

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2013/HPC/0466

In the matter of: An Application under Order 30 Rule 14 of the High Court Act Cap 27 of the Laws of Zambia

In the matter of: The property comprised in a Third Party Mortgage and Overdraft Facility relating to S/D No. 294 of Stand No. 9812, in the Lusaka Province of the Republic of Zambia in the name of Esther Chanda

In the matter of: Foreclosure and Possession

**BETWEEN:**

FIRST NATIONAL BANK ZAMBIA LIMITED APPLICANT

AND

ESTHER CHEWE CHANDA T/A TABLE PRIDE RESPONDENT  
(Sued as Customer and Mortgagor)

**BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC AT  
LUSAKA IN CHAMBERS**

For the Applicant: Ms G Musiyani  
*In- House Legal Counsel*  
Mr. M Moonga  
*Assistant Legal Counsel*  
*In-House*



For the Respondent: *No appearance*

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**JUDGMENT**

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**List of authorities referred to:**

1. Order 30 Rule 14 of the High Court Act Cap 27 of the Laws of Zambia
  2. Union Bank of Zambia Limited Vs Southern Province Co-operative Marketing Union Limited (1997) SJ7, SC 1994
  3. International Commercial Bank Zambia Limited Vs Kavino Limited and 3 Others
  4. Dunlop Pneumatic Tyre Co. Vs New Garage and Motor Co. (1915) A.C. 79
- Section 10 1(A) of Statutory Instrument No. 21 of 1994

This is the Applicant's application brought pursuant to **Order 30 Rule 14 of the High Court Rules Cap. 27 of the Laws of Zambia**, filed into Court on 25<sup>th</sup> September, 2013. The application was supported by an affidavit deposed to by **Robert James Wishart** employed by the Applicant as Head of Credit.

The Respondent was availed a Credit Facility by way of Overdraft in the sum of K450,000,000 as evidenced by Exhibit "RWJ1" a copy of the Facility Letter, duly signed by the Respondent.

Pursuant to Clause 4.1 of Exhibit "RSW1" the Facility Letter, interest rate was agreed to be the Bank's Local Currency Base Rate (Zambian Kwacha) prevailing from time to time per annum then 17% plus a margin of 2% payable under the said Facility Letter. The interest payable was to be calculated;

- (i) on the basis of a 365 - day year, irrespective of whether or not the year in question is a leap year;
- (ii) on the daily balance owing under the facility **notwithstanding that such balance may have been increased by the debiting of interest to such balance; (my emphasis)**
- (iii) it would accrue from day to day;
- (iv) debited to the Borrower's account held with the bank, monthly in arrears;
- (v) compounded monthly.

The said Facility was secured by a Third Party Mortgage over Subdivision No. 294 of Stand No. 9812, Nyumba Yanga, Lusaka and Certificate of Title over the said property as well as a Fire Policy as evidenced by Exhibits “RWJ2”, “RWJ3” and “RWJ4” copies of the said security documents.

It is the Applicant’s submission that the Respondent has defaulted on its repayment obligations despite reminders to settle the indebtedness as evidenced by Exhibits “RWJ9” to “RWJ12”, copies of the said reminders and responses from the Respondent.

The Respondent did not file an affidavit in opposition to the claim. At the hearing date the Respondent did not appear, either in person or by Counsel. Notice of the hearing was duly advertised in the Zambia Daily Mail dated Thursday, 30<sup>th</sup> January, 2014.

From the documents on file the Respondent is clearly indebted to the Applicant; and has defaulted in its repayment obligations. Therefore there is also no defence to the claim.

Be that as it may, on scrutiny of **Clause 4.1** governing interest in this transaction, I note the following:-

Firstly, that the interest was charged at the Bank's (i.e. the Applicant) Local Currency Base Rate, then at 17% plus 2% margin. It is not clear if the Applicant's Local Currency Base Rate was higher or lower than the Bank of Zambia's Lending Rate at the time. If the Applicant's Local Currency Base Rate was higher than the Bank of Zambia's pronounced Lending Rate at the time, the Applicant's rate should be brought to a reasonable margin. It is common cause that banks are in the business of lending to make profit. But the margin that they charge to make that profit must be reasonable and not be so much higher than the pronounced Bank of Zambia Lending Rate so as to make the Bank of Zambia intervention irrelevant. Therefore the interest rate to apply to this Facility, *ab initio*, shall be the Bank of Zambia's Lending Rate, at the time the Overdraft was availed to the Respondent, with a margin of 2%.

Secondly, I note that the interest was to be calculated on the daily balance owing under the Facility, **notwithstanding that such balance may have increased by the debiting of interest to such balance. (My emphasis).** My understanding of this provision is that the amount owing increased every time interest is debited to the Loan account. Thereafter the interest is compounded. This means that interest is being charged upon interest. The net result is that the account was charged penalty interest. As I stated in my judgment in the case of **International Commercial Bank Zambia Limited Vs Kavino Limited and 3 others**, (2013/HPC/0154) penalty interest whether on the over dues or on the entire amount outstanding is inappropriate as it goes beyond the normal interest already charged, and necessarily escalates the debt and in any event is

illegal in Zambia. Charging of penalty interest, however described is an inappropriate banking practice, and should be frowned upon by Courts.

Quoting from the case of **Dunlop Pneumatic Tyre Co. Vs New Garage and Motor Co. (1915) A.C. 79** adopted with approval by the Supreme Court in the case of **Union Bank Zambia Limited Vs Southern Province Co-operative Marketing Union Limited**.

*“.....the Law has generally frowned upon penalties, including any penalty for non-payment of money. It seems to us that even where there has been specific agreement that upon failure to pay a sum of money in breach of contract, a larger sum shall become payable, **this would be a classic example of a penalty provision which can generally not be entertained**”.* (my emphasis)

Moreover **Section 10 1(A) of Statutory Instrument No. 21 of 1994**, state that:-

*“A bank or Financial Institution shall not impose on any borrower any charge or penalty as a result of failure by the borrower to repay or pay in accordance with the contract governing the Loan”.*

In my view the above legal provisions and principles of law make it clear that penalty interest however couched is illegal in Zambia. The above legal

provisions puts to rest the often cited argument that, contractual interest, however exorbitant, cannot be interfered with by the Courts, because it has been agreed to by the parties. In my view contractual interest which goes beyond the reasonable rate allowed to make reasonable profit cannot be entertained by Courts.

The interest rate charged on this Facility is clearly penalty interest even if it is not specified as such.

Often lawyers argue that because it has been agreed to by the parties, it is contractual interest. On the contrary, the fact that it may have been agreed to by a gullible borrower does not take away the fact that it is illegal and a bad banking practice which should not be entertained by the Courts. Plainly put this is pure exploitation and not banking.

It is illegal to impose on a borrower any charge or penalty as a result of the failure by the borrower to repay or pay in accordance with the contract or agreement governing the Loan. The logic here is anchored in the **Dunlop Pneumatic Case** above which clearly stated that even where there has been specific agreement that upon failure to pay a sum of money in breach of contract, a larger sum shall not be payable as it is a classic example of a penalty provision which can generally not be entertained. This position is covered by Section 10 1(A) of Statutory Instrument No. 21 of 1994 as well.

In my view penalty interest has found its way heading through the back door by the way this case, and other cases where interest has been drafted in this style where interest has been charged in this manner. Informed by the Supreme Court's decision in the **Union Bank Vs Southern Province Co-operative Case**, and the law as enunciated in the **Dunlop Pneumatic Case**, and **Section 10 of Statutory Instrument No. 21 of 1994** above, the interest rate charged herein, which in practical terms amount to penalty interest cannot be entertained.

In the event the interest rate charged by the Applicant is hereby struck out for being illegal and unconscionable.

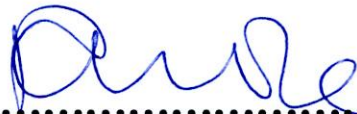
**ORDER:-**

1. Informed by the Decision, Letter and Spirit of the **Union Bank Case**, affirmed by the **Dunlop Pneumatic Case** and **Section 10(1)A of Statutory Instrument No. 21 of 1994** the interest rate as provided for in **Clause 4.1** of the Facility Letter is struck out for being unconscionable and illegal.
2. I enter judgment in favour of the Applicant on the Overdraft amount advanced to the Respondent, with interest *ab intio*, as determined by the Bank of Zambia at the time of the Overdraft with a margin of 2%, or the

Applicant's Local Currency Base Rate then prevailing per annum with a margin of 2% whichever is lesser, from the time the Loan was advanced to the Respondent.

3. As the Respondent did not waste the Applicant's or the Court's time, costs shall be in the Cause.
4. Right to Appeal is granted.

Dated this... 25<sup>th</sup> ... day of ... April ..... 2014



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**Prisca M. Nyambe, SC**  
**JUDGE**