another v. Ital Terrazzo Limited*** *(12)* where it was stated that:

"At law anybody can be a witness for a company or indeed any other litigant. He can be such a witness either as a deponent of an affidavit or in oral form. What matters mostly is that he should have personal knowledge of facts he is testifying on."

5.8 In light of this authority, he submitted that in this case, the 1st respondent had personal knowledge of the circumstances pertaining to the account in question. Hence, there was no need for the 2nd respondent to come and regurgitate the evidence. The learned trial judge cannot be faulted for dismissing the appellants arguments on this issue.

5.9 The appellant had no right to debit the respondents' joint account without their authority. It was not in dispute that the

2nd respondent never signed any personal guarantee or any form of authorization to allow the bank to debit any account held in her name. Since the 2nd respondent was not privy to the undertaking and guarantee made by the 1st respondent, the appellant had no legal basis to set off funds in the joint account against the debt owed by the third party. The law does not allow joint account holders to pledge each other's credit and it is the duty of a banker to get concurrence of all the joint account holders to any pledge involving a joint account. To support this argument, reference was made to **The Practice and Law of Banking**, at page 251 which puts it succinctly that:

"The fact that persons have jointly opened an account does not imply that they have power to pledge each other's credit. If therefore, an overdraft is required, the banker should see that all the joint parties concur in the request. For if this is not done, only those who are responsible for the borrowing can be liable to repay the sum borrowed."

5.10 **Halsburys Laws of England, Volume 42, paragraph 435** states that;

"Subject to certain exceptions, a set off may only be maintained where the claims to be set off against each other exist between the same parties and in the same right."

5.11 In light of the foregoing, it was submitted that the letter of undertaking related to overdraft facilities enjoyed by the 1st respondent himself, and not the credit facilities given to Investment and Financing Limited. Counsel therefore prayed that the appeal be dismissed.

5.12 Mr. Mambwe's oral arguments were that the finding of negligence was obiter dictum in that no relief ever flowed from it. The ***Muzeya*** (10) case cited by the appellants is distinguishable from this case because in that case, the plaintiffs were claiming individual terminal benefits while this case relates to a single asset of both respondents. So, the evidence of one person relating to the asset is sufficient.

6.0 ORAL ARGUMENTS IN REPLY

6.1 Mr. Sangwa reiterated that negligence must be pleaded. The respondents' never raised any issue touching on negligence but the court made it central to its judgment. Although the

respondents stated that it was obiter dictum, his view was that in obiter, you do not make findings. He argued that in the case of ***Lloyds Bank Limited v. EB Savory and Company*** [9] which the court relied upon, negligence was an issue but not in this particular case. Therefore there was a serious misdirection on the part of the court as at that time, the court had not yet examined whether the plaintiff had proved its case or not. The burden of proving the case was wrongly shifted from the plaintiffs to the defendant.

6.2 Mr. Sangwa further argued that the 1st respondent should have explained why the 2nd respondent's details were not in the account opening form and why the specimen card was signed by him alone. The 1st respondent should have provided evidence to show that notwithstanding the deficiencies, it was a joint account.

6.3 In the case of ***Finance Bank v. Mirriam Muzeya and four others,*** [10] out of 5 respondents, only 2 gave evidence but the court awarded damages to all 5. This court overturned the lower court's decision and held that since only two testified,

only 2 were entitled to judgment. We were urged to follow this decision.

6.4 Mr. Sangwa stated that the transfer of US$850, 000 did not relate to the same loan.

7.0 DECISION OF THE COURT

7.1 Having considered the record of appeal and counsels' written and oral submissions, we shall deal with the 1st and 2nd grounds of appeal separately and the 3rd to 5th grounds together.

7.2 On ground one, the evidence on record shows that the 1st respondent went to the appellant's bank with his wife the 2nd respondent with the intention of opening a joint account in US dollars. A bank official by the name of M. Katepa attended to them and Account No. 010800121000 was opened in both the 1st and 2nd respondent's names. However, only the 1st respondent filled in the application form. On the type of account, "joint" was ticked. Part E of the form headed "Joint Mandate" was not completed by either respondent. The form was signed by M. Katepa an employee of the appellant who opened the account on 29th August, 1994.

7.3 Although the account opening form indicates account number 010800121000, the statement of account dated 17th December, 2012 shows that the account was No. 0880012002. We therefore take it that the account in issue was renumbered 0880012002 instead of 010800121000 as that is the only possible inference that can be drawn from the stated facts.

7.4 There is a dispute as to whether the findings by the court on negligence were obiter dictum. According to Wikipedia "obiter dictum" is a latin phrase meaning "by the way" that is, a remark in a judgment that is "said in passing." It is a concept derived from English common law, whereby a judgment comprises only two elements: *ratio decidendi* and *obiter dicta.* For the purpose of judicial precedent, ratio decidendi is binding, whereas obiter dicta are persuasive only."

7.5 On page 41 of the lower court's judgment, the court followed the case of ***Lloyds Bank Limited v. E.B. Savoy and Company*** [(9)] where it was held among other things that breach of the bank's own rules would not necessarily prove that the bank had been guilty of negligence as the rule which had been broken might have been made from excessive caution. But in most

cases, the breach would furnish a strong *prima facie* ground for holding that the bank had not acted without negligence.

7.6 In the second paragraph on page 41, the lower court accordingly found that; "The defendant bank did not act properly and without negligence in opening the account in the name of "Dimitrios Monokandilos and Filandria Kouri"

In the third paragraph on the same page Judge Mweemba stated that "*It is clear that the defendant bank was negligent in the way it opened the account in issue as well as the way it allowed it to operate without obtaining the required personal details of Filandria Kouri and her specimen signature.*"

7.7 We are certain that the ***Lloyds Bank*** [9] case was based on a claim that the bank was negligent by not asking a customer the name of his employer and in the case of a married woman the name of her husband. In the case before us, negligence was not pleaded or raised in evidence. As Mr. Sangwa rightly pointed out, a plaintiff is bound by his own pleadings and a trial court should not raise issues which were not pleaded and tried before it. The parties should at least be heard on such issues before the matter is determined. The case of ***Savenda Management***

Services Limited v. Stanbic Bank Limited [3] refers. In this case, the lower court did not hear the appellant on the question of negligence.

7.8 We have examined the lower court's finding in this regard as quoted above and are of the view that the lower court applied the ***Lloyds Bank*** [9] case out of context and actually found that the appellant was negligent. The findings on negligence were not *obiter dicta*. We therefore set them aside as they are findings which, on a proper view of the pleadings and evidence, no trial court acting correctly could have reasonably made. The ***Communications Authority of Zambia*** [7] case applies. For the foregoing reasons, the first ground of appeal succeeds.

7.9 On the second ground of appeal we note that both respondents were present at the bank when the account was being opened. M. Katepa the appellant's employee who endorsed the account opening form, had the duty to ensure or insist that the form was completed before opening the account which she breached.

7.10 The respondents were not to blame for the banks failure to obtain all the required information from them such as the joint mandate and specimen signature of the 2nd respondent. The

bank should have taken advantage of the presence of the 2nd respondent on the date that the joint account was opened and taken the full particulars of the 2nd respondent and joint mandate as the intentions of the couple were very clear. The lower court rightly found on page 4 of the judgment that the bank was put on inquiry by the name of the account.

7.11 The fact that the account was in the names of both respondents and the type of account that they were permitted to open was "Joint" meant that it was a joint account; notwithstanding that only the 1st respondent was operating it. We are fortified by the case of ***Aroso v. Coutts and Company.*** [1] Although the "mandate" is crucial in determining the nature and classification of the account according to the case of ***Fielding v. Royal Bank of Scotland Plc,*** in our view that is not the only factor that shows the nature and classification of an account. Other factors like the name of the account, specific type of account indicated in the account opening form and the intentions of the parties also can be used to determine such an issue.

7.12 Coming to the third, fourth and fifth grounds of appeal, we shall begin with the issue, whether the 2nd respondent ought to have stood as a witness in order to prove her case. Although it was not a representative action, we accept the respondent's advocates submissions that the issue before court affected both parties as it related to only one joint account. The evidence adduced by the 1st respondent who had full knowledge of what transpired related to both parties. While we agree with the principal espoused in the case of ***Finance Bank v. Mirriam Muzeya and four others***, (10) we are of the view that the case is distinguishable from the case before us in that it involved the separate employment contracts of each respondent and how they were treated by their employer. Each had to prove his claim for damages. In this case, the 1st respondent's evidence covered the 2nd respondent's case. There was therefore no need to call the 2nd respondent to come and repeat the evidence.

7.13 The cases *of* ***Khalid Mohammed v. The Attorney General*** (8) *and* ***Wilson Masauso Zulu v. Avondale Housing Project*** (13) do not state that a plaintiff must give evidence but that he ought to prove the case on the balance of probabilities. This can be done even through other competent witnesses.

7.14 As regards the issue whether the bank had legal authority to debit the joint account, we note that the account was debited with US$850, 000 on 16th July, 1996 and US$650, 000 on 29th August, 1996 as shown in the account statement dated 17th December, 2012 on page 93 of the record of appeal. There is no evidence that a sum of US$949, 933.81 was debited on 26th February, 1996 as pleaded by the respondents and accepted by the lower court.

7.15 It is clear from the evidence on record that the 2nd respondent did not issue any document authorizing the appellant to debit the joint account. The appellant took the letter of undertaking and the letter of guarantee signed by the 1st respondent as authority to debit the account with the amount outstanding on the loan owed by the company in which the 1st respondent was a shareholder and director. The letter of undertaking dated 28th April, 1995 on page 104 of the record of appeal states:

"I D. Monokandilos confirm that the money held in my two foreign exchange accounts should secure the overdraft facilities I enjoy in the books of Finance Bank (Z) Limited."

The two foreign exchange accounts were not described by their numbers. Reference was made to the 1st respondent's personal accounts and his two foreign exchange accounts and not the joint account in issue. The undertaking was intended to secure the overdrafts granted to him as an individual. The guarantee he made on 28th November, 1995 for the loan owed to the appellant by International Investments and Financing Limited was also personal as can be seen on pages 4 and 5 of the record. The record also shows that he was personally sued by the appellant in another suit, for the guarantee and judgment was passed against him. Our firm position is that the appellant was not authorized by the joint account holders to debit their joint account in order to recover the debt incurred by International Investments and Finance Limited, a third party.

7.16 The lower court was therefore on firm ground when it held that the respondents had proved the case on a balance of probabilities and that the account was wrongly debited. On this basis, we find that the overdraft created was illegal and it should be reversed.

7.17 Mr. Mambwe's submission that we should enter judgment for the respondents to recover US$1,500,000.00 instead of US$949, 933.87 is rejected because the claim according to the writ was for US$949, 933.87 and not US$1, 500,000.00. It is trite law that litigants are bound by their pleadings. **Section 24 (1) (a) of the Court of Appeal Act** empowers the court on the hearing of an appeal in a civil matter to confirm, vary, amend or set aside the judgment appealed against or give judgment as the case may require; but it does not empower the court to determine matters that ought to be pleaded but which were not pleaded such as negligence and a liquidated claim.

7.18 As regards the interest rate of 7% per annum, the evidence on record shows that that was the rate agreed upon between the parties. Since the account was incorrectly debited on 16th July, 1996 and 29th August, 1996, we set aside part of the lower courts judgment that says it was debited on 26th February, 1996. Instead we adjudge that it was debited on 16th July, 1996 and 29th August, 1996 and that interest should accordingly be calculated on the principal of US$949, 933.81 at 7% per annum from the date of the writ until full settlement. The third, fourth and fifth grounds of appeal therefore fail.

8.0 CONCLUSION

8.1 In closing, only ground one has succeeded, the rest of the grounds have failed. Since the success of the first ground does not affect the outcome of the appeal, we take it that the appeal has failed. We order that the appellant shall bear the costs in the court below and here. The same should be agreed upon or taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y SICHINGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE