IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 016/2016**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

CHANCE KALIMA AND OTHERS	**APPELLANTS**
AND	
PLASTICO ZAMBIA LIMITED	**1ST RESPONDENT**
INDO-ZAMBIA BANK LIMITED	**2ND RESPONDENT**
THOM JOSEPH THEWO (ADMINISTRATOR OF THE ESTATE OF THOMPSON TSILIZIANI THEO- DECEASED)	**3RD RESPONDENT**

CORAM: MAMBILIMA CJ, KAOMA AND KAJIMANGA JJS;
On 2nd October, 2018 and 28th February, 2019

For the Appellants	**:**	**Mr. E. B. Mwansa SC of EBM Chambers**
For the 1st Respondent	**:**	**No Appearance**
For the 2nd Respondent	**:**	**Ms. I. C. Lamba of Chongo, Manda, and Associates**
For the 3rd Respondent	**:**	**Mr. H. C. Mubashi of HC Mubashi and Company**

JUDGMENT

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **UNION BANK (Z) LTD V SOUTHERN PROVINCE COOPERATIVE MARKETING UNION LTD (1995/1997) ZR 207**
2. **ZAMBIA NATIONAL COMMERCIAL BANK PLC V JOE MWANSA CHISANGA AND SERIOES LIMITED, APPEAL NO. 166/2003**

3. **MAGNUM ZAMBIA LIMITED V BASIT QUADRI (RECEIVER/MANAGER) AND GRINDLAYS BANK INTERNATIONAL ZAMBIA LIMITED (1981) ZR 1**
4. **YONNAH SHIMONDE AND FREIGHT AND LINERS V MERIDIEN BIAO BANK (Z) LIMITED, (1999) ZR 47**
5. **CREDIT AFRICA BANK LIMITED (IN LIQUIDATION) V JOHN DINGANI MUDENDA (2003) ZR 71**
6. **GALCO (Z) LIMITED AND PLASTICO (Z) LIMITED V LAWRENCE MUNENGO AND OTHERS, CHANCE KALIMA AND OTHERS, BARCLAYS BANK (Z) AND INDO ZAMBIA BANK LIMITED, APPEAL NO. 63/2001**
7. **GOMBA HOLDINGS UK LTD V MINORIES FINANCE LTD (1989) 1 ALL ER 261; (1988) 1 WLR 1231**
8. **STATE OF HARYANA & ORS. V S. L. ARORA & COMPANY (2010) 2 SCR 297**
9. **ZAMBIA CONSOLIDATED COPPER MINES LIMITED V JAMES MATALE (1995-1997) ZR 144**
10. **ATTORNEY GENERAL V KAKOMA (1975) ZR 216**

LEGISLATION REFERRED TO:

a. **THE BANKING AND FINANCIAL SERVICES ACT, CHAPTER 387 OF THE LAWS OF ZAMBIA**
b. **THE BANKING AND FINANCIAL SERVICES (CLASSIFICATION AND PROVISIONING OF LOANS) REGULATIONS, STATUTORY INSTRUMENT NO. 142 OF 1996**
c. **THE COMPANIES ACT, CHAPTER 388 OF THE LAWS OF ZAMBIA**
d. **THE CORPORATE INSOLVENCY ACT NO. 9 OF 2017**
e. **THE INDUSTRIAL AND LABOUR RELATIONS ACT, CHAPTER 269 OF THE LAWS OF ZAMBIA**

This appeal, is from the Judgment of the Industrial Relations Court, (IRC), delivered on the 4th of April, 2012. The Judgment followed an application by the Appellants to enforce the said Judgment against the 2nd Respondent for the payment of their redundancy package in the sum of K373,155,534.20.

The facts leading to this appeal are common cause. The Appellants are former employees of the 1st Respondent, whose employment was terminated between 23rd December, 1997 and 15th January, 1998. A dispute arose regarding the payment of their terminal benefits. Contemporaneously, a company associated with the 1st Respondent called GALCO Zambia Limited, terminated the employment of its employees and this ignited a dispute over the payment of their terminal benefits. What followed is that the Appellants, together with the former employees of GALCO Zambia Limited, filed a complaint in the Industrial Relations Court against their respective employers. However, the Appellants and the 1st Respondent entered into two consent Judgments on 17th and 19th August, 1999. By the said consent Judgments, the Court below ordered that the Appellants should be deemed to have been declared redundant and entitled to redundancy payments.

On 24th December, 1997 the 1st Respondent was placed under receivership by Indo-Zambia Bank (hereafter sometimes referred to as 'the Bank'). This was after the 1st Respondent had defaulted in repaying its loans and overdrafts. The Bank appointed a

receiver/manager to run the affairs of the 1st Respondent and in view of this development, the Appellants decided to enforce their judgments against Indo-Zambia Bank. Consequently, they made an application to join Indo-Zambia Bank to the proceedings which the Court below granted. Thereafter, the Appellants obtained a garnishee Order nisi against Indo-Zambia Bank. The Court below refused to make this Order absolute but instead, referred the matter to the Registrar for the assessment of the Appellants' redundancy package.

The Appellants were aggrieved by the refusal of the Court to make the garnishee Order nisi absolute. They appealed to this Court and on 27th February, 2004 we dismissed the appeal on the ground that the debts of the 1st Respondent and GALCO Zambia Limited did not come under Section 346(1)(d) of the then Companies Act and could not, therefore, be ranked higher than those of secured creditors, who included Indo-Zambia Bank.

As earlier ordered by the Court, the matter went for assessment before the Registrar, who, on the 3rd April, 2002, ordered the 1st Respondent to pay the Appellants a total sum of

K373,155,534.20 inclusive of 30% interest, for their redundancy package. The Appellants sought leave from the Court to enforce the Registrar's Order and the consent judgments obtained on 17th and 19th August, 1999 against, among others, the liquidator of GALCO Zambia Limited, the 1st Respondent and Indo-Zambia Bank. On 9th May, 2005 the Court granted the leave that was sought but this was in the absence of the Bank and the liquidator of the 1st Respondent, both of whom were non parties to the consent judgments and the judgment on assessment. The non parties applied, to set aside the leave granted on 9th May 2005. The Court granted the application and set aside the leave it had earlier granted to the Appellants to execute the three judgments against the non parties on the ground that the non parties had raised triable issues and had shown sufficient cause to warrant the setting aside of the leave earlier granted. Thereafter, the Appellants applied to join the receiver/manager of the 1st Respondent, Mr. Thompson Tsilizani Thewo as a party to the proceedings. The IRC rejected the application on the ground that it had been made after the Court had rendered three final judgments. The Appellants were not

satisfied with this decision and escalated the matter to this Court. On 20th April, 2010, we allowed their appeal and ordered that the receiver/manager of the 1st Respondent be joined to the proceedings and that the IRC should sit to determine the triable issues before execution of the three judgments.

As fate would have it, Mr. Thompson Tsilizani Thewo the receiver/manager appointed by the Bank died on 14th December, 2010. At the subsequent hearing of their application to enforce the judgments against the non parties, the Appellants called the Administrator of his estate, Mr. Thom Joseph Thewo, who is cited as the 3rd Respondent herein, to give evidence in support of their application.

In his evidence, the 3rd Respondent extensively referred to the contents of an affidavit which was sworn by the late Mr. Thompson Tsilizani Thewo, on 28th January, 2003. This affidavit was entitled: **"AFFIDAVIT SEEKING LEAVE OF THE COURT TO LIFT EX-PARTE ORDER OF LEAVE TO COMMENCE CONTEMPT OF COURT PROCEEDINGS AGAINST ME AND TO ALLOW ME TIME TO PURSUE INDO-ZAMBIA BANK LIMITED TO RELEASE**

K373,155,534.20 FOR PAYMENT TO THE 2ND APPLICANT FROM THE PROCEEDS OF THE SALE OF THE RESPONDENT'S REAL AND OTHER PROPERTIES."

According to the said affidavit, the receiver collected a sum of K18 million from Ifintu Auctioneers, after selling the plant and equipment of the 1st Respondent and he paid the entire sum to the Appellants for their redundancy packages. He deposed that he later successfully concluded the sale of the Respondent's Stand No. 7438 to Kazuma Plastics Limited at the price of US$90,000.00, but Indo-Zambia Bank gave instructions to the purchaser to directly remit the money to it, which the purchaser did. The receiver lamented that Indo-Zambia Bank also directly negotiated the sale of another property, Stand No. 7439, to Keembe Meat Corporation at a price of US$135,000.00, without involving him. He stated that he had raised concern about Indo-Zambia Bank making it difficult for him to independently carry out his duties as receiver.

The 3rd Respondent further testified that the 1st Respondent electronically generated account statements for the period 1st January, 1996 to 31st December, 1997, which showed that the

overdraft had been fully settled as at 15th June, 2001, while a manually generated statement for the period 31st July, 1998 to 28th February, 2001, showed that interest was calculated on a compound basis, such that the lowest rate was 47% while the highest rate was 53% per annum. He stated that the amounts which were reflected as the principal included interest which was charged in the preceding month, meaning that interest was being charged on interest. According to him, the clause on interest in the mortgage provided for simple interest.

In opposing the Appellants' application, Indo-Zambia Bank called Mr. Munaki Derrick Farai to give evidence on its behalf. His evidence was that the 1st Respondent maintained a business account at Indo-Zambia Bank and enjoyed credit facilities. He explained that the 1st Respondent obtained an overdraft of K250 million which was secured by a mortgage over Stand No. 7438, Lusaka. He stated that the 1st Respondent borrowed a further sum of K205 million which was secured by a 'further charge' on Stand No. 7438, Lusaka. The witness also explained that the 1st Respondent borrowed a further sum of K100 million which was

secured by a 'third party second further charge' over Stand No. 7438, Lusaka.

He told the Court that Indo-Zambia Bank appointed a receiver on 24th December, 1997 because there was an amount of K555 million outstanding at the time. He testified that after Stand No. 7438, Lusaka was sold for the sum of K350 million and US$90,000, the balance owing reduced to K1,130,709,980.08 as at 30th April, 2000. He stated that the receiver equally sold Stand No. 7439, Lusaka to Keembe Estates Limited at the price of US$135,000.00, although the amount was not reflected on the 1st Respondent's account.

On the issue of compound interest, he testified that compound interest was charged because it was agreed upon by the parties. He explained that the 1st Respondent's account was classified as non-performing as at 30th June, 1998, meaning that Indo-Zambia Bank ceased to apply interest on the account from 1st July, 1998. He stated that the interest which accrued on a non-performing account could only be calculated manually and this was the reason Indo-Zambia Bank prepared a manual account statement. He further

explained that according to the Bank of Zambia Regulations, interest is not charged when a business account is classified as non-performing. He stated that in assessing a borrower's full indebtedness, the interest that accrued was calculated manually from the date the account was classified as non-performing.

Arising from the evidence which was before it and the submissions of Counsel, the Court below took the view that there were two issues which fell to be decided; that is whether Indo-Zambia Bank interfered with its contractual relationship with the receiver; and, the appropriate rate of interest which was chargeable on the overdrafts.

On the issue of interference, the Court found that Indo-Zambia Bank had interfered with the performance of the receiver's duties. It formed this view after considering the contents of the affidavit of the late Mr. Thomson T. Thewo, the receiver/manager of the Bank, dated 28th January, 2003, which the 3rd Respondent extensively referred to in his evidence. On the appropriate rate of interest chargeable on the overdrafts, the Court took the view that usually, the rate of interest chargeable on overdrafts is simple

interest but that unusual interest, such as compound interest, may be levied on the basis of an express agreement between the parties or in the alternative, evidence of consent or acquiescence to such an arrangement. To buttress this point, the Court cited the case of **UNION BANK (Z) LTD V SOUTHERN PROVINCE COOPERATIVE MARKETING UNION LTD[1].** The Court was of the view that in the case in casu, the 1st Respondent acquiesced to the charging of compound interest in that there was no evidence adduced before it to show that the 1st Respondent or the receiver objected to the charging of compound interest.

Having found that Indo-Zambia Bank interfered with the performance of the duties of the receiver, the lower Court ordered the Bank to pay the judgment sum to the Appellants, after recovering what was owed to it in full, if any, since it was a secured creditor. In making this Order, the Court relied on the case of **ZAMBIA NATIONAL COMMERCIAL BANK PLC V JOE MWANSA CHISANGA AND SERIOES LIMITED[2].**

It is against the above determination by the IRC that the Appellants have now appealed to this Court, advancing four grounds of appeal, namely–

1. **That the Court below misdirected itself in law and fact by holding that the 2nd Respondent was in order to charge compound interest;**

2. **That the Court below misdirected itself in law and fact by holding that the Receiver/Manager did not complete paying the money owed to the 2nd Respondent;**

3. **That the Court below misdirected itself in law and fact by holding that the 2nd Respondent should recover what is owed to it in full, when there was no money owed to the 2nd Respondent; and**

4. **That the Court below misdirected itself in law and fact when it did not believe the evidence of the Receiver/Manager on the payment of the money to the 2nd Respondent which satisfied the loan.**

In support of the appeal, State Counsel E.B. Mwansa, representing the Appellants, filed written heads of argument. He relied entirely on the said arguments at the hearing of the appeal.

In support of the first ground of appeal, State Counsel Mwansa submitted that Indo-Zambia Bank started charging compound interest on 24th August, 1998, after it had appointed a receiver. He stated that the account statement containing compound interest was manually generated by Indo-Zambia Bank and presented to the receiver, who was its agent. To support his

contention that the receiver was an agent of the Bank, Counsel referred us to the case of **MAGNUM ZAMBIA LIMITED V BASIT QUADRI (RECEIVER/MANAGER) AND GRINDLEYS BANK INTERNATIONAL ZAMBIA LIMITED**[3] where we said that-

> **"A receiver who is an agent of the company under receivership is there to secure the interests of the debenture holder and in those circumstances the company concerned is debarred from instituting legal proceedings against its receiver /manager.**
>
> **A company under receivership has no locus standi independent of its receiver....."**

He also referred to the evidence of the Bank's witness, one, Munaki Derrick Farai, who outlined the receiver/manager's terms of reference to include ***"...protecting the interest of the Bank by way of recovering the amounts owed and also to sell the mortgaged property to recover amounts owed to the Bank."***

Mr. Mwansa, SC contended that the Court below was wrong to make a finding that Indo-Zambia Bank was in order to charge compound interest because the shareholders and directors of the 1st Respondent were not in charge of the company at the time and were not aware of the account statement which contained compound interest for them to object. He submitted that it was only Indo-

Zambia Bank itself and its agent, the receiver, that were aware of the compound interest.

Mr. Mwansa SC further contended, that the Court below misapplied the case of **UNION BANK (Z) LIMITED V SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED[1],** in that the 1st Respondent did not perform any act of acquiescence to the charging of compound interest. He submitted that the electronically generated account statements showed that the 1st Respondent was in liquidation from 1st January, 1996 and therefore, there was no justification for allowing Indo-Zambia Bank to charge compound commercial interest forever since the 1st Respondent had, by law, stopped conducting business. According to State Counsel, the case of **YONNAH SHIMONDE AND FREIGHT AND LINERS V MERIDIEN BIAO BANK (Z) LIMITED[4]** supported his submission that compound interest should not be charged after the company has stopped conducting business.

On the second ground of appeal, State Counsel Mwansa argued that the electronically generated statement shows the

deposits which the 1st Respondent paid towards the overdraft until it was fully settled on 15th June, 2001. To support his assertion, he referred us to the evidence of the 3rd Respondent, on page 327 of the record of appeal, when he observed that as at 15th June, 2001 the overdraft had been fully settled. He further submitted that the receiver paid the Appellants a sum of K18 million for their redundancy package after selling the plant and equipment, because he knew that the 1st Respondent had fully settled the overdraft. In his view, it was, therefore, a misdirection for the Court below to hold that the receiver did not finish paying the overdraft.

On the third ground of appeal, State Counsel essentially echoed his earlier arguments made in support of the first and second grounds of appeal. He argued that since the overdraft was fully settled as at 15th June, 2001, the subsequent sale of Stand No. 7439, Lusaka to Keembe Estates Limited was unnecessary and the proceeds of the sale should be refunded to the 1st Respondent. The gist of his submissions was that all the money that was paid to Indo-Zambia Bank after the overdraft was settled, should be paid

back to the 1st Respondent, so that it can satisfy the Judgment sum.

In support of the fourth ground of appeal, State Counsel again rehashed his earlier submissions that the overdraft was fully settled. The only additional argument he made was that the Court below should have believed the evidence of the 3rd Respondent that the overdraft was fully settled.

In response to the Appellant's appeal, Ms. Lamba, on behalf of the Bank, filed heads of argument which she augmented with oral submissions at the hearing of the appeal.

Responding to the first ground of appeal, she submitted that the evidence led by Indo-Zambia Bank was that throughout its business relationship with the 1st Respondent, compound interest was charged because it was agreed upon by way of documentation and practice. That since the Court below found that the 1st Respondent acquiesced to the charging of compound interest, compound interest continued to accrue even after the 1st Respondent was placed under receivership. In her view, the Court

below correctly applied the principle in the case of **UNION BANK (Z) LIMITED V SOUTHERN PROVINCE COOPERATIVE MARKETING UNION LIMITED**[1], in which we held that:

> **"unusual interest such as compound interest may be levied on the basis of express agreement by the parties or in the alternative, evidence of consent or acquiescence to such arrangements."**

On the argument by the Appellants, that Indo-Zambia Bank ought not to have continued charging compound interest because the 1st Respondent, had by law, stopped operating as it was under receivership, it was Counsel's view that in this case, it was not the Bank which went into liquidation but a customer. Counsel thus sought to distinguish the case of **YONNAH SHIMONDE AND FREIGHT AND LINERS V MERIDIEN BIAO BANK (Z) LIMITED**[4] from this case. She stated that in the **YONNAH SHIMONDE** case, it was the bank that went into receivership and this Court correctly held, in accordance with Section 87(1)(b) of the **BANKING AND FINANCIAL SERVICES ACT**[a], that there can be no justification for a bank which was not operating to charge commercial interest forever against its erstwhile customers. Ms. Lamba argued that Indo-Zambia Bank was at all material times a going concern and it

was, therefore, in order to collect all debts from its customers, regardless of whether the customers subsequently went under receivership or liquidation.

Ms. Lamba went on to submit that the uncontroverted evidence adduced by Indo-Zambia Bank showed that the 1st Respondent's account was declared as non-performing on 30th June, 1998. Counsel stated that a non-performing loan is defined under Section 2(1) of the **BANKING AND FINANCIAL SERVICES ACT (a)** as:-

> **"a loan in respect of which any payment of principal or interest is in arrears in excess of ninety days".**

Counsel further submitted that there is evidence, which was unchallenged, that Indo-Zambia Bank ceased to apply interest on the electronically generated statements and started calculating interest manually from 1st July, 1998 in order to ascertain the 1st Respondent's indebtedness. According to her, Indo-Zambia Bank's witness explained that this was in accordance with the provisions of the **BANKING AND FINANCIAL SERVICES (CLASSIFICATION AND PROVISIONING OF LOANS) REGULATIONS[b]**. She referred us

to Regulation 9(2) of the **BANKING AND FINANCIAL SERVICES (CLASSIFICATION AND PROVISIONING OF LOANS) REGULATIONS**[b] which states that:

> **"where the principal outstanding of the loan which is due has been fully recovered, any further excess payments may be taken into income, provided the amount of income recognized is limited to the amount which would have been due to the Bank if the loan had been current at its contractual rate."**

It was her submission that "income", in this regard, includes interest and even if an account is non-performing, the bank has the right to charge the interest due at the contractual rate.

In opposing the second ground of appeal, Ms. Lamba submitted that the Court below was on firm ground in holding that not all the money owed to Indo-Zambia Bank was fully paid after all the properties were sold. She contended that there was evidence, which was unshaken, from the witness called by Indo-Zambia Bank that after the sale of Stand No. 7438, Lusaka, the 1st Respondent's indebtedness reduced to K1,130,709,980.08 as at April, 2000, although interest continued to accrue.

In countering the Appellants' argument that the overdraft was fully settled, Ms. Lamba submitted that the Appellants disregarded the evidence of Indo-Zambia Bank, which showed that interest continued to accrue as was shown on the manually generated statement. She contended that the witness from Indo-Zambia Bank confirmed that the nil balance on the electronically generated statement did not mean that Indo-Zambia Bank was not entitled to collect the money that was due to it. She argued that as provided for under regulation 9(1) of the **BANKING AND FINANCIAL SERVICES (CLASSIFICATION AND PROVISIONING OF LOANS) REGULATIONS**[b]-

> **"where a loan is placed in non-accrual status, any cash payments received shall first be applied to reduce the amount of the principal outstanding and due."**

Counsel submitted that in this case the last credit figure of K122,036,642.04 on the electronically generated statement, was used to clear the principal amount as at 30th June 1998. She further contended that the figures on the manually generated statement were lawfully calculated to show the amounts which were due to the bank as "income" in accordance with the Regulations.

properties were sold, a balance of K1,670,457,892.39 remained outstanding as at 28th February, 2001.

Ms Lamba further submitted that Indo-Zambia Bank was a secured creditor and it is trite law that claims of such creditors rank superior to any other claims, including those of the Appellants. She further submitted that once a company is placed under receivership, its debts should be paid in accordance with priority in ranking as provided in Section 110 of the now repealed **COMPANIES ACT (c)**, which provided that:

> **"Where**
>
> **(a) a receiver is appointed on behalf of the holder or trustee of any debenture of a company that is secured by a floating charge; or**
> **(b) possession is taken by or on behalf of such a person;**
>
> **of property comprised in or subject to the charge, then, if the company is not at the time in the course of being wound up, the debts which in every winding up are, under section three hundred and forty-six (relating to preferential payments), to be paid in priority to all other debts shall be paid out of any assets coming to the hands of the receiver or the person taking possession in priority to any claim for principal or interest in respect of debentures."**

According to Ms Lamba, we confirmed this position of the law in our decision in the case of **GALCO (Z) LIMITED AND PLASTICO (Z) LIMITED V LAWRENCE MUNENGO AND OTHERS, CHANCE**

KALIMA AND OTHERS, BARCLAYS BANK (Z) AND INDO ZAMBIA BANK LIMITED[6], in which we stated, inter alia, that:

> **"the debts of the 1st and 2nd Respondents (the Appellants) did not come under section 346(1) d of the Companies Act. They cannot be ranked higher than the secured debts."**

She submitted that the Appellants were attempting to circumvent the Judgment in the GALCO case, cited above, which specified that the claims of the Appellants could not be ranked higher than those of secured creditors, including Indo-Zambia Bank. She, thus contended, that the Court below was on firm ground when it decided that the Appellants should only be paid their benefits after the full amount owing has been paid to Indo-Zambia Bank. It was her submission that this appeal should be dismissed, since evidence was led to show that the 1st Respondent's indebtedness was not extinguished after all its assets were sold.

We have carefully considered the evidence on record, the judgment appealed against and the submissions of Counsel. The central issue in the first ground of appeal is whether Indo-Zambia Bank was entitled to charge compound interest on the

loans/overdrafts advanced to the 1st Respondent. On behalf of the Appellants, State Counsel Mwansa submitted that Indo-Zambia Bank manually generated the account statement containing compound interest and presented it to its agent, the receiver. He referred to the case of **MAGNUM ZAMBIA LIMITED V BASIT QUADRI (RECEIVER/MANAGER) AND GRINDLEYS BANK INTERNATIONAL ZAMBIA LIMITED**[3] to support his argument that the receiver was an agent of Indo-Zambia Bank. Mrs. Lamba conceded that the 2nd Respondent applied compound interest to the moneys owed by the 1st Respondent because it was agreed upon by way of documentation and practice.

It is trite that a receiver is not an agent of a debenture holder. The correct position, as enshrined in Section 13(1) of the **CORPORATE INSOLVENCY ACT**[d], is that a receiver, appointed otherwise than by the Court is deemed, in relation to the property or undertaking, to be an agent and officer of the company which is under receivership, and not an agent of the persons by or on whose behalf he is appointed. At common law, the agency of a receiver is

considered to be a special type of agency. In the English case of **GOMBA HOLDINGS UK LTD V MINORIES FINANCE LTD (7)**, the Court explained that:

> **"The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder are treated as if they were the acts of the mortgagor."**

We have embraced this position in this jurisdiction. We have pronounced ourselves in various decisions, including in the case of **MAGNUM ZAMBIA LIMITED V BASIT QUADRI (RECEIVER/MANAGER) AND GRINDLEYS BANK INTERNATIONAL ZAMBIA LIMITED[3]** cited to us, that a receiver is an agent of a company under receivership. Mr. Mwansa's submissions on this point that the receiver was an agent of the Bank are, therefore, untenable.

On State Counsel Mwansa's argument that the 1st Respondent having been in liquidation, there was no legal justification for allowing Indo-Zambia Bank to forever charge compound commercial interest when the 1st Respondent had by law stopped conducting

business, we are of the considered view that the case of **YONNAH SHIMONDE AND FREIGHT AND LINERS V MERIDIEN BIAO BANK (Z) LIMITED**[4] which State Counsel relied on is distinguishable from the case in casu. In that case, the bank went into liquidation and we held that there was no justification for allowing the charging of compound commercial interest forever by a liquidated bank which was obliged by law to stop conducting business. In the case in casu, Indo-Zambia Bank never went into liquidation as was the case in **YONNAH SHIMONDE AND FREIGHT AND LINERS V MERIDIEN BIAO BANK (Z) LIMITED**[4] case. It was the borrower, the 1st Respondent, which was placed under receivership. It would appear, therefore, that State Counsel applied the case of **SHIMONDE**[4] out of context.

Coming back to the issue of compound interest, it is trite law that compound interest can only be sustained if there is an express agreement between the parties to the charging of compound interest or if there is evidence of consent or acquiescence to such a practice or custom. In the case of **UNION BANK ZAMBIA LIMITED V**

SOUTHERN PROVINCE CO-OPERATIVE MARKETING UNION LIMITED[1], we held as follows-

> **"The issue of real substance in this appeal concerns the charging and awarding of interest. A number of authorities were cited and we take this opportunity to affirm that there can hardly be any serious quarrel with the legal position as it emerges from the authorities. This is that -to borrow from the language of Halsbury's Laws of England (Vol. 3, Fourth Edition, para 160)-by the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts or loans. However, when it comes to an unusual rate of interest - such as compound interest - express agreement is required, or in the alternative, evidence of consent or acquiescence to such a practice or custom."**

The first point of call, therefore, should be to ascertain the nature of the agreement between the parties. In this case, the 1st and 2nd Respondents executed a mortgage deed relating to Stand No. 7438 on 26th June 1995 which provided for **"...interest at the current rates (as well after as before any judgment) <u>with monthly rests</u>..."**. By agreeing to the charging of interest with 'monthly rests', the 1st Respondent expressly agreed to the charging of compound interest. Compound interest was aptly defined in the Indian case of **STATE OF HARYANA & ORS. V S. L. ARORA & COMPANY**[8], where the Supreme Court of India had this to say-

> **"Compound interest refers to a method of charging interest where interest is computed not only on the principal, but also the accrued**

interest. For this purpose, periodical rests are provided for computation of interest, say yearly, or quarterly or monthly. At the end of the first 'rest', the interest accrued till then is added to the principal, so that for the second interest bearing period, the aggregate of the original principal and interest thereon becomes the enhanced principal. At the end of the second rest, the accrued interest on the enhanced principal is added to the enhanced principal so that such further enhanced principal becomes the principal for charging the interest for the third period. It goes on in this manner until repayment, by progressively enlarging the principal base by adding interest at regular intervals. As a result, the debtor is made to pay interest not only on the original principal, but on the interest on the principal, and on the interest upon the interest on the principal and so on.... Compound interest can be awarded only if there is a specific contract, or authority under a Statute, for compounding of interest. There is no general discretion in courts or tribunals to award compound interest or interest upon interest." (emphasis by underlining ours)

We entirely agree with this definition of compound interest. On the basis of the mortgage deed, Indo-Zambia Bank was entitled to charge compound interest. However, we do not agree with the reasoning of the Court below when it upheld the charging of the compound interest in this case on the ground that the 1st Respondent had acquiesced to the charging of compound interest. In our view, acquiescence did not arise in this case because there was an express provision in the mortgage deed to the effect that interest will be charged at ***'current rates...with monthly rests'.*** In the circumstances, it will be otiose for us to discuss acquiescence

because it did not arise. From the foregoing reasons, we find no merit in the first ground of appeal.

A common thread which runs through the second and third grounds of appeal is the issue as to whether the 1st Respondent had repaid the money owing to the Bank in full. In its judgment, the Court below ordered that ***'the 2nd Non-Party (Indo-Zambia Bank) pays the judgment sum to the 2nd Applicant out of the proceeds of the Receivership after recovering what is owed to them in full...'*** By implication, the Court was intimating that the 1st Respondent was still in debt to the Bank. In the case of **GALCO (Z) LIMITED AND PLASTICO (Z) LIMITED V LAWRENCE MUNENGO AND OTHERS, CHANCE KALIMA AND OTHERS, BARCLAYS BANK (Z) AND INDO ZAMBIA BANK LIMITED**[6], we decided the Appellants' appeal against the lower Court's decision to refuse to make the garnishee nisi Order against Indo-Zambia Bank absolute. We held that the Appellants' claims did not fall under the provisions of section 346 (1) (d) of the **COMPANIES ACT**[d] and could not, therefore, be ranked higher than those of secured creditors.

We also held that, Indo-Zambia Bank was entitled to fully recover the money that was owed to it before paying the Appellants.

What remains in dispute is whether Indo-Zambia Bank fully recovered all its money from the 1st Respondent. The Appellants argued that the overdraft was fully settled as shown on the electronically generated statement, while Indo-Zambia Bank argued that a balance of K1,670,457,892.39 remained outstanding as at 28th February, 2001 as indicated on the manually generated statement. Ms. Lamba, on behalf of Indo-Zambia Bank argued that only the principal amount was fully settled and that the sum of K1,670,457,892.39, which was outstanding was in respect of compound interest from the time that the 1st Respondent's account was declared as non-performing on 30th June, 1998.

We have carefully scrutinised the account statements in issue. There are two manually generated statements on record. The first statement is on page 307 of the record of appeal. It has no heading but opens with a balance of K19,981,109.72 on 30th June, 1998 and closes with a balance of K75,511,116.80 on 28th February,

2001. The second statement is at pages 308 to 309 of the record of appeal. It is headed **'PLASTICO ZAMBIA.'** It starts with an opening balance brought forward of K657,671,952.14 as at 31st July 1998, and closes with a balance of K1,670,4576,892.39 on 28th February 2001. This is the statement which Ms Lamba is relying on to support her submission that the amount of K1,670,457,892.39 in respect of compound interest is still outstanding.

A scrutiny of the electronic statement shows that it captures entries from 1st July 1996 up to 15th June 2001. On 31st July, 1998 (page 291 of the record of appeal) it reflects a balance of K657,671,952.14; the same amount which is reflected as the opening balance on the manually generated statement as at 31st July 1998 (page 308 of the record). Therefore, as at 31st July 1998, the balances on the two statements are at par. The electronically generated statement however, goes on to show all the transactions on the account until 15th June 2001, when through an injection of K122,036,642.04, the account balance is 0.00. It states that this is a full settlement of the overdraft.

It is common cause that the 1st Respondent's loan was declared as no performing on 30th June 1998. As we have stated above, the **BANKING AND FINANCIAL SERVICES ACT**[a] defines such a loan as one in respect of which payment of principal or interest is in arrears for a period in excess of ninety days. The purpose of declaring a loan to be non-performing is to ensure that the concerned bank's balance sheet reflects the correct value of the loan as opposed to an exaggerated value of the principal amount and interest, which may or may never be paid by the debtor. A financial institution is required by law, at the end of each calendar month, to furnish the Bank of Zambia with a statement showing those of its loans that are non-performing.

A scrutiny of the electronic statement shows that the Bank stopped charging interest on the 1st Respondent's account after 30th June, 1998 when the loan was declared to be non-performing and instead, calculated it manually on the statement appearing from pages 308 to 309 of the record of appeal.

Mrs. Lamba argued, relying on Regulation 9(2) of the **BANKING AND FINANCIAL SERVICES (CLASSIFICATION AND**

PROVISIONING OF LOANS) REGULATIONS[b], that even though the 1st Respondent's account was non-performing, the Bank had the right to charge the interest due at the contractual rate. We have reproduced the provisions of the said Regulation 9(2) of the **BANKING AND FINANCIAL SERVICES REGULATIONS[a]** above. Regulation 9(1) of these Regulations states:-

> **"9. (1) Where a loan is placed in non-accrual, any cash payments received shall first be applied to reduce the amount of the principal outstanding and due."**

For ease of reference, we will reproduce the provisions of Regulation 9(2). It states:-

> **"(2) Where the principal outstanding of the loan which is due has been fully recovered, any further excess payments may be taken into income, provided the amount of income recognised is limited to the amount which would have been due to the bank or the financial institution if the loan had been current at its contractual rate."**

Now, according to the electronic statement, the principal was fully recovered on 15th June, 2001. Up to 15th June, 2001, therefore, the loan was still running on its contractual terms. The Bank was entitled to charge compound interest. Regulation 9(2) refers to a situation where the outstanding principal amount which is due has "been fully recovered." It cannot apply to this case

because the manual statement, containing the computation of principal and interest after 30th June, 1998 only went up to 28th February, 2001, well before the principal amount on the loan was fully paid on 15th June, 2001. Consequently, we cannot fault the Court below for holding that the Bank should pay the judgment sum to the Appellants out of the proceedings of the receivership after recovering what is owed to them in full. It is clear to us, from the statements availed, that at the date when the loan was repaid in full, there was still outstanding, interest on the loan which had not been paid. The second and third grounds of appeal cannot therefore succeed.

Coming to the fourth ground of appeal; we find that it is otiose, in view of our finding in relation to the second and third grounds of appeal. Much as it can be stated that the principal amount of the loan was repaid in full, that payment did not clear the indebtedness of the 1st Respondent to the Bank.

All grounds of appeal having failed, the appeal stands dismissed. In the circumstances, of this case, we order that each party should bear its own costs.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE