INVESTMENT MERCHANT BANK *v* LILYVALE FARM LIMITED.

Supreme Court.
Sakala, Chirwa and Chibesakunda JJJs
26TH June AND 27TH September 2002.
(SCZ Judgment No. 27 of 2002.)

Flynote

Banking – Banker and Customer – Interest on unutilized overdraft – Whether allowed.

Headnote

This is an appeal from the High Court in which the Learned trial Judge refused to grant interest on unutilized amount on an authorized overdraft. The appellant appealed against the refusal.

Held:

Interest can only be charged on the actual amount utilized in the overdraft. Legal charges, commissions and usual bank charges, cannot be capitalized into the principal sum to attract compound interest.

Legislation referred to:

Statutory Instrument Number 179 of 1995 - Banking and Financial Services Act, (Cost of Borrowing) Reg. 2.

Case referred to:

Union Bank (Zambia) Limited v *Southern Province Co-operative Marketing Union Limited* (1995-1997) Z.R. 207

M. Mutemwa of Mutemwa Chambers for the appellant.
B.L. Mupeso (Mrs.) of Simeza Sangwa and Associates for the respondent.

Judgment

CHIRWA, JS, delivered the judgment of the Court.

This is an appeal from the High Court in which the learned trial judge refused to grant

interest on unutilized amount on an authorised overdraft. The simple facts of the case as found by the court are that the respondent asked the appellant's Bank for an overdraft facility. The sum at first was for K15 million, but this was increased, after negotiations, to K50 million. To secure this overdraft facility the respondent's offered property Lot No. 5417/M Kabwe as security and a mortgage deed was duly executed.

The problem arose when the appellant issued originating summons praying for the sale of the secured property in order to recover the alleged balance due on the overdraft. According to the appellant's witness, the respondent borrowed a total of K43,000,000.00 but interest was charged on the agreed maximum sum to be borrowed of K50,000,000.00. The respondents dispute this saying that they cannot pay interest on unutilized sum.

The learned trial judge found that what was in dispute was the principal and interest to be charged. The learned trial judge found that as this was an overdraft facility, the appellant could only charge interest on the sum actually utilized and her finding was supported by the appellant's witness. She therefore directed that the amount due should be calculated at the amount actually utilized plus interest and that this should be paid within 60 days from the date of judgment. In default, the appellant were at liberty to foreclose and sell the mortgaged property without any further recourse to the court.

There was only one ground of appeal and this was that the learned trial judge erred in law and fact in restricting interest charges only to the actual amount withdrawn, contrary to the mortgage deed which formed the basis of the loan agreement. In arguing the appeal Mr. Mutemwa relied on his written heads of arguments, arguing that the mortgage deed provided that the respondent was responsible for the legal charges incurred in perfecting the security and commission and other usual bank charges and these were capitalized to the loan amount and this was provided under paragraph 5 and 9 of the mortgage deed. In other words, the total sum cannot be only the amount utilized plus interest, but the amount unutilized plus interest and the charges agreed upon in the mortgage deed and these formed the principal sum due. Mr. Mutemwa also relied on the case of *Southern Province Co-operative Marketing Union* v *Union Bank Ltd* that arrangement fees on a facility are payable by the borrower. In reply, Ms Mupeso also relied on her written heads of arguments supporting the learned trial judge that interest can only be charged on the amount and that the mortgage deed does not say legal charges, commissions and other administrative charges attract interest and to do so would amount to unjust enrichment. Ms. Mupeso also referred us to Statutory Instrument No. 179/95 concerning Banking and Financial Services Act (Cost of Borrowing) Regulations which exclude charges for arranging or renewing the loan, administrative charges of an overdrawn account or commitment fee as forming part of the cost of borrowing.

We have considered the judgment of the lower court and the arguments before us. From the evidence on which the lower court based its judgment, it is clear that the respondent is not disputing utilizing the overdraft facility, which facility carried compound interest. What is disputed is the principal sum and interest due. The learned trial held that the respondent is only liable for interest on the amount actually used. We cannot fault her in this finding. We further agree with Ms. Mupeso that the legal charges, commissions and usual bank charges cannot be capitalized into the principal sum to attract compound interest. This is specifically excluded in Regulation 2 of the Banking and Financial Services Act (cost of Borrowing) Regulations. We are satisfied that although the appellant can charge legal fees and other usual bank charges, these cannot be capitalized into the principal utilized sum to attract interest as agreed. These charges stand on their own. We therefore dismiss this appeal and confirm the lower court's decision that interest can only be charged on the actual amount utilized in the overdraft loan agreement and no other charges.

As it appears from the evidence of the respondent's witness that the outstanding sum was not actually agreed upon, we order that this sum be ascertained by the Deputy Registrar and the respondent be given 60 days thereafter to pay, in default the appellant may be at liberty to sell the security. Costs will be for the respondent.

Appeal dismissed.