IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 259 OF 2022**

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

DIEGO CASILLI	**APPELLANT**
AND	
ACCESS BANK (ZAMBIA) LIMITED	**1ST RESPONDENT**
SOLOMON NGWENYA	**2ND RESPONDENT**
GEORGE MUBIPE	**3RD RESPONDENT**
FOCUS CAPITAL LIMITED	**4TH RESPONDENT**
FOCUS FINANCIAL SERVICES LIMITED	**5TH RESPONDENT**

CORAM: Chashi, Ngulube and Patel, JJA
ON: 15th November 2023 and 14th August, 2024

For the Appellant: *M. Nkunika, Messrs Simeza Sangwa & Associates*

For the 1st Respondent: *E.K. Mwitwa, Messrs Mwenye & Mwitwa Advocates*

For the 2nd and 3rd Respondents: *J. Chileshe and A. Simunyola, Messrs Eric Silwamba, Jalasi & Linyama Legal Practitioners*

For the 4th and 5th Respondent: *N/A*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. ***Solomon Ngwenya and Another v. Diego Casilli – CAZ Appeal No. 230 of 2022***

2. ***Kuwait Oil Tanker Company SAK & Another v Al Bader & Others (2000) 2 All ER, 271,***

3. ***Mandlakhe Khela Shinga v The Society of Advocates (Pieter Maritzbury Bar) (intervening as Amicus Curiae) & Another - Appeal No. AR 969/2004***

4. ***Zimbabwe Homeless Peoples Federation & 2 Others v Minister of Local Government and National Housing and 3 Others - Judgment No. SC 78/21, dated 24th June 2021***

5. ***Milton Gardens Association & Another v Mvembe & Others HH 94/16***

6. ***Admark Limited v Zambia Revenue Authority (2006) ZR,43***

7. ***Attorney General v Roy Clarke (2008) ZR, 38***

8. ***Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others (2005) ZR, 135***

9. ***Indo Zambia Bank Limited v R. M Fumbeshi and Company Limited & Others - CAZ Appeal No. 238 of 2021***

10. ***Morehouse et al v Income Investments Ltd et al - Can LII, 353***

11. ***Neighbours City Estates Limited v Mark Mushili -SCZ Appeal No. 47 of 2013***

<u>Legislation referred to:</u>

1. ***The Banking and Financial Services Act, No. 7 of 2017***

2. ***The Money Lenders Act, Chapter 398 of the Laws of Zambia***

Rules referred to:

1. ***The Court of Appeal Rules, Statutory Instrument No. 65 of 2016***

2. ***The Supreme Court Practice (White Book) 1999***

Other Works referred to:

1. ***STADOCU*** - on ***Legal Writing and Drafting: Tips from the Top Professionals. Posted by Giles Files, April 9, Appeals, checklists, Consumer Protection, Dispute Resolution (LRL3) Insights, Legal Practice, Retired Judges, Thought Leaders***

2. ***The Doctrine of Unconscionability and Abusive Clauses: a Common Point Between Civil and Common Law Legal Traditions – Professor Camilo A. Rodriquez-Yong***

1.0 INTRODUCTION

1.1 This is an appeal from the Judgment of Honourable Mrs. Justice I.Z Mbewe *(Commercial Division)* delivered on 4th May 2022.

1.2 In the said Judgment, the learned Judge *(the Judge),* did not find the 1st Respondent, whom in this appeal we shall refer to as the Bank, liable for any of the Appellant's *(who was the plaintiff in the court below)* claims. In disposing of the matter, the following were the findings and Orders of the Judge:

(i) The Plaintiff's claims for damages for conspiracy to defraud against the 1st Defendant (1st Respondent herein) fails.

(ii) The Plaintiffs claims for damages for conspiracy to defraud against the 2nd, 3rd, 4th and 5th Defendants *(the 2nd, 3rd, 4th and 5th Respondents herein)* succeeds. Damages to be assessed by the Registrar.

(iii) The Plaintiff's claim for the sum of US$2,999,998.00 succeeds and the 2nd, 3rd, 4th and 5th Defendants are jointly and severally liable, less the amounts paid, subject to a reconciliation by the Registrar.

(iv) The claim for interest under clause 3 of the loan agreement succeeds, on the outstanding amount against the 2nd, 3rd, 4th and 5th defendants. Interest shall be at LIBOR from the date of the writ till full payment.

(v) The alternative claims against the 1st defendant are all without merit and are accordingly dismissed.

1.3 As regards the costs, the Judge ordered as follows:

(i) The 2nd, 3rd, 4th and 5th Defendants shall bear the Plaintiff's costs. To be taxed in default of agreement.

(ii) The Plaintiff shall bear the 1st Defendant's costs. To be taxed in default of agreement.

1.4 At the hearing of the appeal, counsel for the Appellant brought to our attention the fact that there was another appeal by the 2nd and 3rd Respondents under Cause Number CAZ Appeal No. 230 of 2022. Counsel appealed for the panel in this matter to also preside over the other appeal, so as to avoid conflicting decisions. That request was denied, as the Court of Appeal is one Court and we therefore did not find a possibility of contradicting ourselves.

2.0 BACKGROUND

2.1 In this appeal, we shall refer to the 2nd, 3rd, 4th and 5th Respondents as the Respondents. However, where need arises to address them individually, we shall accordingly do so. The 5th Respondent was carrying on the business of discounting invoices and financing orders, whilst the 4th Respondent was carrying on the business of Fund Managers.

On or about February and March 2017, the 4th and 5th Respondents were facing a number of challenges financially and urgently needed funds to pay creditors who were threatening to enforce their securities and also for operations.

2.2 It is in that regard that the Appellant as a businessman, in his individual capacity, agreed to advance the 2nd and 3rd Respondents, who were shareholders in the 4th and 5th Respondents, the sum of US$3,000,000 *(the Funds)* in order to sustain their operations. In that respect, the Appellant on one hand and the 2nd and 3rd Respondents *(the Borrowers)* on the other hand, on 24th February 2017, executed a Loan Agreement, in which the Appellant advanced the Borrowers the Funds.

2.3 According to the Loan Agreement, the management of the Funds was entrusted to the 4th Respondent, an affiliate of the 5th Respondent. The Funds were under clause 3 of the Loan Agreement to attract interest as agreed.

2.4 The securities to be provided by the borrowers were provided for under clause 4 of the Loan Agreement and of interest to the appeal are the following:

(i) **Fixed charge on the bank account and assignment of receivables which are due from the Approved Off-Takers to the 5th Respondent *(Charged Account)***

(ii) **Acknowledgment from the Approved Off-takers that it shall pay all receivables due to the 5th Respondent into the Charged Accounts.**

2.5 According to the definition clause, Approved Off-taker means an approved Chip Company that has entered into a supplier financing facility support agreement, under the reverse invoice discounting product structure, such as Mopani Copper Mines Plc, Zambia Sugar Plc, Lafarge Zambia Plc and so forth.

2.6 The Charged over Account Deed appears at page 644 of the record of appeal *(the record)*. The parties to the Deed are the Appellant, the 2nd, 3rd, and 4th Respondents. This was entered into pursuant to the Loan Agreement as one of the securities. Following up on this, the Borrowers sent the Charge to the Bank together with copy of Notice, which the Bank acknowledged receipt of. Some of the salient provisions contained therein were as follows:

(i) The Bank was instructed to pay all sums due to the Appellant as the lender under or in connection with the Charged Account on demand by the Appellant.

(ii) Hold all sums from time to time standing to the credit of the Charged Account to the Order of the Appellant.

(iii) The Borrowers were not permitted to withdraw any amount from the Charged Account without the prior written consent of the Appellant.

2.7 In addition, the Appellant sent a Form of Acknowledgement of the Account to the Bank which the Bank put on its letter head and signed. This Form clearly stated that, the Bank will not permit any amount to be withdrawn from the Charged Account without the Appellant's written consent.

2.8 In addition to the Loan Agreement, the 4th and 5th Respondents executed a Receivables Sales Agreement. The 4th Respondent, the Appellant, and the Borrowers in February 2017, signed an Investment Agreement. It is in this document which appears at page 278 of the record, that the 4th Respondent was appointed as Fund Managers, to manage the Funds.

2.9 The Borrowers drew down the Funds and made disbursements. Fast forward, when the Borrowers defaulted on their payments, the Appellant made a demand and thereafter commenced an action in the court below, on 5th March 2018, by way of writ of summons claiming the following reliefs:

(1) Against the Bank and the Respondents

(a) Damages for conspiracy

(b) The sum of US$2,999,988

(c) Interest under clause 3 of the loan agreement

(2) In the alternative against the Bank

(a) The sum of US$2,999,988

(b) Damages for breach of the terms of the notice of charge and notice of acknowledgement of the notice of charge

(c) Interest under clause 3 of the loan agreement.

2.10 According to the attendant statement of claim, the Appellant averred that, there was conspiracy to defraud him by the Bank and the Respondents as they wrongfully and with intent to injure him by unlawful means conspired to defraud him. Further that the Bank and the Respondents concealed the fraud and the proceeds therefrom.

2.11 That in furtherance of the conspiracy, the Bank and the Respondents carried out unlawful acts, which injured the Appellant by withdrawing Funds from the Charged Account without the Appellant's written consent.

2.12 It was further averred that, the Respondents carried out unlawful acts by failing, neglecting or refusing to provide the Appellant the acknowledgements from the 5th Respondent into the Charged Account. That they diverted the receivables payable into the Charged Account into other accounts.

2.13 As regards the Bank, the Appellant in the alternative, claimed breach of the Notice of Charge and the Notice of Acknowledgment of Charge, as it paid out Funds without the prior written consent of the Appellant.

2.14 That as a result of the breaches, the Bank was liable for the payment of US$2,999,988 and interest.

2.15 In its defence settled on 21st March 2018, the Respondents averred that the Appellant was neither registered pursuant to the provisions of **The Banking and Financial Services Act**[1] nor **The Money Lenders Act**[2], and that therefore, the lending was in contravention of the two Acts.

2.16 According to the Respondents, the Appellant by way of an e-mail dated 3rd March 2017, waived the necessity of approval as a *sine qua non* for the disbursement of Funds.

2.17 They averred that, the Funds were to be applied to the capital operational costs of the 5th Respondent, an act which was fully performed. They denied any conspiracy to defraud or injure the Appellant as alleged or at all.

2.18 In its defence settled on 3rd April 2018, the Bank averred that, it had no contractual or banker relationship with the Appellant on account of the Notice of Charge or at all. That the notice of charge did not create any legal or contractual relations between the Bank and the Appellant and that, the Bank's banker-customer relationship and obligations were at all material times with the 4th Respondent, which was its customer at the material time and not the Appellant.

2.19 It was averred that on 3rd March 2017, its officer, Kahenya Kiznski was informed verbally and by e-mail, by the Appellant's authorized representative Suhayl Dudhia, *(Dudhia)* that the amount paid into the Charged Account was to be paid into the 4th Respondent's operations account and

that, other receivables would therefore be paid into the Charged Account.

2.20 The Bank denied the allegation that it did with the other Respondents severally and/or jointly carry out unlawful acts and means by which the Appellant was injured.

2.21 According to the Bank, the payments were made on instructions from the 4th Respondent, in line with the usual banker-customer relationship. Further that the Notice of Charge and Notice of Acknowledgement did not create any legal or contractual relationship between the Bank and the Appellant.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and the submissions, the Judge formulated six (6) issues for determination as follows:

(i) Whether the charge over Account was enforceable against the Bank.

(ii) Whether the Appellant's Legal Counsel (Dudhia) was an agent, authorized to act on behalf of the Appellant.

(iii) Whether the email dated 3rd March 2017, waived the terms of the Account Charge.

(iv) Whether the Respondents were privy to the Account Charge over Account.

(v) Whether the Appellant can claim against the Bank and the Respondents damages for conspiracy to defraud.

(vi) Whether the Appellant is entitled to the reliefs or alternative reliefs sought.

3.2 According to the Judge, the matter presented an intricate arrangement between the Appellant and the Borrowers. In the Judge's view, what started off as a loan or lender-borrower relationship, quickly degenerated into an acrimonious relationship between the parties.

3.3 Further, the Judge noted that, this is a case which not only turned principally on the contemporaneous documents and their legal effect, but also on the conduct of the parties. The Judge therefore started by analyzing the Loan Agreement, the Investment Agreement, the Receivable Sales Agreement and the Charge Over Bank Account Deed.

3.4 The Judge then considered the issue of whether Dudhia by his conduct was an agent of the Appellant. After considering the evidence and the authorities on agency, the Judge on the totality of evidence, found that Dudhia held out as an authorized agent for the Appellant.

3.5 Arising from the aforestated finding, the Judge then proceeded to consider the implication of the e-mail of 3rd March 2017. The Judge concluded that the true scope of the e-mail was that, it was a waiver of instructions contained in the Account Charge over Account and clause 7 of the Loan Agreement, which required any amendment of the terms to be in writing.

3.6 The Judge opined that the e-mail meant that the Funds would be withdrawn from the Charged Account and used for operational purposes and thereafter, credit the account with new receivables as contemplated in the Investment Agreement where Off-takers were expected to make payments into the Charged Account. That from the foregoing, it cannot be said that the 1st Respondent allowed withdrawals of Funds without prior written consent of the Appellant. The Judge

found that the 1st Respondent acted on the instructions of Dudhia who gave *carte blanche* authority of how the money in the Charged Account was to be used.

3.7 As regards the Account Charge over Account, the Judge found that all the Respondents were aware of the Charge.

3.8 On conspiracy to defraud, the learned Judge acknowledged the submissions from the parties which dealt with the tort of conspiracy to defraud. The Judge considered the law extensively, with citation of authorities and in particular the case of **Kuwait Oil Tanker Company SAK & Another v Al Bader & 2 Others**[1], which details the requisites to be considered in proving the conspiracy. The Judge concluded that, the test for liability in the tort of conspiracy is whether there is a just cause or excuse for the Respondents combining with each other to use unlawful means. That whether this is the case, depends upon the nature of the unlawfulness and its relationship with the resultant damage suffered by the Appellant.

3.9 The Judge made a finding that, there was a deviation in the business relationship between the Bank and the 4th

Respondent as holder of the Charged Account and the contractual relationship between the Appellant and the Bank was established by virtue of the Charged Account.

3.10 Based on the material before her, the Judge held that the Appellant had not adduced sufficient evidence proving any combination by the Bank with the Respondents to conspire to defraud the Appellant. That it had not been proved that the Bank acted unlawfully by allowing the withdrawal of Funds from the Charged Account. The Judge formed the view that there was no basis to find the Bank liable for unlawful conduct relating to the Charged Account. That there was no proof of the alleged unlawful act or a combination to further a common end between the Bank and the Respondents. According to the Judge, she could not draw an inference that the Bank conspired with others, as it acted within its power and authority as a bank

3.11 The Judge went on to conclude that the Appellant had not proved any conspiracy to defraud, against the Bank, as there was no meeting of minds or a combination between the Bank and the Respondents. That therefore the claim for damages

against the Bank, for conspiracy to defraud was devoid of merit and failed.

3.12 As regards the Respondents, the Judge was of the view that they were aware that the securitization process relating to the ATI cover had not been perfected, but went ahead to make withdrawals from the Charged Account. The Judge found that there was a combination between the Respondents.

3.13 The Judge was of the considered view that, there was sufficient evidence adduced by the Appellant to prove the injury and damage, as the Borrowers failed to settle their indebtedness to the Appellant, whilst the 4th Respondent breached the terms of the Investment Agreement by failing to notify the Appellant of the acknowledgments from Off-takers as per the business model and failed to notify the Appellant of the Off-takers.

4.0 THE APPEAL

4.1 Disenchanted with the Judgment, the Appellant has appealed against parts of the Judgment by advancing seven (7) grounds of appeal couched as follows:

(i) The finding by the learned Judge that Mr Suhayl Dudhia (PW2) was the agent of the plaintiff with respect to the relationship between the plaintiff and the 1st Defendant created by the Account Charge over Account No.800000529738 was against the weight of the evidence and the law.

(ii) The finding of the learned Judge that the 1st Defendant was not a party of the combination or agreement with the 2nd, 3rd, 4th and 5th Defendants to injure the plaintiff by unlawful means was against the weight of the evidence and the law.

(iii) The finding by the learned Judge that the email of 3rd March 2017 from PW2 was a waiver of the undertaking in clause 2 (d) of the Account Charge Over Account No. 800000529738 by the 1st defendant to the plaintiff not to permit any amount to be disbursed from Charged Account without the plaintiff's prior written consent was against the weight of the evidence and the law.

(iv) The conclusion of the learned Judge that there was no lawful conduct or breach of the Account Charge over Account No. 800000529738 by the 1st Defendant in disbursement of the funds from the Charged Account was against the weight of the evidence and the law.

(v) The finding of the learned Judge that the 1st Defendant was not liable to the plaintiff for the sum of US$2,998,000 and interest pursuant to clause 3 of the Loan Agreement was against the law and weight of the evidence.

(vi) The learned Judge was wrong in law to award the plaintiff interest under clause 3 of the Loan Agreement on the outstanding amount payable by the 2nd, 3rd, 4th and 5th Defendants at LIBOR from the date of the writ until full payment.

(vii) The decision by the learned Judge to dismiss the plaintiff's alternative claims against the 1st defendant was against the weight of the evidence.

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 The Appellant filed into Court heads of argument on 4th July, 2022. The said heads of argument are not only tedious, copious and prolix but repetitive. We shall not recapitulate them but will refer to them when and where necessary. Before consideration of the appeal, we will have something to say on the manner these heads of argument have been presented.

6.0 1ST RESPONDENTS AND 2ND AND 3RD RESPONDENTS' ARGUMENTS

6.1 The 1st Respondent filed its arguments on 18th January, 2023, whilst the 2nd and 3rd Respondents filed theirs on 15th December, 2022. We shall equally not replicate the same, but shall refer to them as need arises.

7.0 APPELLANT'S HEADS OF ARGUMENT IN REPLY

7.1 The Appellant filed its arguments in reply to the 1st Respondent on 1st June 2023 and to the 2nd and 3rd Respondents on 11th January,2023, which we shall consider simultaneously with the Appellants heads of argument.

8.0 HEADS OF ARGUMENT

8.1 Before we delve into the merits of the appeal we had earlier indicated that we will have something to say about the Appellant's heads of argument. In civil matters **Order 10/6 (b) of The Court of Appeal Rules[1] (CAR)** provides for lodging of an appeal by filing the record of appeal together with heads of argument.

8.2 In addition, Order 10/9 (10) **CAR** provides as follows:

> **"The document setting out the heads of argument shall clearly set out the main heads of the appellant's arguments together with the authorities to be cited in support of each head of argument"** (the underlining is ours for emphasis only).

8.3 The Appellant's heads of argument in this matter consisted of 196 pages, whilst his heads of argument in reply to the Bank's heads of argument consisted of 51 pages. Adorably in their response, the Bank and the 2nd and 3rd Respondents filed into court heads of argument consisting of 19 and 21 pages respectively.

8.4 We have of late noted with concern, the voluminous heads of argument being filed by parties and we are of the view that this is the opportune time for us to render guidance on what are heads of argument.

8.5 **STADOCU** - on **Legal Writing and Drafting: Tips from the Top Professionals,**[1] quoting LTC Hearns, Deputy President of the Supreme Court of Appeal of South Africa, on the purpose of heads of argument had this to say:

> **"The purpose of heads of argument is to convince the Court of Appeal that the court below has either erred or was correct. This means that the Judgment in the court below has to be addressed. Too often Counsel simply ignore that Judgment and reargue the case, quite regularly by recycling the heads used in the trial court. This approach is not only disrespectful towards the court of first instance – it is also unhelpful and misses the point that appeals are not re-hearing."**

8.6 LTC Hearns, went on to state that, there is a clear distinction between heads of argument and written arguments. The rules do not permit the latter. The operative words are "main" "heads" and "argument." "Main" refers to the most important part of the argument; "heads" means points not a dissertation and "argument" involves a process of reasoning that must be set out in the heads.

8.7 The aforestated was re-emphasized in the South African decision in **Mandlakhe Khela Shinga v The Society of Advocates (Pieter Maritzburg Bar) intervening as Amicus Curiae) & Another**[2] where the court noted that "heads – means points not a dissertation; and arguments involves a process of reasoning that must be set out in the heads. That in addition and to emphasize the point, heads of argument must be clear, succinct and without unnecessary elaboration.

8.8 The Supreme Court of Zimbabwe had the opportunity to address the issue of heads of argument in the persuasive case of **Zimbabwe Homeless Peoples Federation & 2 Others v Minister of Local Government and National Housing and 3 Others.**[3]

8.9 In that case, a preliminary issue was raised that the Appellant's heads of argument were not compliant with Rule 52 (2) of **The Supreme Court Rules, 2018**. The court was being asked to make a determination as to whether there were proper heads of argument filed before the court. The heads of argument spanned seventy (70) pages. The court stated that there was little doubt that there had been failure to comply with the Rules. They observed that the Appellants were requested to file heads of argument. That instead what they filed was more of a dissertation; it was prolix, rambling and in some cases repetitious and no consideration was given to being concise.

8.10 Heldi Barter, an Attorney in the South African law firm of Barter Mckellor in her presentation titled "Heads of argument: explanation and purpose in South Africa, had this to say:

> **"In the context of South Africa "heads of argument refers to a written document that outlines the legal arguments, authorities, case law, statutes, regulations, etc and the points that a legal representative intends to**

present during oral argument in court proceedings. That heads of argument are an essential tool in legal proceedings serving to organize, clarify and present the legal argument of a party before a court. They help facilitate a more efficient and focused presentation of a case while aiding the court and the opposing party in understanding the complex issues at hand."

8.11 The issue was also ably amplified in the High Court of Zimbabwe, in another persuasive case of **Milton Gardens Association & Another v Mvembe & Other.**[4] The Court obviously exasperated, had this to say at page J5 of the Judgment:

"I must make observations concerning the heads of argument filed on behalf of the applicants in this matter. Those stretch up to 127 pages. Heads of argument are meant to be simply that. The purpose of heads of argument is to set out fully ones arguments. Heads of argument are required to be drawn up in a clear and concise manner. It is inappropriate to file voluminous pile of papers and expect the other party as

well as the court to plough through such a voluminous pile of paper and still be able to make sense out of them. What these heads of argument contain is basically every fact and argument concerning this matter. This is inappropriate. In fact this is an abuse of the court process. This style of drafting heads of argument and conduct ought to be discouraged. The eventual consequence of such conduct results in delays in delivery of the Judgment. Concerned litigants who bombard the court with voluminous papers and information deserve to be penalized, even if they are eventually successful in the litigation. This sort of conduct deserves censure by this Court..."

8.12 In the **Zimbabwe Homeless People Federation** case, the Supreme Court did not end with the censure. They went further and had this to say:

"Ordinarily the failure to file proper heads of argument would have consequences. However, considering that this Court has heard the Appellants on the basis of those lengthy and rambling submissions, the court in

the exercise of its discretion will condone this anomaly, regard being had to the fact that this is perhaps the first time this court has taken the pains to emphasize the distinction between heads of argument and written arguments. In future, heads of argument that do not comply with Rules 52 (2) may well be struck out, the result being that the party guilty of such non-compliance may well be regarded as being barred, with the concomitant results that would normally flow from such a determination."

8.13 In the appeal before us, we have suffered the exasperation as the Judge did in the **Milton Gardens Association** case. As earlier alluded to, the Appellant's heads of argument and the Appellant's heads of argument in reply goes up to 196 pages and 51 pages respectively. The contents are not only repetitive, but seems to be arguing the case as if it was before the court of first instance and not an appeal, with the restating of facts at large. The Appellants submissions in the court below appears at page 1033 of the record and weighs in

with 120 pages and seem to have been recapitulated at large in the Appellant's heads of argument before us.

8.14 With the persuasiveness of the Zimbabwean and South African cases which we wholly adopt, we are of the view that the Appellant's purported heads of argument and the reply contravene Order 10/9 (9) **CAR** and are therefore an abuse of the court process. Litigants and legal practitioners should forthwith be warned that in future we will not entertain such heads of argument, which will suffer the fate of being expunged or struck out. Although our rules do not prescribe the maximum number of pages heads of argument should contain, parties should by all means refrain from filing dissertations, thesis or written submissions. Save in exceptional cases and circumstances, heads of argument should not exceed thirty (30) pages.

9.0 CONSIDERATION AND DECISION

9.1 The grounds of appeal in this matter are solely targeted at the Judges findings in respect to the Bank. The first ground attacks the finding of fact by the Judge that Dudhia was an

agent of the Appellant with respect to the relationship between the Appellant and the Bank. According to the Appellant, this was against the weight of evidence and the law.

9.2 The Appellant was of the view that the Judge ignored the pleadings and injected itself in the proceedings by introducing and adjudicating on the issue of agency, which the parties to the proceedings did not raise. Reliance in that respect was placed on the case of **Admark Limited v Zambia Revenue Authority.**[5]

9.3 The Appellant further argued that there was no agency relationship between the Appellant and Dudhia, as ingredients in respect to the law of agency were not met.

9.4 On behalf of the Bank, it was submitted that the finding was based on the Judge's meticulous evaluation of the pleadings, documentary evidence and testimonies of the witnesses. It was the Bank's position that in order for the Judge to determine whether the Appellant was entitled to the reliefs it was seeking against the Bank, it was inevitable to take into

consideration the relationship that existed between the Appellant and Dudhia, who took a very active role in communicating between the Appellant, the Bank and the Respondents.

9.5 The Bank placed reliance on the case of **Attorney General v Roy Clarke**[6] where it was held that:

> **"A party cannot rely on unpleaded matters except where evidence on the unpleaded matter has been adduced in evidence without objection from the opposing party."**

9.6 Further reliance was placed on the case of **Mazoka v Mwanawasa & Others**[7] where it was held that:

> **"In a case where a defence and or, in our view, any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should feel precluded from considering it."**

9.7 The 2nd and 3rd Respondents on their part submitted that Dudhia was an agent of the Appellant based on the evidence and Dudhia's own admission and in the manner he held himself out.

9.8 A perusal of the pleadings and in particular the Bank's defence, paragraph (11) shows that the issue of agency first arose, when the Bank pleaded that Dudhia was the Appellant's authorized representative.

9.9 This was replicated in the 2nd Respondent's witness statement in paragraph 20, in which he referred to Dudhia as the Appellant's authorized agent and this was an issue on which the 2nd Respondent was subjected to cross examination.

9.10 The Judge in our view, in formulating the issue for determination as to whether the Appellant's legal Counsel (Dudhia) was an agent, authorized to act on behalf of the Appellant, did so, taking into consideration the pleadings and the evidence before her.

9.11 The Judge then went on to outline the principles in the law of agency and also considered the role played by Dudhia and his conduct and interactions with the Bank, in complete and total absence of the Appellant, as the Appellant's face, before arriving at her finding. In our view, the finding by the Judge was supported by the evidence which was before the court

and the law and we therefore find no basis on which to fault the Judge.

9.12 The second ground attacks the finding of fact by the Judge that the Bank was not a party of the combination or agreement with the Respondents, to injure the plaintiff by unlawful means. According to the Appellant, this was against the weight of evidence. It is evident that the only piece of evidence which links the Bank to the Respondent is the Charged Account. There is no evidence which links the Bank to the Respondents in the manner they went about in procuring the loan from the Appellant. In our view, we find no basis on which to fault the Judge in her finding of fact as it was supported by evidence and was not perverse.

9.13 The third ground gravitates on the interpretation and understanding of the email dated 3rd March 2017. According to the Appellant, the finding by the Judge that the email from Dudhia was a waiver of the undertaking in clause 2 (d) of the Account Charge by the Bank to the Appellant, not to permit any amount to be disbursed from the Charged Account,

without the Appellants written consent was against the weight of the evidence and law.

9.14 We note that the Funds were a loan from the Appellant to the Borrowers. The Funds were not and could not be categorized as receivables in the contemplation of the parties and understanding of the transaction. It is therefore inconceivable and no explanation was proffered as to how and why the Funds were deposited or sent to the Charged Account, which was wholly created for receivables from Off takers; which receivables were to be charged and not the Funds.

9.15 The Funds *stricto sensu* were a loan advanced to the borrowers and was to be administered by the 4th Respondent as the Fund Manager and the payment should have been directed to the 4th Respondent's operations account, as the duly appointed Fund Manager under the loan agreement.

9.16 In the view that we have taken, the Funds, not being receivables, but a loan, were not supposed to be subjected to the Charged Account, which restricted withdrawals without the Appellants written consent.

9.17 The e-mail in issue appears at page 160 of the record and it reads:

Dear Lewis

Please note that $3Million is supposed to be paid out into Focus Operations following which the new receivables would be paid into this account on which we have the charge.

Thanks

Suhayl"

9.18 In our view, the e-mail was succinct. It was by no means meant to be a written consent giving permission to pay out monies and therefore the issue of the waiver did not arise. It was clearly stating that the Funds were meant for Focus operations and should accordingly be moved. Only receivables from Off takers were supposed to be deposited in the Charged Account and were supposed to be subjected to the restriction.

9.19 In the view that we have taken, there was no unlawful conduct on the part of the Bank nor breach of any agreement

and therefore grounds four, five and seven all fall away. Ground three succeeds only to the extent that the finding by the Judge that the e-mail was a waiver was erroneous.

9.20 In respect to ground six, the Appellant attacks the Judge's awarding of interest to the Appellant at LIBOR instead of the interest which was provided for under clause 3 of the Loan agreement.

9.21 In our recent case of **Indo Zambia Bank Limited v R. M Fumbeshi and Company Limited & Others,**[8] we did in that case hold as follows:

> ***"Taking into consideration the circumstances of the case, this was a proper case for restricting the will and freedom of the parties in the manner they contracted by applying the doctrine of unconscionability. There is definitely no doubt that there was oppression and predatory conduct on the part of the Appellant."***

9.22 It is evident that the Appellant under clause 3 of the Loan Agreement charged interest in excess of maximum interest

chargeable under **The Money Lenders Act**[2] and what financial institutions registered under the **Banking and Financial Services Act**[1] are generally charging.

9.23 The fairness of interest charged in other jurisdictions is governed by various statutes as well as common law which is applicable in our jurisdiction. It is trite at common law, that unduly harsh interest terms may be unconscionable and unenforceable. **Professor Camilo A Rodriquez – Yong,**[2] in his Article presented to the Oxford University Law Forum on the subject of The Doctrine of Unconscionability and abusive clauses: a common point between civil and common law traditions, had this to say:

> ***"The speed at which the world moves and advances has brought multiple economic social changes to our society. One of the clearest examples of these transformation is the way in which people contract in the acquisition of services and goods. We have moved from a period where the content of a contract was individually negotiated by both parties, to one where only one of them imposes it, the party that***

holds bargain superiority. This situation has led to the creation of a contractual model known as adhesion contracts...Taking into consideration the great power that one of the parties enjoys in determining the rights and obligations of the contract, it has become necessary to develop mechanisms that limit such authority. One of these mechanism is the adoption of legal doctrines that attempt to avoid the unlimited and abusive exercise of that unequal power by restricting the autonomy of will and freedom of the parties to enter in contract within these developments, it is possible to identify two key doctrines; the doctrines of unconscionability and of abusive clauses. These doctrines represent legal instruments that prevent contractual unfairness and protect parties from overreaching. The former is implemented in common law countries....”

9.24 Unduly harsh interest terms may be unconscionable and unenforceable. The doctrine of unconscionability is one of the

legal instruments used by the courts to "police" agreements and protect against unfairness, in order to avoid the incorporation and legal enforcement of one sided, oppressive or unfair contracts or clauses.

9.25 A person from time to time may be in a desperate situation and thereby agree to a loan with an exorbitant interest rate. In such circumstances, the law forbids lenders from acting in a predatory fashion and restricts the rate of interest that may be charged.

9.26 Generally, where an interest rate was negotiated with undue influence, such as where the lender preys upon the vulnerabilities of the borrower or where an interest rate is beyond the statutory limit and is explicitly unlawful or is so disproportionate as to offend a sense of reasonableness within the market place for similar lending rights, that interest may be set aside or substituted as was appropriately done in the case of **Morehouse et al v Income Investments Ltd et al.**[9]

9.27 From the aforestated, it is clear that courts are open to considering a loan as unconscionable if the terms are so unfair that it would be wrong to uphold them. Cases of severe unfairness and lopsided bargaining power are some of the examples of contracts that "shock the conscience" in the eyes of the court.

9.28 As held in the **Morehouse et al** case, as to when an interest rate will be viewed as unconscionable and worthy of relief, such as setting aside or reduction, among other things, is left to the discretion of the court, reviewing various factors. The court must evaluate all the circumstances on an objective basis; considering the reasonable expectations of the average person entering into such agreement.

9.29 Although the Judge did not state the basis on which she diverted from the interest under clause 3 of the Loan Agreement, we are not in a position to fault her as the interest was exorbitant and therefore unfair. As earlier alluded to, it was in excess of the statutory limited interest rate under **The Money Lenders Act** and what would generally be charged by financial institutions registered

under **The Banking and Financial Services Act**, when the Appellant was neither captured under **The Money Lenders Act** nor **The Banking and Financial Services Act,** to be charging such an interest rate.

9.30 The circumstances of this case also clearly shows that the Appellant took advantage of the Respondents desperation in borrowing the money in order to save its operations as the Respondents were facing threats of enforcement of securities by their creditors.

9.31 The Supreme Court had occasion to address this issue in the case of **Neighbours City Estates Limited v Mark Mushili**[11]. In that case, the trial court was faced with the question of the legality of the loan agreement, especially as it related to the interest agreed between the parties, which the borrower alleged was illegal due to the fact that the lender had no money lenders certificate. The trial Judge took the view that both parties agreed to the terms of the agreement and that in doing so, they were represented by Counsel and that therefore the issue of illegality could not arise. The learned Judge proceeded to enter judgment in favour of the lender for

the outstanding amount, together with interest of 120 per centum per annum as per the agreement between the parties.

9.32 On appeal, the Supreme Court formulated the issue for determination as follows:

> ***"The question is what is the position of the law as regards the interest agreed between the parties."***

9.33 The Supreme Court noted that the interest which was charged was higher than the interest of 48 per centum per annum which was the ceiling under **The Money Lenders Act**. They further noted that it was even higher than that which was being charged by lending institutions. The Supreme Court was of the view that since the lender was not a money lender under the Act, he was not entitled to charge such high interest.

9.34 The Supreme Court went on to hold that the agreement between the parties, was an ordinary contract, which should attract reasonable interest. They went on to state at page J17 of the judgment as follows:

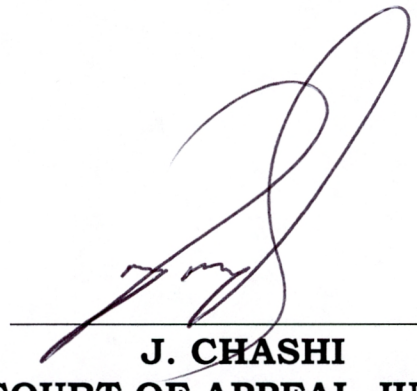
"It seems obvious to us that the Respondent took advantage of the Appellant's desperation to charge excessive interest which we cannot allow as this would be against the public policy. It is our duty to protect desperate members of the public who end up being exploited by loan sharks. We must bear in mind, in this case, that the lender was an individual and not a financial institution and certainly we agree that although he is entitled to interest, this must be reasonable."

9.35 In varying the interest chargeable, the Supreme Court ordered that interest payable on the principal sum should be at the average short-term deposit rate, from the date of the writ, to date of judgment and thereafter at the bank lending rate, till full payment.

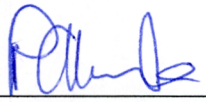
9.36 In the view that we have taken, the sixth ground has no merit based on our reasoning.

10.0 CONCLUSION

10.1 The appeal having substantially failed, it is accordingly dismissed. Costs to the Bank and to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
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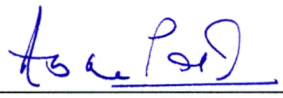

A.N. PATEL, SC
COURT OF APPEAL JUDGE