IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 126 OF 2001

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

FELIX CHANDA	APPELLANT
AND	
ACCESS LEASING LTD	RESPONDENT

CORAM: Ngulube CJ, Chirwa and Chibesakunda, JJS on 28th March 2002 and 26th November, 2003

For the Appellants: Mr. M.Z Mandenga, M.Z. Mandenga & Co.
For the Respondent: Mr. R.C. Mittal, Cave Malik & Co.

JUDGMENT

Chirwa, J.S. delivered judgment of the Court: -

The late delivery of this judgment is regretted. This was due to misplacement of the record by the court.

The appeal arises from an action commenced by **FELIX CHANDA**, in this judgment referred to as the plaintiff against **ACCESS LEASING** Ltd., the defendant, the position the parties were in the court below. The plaintiff's claim in the court below was for the: -

1) Declaration that it is wrongful, improper and illegal for the defendant to charge the plaintiff penal interest on the Finance

(2) An order that the defendant must recompute the plaintiffs indebtedness to the defendant without inclusion of penal interest,

(3) An order that the defendant should sell or dispose of mini buses registration numbers AAR 1282 and AAR 2479 at the best price and the proceeds there from be applied towards the liquidation of the plaintiffs' indebtedness to the defendant,

(4) An order that the balance, if any, be paid to the plaintiff with interest at an average short-term deposit rate per annum prevailing on the date of sale of the mini buses.

(5) An injunction to restrain the defendant from threatening to impound, seize or take possession or seizing mini bus registration AAT 2500 or any other mini bus property of the plaintiff pending disposal of this case

(6) Further or other relief

(7) Costs for an incidental to these proceedings.

After trial, the learned trial court found that there were two finance lease agreements between the parties; the first was dated 3rd April 1998 and the second one is dated 7th October 1998. These two agreements carried different rates of interest. The first agreement carried an agreed 10% compound interest. In the second agreement, the learned trial judge found that the word "compound interest" was not reflected in the agreement and she therefore ruled the charged compound interest illegal and ordered the defendant to recompute the indebtedness of the plaintiff to the defendant on the second agreement, expunging from the recomputation the compound interest. The court went further to order that since the two mini buses

had been sold, the defendant in computing the plaintiff's indebtedness must take into account the amount realized from the sale of these two mini buses. The learned trial judge declined to grant an injunction in respect of the two mini buses as they had already been sold. Further, the learned trial judge declined to order payment of any balance from the sale of the two mini buses as evidence showed that the sale of the two mini buses did not liquidate the plaintiff's indebtedness. Costs for the action were awarded to the defendant as the court found that the plaintiff was in breach of the lease agreements.

It is against these findings by the lower court that the plaintiff has appealed. The memorandum of appeal contains 5 grounds of appeal and these are: -

1. The learned judge misdirected herself in that she failed to take cognisance of the fact that by an amended writ of summons and an amended statement of claim, the plaintiff's second claim was for "an order that the defendant must recompute the plaintiff's indebtedness to the defendant without the inclusion of penal interest and/or compound interest under lease 2".

2. The learned judge misdirected herself when she held that "in this case the first leasing agreement in my view provides for the charging of compound interest and I have no doubt that this provision being part of the agreement executed by the parties, the same was agreed to and is binding on the plaintiff. Since the same was agreed, I see no reason why the

plaintiff should now turn around and say that the charging of compound interest on the arrears was not agreed to".

3. The learned trial judge misdirected herself when she held that "the question in his case is whether provision of clause 7 common to both lease financing agreements allows the charging of compound interest."
4. The learned judge misdirected herself when she failed to decide whether or not clause 7 common to both lease financing agreements provided for charging of penal interest.
5. The learned judge misdirected herself when she awarded costs in the court below to the defendant.

The grounds of appeal were adequately supplemented by detailed heads of arguments and the respondent also filed detailed heads of arguments. We also heard oral submissions from counsel for the appellant.

The gist of the first ground of appeal is that had the learned trial judge taken cognisance that the writ and statement of claim had been amended so as to include a prayer that the defendant should recomputed the indebtedness without the inclusion of penal interest and/or compound interest under lease 2 she was most likely to have approached the case differently and in all probability the outcome would have been different. The brevity of the ground of appeal received an equal brevity answer, that the learned trial judge granted what the plaintiff prayed for, namely that the indebtedness of the plaintiff should be recomputed so as to expunge the compound interest. Looking at the agreements, we do no see any penal interest being charged and no evidence was led to show this penal interest. The learned trial judge correctly ruled that since compound interest

was not agreed upon in the second lease agreement as in the first agreement, the same should be expunged from the total indebtedness on the second agreement. The interest charged on the overdue balance was agreed upon and this is not penal interest as this is allowed under the Banking and Financial Services (cost of Borrowing) Regulations, Regulation 10 (1) (a). If there is an outstanding balance, which inevitably has been calculated to include the agreed interest, interest is charged on this outstanding balance and this is not a penalty. As the learned trial judge properly found that compound interest was not agreed upon in the second agreement and in the absence of any evidence that penal interest was charged, we cannot fault the learned trial judge in her direction that the total indebtedness of the plaintiff on the second lease should recomputed excluding the compound interest. We see no merit in this first ground of appeal and it is dismissed.

The second ground of appeal is premised on the understanding that the learned trial judge made a wrong finding of fact that the parties had agreed on compound interest in the first lease agreement. It was submitted that this finding of fact was wrong and this is a proper case that this court can disturb this finding of fact. We have looked at the lease agreement in the first agreement and that portion that talks of interest is in fact not clause 7. Interest rate charged is a schedule to the agreement which gives details of the lessee, the amount advanced, the period of the lease and interest. On interest, the Schedule provides as follows: -

> "Interest at the rate of 10% per month will be levied on all arrears of payment. Note that compounding interest will apply on this facility"

What follows thereafter are particulars of equipment leased, the signatures of the parties or their representatives. As a contrast to the second lease agreement which provides as follows: -

It was submitted that this finding of fact was wrong and this is a proper case that this court can disturb this finding of fact. We have looked at the lease agreement in the first agreement and that portion that talks of interest is in fact not clause 7. Interest rate charged is a schedule to the agreement which gives details of the lessee, the amount advanced, the period of the lease and interest. On interest, the Schedule provides as follows: -

> "Interest at the rate of 10% per month will be levied on all arrears of payment. Note that compounding interest will apply on this facility" What follows thereafter are particulars of equipment leased, the signatures of the parties or their representatives. As a contrast to the second lease agreement which provides as follows: -
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> "Monthly instalments of K1,473,463.99 (including VAT) will be payable. Additionally interest at the rate of 10% per month will be charged on any overdue balance of the principal and interest amounts until such time the balances are paid".

It is clear from these extracts from the lease agreements that compound interest was not specifically agreed upon by the parties in the first lease agreement. There is no perverse finding by the learned trial judge on the finding that compound interest was not agreed upon by the parties. The finding was amply supported by the evidence before the court. This second ground of appeal is also dismissed.

Ground 3 in the grounds of appeal has been adequately covered during our consideration of the 2nd ground of appeal and it is also dismissed.

Ground 4 states that the learned trail judge misdirected herself when she failed to decide whether or not clause 7 common to both

why I should award the costs to him. I will instead award the costs of this action to the defendant". The learned trial judge was properly seized on the question of costs, that they usually follow the event but she felt the plaintiff caused all this litigation because of his default on the lease agreements. The plaintiff does not dispute the courts discretion in awarding costs but says that the court should have taken cognisance the fact that the failure on the part of the plaintiff to keep up with his payments was caused by his bank. The problem between him and his bank is his own affair and that cannot delude from the fact that he was in breach of the lease agreement. It would have been different if his sole aiming of coming to court was to challenge the compound interest on the second lease agreement. But he brought an action claiming all sorts of relieves and we cannot fault the learned judge's exercise of her discretion on costs in favour of the defendant. This ground of appeal is also dismissed. In total, therefore, this appeal fails on all grounds with costs to the defendant, in default of agreement, to be taxed.

M. M. W. S. NGULUBE
CHIEF JUSTICE

D. K. CHIRWA
SUPREME COURT JUDGE

L. P. CHIBESAKUNDA
SUPREME COURT JUDGE