

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ/08/330/2021

BETWEEN:

LOVELY MALUMANI



Appellant

AND

BONANZA CASH EXPRESS LIMITED

Respondent

Coram: Chashi, Ngulube and Sharpe-Phiri, JJA
on 22nd March 2022 and 27th April 2022

For the Appellant: In person

For the Respondent: Mr. K. Mwale of Messrs K. Mwale and
Company

J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

Cases referred to:

1. Mususu Kalenga Building Limited, Winnie Kalenga Richmans Money Lenders Enterprises, SCZ Judgment No. 4 of 1999
2. Mumba v Lungu (2014) Vol. 3 ZR 351
3. Halcombe v Coulton (Nswca) 22.12.1998
4. Colgate Palmolive Zambia Inc v Abel Shemu Chika and 10 others SCZ Judgment No. 11 of 2005; Appeal No. 181 of 2005
5. Printing and Numerical Registering Co. v Simpson (1875) Lr 19 Exch 462.

Legislation and other works referred to:

1. The Judgments Act, Chapter 81 of the Laws of Zambia
2. Chitty on Contracts, 23rd Edition page 581

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment delivered on 23rd November 2020 by the Honourable Justice I.Z. Mbewe of the High Court, Commercial Division.

1.2 In the said Judgment, the learned Judge found that the Appellant had admitted her indebtedness to the Respondent and entered Judgment on admission in the sum of K276,000 with interest at the short-term deposit rate from the date of the originating process to date of Judgment and thereafter at the commercial lending rate until full payment.

2.0 BACKGROUND

2.1 The Respondent availed the Appellant a loan facility of K75,000 on 26th October 2018, the repayment of which was secured by the deposit of an Occupancy License relating to Plot No. 58/Block 06, Chainda, Lusaka.

2.2 Pursuant to the terms of the facility, the Appellant was to repay the loan with interest at the rate of eight percent (8%) in twelve equal monthly instalments of K12,250. The entire debt was to be repaid by 26th November 2019.

2.3 According to the Respondent, despite numerous requests and reminders to amortize the debt, the Appellant failed to repay the loan and as of 21st July 2020, the Appellant remained indebted to it in the sum of K276,360.

2.4 On 11th August 2020, the Respondent, as Applicant in the Court below, commenced legal proceedings by way of Originating Summons in the High Court at the Commercial Division under cause number 2020/HPC/0613 claiming the following reliefs:

- i. An Order that the Respondent do forthwith pay the Applicant the outstanding balance of K276,360 due and owing to the Applicant as at 31st July 2020 plus interest thereon at the agreed commercial bank lending rate by reason of the Respondent's default in fulfilling his obligations under the home loan facility availed to the Respondent on 26th November 2018.***
- ii. An Order for possession, sale and/or foreclosure of the said property comprised in an equitable mortgage relating to Plot No. 58/Block 06, Chainda, Lusaka pledged as security for the loan facility.***
- iii. Any further relief.***
- iv. An Order for costs.***

2.5 In opposing the action, the Appellant, as Respondent in the Court below, filed an affidavit on 11th November 2020, conceding that the evidence contained at paragraphs 3,4,5 and 6 of the affidavit in support was accurate and that she was indebted to the Respondent in the sum claimed.

2.6 The Appellant conceded being unable to meet her repayment commitments of K12,000 per month, and instead proposed to acquit her indebtedness by monthly instalments of K5,000. The Appellant also alluded to selling off a piece of land to liquidate the outstanding loan facility. She urged the Court to allow her application.

3.0 **DECISION OF THE COURT BELOW**

3.1 After considering the affidavit evidence and arguments of Counsel, the learned Judge in the Court below held that the Appellant had admitted her indebtedness to the Respondent, and accordingly entered Judgment on admission in favour of the Respondent for the sum of K276,360 with interest at the short-term deposit rate from the date of the originating process to date of Judgment and thereafter at the commercial lending rate until payment.

3.2 The Judge further ordered that the Appellant settle the judgment debt within ninety (90) days from the date therein

and in default, that she unconditionally conveys the property known as Plot 58/Block 06, Chainda, Lusaka to the Respondent.

4.0 **THE APPEAL**

4.1 Being dissatisfied with the Judgment, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 28th September 2021.

4.2 The Appellant advanced three grounds of appeal namely:

- i. The Court below erred in law and fact when it held that the Respondent should pay the entire amount being claimed by the Applicant without considering how the interest was arrived at.**
- ii. The Court below further erred awarding the interest at the commercial lending rate until full payment without considering the fact that the Applicant has already exaggerated the interest.**
- iii. My lawyer misrepresented me in the sense that she did not submit what I told her to submit in Court.**

5.0 **ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 In the heads of argument filed on 20th October 2021 in support of the appeal, it was argued under the first ground, that the learned Judge in the court below erred in law and fact when she held that the Appellant should pay the entire amount being claimed by the Respondent without considering how the interest was arrived at.
- 5.2 It was argued that the Appellant had received an amount of K72,000 and was required to repay the loan in twelve monthly instalments of K12,250, totaling K147,000, and that this represented an interest rate of over one hundred percent.
- 5.3 It was further argued that the amount of K276,360 claimed by the Respondent represented a rate of interest of 383.3% and a cost of borrowing of K204,000, despite the Appellant having only borrowed a sum of K72,000.
- 5.4 It was submitted that the interest rate applied to the loan was astronomical and that the Appellant would not recover any funds after the sale of her property to repay the debt.

- 5.5 It was further contended that the learned Judge in the court below did not consider the exorbitant and exploitative interest rates or understand the cost of borrowing.
- 5.6 Turning to ground two, it was the Appellant's argument that the lower court erred in awarding interest at the commercial lending rate until payment without taking into consideration the fact that the Respondent had exaggerated the interest.
- 5.7 The Appellant essentially repeated the arguments under Ground 1, which we will not reproduce.
- 5.8 Under Ground 3, the contention was that the Appellant had been misrepresented by her lawyers in the lower court. It was submitted that the Appellant's lawyer had also deceived the court that she could repay the entire debt within two months.
- 5.9 It was also argued that the Respondent had rejected the Appellant's efforts to settle the debt by refusing to negotiate or accept instalments terms.
- 5.10 Finally, it was submitted that this court ought to harmonize the interest rates and permit the Appellant to settle the debt in instalments.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 In the Respondents heads of argument opposing the appeal filed on 17th March 2022, Counsel for the Respondent argued Grounds 1 and 2 together. It was argued that the issues advanced by the Appellant were new and were never raised nor pleaded in the court below and as such the Respondent did not have an opportunity to respond to the same.

6.2 It was Counsel's contention that the Appellant was bound by her pleadings and conduct in the lower court and could not raise new issues on appeal. To support this position, Counsel for the Respondent relied on the case of **Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises¹**, where the Supreme Court held that issues not raised in the lower Court could not be brought before it.

6.3 The Respondent also cited the **Mumba v Lungu²** case, where Malila, JS, in delivering the judgment of the Supreme Court justified the preceding rule on the following grounds saying:

'The reason for this position in our view, is that in the adversarial system of justice such as obtains in this

country, it is generally considered fair to afford the opposing party an opportunity to respond to every issue raised. Furthermore, we are loath to reverse a lower court based on the issue that the trial court has not ruled upon. This court will, however, affirm or overrule a trial court on any valid legal point presented by the record, regardless of whether the point was considered or even rejected.'

- 6.4 To aid this contention, Counsel for the Respondent cited the case of **Halcombe v Coulton**³ and argued that allowing a party to raise issues in an appellate Court which were not litigated in the lower Court, not only undermines the respective functions of the trial and appellate Courts and policy of the law, but also deprives the appellate Court of the benefit of the views of the trial Court.
- 6.5 Counsel for the Respondent further submitted that the issues raised under Ground 1 and 2 of the Appellant's arguments were not pleaded by the Appellant in her evidence in the lower Court and therefore ought not to be permitted to be brought in on appeal.
- 6.6 On the issue of freedom of contract, Counsel for the Respondent relying on the learned authors of Chitty on

Contract, submitted that parties are free to enter contracts and that this doctrine had always been respected.

6.7 Counsel referred to various authorities including the cases of **Colgate Palmolive Zambia Inc v Abel Shemu Chika and 10 others**⁴ and **Printing and Numerical Registering Co. v Simpson**⁵ to support his assertion.

6.8 It was the Respondent's further position on the nature of the agreement that the terms of the contract between the parties were specific. Our attention was drawn to the express terms and conditions of the loan agreement and Counsel for the Respondent argued that the Appellant must be bound by the agreement of the parties which was reduced to writing and signed by both parties.

6.9 The further argument of the Respondent's Counsel was that it is a well-established rule of law that a party will ordinarily be bound by the terms of the written agreement whether he/she has read them or is ignorant of the precise legal effect.

6.10 In relation to Ground 3 in which the Appellant lamented that her legal counsel had misrepresented her before the lower Court, Counsel for the Respondent submitted that although the Appellant made this assertion, she had not

revealed the extent of the misrepresentation or that she had given contrary instructions to her counsel.

6.11 It was submitted that the Appellant had been represented by Counsel when the matter was heard on 23rd November 2020, but that her Counsel had simply relied on the affidavit in opposition which had been deposed to by the Appellant.

6.12 Counsel for the Respondent argued that the Appellant had tendered her evidence into Court by way of affidavit and that her Counsel had simply relied on this evidence before Court. Following the consideration of this evidence, the learned Judge proceeded to enter judgment against the Appellant.

6.13 The Respondent's Counsel further highlighted that the client-lawyer relationship and instructions thereon between the Appellant and her Counsel were in any event privileged. The Respondent urged the Court to dismiss this and other grounds of appeal.

7.0 **OUR ANALYSIS AND DECISION**

7.1 We have carefully reviewed the Record of Appeal and considered the arguments of the respective parties.

- 7.2 In Ground 1, the Appellant's contention is that the lower court erred in awarding the entire Respondent's claim without considering how the interest had been tabulated.
- 7.3 The Appellant complained that the Respondent had charged exorbitant and extortionate rates of interests on the loan. Oppositely, the Respondent challenged this ground of appeal asserting that this was a new issue introduced by the Appellant, which was not raised or pleaded in the lower court.
- 7.4 Upon review of the proceedings in the lower court, it is apparent that the Appellant did not oppose or dispute the rate of interest applied on the loan by the Respondent in the lower court. It is evident that this issue of the interest rate being applied on the loan between the Appellant and the Respondent being exorbitant was not pleaded nor was the issue of interest disputed in the lower court.
- 7.5 The issue of the rate of interest applied to the loan between the parties not having been raised in the lower Court, the Judge was not afforded the opportunity to decide on this question. This court cannot therefore reverse a decision of the lower court based on issues that were not before it.

7.6 The question of the interest rate applicable on the loan not being disputed nor raised in the lower court cannot therefore be introduced in the appellate Court. We are fortified in our view by the holding of the Supreme Court in the case of **Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises (supra)**, where it held 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.'

7.7 On this point, the Supreme Court said in its judgment in the case of **Mumba v Lungu (supra)** as follows:

'We are loath to reverse a lower Court based on the issue that the trial court has not ruled upon.'

7.8 Based on the foregoing, we concur with the Respondent and the authorities cited that ***'a matter which was not raised in the lower Court cannot be raised in a higher Court as a ground of appeal'***. We are of the view that it is not competent for the Appellant to raise the issue of interest in this Court.

7.9 In any case, even assuming that the subject of the interest rate had been raised in the lower court, the doctrine of freedom of contract would fall to be considered in line with the learned authors on contracts, in *Chitty on Contracts*, who stated that:

'Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them or not. He is ignorant of their precise legal effect.'

7.10 Equally, in the **Colgate Pamolive (Z) Inc v Abel Shemu Chika and 110 others**, the Supreme Court adopted, with approval the following passage from **Printing and Numerical Registering Company v Sampson**:

'If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have utmost liberty of contracts and that their contracts when entered into freely and voluntarily shall be sacred and shall be enforced by the Courts of justice.'

7.11 The foregoing authorities are unambiguous, where parties have reduced their agreement to writing, and signed by both parties, they are bound by the terms and agreement therein. A careful perusal of the agreement of the parties in the present case, exhibited at page 18 of the Record of Appeal dated 28th October 2021, displays the loan agreement entered between the parties on 26th October 2018. It provides the requisite interest rate chargeable. Both parties signed the agreement. This document distinctly demonstrates that the Appellant's acquiescence to the terms of the loan.

7.12 Given the foregoing, the Judge in the lower court was on firm ground in upholding the Respondent's claim based on the terms of this agreement. We see no merit in varying the interest or consideration which the Appellant agreed to bind herself to. For the reasons given above, Ground 1 of this appeal fails.

7.13 On the second Ground, the Appellant argued that the lower Court erred in awarding interest at the commercial lending rate until payment without considering that the Respondent had already applied interest.

7.14 **Section 2 of the Judgments Act** provides that:

‘Every judgment, order, or decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree.’

7.15 It is beyond contention that **Section 2 of the Judgments Act** mandates the High Court and Subordinate Courts to award interest on money Judgment in a manner such Court may deem fit. Such interest should not exceed prevailing lending rates as determined by the Bank of Zambia.

7.16 The above position has been the practice in a plethora of authorities, and it is now settled law. A judgment for a sum of money shall attract interest as determined by the court. This being the case, we are of the view that there is no basis to falter the trial Judge’s order that the Appellant should pay interest on the admitted sum of K276,300.00 as this position is provided by law. For the said reason, the second Ground of appeal also fails.

7.17 In relation to the third Ground of appeal, the Appellant laments that her lawyer misrepresented her to the Court.

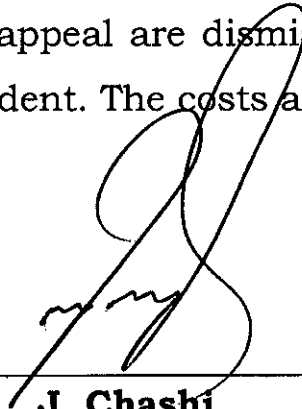
7.18 As regards this ground of appeal, we would say that whilst it is within a Court's inherent authority to chastise, discipline or recommend for such corrective measures against erring officers, in the context of the facts of this case or manner that this ground has been brought, it is our position that it is not the duty of the Court to interfere with the private interactions between Counsel and Client in so far as receipt and execution of instructions is concerned.

7.19 As regards the manner this ground has been raised, it is our position that the law provides sufficient regulation of how Counsel and client must relate including providing for a framework for members of the public to seek redress against erring Counsel. The Appellant is at liberty to invoke her rights thereunder.


7.20 The Courts can only act on misconduct or dereliction of duty on the part of Counsel that manifests itself in the conduct of business of the Court. This is not one such case for the Court to intervene at appeal stage. Ground 3 of this appeal therefore fails.

8. **CONCLUSION**

8.1 All the grounds of appeal are dismissed accordingly with costs to the Respondent. The costs are to be agreed and in default to be taxed.



J. Chashi
COURT OF APPEAL JUDGE



P.C.M Ngulube
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE