IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 169 OF 2022**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

CITY EXPRESS SERVICES LIMITED **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA

ON: 26th April and 8th June 2023

For the Appellant: *H.C Musa (Mrs) Messrs Milner & Paul Legal Practitioners*

For the Respondent: *N. Simachela (Mrs) Messrs Nchito & Nchito*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court

Cases referred to:

1. ***Yeta v African Banking Corporation (Zambia) Limited – SCZ Appeal No. 177 of 2013***
2. ***Mass Tours and Travels Limited v Stanbic Bank (Z) Limited (HCC No. 120 of 2010) (2014) UGCOMME 98***
3. ***Chrismar Hotel Limited v Stanbic Bank Zambia Limited – SCZ Appeal No. 155 of 2016***
4. ***Communications Authority of Zambia v Vodacom Zambia Limited (2009) ZR, 106***
5. **Philip Mhango v Dorothy Ngulube and Others (1983) ZR, 61**

Legislation referred to:

1. ***The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia***
2. ***The Banking and Financial Services (Cost of Borrowing) Regulations – Statutory Instruments No. 179 of 1995***
3. ***The Value Added Tax (Exemption) Order - Statutory Instrument No. 49 of 2011***
4. ***The Value Added Tax (Exemption) Order 2014 – Statutory Instrument No. 68 of 2014***

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Mr Justice W.S Mweemba, High Court Judge, Commercial Division, delivered on 19th August 2021.

1.2 In the said Judgment, the learned Judge dismissed the Appellant's (plaintiff in the court below) claims, for an *Order for an account and reconciliation of the finance lease account for assets and an Order for refund of lost input of Value Added Tax (VAT).*

1.3 In the same Judgment, the learned Judge on the counterclaim, entered Judgment in favour of the Respondent in the sum of K5,523,046.78 together with interest.

2.0 BACKGROUND

2.1 In 2008, the parties executed six (6) finance lease agreements on divers dates, for six Scania Irizar 900 Luxury Buses. In March 2010, the Appellant defaulted on the monthly rentals and fell into arrears. Following the default, the Respondent restructured the finance lease agreements. However, the Appellant fell into further arrears and sometime in 2013 stopped making payments.

2.2 When the Respondent threatened repossession of the buses, the Appellant on 22nd April 2015 commenced an action by way of writ of summons, claiming the following reliefs:

(i) An Order for an account and reconciliation of the finance lease account for the assets namely SCANIA IRIZAR 900 registration number ABL 4819, ABR 2373, ABR 445, ABM 9416 and ABP 192 respectively, in order to determine how much has been paid by the plaintiff as lease rentals and how much is owed in arrears, if any

(ii) An Order for the refund of lost input VAT claims due to the negligence of the defendant in the sum of K3,189.089.20

(iii) An Order of injunction restraining the defendant from repossession of the leased assets from the plaintiff

2.3 According to the attendant statement of claim, the finance lease agreements were for 32 rentals of USD10,000.00 at monthly intervals and payable on the 21st day of each month with respect to ABL 4817 and ABR 4819.

2.4 That with respect to ABM 9416, the finance lease agreement was for 35 rentals of USB 10,066.69 at monthly intervals and payable every 3rd day of the month, commencing on 3rd November 2008. With respect to ABR 445 the finance lease agreement was for 35 rentals of K40,790,938.64 plus Value Added Tax (VAT) on the capital portion at monthly intervals and payable on the 15th of every month commencing 15th December 2008. As regards ABR 2373 the finance lease agreement was for 35 rentals of K47,097,133.20 plus

VAT on capital portion at monthly intervals and payable on 15th of each month, commencing 15th January 2009.

2.5 It was averred that the Respondent had for a long time not been sending monthly VAT invoices on lease rentals in total disregard of acceptable practice, despite numerous letters by the Appellant requesting the same. Consequently, the Appellant had lost claims of input VAT in the sum of K3,189,089.28.

2.6 It was further averred that in 2013, the Appellant's road service licence was revoked for some time and that partly contributed to the accumulation of arrears and the Respondent was accordingly informed.

2.7 According to the Appellant, the Respondent had over charged the Appellant on finance charges and had applied compound interest on the leases which was inconsistent with the standard banking practice and an abrogation of **The Banking and Financial Services Act**[1]. It was averred that the Appellant had raised concerns on the calculations of the debt and rentals due but the Respondent had refused to resolve these concerns and as a result, the Appellant has suffered loss in unclaimed input VAT.

2.8 The Respondent filed its defence and counterclaim on 7th May 2015, in which it confirmed execution of the lease facilities and averred that the Appellant was at liberty to go to any branch of the Respondent and obtain the monthly VAT. It further contended that the Appellant should be found liable for contributory negligence, as it did not do anything to mitigate its loss, which loss in this event cannot be attributed to the Respondent. Further, that the Respondent was not privy to the administrative proceedings between the Appellant and RTSA, hence the contractual obligations under the lease finance ought not to have been affected.

2.9 According to the Respondent, the Appellant was indebted in the sum of K5,523,046.78 and the Respondent had accurately computed the Appellants indebtedness. The Respondent then counter claimed:

(i) Payment of arrears in the sum of K5,523,046.78

(ii) In the alternative, delivery up of the lease assets.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the witnesses' evidence and the submissions by the parties, the learned Judge observed that the clauses in the facility letter and the lease agreement were common in all the six leasing facilities in issue. He noted that the Appellant had made some payments but about March 2010, the Appellant defaulted in its rental payments and fell into arrears.

3.2 The learned Judge opined that the main issue in dispute between the parties was whether the amount due under the finance lease agreements executed between the parties needed reconciliation following the claim by the Appellants that there had been an inclusion of *extension charges*, *late charges* and *VAT in* the amount the defendant had calculated as the final figure owing.

3.3 The learned Judge noted from the Appellants submissions on extension charges, that the Appellants contention was that, they were added unilaterally and without the Appellant's knowledge, contrary to section 47 (2) of **The Banking and Financial Services (Cost of Borrowing) Regulation 1995**[2] and **Regulation 7(1) of The Banking and Financial Services Act**[1]**.** That a

perusal of the facility letter and the lease agreement indicated no extension charges as an element of the contractual agreement between the parties. That according to the Appellant, there was also no variation of the finance lease agreements executed between the parties as per clause 14 and 17 (b) of the facility letters to include such a term as was evidenced by the restructured extension lease facility letter.

3.4 On the other end, the Respondent contended that there was nothing untoward, whether legal or contractual about the Respondent imposing extension charges on the lease account. That the definition of "Cost of Borrowing" in Regulation 2 of Statutory Instrument No. 79 of 1995 excludes a charge for arranging or renewing the loan which renewal was done at the Appellant's behest in 2011.

3.5 The learned Judge found that, there was no requirement for a lender to disclose extension and restructure charges for renewing a loan under the cost of borrowing regulations, as these are specifically excluded from the definition of *"cost of Borrowing"*. The learned Judge therefore found that the Respondent was entitled to

charge the Appellant the extension or loan renewal and restructure charges.

3.6 On the issue of late charges, the learned Judge after perusing pages 54-76 of the Respondents bundles of documents, opined that it was clear that no late charges were charged by the Respondent. That the only entries in this regard relate to *"Int delayed"* or *"Instalment payments (s) delayed"*. According to the learned Judge, these relate to interest on an overdue rental payment or overdue payment on a loan and were therefore sanctioned by clause 7 of the facility letter which provides for interest on overdue rentals to be charged at base, plus a margin of 15% per month as per clause 4 (b) of the lease agreement.

3.7 According to the learned Judge, the charging of default interest was also in accordance with sub regulation 1 (a) of Regulation 10 of **The Banking and Finance Services (Cost of Borrowing) Regulations**[2]. That the Appellant had not showed the court any late charges which were unduly punitive and outside the finance lease agreement between the parties. The learned Judge

found that the late charges were properly so charged and should therefore hold.

3.8 In respect to the issue of capitalisation of VAT, the learned Judge was of the considered view that the Appellant's contention that permitting the Respondent to load or add VAT to the cost price of the leased assets before calculating the finance charges would amount to unjust enrichment as the "*owner of the goods*" cannot be expected at law to make profit or derive a benefit from his legal obligations to pay tax, was misconceived and based on failure to understand the nature of finance leasing transaction. That finance lease is an agreement for the possession and usage of an asset or property over a set period of time where the lessor as owner of the asset or property receives lease payment to cover its ownership costs. The lessee is responsible for maintenance, insurance and taxes. The lessee also bears the risk of loss, destruction and depreciation of the leased assets and its obsolescence or malfunctioning. That the regular rental payments during the primary period of the lease are calculated to enable the lessor amortise its capital outlay and to make

a profit from its finance charges. That it therefore follows that all money advanced by a lender to acquire the asset to be leased from the supplier must be capitalised and finance charges charged thereon.

3.9 After a review of clause 5 and 11 of the facility letter and second schedule of the lease agreement, the learned Judge was of the view that it was clear that the rentals were to be paid with VAT. He found that the Respondent fully disclosed to the Appellant that finance charges would be calculated on the cost price of the leased assets plus VAT thereon. The learned Judge accepted the testimony of DW2 that, VAT is part of the funds that the Respondent paid to the supplier in order to acquire the leased assets in issue. That, it therefore follows that VAT paid by the Respondent to the supplier, formed part of the sum advanced or loaned to the Appellant which attracted finance charges as agreed between the parties.

3.10 The learned Judge further made a finding that the Appellant agreed that VAT should be added to the cost price of the leased assets before charging the finance charges when it executed the facility letters and the lease agreement. The Judge noted that, it is clear from

Order 2 (7) (e) of **The Value Added Tax (Exemption) Order, Statutory Instrument No. 49 of 2011**[3] that the principal amount on finance leases is subject to payment of tax and in particular VAT. That it is trite that VAT is payable to Zambia Revenue Authority (ZRA), either (a) at the time when services are rendered or (b) at the time when the payment is made or (c) at the time when the invoice is issued, whichever is the earliest.

3.11 According to the learned Judge, VAT is payable because apart from being part of the sum paid to the supplier, it is also part of the sum advanced or loaned to the lessee by the lessor. That in *casu*, the parties agreed that VAT was to be charged upfront on four lease agreements and on two lease agreements, it was to be spread across the monthly lease payments. That VAT was to be paid on the capital component of the leased buses but not on the interest component. For avoidance of doubt, the learned Judge held that the Respondent legally charged VAT upfront or on monthly basis. That the VAT amounts charged were validly deducted from the amounts advanced to the Appellant as they were provided for in the finance lease facility letters and the finance lease

agreements, as condition for the grant of the finance lease facilities.

3.12 As regards the complaint by the Appellant that the Respondent was not issuing VAT invoices, the learned Judge made a finding that VAT invoices could only be issued when a full repayment of the rental had been made by the Appellant. That the Appellant could not blame the Respondent for not issuing VAT invoices when it did not make full rental payments as they fell due. That consequently, as the Appellant defaulted on making full repayments from September 2009, VAT invoices were not issued.

3.13 The learned Judge concluded that the Respondent correctly calculated the finance charges payable when it added VAT to the cost price of the leased assets and that this was agreed to by the Appellant and therefore the finance charges were not overstated.

3.14 The learned Judge also found that the Appellant had not brought evidence of how the sum of K3,189,089.20 which it alleges is a loss it suffered in unclaimed VAT was arrived at. That there was no proof that it ever processed other VAT claims with ZRA. That as this was

a special loss, the Appellant ought to have adduced evidence which would have made it possible for the court to determine the value of the loss and that the claim therefore for K3,189,089.20 fails.

3.15 As regards the compounding of interest, the learned Judge took the view that by executing the facility letters and the lease agreements, the parties expressly agreed that compound interest be charged.

3.16 The learned Judge observed that the claim for an Order for an account and reconciliation of the finance lease account was based on the Appellant's belief that there was massive overcharging by the Respondent. Having found that the Respondent was entitled to;

(a) Charge finance charges on the costs price of the leased assets plus VAT thereon

(b) Charge extension or renewal and restructure charges and

(c) Charge compound interest on overdue rentals,

there was therefore nothing much left to reconcile.

3.17 The learned Judge opined that the Respondent properly computed the lease account and kept the Appellant informed of the outstanding balance regularly. The Appellant's claim for an Order to account and for reconciliation therefore failed. The Appellant's claims were all dismissed.

3.18 The learned Judge was of the view that it was clear that the Respondent properly invoiced the Appellant for rentals and other charges provided for by the lease agreements. That the Respondent had proved its counter claim. The learned Judge therefore entered Judgment in favour of the Respondent in the sum of K5,523,046.78 plus interest and made no order as to costs.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court advancing the following six (6) grounds:

(i) The court below erred in law and fact when it entered Judgment in favour of the defendant in the sum of K5,523,046.78, by holding that it was clear that the defendant properly

invoiced the plaintiff for rentals and other charges provided by the lease agreements without proper evidence to prove how that figure was arrived at.

(ii) The court below erred in law and fact when it dismissed the plaintiff's claim for an order for an account and reconciliation, despite the uncontested evidence on record showing that the defendant was not itself sure of what was allegedly owed and this was shown by different amounts being claimed

(iii) The court below erred in law and fact by holding that the defendant was entitled to charge the plaintiff extension charges and restructure charges, basing the same on the Banking and Finance Service (Cost of Borrowing) Regulations SI No. 179 of 1995 which specifically excludes these charges from the definition of cost of borrowing without due regard to the schedule to the Banking and Finance Service (cost of borrowing) Regulations SI No. 179 of 1995

which provides that the bank is obliged to disclose a list of each charge to be financed.

(iv) The court below erred in law and fact when it held at page J42 of the Judgment that the default interest charges on the finance leases herein were properly so charged and therefore held, without due regard to the provisions of Regulation 10 (1) of the Banking and Finance Services (Cost of Borrowing Regulations 1995).

(v) The court below erred in law and fact when it held at page J45 and made perverse findings of fact unsupported by evidence that the VAT amount charged were validly deducted from the amount advanced to the plaintiff as they were provided for in the finance facility letters and the finance lease agreement when the said facility letters and finance lease agreements did not provide for capitalization of VAT amount.

(vi) The court below erred in law and fact when it held at page J46, that the plaintiff had failed

to prove the alleged loss of K3,189,089.20, for unclaimed VAT and how the said sum was arrived at when the evidence at page 49 of the plaintiffs bundle of documents gave sufficient details of how the sum of K3,189,089.28 was arrived upon coupled with the *viva voce* evidence of the plaintiff.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 Grounds one and two were argued together. The grounds attack the holding by the learned Judge on page J51, were the Judge held that:

> ***"It is clear to me that the defendant properly invoiced the plaintiff for rental and other charges provided for by the lease agreements. The upshot of my conclusion is that the defendant has proved its counter claim or case on the balance of probabilities....***
>
> ***I accordingly enter Judgment in favour of the defendant against the plaintiff for the payment of K5,523,046.78 plus contractual interest from 25th June 2016 to date of***

Judgment and thereafter at the current lending rate as determined by the Bank of Zambia until the same shall be satisfied."

5.2 It was contended that the findings were a misdirection as there was no supporting evidence to prove how the amount of K5,523,046.78 was arrived at. That there was no proof by the Respondent to show, how the amount was arrived at. It was submitted that the finding by the lower court was made in the absence of any relevant evidence and therefore ought to be reversed. Reliance in that respect was placed on the case of **Yeta v African Banking Corporation (Zambia) Limited**[1] on when the appellate court can reverse findings of fact of a trial Judge.

5.3 It was also contended that the court below misdirected itself when it held that the Appellant's application for an Order to account and reconciliation failed. It was submitted that there was no certainty in the amounts which were being claimed by the Respondent. That the lower court owing to the inconsistent demands in the amounts actually owed to the Respondent, it was proper

and just that the only way parties could establish what is actually owing was to order a reconciliation. As was held in the case of **Mass Tours and Travels Limited v Stanbic Bank (Z) Limited**[2] the court below should have ordered an account and reconciliation of the amounts owed, so as to arrive at the actual amount owed by the Appellant.

5.4 We were urged to uphold the two grounds and set aside the Order of the lower court that the Appellant is indebted to the Respondent in the sum of K5,523,046.78 and order the Respondent to account and reconciliation of the actual amount owed. That the court ought to have based its Judgment on appropriate oral and documentary evidence which should have provided a justification for the award. We were called upon to re-appraise and review the entire oral evidence and determine whether there was any evidence to support the trial court's finding that the Respondent was entitled to K5,523,046.70.

5.5 As regards the third ground, the Appellant attacks the finding by the learned Judge that the Respondent was

entitled to charge the Appellant extension or loan renewal and restructure charges, without directing his mind to the schedule to **The Banking and Financial Services (Cost of Borrowing) Regulations, Statutory Instrument No. 179 of 1995**[2] which under Regulation 6 *"contents of disclosure statement"* provides a list of all information required to be disclosed by the Bank to the borrower.

5.6 It was submitted that a perusal of the list includes among others a list of each charge to be financed. That therefore the finding that there is no requirement for a lender to disclose extension and restructure charges was misconceived, for the Respondent was obligated to disclose the extension and restructure charges to the Appellant. Our attention was drawn to the case of **Chrismar Hotel Limited v Stanbic Bank Zambia Limited**[3] and we were urged to reverse these charges as they were not communicated or agreed to by the Appellant and constituted punitive charges.

5.7 Grounds four and five were argued together. The Appellant attacks the finding that the default interest of

the finance leases was properly charged. It was contended that the default interest charges were punitive in nature and as such ought not to have been charged.

5.8 It was further argued that the facility letters and lease agreements never provided for capitalisation of VAT. According to the Appellant, the Respondent imposed interest on both the principal loan amount and VAT which was being charged monthly and compounded. It was submitted that the capitalisation of VAT on the cost price was unjust and unfair as interest ought not to have been charged and compounded on VAT. We were urged to re-compute the lease accounts to determine the exact figures owed to the Respondent.

5.9 In respect to the sixth ground, it was submitted that the finding by the court was made in total disregard of the documentary and oral evidence tendered to the court. That a perusal of the letter of 30th March 2015 clearly shows and gives sufficient details and calculations of how the amount of K3,189,089.20 was arrived at and

the basis upon which the claim was being made. We were beseeched to reverse the finding of the court below.

6.0 ARGUMENTS IN OPPOSITION

6.1 In response to the first ground, it was submitted that, there was sufficient evidence to support the court's finding and the entry of Judgment on the counterclaim in favour of the Respondent for the amount claimed. The Respondent cited the case of **Communications Authority of Zambia v Vodacom Zambia Limited**[4] where the Supreme Court stated as follows:

> **"The appellate court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings in question were 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, can reasonably make"**

6.2 The Respondent noted that, the Appellant had referred to page 207 of the record of appeal (the record) and submitted that the Respondent had placed the amount

due at K4,163,815.91. The Respondent drew our attention to the fact that the document referred to by the Appellant was not prepared by the Respondent but by the Appellant itself. According to the Respondent, it has always been consistent in the demands for payment.

6.3 In response to the second ground, it was submitted that the finding of fact at pages 59-60 of the record, lines 29-31 and 1-3 respectively was made on the correct view of the evidence that was before the court. That the letters in issue appears at pages 177-179 of the record. That the letter at page 177 shows the Respondent's demand for payment for various leases in the third column. According to the Respondent, the sums due are expressed in dollars in the first four rows and the last two rows, the additional figures are expressed in Kwacha. The outstanding balances are listed as USD177,037.53, USD187,714.30, USD257,626.65. That in addition, the letter highlighted the two facilities denominated in Kwacha with balances as K952,511,389.49 and K55,222,686.46 (unrebased). It

was submitted that these are the same balances that appear in the letter on page 178 of the record.

6.4 According to the Respondent, the court below was therefore on firm ground when it found that the amount demanded by the Respondent in the two letters was the same and so the reason advanced by the Appellant for a reconciliation of the debt did not hold any water. That there was therefore no uncontested evidence on record showing that there was uncertainty in the amount that the Respondent was claiming.

6.5 In respect to the third ground, it was submitted that the finding of the court below was supported by law. That Regulation 7 (1) of **The Banking and Financial Services (Cost of Borrowing) Regulations** provides as follows:

> **"A Bank or financial institution shall disclose the cost of borrowing to the borrower, as or before the time at which the loan is made."**

6.6 That in Regulation 2, *"cost of borrowing"* is defined as including administrative charges for services or transactions and similar charges but excludes, *inter*

alia, a charge for arranging or renewing the loan. That according to this regulation, for charges related to renewal and re-structuring of loans are exempted and as such, there is no obligation on the part of the bank to specifically disclose them.

6.7 According to the Respondent, the renewal and restructure was done at the behest of the Appellant. We were invited to peruse the letter at page 86 of the record where the Appellant requested for a restructure of the lease facility by "respreading the arrears and extending the tenure by a further 43 months."

6.8 The Respondent further submitted that the court below was on firm ground when it found that the Respondent was entitled to charge the Appellant for extension or loan renewal and restructure of the facility as they were excluded by law and provided for contractually by the facility letter

6.9 It was the Respondent's contention that the extension and renewal charges were not punitive in nature and therefore the case of **Chrismar Hotel Limited**[3] on this aspect was not applicable.

6.10 In response to ground four, it was submitted that the court below, based its finding that the Respondent properly applied default interest charges on the Appellant's account on the provisions of the facility letters and Regulation 10 of **The Banking and Financial Services (Cost of Borrowing) Regulations 1995**. The Respondent relied on the case of Chrismar **Hotel Limited,** where the Supreme Court stated as follows:

> ***"The charging of default interest, which was sanctioned by the lease agreement was perfectly legitimate and in accordance with sub regulation (1) (a) of Regulation 10 of The Banking and Financial Services (cost of borrowing) Regulations made pursuant to the Banking and Financial services Act, Chapter 387 of the Laws of Zambia. Any other late charges and overdraft charges are unduly punitive and outside the financial lease agreement."***

6.11 It was contended that the Appellant failed to demonstrate to the court below that interest on the lease facility was being compounded in the manner alleged or at all.

6.12 As regards the fifth ground, it was submitted that the finding of fact was made on a proper evaluation of the evidence before the court below. We were invited to look at clause 5.1 of the facility letter, at page 227 of the record. According to the Respondent the VAT component was a part of the amount loaned to the Appellant, as it was part of the purchase price for the assets acquired under the lease facility. It was submitted that the court below was on firm ground when it made the finding that the Respondent treated VAT correctly on the lease facility.

6.13 In response to the sixth ground, the Respondent submitted that, the only evidence of the alleged loss of K3,189,082.20 is a letter written by the Appellant dated 30th March 2015, appearing at page 123 of the record and the Appellants oral evidence. It was further submitted that PW1's evidence does not show where he

explained how the alleged loss was suffered. That in fact, PW1 at page 428 of the record, admitted that he was aware that passenger transport business is in fact exempt from VAT. It was argued that even in its heads of argument, the Appellant has not shown the court where in the evidence tendered in the court below, the Appellant explains how the loss arose.

6.14 Reliance was placed on the case of **Philip Mhango v Dorothy Ngulube and Others**[5] on the need of any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with fair amount of certainty. It was the Respondent's contention that the Appellant failed to discharge its burden of proof and as such the court below could not make a finding of fact in its favour.

7.0 OUR ANALYSIS AND DECISION

7.1 In our determination of the appeal, we shall concurrently consider grounds three and four, then grounds one and two and conclude with grounds five and six, in that order.

7.2 We have taken that route as grounds three and four have a bearing on the outcome of grounds one and two. We note that the claim by the Appellant in the court below, for an order for an account and reconciliation of the lease finance account as rightly observed by the learned Judge in the court below, arose out of the Appellant's belief that it had wrongly been charged extension charges and late charges which were punitive in nature and VAT, which as a result had inflated the amount owing. The granting of the order for an account and reconciliation by the court below was therefore dependant on the Appellant proving that it had wrongly been charged.

7.3 The issue which arose and was subject of contention by the parties, was whether the Respondent was entitled to charge the Appellant extension or loan renewal and restructure charges. As regard the issue of VAT, we shall deal with that when considering grounds five and six. The learned Judge in determining this issue had recourse to **The Banking and Financial Services (Cost of Borrowing) Regulation 1995** and in particular

regulations 2 and 7 (1) in arriving at the finding of law that the definition of *"cost of borrowing"* excludes a charge for arranging or renewing the loan.

7.4 It was in that respect that the learned Judge opined that there was no requirement for the Respondent to disclose extension and restructure charges for renewing a loan, as under the Regulations, these are specifically excluded. In view of the aforestated, we note that, that is as the law stands and we therefore find no basis on which to fault the learned Judge on his decision that the Respondent was entitled to charge for renewal and restructure.

7.5 We have had the opportunity to thoroughly comb through the bank statements which were submitted by the Respondent in the court below, from the time of restructuring, appearing at pages 335-359 of the record. We are not able to note any late or punitive charges applied on the accounts and neither has the Appellant been able to draw any to our attention. What can be deciphered from the bank statements is charges in respect of interest payment delayed and/or instalment

payment delayed. This relates to interest chargeable on an overdue rental payment and which the parties had contractually agreed to under clause 7 of the facility letters. These basically relate to compound interest which the parties had agreed to under the facility letters and lease agreements.

7.6 We now turn to grounds one and two. Under these grounds, the Appellant firstly attacks the learned Judge for dismissing the Appellant's claim for an Order for an account and reconciliation. Having dismissed the third and fourth grounds, we need not to say more about this, suffice to state that, arising from our decision on grounds three and four, we are of the view that the Appellant was properly invoiced and as such there was no need for the learned Judge to make an Order for an account and reconciliation, as there was nothing to reconcile nor account for.

7.7 Secondly, the Appellant attacks the learned Judge for entering Judgment on the counterclaim in favour of the Respondent, in the sum of K5,523,046.78 when according to the Appellant there was no proper evidence

to prove how the figure was arrived at. As we earlier alluded to, the Appellant was properly invoiced. The Respondent in the court below submitted bank statements from the time of restructuring as shown at pages 335-359 of the record and as testified by the Respondent's first witness (DW1) at page 486 of the record, there was a balance outstanding at the end of each statement (mini statement). Those balances added together give you the amount which was being counterclaimed.

7.8 In view of the aforestated, we do not agree with the Appellant's assertion that the figure in the counterclaim was not supported by evidence. Neither do we see any inconsistency in the Respondent's claims. The first and second grounds of appeal are equally dismissed for lack of merit.

7.9 As regards the fifth and sixth grounds, both grounds refer to the issue of VAT. The first issue is whether the finding by the learned Judge that the amount of VAT charged was validly deducted was unsupported by evidence and therefore perverse. The second issue is

whether the learned Judge can be faulted for holding that the Appellant had failed to prove the alleged loss of K3,189,089.20 for unclaimed VAT.

7.10 From the onset, it is clear and confirmed by the averments in the Appellant's own statement of claim that VAT was being charged on the capital portion as it appears in paragraph 5 of the statement of claim. This position was confirmed by the Respondent's second witness (DW2) and the learned Judge at page 505 of the record, that at the time VAT was just being charged on the capital component and not the interest component.

7.11 The issue, which the two grounds raises is how VAT is applied in lease financing. DW2, Reuben Mutale Malindi, the Respondent's Recoveries' Manager was astute in his explanation at pages 504-505 of the record in cross examination when he testified as follows;

> **"When purchasing the asset, the asset would cost a particular amount and then there would be VAT added to it. The bank paid the full amount plus VAT to the dealers and then it had to recover that money from the lease and**

because it had given out all that money upfront, that is how every month the customer would pay a component that would be broken into components; there would be the capital component and interest component. So, when you pay a full instalment you would have paid something towards VAT and then the tax invoices would be given to you. If you are able to claim VAT, then you can go and claim it which I think was not a possibility for this particular plaintiff because of the nature of business they were in"

7.12 We note that in addressing income tax issues, ZRA does issue practice notes and guidelines to members of the public for ease of reference and understanding which in our view are highly persuasive as they are anchored on the available tax statutory provisions. These are easily accessible through the ZRA website. It is in that respect that we have been compelled to rely on the guidelines issued by ZRA, giving guidance on the application of VAT on leasing finance companies, which is in line with

the position taken by the court below, except on the Appellant's claims for a refund.

7.13 The ZRA guidelines explain how VAT applies to leasing companies in different situations obtaining in the industry. It identifies the various supplies in a lease transaction and explains the liability of such supplies for VAT purposes.

7.14 The guideline given under paragraph 2.0 on finance lease is as follows:

> "There are usually three players in a finance lease arrangement namely: **the lessor, the lessee** and **the seller**. (i) **The Lessor** provides the funds, or rather pays the seller for the equipment. The seller issues a tax invoice to the lessor who retains ownership or title to the asset. The lessor uses the tax invoice to reclaim the input tax charged to him by the seller. The lessor charges VAT on the lease rentals paid by the lessee.
>
> (ii) **The seller** supplies the equipment to the lessee who has entered into a lease

agreement with the lessor. At the same time, he issues a tax invoice to the lessor.

(iii) **The lessee** uses the asset during the lease period, whilst paying inclusive monthly lease rentals to the lessor. The lessee is entitled to reclaim the VAT charged to him by the lessor subject to normal input tax rules" (the underlining is ours for emphasis only)

7.15 According to ZRA, the provision of credit and the interest component of finance leases are exempted from VAT in accordance with paragraph 7 of **The Exemption Schedule (Statutory Instrument No. 68 of 2014)**.[4] That however, the following are taxable;

(i) Principal and other finance charges on finance leases

(ii) Principal, interest and other finance charges, charged on operating leases and

(iii) Principal, interest and other finance charges charged by institutions engaged in hire purchase

7.16 Germane to this appeal, ZRA on leasing of motor vehicles under paragraph 3.1 states as follows:

"The general rules is that input tax on the supply or importation of motor vehicles is non deductible. However, leasing firms have been permitted by Statutory Instrument No. 12 of 1998 to reclaim input tax on the purchases of motor vehicles meant for leasing. In all the above cases, if the asset being leased is a motor vehicle, the lessor can reclaim input VAT charged to him by the supplier or seller of the motor vehicles. But this rule does not extend to the lessee. The lessee being the end user cannot reclaim the input VAT Charge to him by way of lease rentals on a motor vehicle" (underlining ours for emphasis only)

7.17 What emerges from the aforestated is that the lessor is entitled to charge the lessee, VAT on the principal, and that the lessee in a lease finance involving a motor vehicle as was the case in this matter cannot as the end user, reclaim the input VAT.

7.18 In view of the aforestated, the Respondent was entitled to charge the Appellant VAT and therefore the VAT deductions were validly done. On the claim for the VAT

refund loss of K3,189,089.20, we find that the claim was not tenable as the Appellant was not entitled to a claim for refund. Therefore, the fifth and sixth grounds also have no merit and are equally dismissed.

8.0 CONCLUSION

8.1 All the six grounds of appeal having failed, the appeal herein is accordingly dismissed with costs to the Respondent. Same to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

D.L.Y SICHINGA, SC
COURT OF APPEAL JUDGE

N.A SHARPE-PHIRI
COURT OF APPEAL JUDGE