

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0610

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: **An application under Order 30 Rule 14 of the High Court Act Chapter 27 of the Laws of Zambia as read with Order 88 of the Rules of the Supreme Court, 1999 Edition.**

IN THE MATTER OF: **A Third-Party Mortgage relating to Stand No. 125, Chilanga, Lusaka, in the name of Shadreck Lungu**

AND

IN THE MATTER OF: **An Order for foreclosure, Possession and sale of Mortgaged properties**

BETWEEN:

INVESTTRUST BANK PLC



APPLICANT

AND

LONGRIDGE COMMUNICATIONS LIMITED

1ST RESPONDENT

AND

SHADRECK LUNGU

2ND RESPONDENT

Before the Hon. Lady Justice Mrs. Irene Zeko Mbewe

For the Applicant:

Ms Sakala of Messrs Fraser Associates

For the Respondents:

In Person

J U D G M E N T

Cases Referred To:

1. *Reeves Malambo v Patco Agro Industries SCZ Judgment No. 20 of 2007*
2. *YB & F Transport Ltd v Supersonic Motors Limited SCZ Judgment No. 3 of 2000*
3. *Union Bank of Zambia Ltd v Southern Province Co-operative Marketing Union Ltd (1995-97) ZR 207*
4. *Credit Africa Bank Ltd (In Liquidation) v John Dingani Mudenda (2003) ZR 71t*
5. *Chrismar Hotel Limited v Stanbic Bank Zambia Limited SCZ Judgment No 20 of 2017*

Legislation referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Banking and Financial Services (Cost of Borrowing) Regulations Statutory Instrument No 179 of 1995*

Other Works Referred to:

1. *Halsbury's Laws of England, 2nd Edition Volume 20*
2. *Paget's Law of Banking, 8th Edition*

The Applicant's claim against the Respondents' herein is for the following reliefs:

- (i) Immediate payment of monies secured by a mortgage which as at 7th September 2016 stood at ZMW275,377.61.
- (ii) Sale of Stand 125 Chilanga, Lusaka.
- (iii) Foreclosure Order on Stand 125 Chilanga, Lusaka
- (iv) Delivery and possession of Stand 125 Chilanga, Lusaka.
- (v) An Order for the recovery of the sum of ZMW50,000 held in the 1st Respondent's name and pledged as security by way of a lien.
- (vi) Further or other relief
- (vii) Interest
- (viii) Costs.

The application is supported by an affidavit deposed to by Crispin Isukanji Daka the Acting Head of Credit in the Applicant Bank. The salient facts are that by an Overdraft Agreement and a facility letter dated 22nd October 2013, the 1st Respondent was availed a credit facility in the sum of ZMW500,000.00 **(Exhibits "CID 1- 2")**. According to the facility letter, the funds advanced to the 1st Respondent would be used as working capital. The credit facility was approved through a board resolution by the 1st Respondent's

board of directors on 22nd October 2013 (**"CID 3"**). That the loan was disbursed through the 1st Respondent's Account No. 110110133668010. According to the deponent, the loan was secured by a duly executed and registered third party mortgage over Stand 125, Chilanga. The 1st Respondent issued a letter of consent, executed a Memorandum of Deposit of Title, and deposited with the Applicant the Certificate of Title relating to the subject property, and a lien over the sum of ZMW50,000.00 in the fixed deposit account in the 1st Respondent's name as provided in clause 7.1.2 of the Overdraft Agreement (**Exhibit "CID4-7"**). The Overdraft Agreement provided in clause 6.1.2 that the principal sum and all interest accruing thereon would be paid within a period of 12 months from the date of disbursement. That the said Agreement provided that in the event of default, the Applicant would be at liberty to enforce the securities. It is deposed that the 1st Respondent's account as at 7th September 2016 is currently overdrawn by ZMW275,377.61 (**Exhibit "CID 8"**). That Stand 125, Chilanga is in possession of the 2nd Respondent. The Applicant prayed for the reliefs sought in the Originating Summons.

The 1st Respondent opposed the application by way of affidavit deposed to by Shadreck Lungu a Director in the 1st Respondent and the 2nd Respondent herein. According to the deponent, the 1st Respondent obtained an overdraft facility in October 2013 of ZMW100,000 and not ZMW500,000.00 as alleged by the Applicant. That funds totalling ZMW100,000.00 were disbursed by the Applicant as an overdraft facility to the 1st Respondent bank account and that the Overdraft Agreement confirms that the Applicant had agreed to provide a renewal of the overdraft facility with a limit of ZMW100,000.00 to the 1st Respondent. According to the deponent, that although the Overdraft Agreement stipulated the creation of the third party mortgage over Stand 125 Chilanga to secure the sum of ZMW500,000.00, a lien over the sum of ZMW50,000.00 in a fixed deposit was created as stipulated in clause 7.1.1 and 7.1.2 of the facility letter which were in reference to security pertaining to the Advance Payment Guarantee facility of ZMW400,000.00 and the overdraft facility of ZMW100,000.00 respectively since there was no separate Advance Payment Guarantee executed between the parties herein. That the said overdraft facility was granted in December 2012 and covered by the

1st Respondent's fixed deposit account in the sum of ZMW50,000.00 held with the Applicant. That upon renewal of the overdraft facility in October 2013, the said overdraft continued to be secured by the 1st Respondent's fixed deposit in the sum of ZMW50,000.00 as confirmed by clause 8.2 of the facility letter. It is deposed that the 1st Respondent in October 2013 obtained an Advance Payment Guarantee in favour of Zamtel to the value of ZMW400,000.00 which was to expire in October 2014. It is deposed that the third party mortgage over Stand 125, Chilanga was security for the Advance Payment Guarantee facility to Zamtel of ZMW400,000.00 as per clause 8.1 of the facility letter.

According to the deponent, the Bank overdraft and Advance Payment Guarantee facility were mutually exclusive and issued on different terms and conditions. It is deposed that a property with a market value of ZMW950,000.00 in 2013 could be used to secure an overdraft facility of ZMW100,000.00. That upon expiry of the overdraft facility on 31st October 2014, the Applicant exercised its rights pertaining to the security for the overdraft by converting the accumulated sum of ZMW54,340.32 held in the fixed deposit

account of the 1st Respondent to partially offset the balance on the overdraft facility.

According to the deponent, following the expiry on 31st October 2014 of the Advance Payment Guarantee to Zamtel, the Applicant has to date not paid out any claim, and according to clause 5 and 8 of the Advance Payment Guarantee, the 1st Respondent has no obligations under the Advance Payment Guarantee (**Exhibit "CID 12"** in the Respondents' affidavit in opposition). That the third party mortgage does not specifically state which particular facility is the subject of the security. It is deposed that upon termination of the fixed deposit account, the Applicant in February 2015 confirmed to the 1st Respondent that there is an outstanding amount on the overdraft facility of ZMW161,794.92. According to the deponent, the money being claimed of ZMW272,377.61 by the Applicant on the balance of the overdraft is excessive and includes compound interest which should be reversed.

The Applicant filed an affidavit in reply on 12th May 2017 in which it is deposed that contrary to the Respondents' assertion, the 1st Respondent applied for and was availed two credit facilities whose

aggregate is ZMW500,000.00 (**Exhibit "CID 1"** in the affidavit in support). According to the Applicant, the mortgaged property is security for both credit facilities without distinction. That the initial overdraft was secured by a lien of the 1st Respondent's fixed deposit account and the subsequent overdraft granted in 2013 was granted on enhanced terms and security, being the lien and mortgaged property. According to the deponent the two credit facilities were not mutually exclusive. It is deposed that the Applicant did not and could not have granted an overdraft facility of ZMW100,000.00 to the 1st Respondent and have it secured by the 1st Respondent's fixed deposit account whose value was not equal to the said overdraft facility.

It is deposed that the Applicant retained its right to offset the overdraft which as at October 2014 stood at ZMW193,122.52 and that the same was not sufficient to discharge the 1st Respondent's obligations towards the Applicant which included quarterly guarantee charges. That the Applicant still enjoys the right to enforce the security pledged for the facilities. According to the deponent, both facilities were secured by the fixed deposit and

mortgaged property and that the Applicant is entitled to the claim herein which includes compound interest charged pursuant to clause 5.1 of the Overdraft Agreement (**Exhibit "CID 2"** in affidavit in support of originating summons). That the 1st Respondent admitted their claim in a letter dated 1st July 2016 addressed to the Applicant and therefore the Applicant is well within its contractual rights to foreclose on the secured property (**Exhibit "CID 3"** in the Applicant's affidavit in reply).

Both parties filed skeleton arguments and list of authorities.

In the Applicant's skeleton arguments, the case of **Reeves Malambo v Patco Agro Industries Limited**¹ was cited in support of the cumulative remedies available to a mortgagor on default by the mortgagee. In respect to a lien and its implication, the case of **YB and F Transport Limited v Supersonic Motors Limited**² was referred to.

In the Respondents' skeleton arguments, the gist is that the Applicant exercised its right of the lien and converted the proceeds from the fixed deposit account in the sum of ZMW54,340.32 towards partially liquidating the outstanding balance on the

overdraft facility which stood at ZMW161,794.92 as at 31st January 2015. That the Advance Payment Guarantee facility of ZMW400,000.00 was secured by a Third Party Mortgage over Stand 125 Chilanga. The 1st Respondent prays that the Applicant's claim for foreclosure, possession and sell of Stand 125 Chilanga be dismissed following the expiry of the Advance Payment Guarantee. The 1st Respondent prays that the Court orders for the recalculation of the amount claimed of ZMW275,377.91.

At the hearing, the parties relied on the affidavit evidence, skeleton arguments, list of authorities and made oral submissions which are a repeat of the skeleton arguments. The parties filed written submission.

In its written submissions, the Respondents' more or less had the same arguments as in their skeleton arguments. The case of **Chrismar Hotel Limited v Stanbic Bank Zambia Limited**³ was cited in support of the proposition on the variation of contractual terms between banker and customer. The case of **Indo Zambia Bank Limited v Victory Plumbers Zambia Limited and Another**⁴ were cited in respect to penal interest. The Respondents' contend

that the Applicant has charged penal interest and cited the case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union.**⁵

I have carefully considered the affidavit evidence, skeleton arguments supported by list of authorities and oral submissions of both parties in support of their respective rival arguments.

The Applicant's application is predicated on *Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia* which states as follows:

"14. Any mortgagee or mortgagor whether legal or equitable on any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say-

Payment of moneys secured by the mortgage or charge

Sale

Foreclosure

Delivery of possession (whether before or after) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;

redemption;

Reconveyance

Delivery of possession by the mortgagee.

From the submission and arguments of the parties herein, the issues for determination are as follows:

- (i) Whether the Applicant is entitled to foreclose, take possession and exercise the power of sale over Stand 125 Chilanga.
- (ii) Whether the Applicant exercised its lien over the 1st Respondent's fixed deposit account in respect to the overdraft facility.

- (iii) Whether Stand 125 Chilanga was used as security for both the Advance Payment Guarantee facility and the overdraft facility.
- (iv) Whether the claimed amount includes penal and compound interest on the overdraft facility.

It is common cause that on the 22nd October 2013, the 1st Respondent was availed an overdraft facility of ZMW100,000.00 for working capital support and a Bank Advance Guarantee facility of ZMW400,000.00 for the purchase of airtime. Both the overdraft facility and the Advance Payment Guarantee attracted interest at 9.75% per annum plus a margin of 9% totalling to 18.75% per annum. It is common cause that the overdraft facility was secured by a lien over the fixed deposit of the 1st Respondent held with the Applicant Bank for the sum of ZMW50,000.00 plus compound interest as contained in the facility letter dated 22nd October 2013. It is not in dispute that an Overdraft Agreement was executed by the 1st Respondent and Applicant which was to be read with the facility letter of 22nd October 2013. It is not in dispute that the 1st Respondent executed a Memorandum of Deposit and a Third Party Mortgage relating to Stand No. 125 Chilanga in favour of the

Applicant. It is common cause that the overdraft facility as at 31st January 2015 stood at ZMW161.794.92. It is not in dispute that the Advance Payment Guarantee expired on 31st October 2014, extinguishing the Applicant's liability to Zamtel.

The bone of contention by the 1st Respondent is that following the expiry of the Advance Payment Guarantee facility to Zamtel, on 31st October 2014, the Applicant is not entitled to foreclose, take possession and exercise the power of sell over Stand 125 Chilanga as the Respondents herein never pledged the mortgaged property as security for the overdraft facility. Following from that, that the lien on the fixed deposit was extinguished.

The contractual documents unpinning the credit facilities to the 1st Respondent are the facility letter dated 2nd October 2013, the Overdraft Agreement executed on 31st October 2013, the mortgage letter dated 29th October 2013, Memorandum of Deposit of Title Deeds dated 31st October 2013 and the Third Party Mortgage registered on 19th November 2013.

Third Party Mortgage

The 1st Respondent argues that there is no evidence as to how the subsequent overdraft facility was linked to the Third Party Mortgage as it continued to be secured by the 1st Respondent's fixed deposit account as stipulated in clause 8.2 of the facility letter and clause 7.1.2 of the Overdraft Agreement. **(Exhibit CID 9-11"** in the affidavit in opposition). The 1st Respondent contends that the two facilities namely the bank overdraft of ZMW100,000.00 and the Advance Payment Guarantee facility of ZMW400,000.00 issued to Zamtel were mutually exclusive and were separate facilities. Conversely, the Applicant argues that the subsequent overdrafts had enhanced terms and security.

In order to determine whether the mortgaged property secured the overdraft facility, it is necessary to examine the security documents. According to clause 8 of the facility letter dated 22nd October 2013, it provides that:

"8.1 Third Party Mortgage over Stand 125 Chilanga, Lusaka by Shadreck Lungu for the sum of ZMW500,000) Five Hundred Thousand Kwacha only) plus compound interest.

8.2 A lien over the fixed deposit in the name of Longridge Communications Limited held with Investrust Bank Plc for the sum of ZMW50,000 (Fifty Thousand Kwacha only) plus compound interest.

In the definition and interpretation clause of the Overdraft Agreement of 31st October 2013, it states as follows:

“Property” means a real estate property (including a plot of land with or without construction thereon or a flat in a building) against the security of which the limit is granted by the Bank in terms of this Agreement. The word property shall include the improvements made or occurred to it and also all benefits arising out of the property”.

Clause 4 of the Overdraft Agreement provides for the mode of operation of the overdraft account as follows:

“4.4.1 The Borrower satisfies the Bank of a clear and marketable title to the properties”.

In clause 7 of the Overdraft Agreement on Security, it reads as follows:

“7.1.1 A Third Party Mortgage over Stand 125 Chilanga by Shadreck Lungu and Longridge Communications Limited to secure ZMW500,000 (Kwacha Five Hundred Thousand) plus compound interest; and

7.1.2 A lien over the sum of ZMW50,000 (Fifty Thousand Kwacha) in fixed deposit account in the name of Longridge Communications Limited.

In the extracts of the 1st Respondent’s Board Minutes, it states as follows:

- 1. A Third Party Mortgage over Stand No. 125 Chilanga by Shadreck Lungu and Longridge Communications Limited to secure the sum of ZMW500,000 (Kwacha Five Hundred Thousand only) plus compound interest; and**
- 2. A lien over the sum of ZMW50,000 (Fifty Thousand Kwacha) in a fixed deposit account in the name of Longridge Communications Limited.**

In the Memorandum of Deposit of Title executed by the 2nd Respondent, Clause 1 states as follows:

1. **The original title document..... to secure to the said Bank the repayment of the total sum of ZMW500,000 (Kwacha Five Hundred Thousand only) together with interest as indicated in the Facility Letter of 22nd October 2013 and any subsequent addendum to the Borrower....."**

In the executed Third Party Mortgage, the recitals read as follows:

"AND WHEREAS the Mortgagor has requested the Bank to grant the customer a Temporal Overdraft Facility and accommodation under a Facility letter dated 22nd October 2013 which the Bank has agreed to do upon the terms and upon having the security hereinafter appearing."

In the Certificate of Title, the endorsement is as follows:

" a Third Party Mortgage to Investrust Bank Plc to secure K500,000 and interest."

The 2nd Respondent, by letter dated 22nd October 2013 and addressed to the Applicant, wrote as follows:

"RE-Lodgment of title No 218512 for Stand 125 Chilanga

Kindly acknowledge receipt of title No 218512 for Stand No 125 Chilanga from Mr. Shadreck Lungu on behalf of Longridge Communication Ltd to be used as collateral for a bank guarantee of K400,000 and an overdraft of K100,000 to Longridge Communications Ltd"

The 1st Respondent argues that the above cited letter was a letter requesting the Applicant to acknowledge receipt of the Certificate of Title relating to Stand 125 Chilanga. From the contents of the above cited letter, I opine that the Respondents' understood that the mortgaged property was to be used as collateral for both the Advance Payment Guarantee facility and the overdraft facility as specified in the facility letter dated 22nd October 2013.

The 1st Respondent further argues that the agreements by the parties herein did not explicitly state in any clause that the two facilities were joined or linked, and that the arguments by the Applicant are an attempt to imply what they think the Agreements stated. The 1st Respondent drew the Court's attention to the case of **Chrismar Hotel Limited v Stanbic Bank Zambia Limited SCZ Judgment No 20 of 2017⁵** where it was held that:

"When there is a new arrangement and the customer has signed the application, then obviously he is bound, but when the bank wishes for its own reasons to impose a new term on the banker customer contract, it must do so in such a way as to leave no possible doubt, and it cannot do so unilaterally. The bank's duty in this regard is fourfold:

- (i) to advice the customer of the new term;**
- (ii) to ensure that the advice is received by the customer;**
- (iii) to ensure that the customer understands the consequences of failure to comply with whatever he is asked to do; and**
- (iv) to make it clear that the bank will not be responsible if he fails to comply. The variation of the contract thus requires knowledge and consent on the part of the customer, and possibly also consideration."**

The above case is distinguishable from the present one and does little to aid the 1st Respondent in that clause 2.2 of the Overdraft

Agreement dated 31st October 2013 governs the parties relationship vis a vis the overdraft facility and reads as follows:

"The Relationship between the Bank and the Borrower as lender and the Borrower shall commence from the date of this Agreement and subsists until all monies due and payable by the Borrower to the Bank under this Agreement and in all other documents pursuant hereto shall have been fully paid to and received by the bank." (underlining for emphasis purposes)

From a reading of this clause, my understanding is that the relationship between the Applicant as lender and 1st Respondent as borrower continues to subsist until all monies due and payable by the 1st Respondent as borrower are paid and received by the Applicant. Therefore, the 1st Respondent continues to be bound by the terms of the Overdraft Agreement due to the unpaid amount, and are not subject to any new arrangements. This position holds true by virtue of the definition and interpretation clause in the Overdraft Agreement which defines an "agreement" as follows:

"agreement" means this Overdraft Agreement for grant of overdraft facilities and all terms and conditions herein read in conjunction with the facility Letters dated 22nd October 2013."

In the facility letter of 22nd October 2013, the security for the sum of ZMW500,000 is a Third Party Mortgage over Stand 125 Chilanga. As earlier stated, this amount includes the ZMW100,000.00 availed to the 1st Respondent as an overdraft. The facility letter was duly signed by the 1st Respondent wherein it accepted the terms and conditions of the facility pursuant to its board resolution. I find the 1st Respondent's argument that the overdraft facility was not secured by the Third Party Mortgage over Stand 125 Chilanga inconsistent with the documentary evidence, and therefore untenable.

Having examined the documentary evidence on record, I find that Stand 125 Chilanga was used as security for the renewal overdraft facility of ZMW100,000.00 as stipulated by the facility letter dated 22nd October 2013, the Overdraft Agreement executed on 31st

October 2013, and the Third Party Mortgage registered on 19th November 2013.

In respect to the Advance Payment Guarantee, I opine that this is a non issue as this facility expired on 31st October 2013 and no claim was ever made by Zamtel. I find that the Respondents' herein cannot run away and attempt to disassociate the mortgaged property from the overdraft facility as the terms in the Overdraft Agreement subsist until all monies are paid.

Mortgagee's Remedies

It is trite law that where a mortgagor defaults, the mortgagee has a right to foreclose, take possession and sell the mortgaged property. I am fortified by the learned authors of **Atkins Court Forms, Volume 28** at page 8 where it states:

“When the mortgagor defaults, the mortgagee is entitled to pursue all his remedies.”

It is trite that a mortgagee has several remedies available namely payment of money secured, foreclosure and delivery up of possession of the mortgaged property, and sell of the mortgaged

property which remedies are cumulative and come into play where there is default on the part of the borrower. Instructive is the case of **Reeves Malambo v PATCO Agro Industries Limited**¹ where the Supreme Court held as follows:

"A mortgagee is at liberty to exercise his right to foreclosure and sell the property in the event of default and failure by the mortgagor to redeem the mortgaged property; and that under a legal mortgage by demise, the mortgagee becomes an absolute owner of the mortgage term at law as soon as the day fixed for redemption has passed."

From my careful evaluation and analysis of the evidence on record, I am of the settled mind that the Applicant is entitled to the reliefs of foreclosure, possession and to exercise the power of sell over Stand 125 Chilanga.

Lien over the 1st Respondent's fixed deposit account

The Applicant seeks an order for the recovery of ZMW50,000.00 held in a fixed deposit account in the 1st Respondent's name and pledged as security.

In *Halsbury's Laws of England*, 2nd Edition Volume 20 page 552 paragraph 695, a lien is defined as follows:

"Lien in its primary sense, is a right in one man to retain that which is on the possession belonging to another until certain demands of the person in possession are satisfied."

In *Paget's Law of Banking*, 8th Edition at page 468, a lien is defined as :

"Apart from any specific security, the banker can look to his general lien as a protection against loss on loan or overdraft or other credit facility. The general lien of bankers is part of the law of merchant and judicially recognised as such."

It is trite that a banker such as the Applicant has a general lien over any account held by the 1st Respondent. The 1st Respondent argues that the Applicant has already exercised its lien over the fixed deposit of the 1st Respondent and the fixed deposit terminated. (**Exhibit "CID 14"** in the 1st Respondent's affidavit in opposition). Conversely, the Applicant argues that it did not. I find that the fixed deposit was extinguished by the Applicant though the amount

shows ZMW41,995.22 and not ZMW54,340.32 as averred by the 1st Respondent. This position is supported by the narrative on the bank statement (**Exhibit "CID 13"** in the affidavit in opposition).

From the facts on record, there was an express lien created in favour of the Applicant by the 1st Respondent as discerned from clause 8.2 of the facility letter and clause 7.1.2 of the Overdraft Agreement quoted earlier in the Judgment.

However, I find that the fixed deposit did not extinguish the 1st Respondent's indebtedness to the Applicant as the fixed deposit only partially offset the outstanding balance on the overdraft leaving a balance of ZMW161,794.92 as at 31st January 2015 plus interest applied pursuant to clause 7.5 of the facility letter which provides as follows:

"In the event of default, the Bank reserves the right to charge interest on the unpaid balance at the aforementioned rates for the period of default."

Arising from the aforesaid, and following the termination of the fixed deposit account, I find that the Applicant's claim to exercise

its lien on the 1st Respondent's fixed deposit is untenable as the fixed deposit is non-existent.

Compound interest

In its submissions, the 1st Respondent takes issue with compound and penal interest, and argues that the parties herein never agreed to the charging of such interest on the overdraft facility. The law on the charging of compound interest is well settled in Zambia. In a plethora of cases, the Supreme Court has pronounced that where parties have expressly agreed, compound interest is allowed and chargeable. Instructive is the case of **Union Bank of Zambia Limited v Southern Province Co-operative Marketing Union Ltd**³, where the Supreme Court held that:

“The issue of real substance in this appeal concerns the charging and awarding of interest.... However, when it comes to an unusual rate of interests, such as compound interest, express agreement is required. Or in the alternative, evidence of consent or acquiescence to *such* a practice is custom”

In the case of **Credit Africa Bank Limited (In Liquidation) v John Dingani Mudenda⁴**, the Supreme Court stated that:

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

In the present case, the parties expressly agreed to the charging of compound interest as provided in clause 5.1 of the Overdraft Agreement which states that:

“the borrower shall pay interest ... to be charged and received monthly in arrears on the daily outstanding balances on compound basis to the debt of the Borrower’s account in the bank’s books”.

Clause 1.3 in the Third Party Mortgage provides as follows:

"TOGETHER with the charges for interest calculated on the daily overdrawn balances and compounded monthly at

18.75% per annum being 9% above the Bank of Zambia Policy Rate currently at 9.75% per annum....."

Clearly the above cited clauses allow the Applicant to charge compound interest, and the 1st Respondent's argument is without merit.

On the basis of the clauses cited in the preceding paragraphs, I find that the Applicant has rightly applied the agreed compound interest to the overdraft facility.

In respect to other charges, Clause 3 of the Overdraft Agreement reads as follows:

3.1 The Limit shall bear service charges and any other fees, which the Borrower agrees to reimburse to the Bank separately.

3.2 Other charges as applicable furious transactions like demand draft, stop payment charges etc for a normal account shall be applicable on the overdraft account.

3.3 The Bank shall be entitled to recover from the Borrower any charges or costs incurred or claims

suffered by the Bank in connection with the Limit, including on account or execution and stamping of this agreement and any other documentation or security creation pursuant to this Agreement."

It is trite that service charges are a part of normal administrative charges imposed on an account as part of the cost of maintaining an account and falls under Regulation 2 of the *Banking and Financial Services (Cost of Borrowing) Regulations, Statutory Instrument No 179 of 1995*. Therefore, I find that any other charges are the normal charges applied to an account and charged pursuant to clause 3.2 cited above.

Penal Interest

In respect to penal interest, the 1st Respondent submits that the Applicant has charged penal interest over the fixed deposit and cites the case of **Indo-Zambia Limited v Victory Plumbers Zambia Limited and Another**⁶ where the Court held that:

"penal interest is certainly not part of banking practice or 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."

This position on penal interest was reaffirmed by the Supreme Court in the earlier case of **Union Bank of Zambia v South Province Marketing Cooperative Union** cited by the 1st Respondent herein wherein the Supreme Court observed that penal interest is a more extraordinary or unusual type of interest than compound interest. The 1st Respondent made a sweeping statement on the charging of penal interest on the overdraft facility without providing an iota of supporting evidence. In the absence of such evidence, I find that the charging of agreed interest does not amount to penal interest.

Re-calculation of interest

The 1st Respondent prays for a recalculation of the interest. A perusal of the record shows that the Applicant furnished the 1st Respondent with bank statements wherein it advises an account holder to notify the Bank of any discrepancies within seven (7) days of receipt of the bank statement. (**Exhibit "CID 2"** in the Applicant's affidavit in reply). There is no evidence on record that the 1st

Respondent disputed the entries on the bank statement which also shows the interest charged on the account. Therefore, the statements of account as exhibited represent the correct interest rate and the 1st Respondent's prayer for a recalculation of interest is without basis.

Excessiveness of claimed amount

The 1st Respondent argues that the Applicant's claimed amount of ZMW275,377.61 is excessive.

I have perused the bank statement which shows that as at 1st February 2013, the 1st Respondent was overdrawn by ZMW152,707.66. By 31st October 2014 when the overdraft was due to expire, the 1st Respondent was overdrawn by ZMW181,756.21. A deposit of ZMW41,995.22 was made on 15th December 2014 and the narrative is of a transfer from Account No 11-01-1-0133668-020 on account closure. According to the terms of the overdraft facility, the facility was for a period of 12 months up to 31st October 2014. From the documentary evidence, there is no proof of any further payment on the overdraft after the payment of ZMW41,995.22. It is not in dispute that there is an outstanding

balance on the overdraft which now stands at ZMW275,377.61 as at September 2016 which debt the 1st Respondent admitted by letter dated 1st July 2016 (**Exhibit "CID 3"** in the Applicant's affidavit in reply).

It is interesting to note that the 1st Respondent by its letter dated 1st July 2016 admits owing the claimed amount and makes a proposal to liquidate the then sum of ZMW247,764.32 in eight (8) instalments. There is no indication of a complaint by the 1st Respondent relating to excessiveness of the claimed amount nor cogent evidence to prove this assertion.

I find that the 1st Respondent borrowed monies from the Bank which attract interest and charges. The evidence shows that there is a persistent default on the part of the 1st Respondent. It has become customary for defaulters to postpone their day of reckoning with the lender by using all manner of excuses. I hasten to add that the Court shall not aid defaulters in their quest to run away from their obligations but will instead uphold the rights of the Applicant to recover the monies lawfully advanced. In this respect, the Court's duty is to uphold the sanctity of lawful commercial

transactions such as the one between the Applicant and 1st Respondent herein. Parties are therefore bound by commercial agreements and must keep their part of the bargain.

On a balance of probabilities and following the admission of the 1st Respondent of its indebtedness to the Applicant, I find that the Applicant has proved its case.

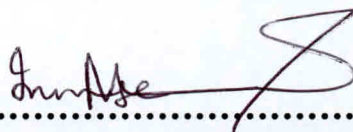
I accordingly enter Judgment in favour of the Applicant against the 1st Respondent in the sum of ZMW275,377.61 as at 7th September 2016, and the said amount shall attract contractual interest as agreed under clause 7 of the facility letter dated 22nd October 2013 up to date of final payment.

The Judgment sum shall be settled within sixty (60) days from date of Judgment, and in default, the Applicant is at liberty to foreclose, take possession and exercise the power of sell over Stand 125 Chilanga belonging to the 2nd Respondent without further recourse to the Court.

Costs to the Applicant and in default of agreement to be taxed.

Leave to appeal granted.

Delivered this 13th day of November 2017.

A handwritten signature in dark ink, appearing to read 'Irene Zeko Mbeve', is written over a horizontal dotted line.

HON IRENE ZEKO MBEWE
HIGH COURT JUDGE