

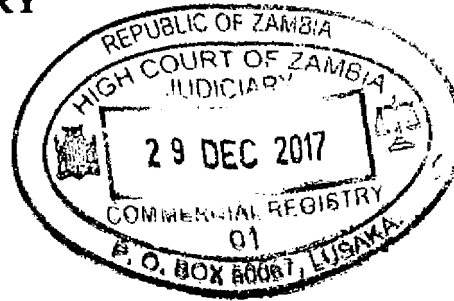
IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0187

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ACCESS BANK ZAMBIA LIMITED

PLAINTIFF

AND

MULEYA MARK MWEETWA

DEFENDANT

Before the Hon. Lady Justice Irene Zeko Mbewe

For the Plaintiff : *Ms C. Simukomba Mukelani, Legal Counsel*

For the Defendant : *N/A*

J U D G M E N T

Cases Referred To:

1. Mohamed v The Attorney General (1982) ZR 49

Works Referred To:

1. *Chitty's on Contract, 23rd Edition, Volume 2 (Sweet & Maxwell)*

By amended Writ of Summons filed into Court on 3rd May 2016, the Plaintiff claims for the following reliefs against the Defendant:

- (i) *Payment of K49,573.77 due under loan agreement dated the 12th day of December 2012.*
- (ii) *Interest on the said amount.*
- (iii) *Costs of and incidental to this action.*

In the statement of claim, the Plaintiff averred that the Defendant is a former employee of the Plaintiff who on 12th December 2012 was availed a remedial loan facility of K77,000. According to the terms of the facility agreement, the Defendant was to service the loan by monthly repayments of K2,142.97 commencing on 22nd December 2012 until full payment, and the deductions were to be effected directly from his staff salary account. It is averred that the loan repayments were consolidated so as to service other outstanding obligations from a previous loan agreement with the Plaintiff which stood at K45, 555.52 as at the 6th December 2012. The loan was to run for a period of 4 years and was subject to the commercial

interest rate of 15% per annum. It is averred that the Defendant separated from the Applicant Bank in June 2013 whilst the tenure of the loan was still running and according to the agreement the balance outstanding as at that date immediately fell due and started attracting interest at the prevailing commercial bank lending rate. It is averred that since the loan was not serviced for more than 3 months after separation, the Defendant's ex-staff account was overdrawn and the default interest on overdrawn accounts applied thereafter on the outstanding balance which stood at K49,573.77 as at 8th April 2016. It is averred that despite several reminders to the Defendant he has neglected to settle his obligations and that the Plaintiff has suffered loss and damage. The Plaintiff demands the payment of K49,573.77 and interest, plus costs.

The Defendant entered an appearance and filed a defence on 29th July 2016 and denied the Plaintiff's statement of claim in its entirety as the Defendant had on several occasions engaged the Plaintiff on measures to offset the loan, and that after separation with the Plaintiff, he was serving the loan from time to time.

According to the Defendant this claimed amount was settled in full around February 2015 by his current employers. The Defendant averred that the Plaintiff did not respond to the Defendant's request to settle in instalments until 23rd September 2015 when the Defendant received a demand letter from Country Wide debt recovery who were engaged by the Plaintiff to execute on the Defendant. According to the Defendant, he made several loan repayments immediately he was employed and actually made a final settlement in full on the outstanding loan obligations in the first quarter of 2016.

The Defendant by way of counterclaim claims for:

- (i) A declaration that the Defendant has settled all outstanding obligations to the best of his knowledge.*
- (ii) An Order nullifying the bank charges against the Defendant.*
- (iii) Costs.*

In its reply and defence to counterclaim, the Plaintiff averred that the Defendant's new employer only settled part of the loan and that the claimed sum is still outstanding with interest as the Defendant failed to settle his indebtedness to the Plaintiff in full.

In defence to counterclaim, the Plaintiff averred that the Defendant is not entitled to any declaratory Order neither has he expressed a basis for which he would be so entitled.

On the trial date, the Defendant was not in attendance nor did he comply with the Orders for Directions. I decided to proceed with the matter as there was an Affidavit of Service on record and no explanation as to the Defendant's absence.

The Plaintiff's witness Chisanga Chisanga filed a witness statement dated 13th October 2016 where it is averred that according to the Plaintiff's records, a remedial loan facility in the sum of K77,000.00 was availed to the Defendant whilst in the employ of the Plaintiff Bank and that the facility was unsecured. That the Defendant resigned in June 2013 and according to the Plaintiff's policy on exit an employee who has a running loan is required to have a repayment plan. That the Defendant only proposed a payment plan in January 2014. That the Defendant proposed to pay in instalments of K1,500.00 which amount was below what was required by the Bank's policy on unsecured ex-staff term loans which were required to be liquidated within two years of leaving

employment with the Plaintiff. According to PW1, the Defendant's repayment proposal had been subsequent to an agreement dated 17th December 2013 where the parties agreed that the Defendant liquidate his outstanding loan which stood at K73,408.28 in monthly instalments of K2,653.89 for a period of 36 months. PW1 testified that this amount was rejected in part in that the Defendant was allowed to pay K1,500.00 for a period of only 4 months after which he was advised that his current employer would by then be in a position to take over the loan. PW1 testified that the Defendant did pay K1,500.00 consistently for 12 months from January 2015 to January 2016. Thereafter, that his repayments were made intermittently in March, April, August, October and November, 2016. That due to the Defendant's payment inconsistencies, the payment being below the required minimum monthly repayments, the outstanding amount continued to increase despite his repayments. PW1 testified that the Defendant's employers the United Bank of Africa at first declined to take over the loan on behalf of the Defendant but eventually liquidated K50,000.00 of the outstanding balance in January 2016 leaving a balance of K46,474.31 which continued to accrue

interest. The amount paid by United Bank of Africa was the maximum that could be paid according to the Defendant's debt service ratio.

In its written submissions filed into Court on 14th July 2017, the Plaintiff re-narrated the evidence of the witness before Court. The Plaintiff relied on **Chitty on Contracts 23rd Edition, Volume 2 at page 522** where it states as follows:

“Where a borrower fails to repay the loan in accordance with the terms of the contract, the lender has an action against the borrower for the money”.

I adopt the principle in the above quote as my own.

The Defendant did not file any written submissions.

The issue for determination is whether the claimed amount is owing. It is trite law that he who alleges must prove. I am ably guided by the Supreme Court in the case of **Mohamed v The Attorney General (1982) ZR 49**, where it was held that:

"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is

unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inertia or for some reason or other, judgment should nevertheless be given to him on that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence."

The burden of proof lies with the Plaintiff herein who must prove their case. The Defendant did not attend the hearing but I have considered their defence and counterclaim filed herein.

It is trite law that parties are bound by the terms of their contract unless fraud or coercion is pleaded and proved. The relevant evidence by PW1 is that the Defendant whilst in the employ of the Plaintiff was availed a remedial loan in 2012 (pages 1-5 Plaintiff's supplementary bundle of documents). The Defendant denies this assertion and alleges that his new employers, United Bank of Africa

paid off the outstanding amount due to the Plaintiff and therefore he denies owing the said amount. I have perused the documentary evidence on record. It is not in dispute that on 12th December 2012, at the Defendant's behest, a remedial loan was availed to the Defendant. The record also shows that following his resignation from the Plaintiff Bank, a Debt Settlement Agreement was entered into between the parties dated 17th December 2013 wherein the Defendant acknowledges being an ex-staff of the Bank with an outstanding balance (page 7 of the Plaintiff's bundle of documents). On 8th January 2014, the Defendant proposed to pay the loan in monthly instalments of K1,500.00 (page 11 of the Plaintiff's bundle of documents). On the 13th January 2014, the Plaintiff informed the Defendant that they had accepted the proposal to pay monthly installments of K1,500.00 for a period no longer than 4 months and that they expected the Defendant's new employer to take over the payment of the Defendant's obligations with the Plaintiff (page 13 Plaintiff's bundle of documents). The statement of accounts shows payments by the Defendant of K1,500.00 on a monthly basis from 28th January 2014 to 26th January 2015. Thereafter monthly payments of K1,500.00 in March, April, May, August, October and

November 2015 (page 14 of the Plaintiff's bundle of documents). In its defence, the Defendant alleges that the debt was fully paid by his new employer United Bank of Africa in the first quarter of 2016. I find difficulty with this argument in that it is inconsistent with the documentary evidence. It goes without saying that one of the obligations of a borrower is to repay the money lent by the Plaintiff as lender.

I have perused the Defendant's statement of accounts which shows that on 7th January 2016, a sum of K50,393.10 was paid by the Defendant into his loan account leaving an outstanding balance of K46,474.31, which amount continues to accrue interest. Beyond the K50,393.10 reflected in the statement of account, the Defendant has not adduced any other evidence to dispel the Plaintiff's claim of the outstanding amount. In the absence of such evidence, the Defendant's assertions are unsubstantiated and I find that he is indebted to the Plaintiff in the claimed amount of K49573.77 plus interest.

The Defendant seeks an Order nullifying the bank charges against him. The Defendant has failed to support this counterclaim with any evidence and the said counterclaim fails.

In conclusion, I caution borrowers that the Court will not aid defaulters but will instead uphold the rights of the Plaintiff as lender to recover the monies lawfully advanced to the Defendant whilst in their employ.

On a balance of probabilities, the Plaintiff has proved its claim. Judgment is entered in favour of the Plaintiff against the Defendant in the sum of K49,573.77 plus interest at the contractual rate from date of the Writ of Summons to date of Judgment and thereafter at the commercial lending rate as determined by Bank of Zambia until full payment.

The Defendant's counterclaim fails in its entirety.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Delivered in Lusaka this 29th day of December, 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE